UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSEPH L. JOHNSON; CYNTHIA A. MITCHELL, individually and as successor in interest to Mario Romero; N.R., individually and as successor in interest to Mario Romero; D.M., a minor; D.M., a minor; AHN KHE HARRIS; AHN LOC HARRIS; CYNQUITA MARTIN,

Plaintiffs,

v.

CITY OF VALLEJO, a municipal entity; DUSTIN JOSEPH; SEAN KENNEY; JOSEPH KREINS, individually and in his official capacity as Chief of the Vallejo Police Department,

Defendants.

No. 2:13-cv-01072-JAM-KJN

ORDER GRANTING DEFENDANTS' MONELL MOTION FOR SUMMARY JUDGMENT

This action arises from a police shooting incident that occurred on September 2, 2012 in Vallejo, California that resulted in the death of Mario Romero ("Decedent") and the injury

of Joseph Johnson ("Johnson"). Two complaints were filed separately but later consolidated by this Court (Doc. #2, 19). Defendants the City of Vallejo ("the City"); Joseph Kreins ("Kreins"), Chief of the Vallejo Police Department ("VPD") at the time of the incident; and VPD Officers Dustin Joseph ("Joseph") and Sean Kenney ("Kenney") (collectively "Defendants") filed five separate motions for summary judgment (Doc. #63-67). A hearing on these motions was held on April 8, 2015. This Order addresses only the fifth motion for summary judgment (which the Court took under submission) ("the Monell MSJ"), in which Defendants specifically challenge the Plaintiffs' claims under Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691-95 (1978) ("Monell").

At the hearing, Plaintiffs N.R., Ahn Khe Harris, Ahn Loc Harris, and Cynquita Martin ("the Martin and Harris Plaintiffs") all conceded that as a result of the Court's ruling on the other motions, they no longer could pursue their Monell claims, as they had no legal basis for doing so. Therefore, this Order discusses the Monell claims as stated in the complaint filed by Plaintiff Cynthia Mitchell, individually and on Decedent's behalf, and Johnson.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts are undisputed. Johnson's Response to Defendants' Statement of Undisputed Facts (Doc. #77-1); Mitchell's Response to Defendants' Statement of Undisputed Facts (Doc. #81-1); Defendants' Response to Mitchell's Separate Statement of Facts (Doc. #92-1); Defendants' Response to

Johnson's Separate Statement of Facts (Doc. #93-1); Martin & Harris Plaintiffs' Response to Defendants' Statement of Undisputed Facts (Doc. #80).

In the early morning of September 2, 2012, Kenney and Joseph (collectively "the officers") were responding to a pending call related to a reported burglary. The officers spotted a white Thunderbird occupied by Decedent and Johnson. Kenney had received a briefing sometime prior to this event of a vehicle similar in description to the Thunderbird as being involved in a drive-by shooting. The officers pulled up to the Thunderbird, stopping in the middle of the street facing the front of the Thunderbird and within 5-15 feet of it. The Martin and Harris Plaintiffs resided in the house directly facing the scene of this incident and were inside at the time of the shooting.

It is at this point, chronologically, that the versions of events, and evidence in support thereof, are disputed. What is not disputed is that during the encounter between Decedent, Johnson and the officers that followed at least 3 rounds were fired into the Thunderbird's driver-side door and window and 23 rounds were fired into the Thunderbird's windshield by the officers. Johnson was injured as a result of the shooting. Decedent died as a result, receiving bullet wounds in his arms, wrist area and hands region among other areas.

Two very distinct and competing versions of events are evident in the record starting from the time the officers pulled up to the Thunderbird until the end of the incident. One version is that primarily put forth by the Defendants and the other a version put forth by Plaintiffs.

A. Defendants' Version

Kenney stopped his vehicle approximately 10-15 feet away from the Thunderbird, not obstructing its path. Kenney Depo. 169:18-22. Upon the officers stopping their car, Decedent opened the Thunderbird's driver-side door and started to run away. Kenney Depo. 79:10-23. Joseph testified that he noticed Decedent was holding his waistband and observed the butt of a gun tucked into the waistband. Joseph Depo. 104:17-25. Decedent then "spun around and went back towards his vehicle" with a handgun in his right hand. Joseph Depo. 107:23-112:1.

