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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GORDON SIMPSON,

No. C-06-4837 EMC

Plaintiff,

v.

**ORDER RE DEFENDANTS' MOTIONS
IN LIMINE AND DEFENDANTS'
OBJECTIONS TO PLAINTIFF'S
EXHIBITS**OFFICER McNACK, *et al.*,

Defendants.

(Docket Nos. 155, 168-69)

On May 10, 2010, the Court conducted a hearing on (1) a new motion in limine filed by Defendants, (2) Defendants' objections to Plaintiff's exhibits, and (3) Defendants' previous motion in limine on which the Court had conditionally ruled. This order memorializes the Court's rulings made at the hearing.

A. Defendants' Motion in Limine (Docket No. 168)

Defendants have asked the Court to bar Plaintiff's witnesses and counsel from referring to the use of force by police in other mainstream cases – *e.g.*, the Rodney King beating and other similar situations. Defendants argue that the evidence is irrelevant and, even if relevant, unduly prejudicial. Plaintiff does not oppose Defendants' motion.

Based on Plaintiff's oral statement of nonopposition, as well as the Court's concurrence with Defendants that what is relevant in this case is what happened to Plaintiff, not what happened to other people, the Court **GRANTS** this motion.

1 B. Defendants' Objections to Plaintiff's Exhibits

2 1. Third-Party Documents

3 With respect to documents that Plaintiff obtained from third parties (*e.g.*, medical records,
4 medical bills, bank records), the Court overrules Defendants' objections. Under the Court's case
5 management order, Defendants should have filed their objections by April 19, 2010. Defendants,
6 however, did not file their objections until May 7, 2010, which is in essence the day before trial.
7 The objections therefore are deemed waived. The Court notes that, had Defendants raised the
8 objections earlier, then Plaintiff could have dealt with them, *e.g.*, by obtaining a declaration from the
9 appropriate custodian of record to establish that the documents are business records. *See* Fed. R.
10 Evid. 803(6) (hearsay exception for business records); Fed. R. Evid. 902(11) (self-authentication for
11 business records).

12 The Court further notes that, at the hearing, Defendants conceded that they did not in fact
13 believe the third-party documents to be inauthentic. Moreover, Defendants admitted that they did
14 not have a real hearsay objection because Plaintiff likely could have obtained a declaration from the
15 appropriate custodian of record to establish the business records hearsay exception. Defendants,
16 however, argued that, with respect to the medical records, the evidence should still be excluded
17 because they contain expert opinions. The problem for Defendants is that they never raised this
18 objection by April 19 in compliance with the Court's case management order. Moreover, even in
19 the untimely objections that Defendants submitted on May 7, there was never an objection on this
20 basis. The Court therefore deems the objection waived.¹

21 2. Photographs

22 With respect to the photographs of Mr. Simpson's alleged injuries, the Court conditionally
23 overrules Defendants' objections. The best evidence objection is without merit. The advisory
24 committee notes for Federal Rule of Evidence 1002 demonstrate that it is permissible for Plaintiff to
25

26 ¹ The Court notes that, under Federal Rule of Civil Procedure 26(a)(2)(B), an expert report is
27 "not required as a prerequisite to a treating physician expressing opinions as to causation, diagnosis,
28 *Federal Realty Inv. Trust*, No. C-03-02013RMW, 2006 U.S. Dist. LEXIS 57113, at *45 (N.D. Cal. Aug.
3, 2006).

1 testify about his injuries and then show the photographs to confirm and visually illustrate what those
2 injuries were. *See* Fed. R. Evid. 1002, 1972 advisory committee notes (“The usual course is for a
3 witness on the stand to identify the photograph . . . as a correct representation of events which he
4 saw or of a scene with which he is familiar. In fact, he adopts the picture as his testimony, or, in
5 common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort
6 is made to prove the contents of the picture, and the rule is inapplicable.”).

7 As to Defendants’ objections based on lack of foundation and authentication, it appears that
8 Plaintiff will be able to authenticate the photographs and lay a proper foundation for their
9 admissibility based on Plaintiff’s counsel’s representation that Plaintiff took the pictures himself
10 shortly after the alleged incident at issue. The objection is thus overruled subject to Plaintiff laying
11 a proper foundation.

12 3. Plaintiff’s Documents

13 With respect to Plaintiff’s own documents -- *e.g.*, internal documents about his business --
14 the Court conditionally sustains Defendants’ objections. The documents are hearsay unless Plaintiff
15 is able to provide testimony establishing the applicability of the business records or other hearsay
16 exception.

17 C. Defendants’ Motion in Limine (Docket No. 155)

18 Previously, the Court conditionally permitted Plaintiff to ask Defendant Officer Waybright
19 about his alleged use of excessive force on prior occasions. The ruling allowed Defendants to ask
20 the Court to reconsider its ruling after they obtained further information about whether there were
21 any incidents of alleged use of excessive force previous to the incident at issue. *See* Docket No. 163
22 (final pretrial conference order).

23 At the hearing, Defendants and Plaintiff represented to the Court that there appeared to be
24 only one prior incident which allegedly involved the use of excessive force. Plaintiff argued that
25 this evidence should be admitted because it is relevant to his claim against the City. But Plaintiff
26 has provided no specifics about this prior incident, and, even if the prior incident were similar to that
27 at issue in the instant case, one prior incident hardly seems sufficient to give rise to a plausible
28 theory of official policy or custom or deliberate indifference. *See, e.g., City of Canton v. Harris*, 489

1 U.S. 378, 390 n.10 (1989) (noting that “[i]t could also be that the police . . . *so often* violate
2 constitutional rights that the need for further training must have been plainly obvious to the city
3 policymakers, who, nevertheless, are ‘deliberately indifferent’ to the need”) (emphasis added);
4