At some point, the officers began shouting "show me your hands" to Decedent and Johnson. Kenney Depo. 101:21-102:3; Joseph Depo. 118:2-119:25. Johnson complied but Decedent did not. Id. Fearing for the safety of Kenney, Joseph then began firing at Decedent. Joseph Depo. 107:23-112:1. Fearing for his and Joseph's safety, Kenney also began firing at Decedent. Kenney Depo. 98:15-99:7. Eventually Decedent complied and puts his hands up, while Johnson still had his hands up and nearly sticking out his window. Kenney Depo. 107:17-108:14.

After radioing for backup, Kenney and Joseph observed Decedent drop his hands down and start to bring them up in a shooting position. Kenney Depo. 113:25-119:12; Joseph Depo. 124:15-125:7, 135:21-137:19. Kenney responded by firing 7 or 8 rounds at Decedent, and Joseph fired 4-6 shots at Decedent. Id.

Decedent then complied again with the commands to raise his hands. Kenney 123:2-124:6. However, shortly thereafter Decedent dove down to the center console, to get what Kenney figured was a gun. Id. Kenney responded to the "furtive reaction" by firing

his entire magazine, about 12-13 rounds. Id.

B. Plaintiffs' Version

Upon pulling up to within 5 feet of the Thunderbird and facing it at an angle, the police car shined its spotlight into the Thunderbird. Martin Depo. 135:17-136:8; Nagle Decl. Exhibit S (filed under seal, Doc. #84-6). The police car's doors "flew open," the officers shouted "just put your, you know, hands," then the two officers began to open fire on the Thunderbird. Johnson Depo. 140:10-24; Doc. #93-1, Facts 19-21. In response to the officers' demands, both Decedent and Johnson raised their hands. Johnson Depo. 140:25-141:16; Doc. #93-1, Facts 4-5. After shots began, Decedent called out to the officers, "we got our hands up, like, so stop shooting." Johnson Depo. 140:10-141:16. Johnson did not hear any further commands from the officers. Id. Decedent never exited the vehicle during the incident. Doc. #93-1 #33; Johnson Depo. 144:6-13.

Decedent never had a gun during the incident. Johnson Depo. 152:11-13; Doc. #93-1 #36. Plaintiffs assert the only weapon found in the car was a pellet gun with no fingerprints from either Decedent or Johnson; Defendants do not contend they found a weapon with either Decedent or Johnson's fingerprints. Kenney testified that he never saw a weapon during or before the shooting, only after the conclusion. Kenney Depo. 215:4-10. Joseph testified that he and Kenney did not have any verbal communication with each other regarding a gun possessed by Decedent during the incident. Joseph Depo. 140:4-7.

At one point, Kenney reloaded his weapon and approached

closer to the car. Doc. #93-1, Fact 24. Kenney then climbed onto the hood of the Thunderbird right in front of Johnson. Johnson Depo. 144:22-145:18. He was standing on the hood and began firing down into the car. Id.

Johnson was hit by one of the bullets, which is still lodged in his sacrum. Johnson Depo. 61:1-8; Doc. #93-1, Fact 44. Decedent died as the result of sustaining 30 gunshot wounds. Nagle Decl. Exhibit BB (filed under seal, Doc. #84-11). Decedent had 3 gunshot wounds to the head, 5 to the neck, 6 to the torso, 6 to the right upper extremity, 9 to the left upper extremity, and 1 to the left thigh. Id. Johnson submitted an answer to an interrogatory stating he suffered and continues to suffer extreme emotional distress caused by the Defendants as a result of this incident. Doc. #93-1, Fact 61; Nagle Decl. Exhibit AA.

After the initial shots were fired, Ahn Loc Harris went to and was watching the incident from a window inside her residence. She saw Johnson and Decedent inside the car with their hands up. Ahn Loc Harris Depo. 99:11-103:18; Doc. #93-1 #1, 7. She saw Kenney shoot at least 6 shots into the window after climbing onto the hood of the car. Id. Decedent collapsed onto Johnson, taking his "last breath." Id. Kenney shot "probably about two more times" after Decedent collapsed. Id.

Ahn Khe Harris and Martin came to the window as well. Ahn Loc Harris Depo. 103:19-104:17. When Martin got to the window, she saw Kenney standing in front of the Thunderbird reloading his gun. Martin Depo. 134:18-135:7. Martin started banging on the window, but Kenney did not look at her as he climbed onto the hood of the car and began shooting again. Id. Martin finally

got her window open and started yelling at Kenney. Id. Kenney looked over at Martin and she said, "those are not - - you've got the wrong people, those are not those type of people." Id. Kenney responded, saying "what the fuck you think I'm supposed to do." Id. Kenney continued to shoot while he was talking and looking at Martin. Id.; Martin Depo. 145:15-146:5. Looking into the car, Martin saw Johnson passed out and Decedent laid over onto Johnson's lap. Martin Depo. 143:4-16; Doc. #93-1 #37. Martin saw Kenney shooting into the car, "trying to aim for [Johnson's] head." Id.

After the shooting stopped, the officers pulled Decedent out of the car "threw him on the ground and handcuffed his hands behind his back." Martin 148:25-149:21.

II. OPINION

A. Summary Judgment Standard

The Federal Rules of Civil Procedure provide that "a court shall grant summary judgment if the movant shows there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the assertion by citing to particular parts in the record, or by showing that the materials cited do not establish the presence of a genuine dispute. Fed. R. Civ. P. 56(c)(1)(A)-(B). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

The moving party bears the initial responsibility of

informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)). That burden may be met by "'showing'- that is, pointing out to the district court- that there is an absence of evidence to support the non moving party's case." Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000) (quoting Celotex Corp., 477 U.S. at 325). If the moving party meets its burden with a properly supported motion, the burden shifts to the opposing party. Id. The opposition "may not rest upon the mere allegations or denials of the adverse party's pleading," but must provide affidavits or other sources of evidence that "set forth specific facts showing that there is a genuine issue for trial." Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting Fed. R. Civ. P. 56(e)).

The adverse party must show that the fact in contention is material and the issue is genuine. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "material" fact is a fact that might affect the outcome of the suit under governing law. Id. A fact issue is "genuine" when the evidence is such that a reasonable jury could return a verdict for the non-moving party. Villiarmo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). However, uncorroborated and self-serving testimony alone does not create a genuine issue of fact. Id. The Court must view the facts and draw inferences in the manner most

favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient: "There must be evidence on which the jury could reasonably find for [the non-moving party]." Anderson, 477 U.S. at 252. This Court thus applies to either a defendant's or plaintiff's motion for summary judgment the same standard as for a motion for directed verdict, which is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id.

B. Claims

Defendants filed the Monell MSJ addressing the Monell claims brought by Johnson and Mitchell and found in the 4th cause of action in their complaint. Defendants seek summary judgment or in the alternative partial summary judgment of those claims based on Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978).

1. Monell Standard

To create municipal liability under § 1983, the constitutional violation must be caused by "a policy, practice, or custom of the entity," Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011), or be the result of an order by a policy-making officer, see Gibson v. County of Washoe, 290 F.3d 1175, 1186 (9th Cir. 2002). See also Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012). The Ninth Circuit has discussed the proper basis for Monell claims:

In Monell, the Supreme Court held that municipalities

> may be held liable as "persons" under 42 U.S.C. § 1983, but cautioned that a municipality may not be held liable for the unconstitutional acts of its employees solely on a respondeat superior theory. 436 U.S. at 691. Rather, the Supreme Court has "required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997) (citing Monell, 436 U.S. at 694; Pembaur v. Cincinnati, 475 U.S. 469, 480–81 (1986); City of Canton v. Harris, 489 U.S. 378, 389 (1989)). In justifying the imposition of liability for a municipal custom, the Supreme Court has noted that "an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." Id. at 404 (citing Monell, 436 U.S. at 690–91).

Hunter v. Cnty. of Sacramento, 652 F.3d 1225, 1232-33 (9th Cir. 2011).

"Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) holding modified by Navarro v. Block, 250 F.3d 729 (9th Cir. 2001). However, the Ninth Circuit has "long recognized that a custom or practice can be 'inferred from widespread practices or "evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded."'" Hunter, 652 F.3d at 1233-34 (quoting Nadell v. Las Vegas Metro. Police Dep't, 268 F.3d 924, 929 (9th Cir. 2001)). "[*E*]*vidence* of inaction—specifically, failure to investigate and discipline employees in the face of widespread constitutional violations—can

support an inference that an unconstitutional custom or practice has been unofficially adopted by a municipality." Hunter, at 1234 n.8 (emphasis in original).

More relevant here, courts have found that "in some circumstances a *policy* of inaction, such as a policy of failing to properly train employees, may form the basis for municipal liability." Id. "[A] local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011). However, to satisfy § 1983 for a failure to train claim, "a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.' Only then 'can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.'" Id. (quoting Canton, 489 U.S. at 388). The deliberate indifference standard has been discussed thoroughly by the Supreme Court:

> "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city's "policy of inaction" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution."
>
> . . . [¶]
>
> A pattern of similar constitutional violations by

> untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Connick, 131 S. Ct. at 1360 (internal citations omitted) (citing Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 410 (1997); Canton, 489 U.S. at 395.).

In their fourth cause of action, Plaintiffs have also stated claims against Kreins in his individual and official capacities. First, since the City is named as a defendant on this cause of action, naming Kreins in his official capacity is redundant. The Court hereby dismisses the claims brought against him in his official capacity. However, a supervisory official can be found liable in his individual capacity if there is a sufficient nexus between his own conduct and the constitutional violations committed by subordinates. The Ninth Circuit has addressed the contours of the supervisory liability doctrine:

> "Supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others." Preschooler II v. Clark County Sch. Bd. of Trustees, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting Menotti v. City of Seattle, 409 F.3d 1113, 1149 (9th Cir. 2005)). In a section 1983 claim, "a supervisor is liable for the acts of his subordinates 'if the supervisor participated in or directed the violations, or knew of the violations of subordinates and failed to act to prevent them.'" Preschooler II, 479 F.3d at

> 1182 (quoting Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)). "The requisite causal connection may be established when an official sets in motion a 'series of acts by others which the actor knows or reasonably should know would cause others to inflict' constitutional harms." Id. at 1183 (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)).

Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009); see also Mackinney v. Nielsen, 69 F.3d 1002, 1008 (9th Cir. 1995) ("Under § 1983, a supervisor may be liable if there exists either '(1) his or her personal involvement in the constitutional deprivation *or* (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'") (internal citation omitted).

2. Analysis

Defendants first argue that statistics reflecting the number of shootings by police during the relevant time period cannot support a finding the City had a policy or practice that violated citizens' rights without a finding that the shootings were improper. Monell MSJ at pp. 9-14. Defendants are referencing data relied on by Plaintiffs that between May 25 and October 21 of 2012 there were over 10 shootings involving the VPD, resulting in 6 civilian deaths. In addition, there were 3 shootings by police in 2013. All of these came after many years of few to no shootings by police. Defendants contend the inference drawn by Plaintiffs' expert, Franklin Zimring, and put forth by Plaintiffs, is not reasonable. Monell MSJ at p. 11. Defendants argue: "Without a connection between the statistics and a violation of law, the mere happening of civilian fatalities cannot prove the existence of a policy or custom to exercise unlawful force. Id.

In their motion, Defendants rely extensively on Strauss v. City of Chicago, 760 F.2d 765, 768-69 (7th Cir. 1985). In Strauss, the Seventh Circuit addressed statistical information offered by the plaintiff to support a Monell claim at the motion to dismiss stage. 760 F.2d at 768-69. The plaintiff offered "statistical summaries from the Office of Professional Standards regarding complaints filed with the police department," the Chicago Police Department. Id. The summaries indicated that the police department sustained only 6-7% of all registered complaints for a three-year period from 1977-1979. Id. The plaintiff argued this low percentage "'must give rise to a reasonble [sic.] man's suspicions that defendant Chicago's methods of review are weighted to discourage positive findings." Id. The court found the plaintiff's reasoning "specious," and concluded:

> the number of complaints filed, without more, indicates nothing. People may file a complaint for many reasons, or for no reason at all. That they filed complaints does not indicate that the policies that [the plaintiff] alleges exist do in fact exist and did contribute to his injury. [¶] At the very least [the plaintiff] "would need to identify as well what it was that made those prior arrests * * * illegal and to show that a similar illegality was involved in his case."

Id. (quoting Ekergren v. City of Chicago, 538 F. Supp. 770, 773 (N.D. Ill. 1982)).

Defendants next argue that even if the Court considers the "bare statistics regarding officer shootings or the ethnicity of those shot, as a matter of law, Plaintiffs cannot show the existence of a custom or practice in existence for a sufficient duration to constitute evidence of a municipal policy." Monell MSJ at pp. 13-14. They argue this spike in shootings was an

"anomaly, not a pattern" and could not constitute "evidence of repeated constitutional violations." Defendants point to the evidence that the internal investigations and reviews of these shootings did not find the conduct surrounding the shootings improper and that an investigation by the local district attorney's office found no evidence of actionable conduct. Id.

Defendants next attack Plaintiffs' claim on the basis of inadequate training, arguing Plaintiffs do not have sufficient evidence to support such a claim. They argue that even if the conclusions drawn by Plaintiffs from the document, entitled "2013: The Year in Review," is assumed to be true, it does not support Plaintiffs' claims. The report indicates that VPD members had not had internal training in the three years prior to the report. Defendants argue that even with no internal training, there is no evidence this was "inadequate 'in relation to the tasks the particular officer must perform.'" Monell MSJ at pp. 14-15. They also specifically contend that evidence of Kenney's involvement in three of the shootings in 2012 has no nexus with a failure to train, let alone a nexus to wrongdoing.

This argument is persuasive in light of Plaintiffs' inability to affirmatively show each of these shootings constituted excessive force or a constitutional violation of some sort. Defendants' reliance on their own investigations as well as the United States Department of Justice's determination that the officers' conduct was not appropriate for criminal prosecution as proof of propriety carries little weight, since clearly a different standard applies in these contexts.

The arguments put forth by Plaintiffs, both in their

opposition and at the hearing, focus primarily on establishing Monell liability based on a "failure to train" theory. Plaintiffs' strongest argument is that a pattern of VPD officer's resorting to lethal force began to form in Vallejo in the period immediately before the incident underlying this action. Plaintiffs argue that Kreins and the City should have detected the pattern of "shoot first, non-emergency police encounters" resulting in constitutional violations and deaths and that in response, they should have taken some action to avoid such conduct in the future. They argue the lack of discipline of the officers and the lack of even small changes to the admittedly inadequate training in response to these incidents supports their Monell claim.

In order for Plaintiffs' claims to go forward, the Court would need to conclude that Kreins and the City's response, or lack thereof, tends to support they were *deliberately indifferent* to the harm being caused and the risk that, without training or adequate supervision, constitutional violations *would* occur in the future. Defendants' main argument in response is that there is no proof that any constitutional violations actually occurred in the other shootings or events invoking complaints to the VPD. It is clear that allowing a failure to train claim to go to the jury based upon a single unconstitutional incident is improper. See City of Canton, Ohio v. Harris, 489 U.S. 378, 399-400 (1989).

The evidence shows that Kreins had the authority and responsibility to make policy changes and institute trainings within the VPD. Def. Resp. to Pl. SUF (Doc. #91-1) Facts 1-3. Kreins testified that he reviewed general orders, policies and

procedures, staffing issues and the organization itself within the VPD after becoming police chief in July 2012, but that he took no action on this information from July 2012 to the date of the shooting underlying the claims in this case. Id. Fact 5. Kreins also testified that when he entered the VPD as chief his view was that there were "some inadequacies with the training that was being given to the officers at that time." Kreins Depo. 213:12-216:13. This was the result, at least in part, of a reduction in training over the four previous years. SUF Fact 9. The period of time during this reduction in training saw a string of four shootings by police within a three-month period.

Kreins indicates that one training program, the "force-options simulator," would have been useful to Kenney and Joseph when approaching the Thunderbird that night. Kreins Depo. 213:12-216:13. The simulator presents scenarios to officers where they are then required to decide whether to use verbal commands, less lethal weapons, or lethal force. Id. It was not implemented in VPD until 2013. Id. In addition, Plaintiffs' expert, Zimring, discussed a laundry list of types of preventative actions that a police chief wishing to reduce "shoot-first policing" could take. Zimring Declaration at pp. 21-22; SUF Fact 34. Kreins testified that he reviewed all the critical incident reports from 2012 for the VPD. SUF Fact 7; Monell Opp. at p. 8. As a result of that review, Kreins did not make any changes to any type of training at the VPD in response to this information because there was no evidence of constitutional violations. Id.

Kreins also testified that he necessarily relied on

statistics in his position in order to identify trends and to analyze the conduct of officers under his command. Kreins Depo. 216:25-218:24. Kreins stated that he analyzed the VPD statistics and had an awareness of the relative statistics nationwide of officer-involved homicides. Id. The end result of his analysis was that he could not make "a conclusion based upon some generalities in numbers." Id. He testified that he was "unable to tell" whether there was a higher level of police shootings in Vallejo than the national average, but did not take steps to find out more or to improve upon the statistical analysis. Id. Zimring opined that the rate of police killings in Vallejo for 2012-2013 compared to the population generated a risk of death at the hands of police well above that in larger cities such as New York and in the country as a whole. The VPD did not have a policy of looking back at an officer's previous complaints of excessive force or other critical incidents they were involved in when evaluating a specific critical incident. Kreins Depo. 161:7-164:23.

Kreins was also asked at his deposition about a number of incidents involving Kenney. Kreins Depo. 218:25-226:20. Kreins testified that when he met with his officers upon becoming chief, he did not analyze all their case files. Specifically, Kreins admits that he did not even discuss the incidents found in Kenney's file when he sat down with him. Id. This includes the killing of Anton Barrett, the Cooley excessive force complaint, and a complaint from a minor's father, all involving allegations of misconduct on Kenney's part. Id. Kreins believed that VPD did not need to look at an officer's previous complaints of

excessive force because he believed they had a strong understanding of a pattern for a particular officer and he was not aware of any trend involving excessive force. Id.; SUF (Doc. #91-1) Fact 11.

As regards discipline, Kreins testified that his personal interviews of Kenney and Joseph provided enough information on their own to return both of them to duty. SUF, Fact 12. In addition, VPD officers are referred to a marriage and family therapist instead of a licensed psychiatrist. SUF Facts 17-21.

After a careful review of the above described extensive record in this case and relevant case law, the Court concludes that although there is evidence of some systemic issues within the VPD, the evidence does not meet the extremely stringent legal standards required for claims under Monell.

Although VPD officers shot and killed four people in the span of just three months in the middle of 2012 and Defendants deduced no pattern and made no changes in training in response, there is insufficient evidence that any of the other shootings by police resulted in constitutional violations. In order for a claim to succeed, Defendants must have been on "actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights." Connick, 131 S. Ct. at 1360 (internal citations omitted). As stated, "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." Id. In the instant case there is no evidence that VPD officers committed other constitutional violations.

Plaintiffs argue that a reasonable jury could find that the total inaction of the City and Kreins in response to this uptick of police-involved shootings of civilians, and specifically the repeated incidents involving Kenney, showed a "deliberate indifference" to the constitutional rights of the people of Vallejo. See Hunter, 652 F.3d at 1232-33, 1234 n.8; Connick, 131 S. Ct. at 1359. However, again, the unconstitutionality of these actions has not been proven. The Court does note the difficult task facing Plaintiffs who wish to bring a claim for failure to train. As is evident by this case, the constitutionality of police conduct is often not determined by an unbiased entity until years after the conduct has occurred. Nevertheless, some evidence of constitutional violations is required to maintain the Monell claim in this case.

The Court also finds insufficient evidence to create a genuine issue of material fact as to whether "a sufficient causal connection between [Kreins'] alleged wrongful conduct and the constitutional violation[s]" exists. Mackinney v. Nielsen, 69 F.3d at 1008. Although the evidence shows that Kreins' inaction may have been called into question in the face of repeated use of lethal force by his officers against victims who either did not have firearms or who at least did not fire them, there is a lack of evidence that this resulted in constitutional violations. Therefore, the Court also grants Defendants' motion as to the claim against Kreins in his individual capacity for supervisory liability.

III. ORDER

For the reasons set forth above, the Court GRANTS Defendants' motion for summary judgment on Plaintiffs Joseph Johnson and Cynthia Mitchell's Monell claim set forth in the fourth cause of action of their Complaint

IT IS SO ORDERED.

Dated: April 14, 2015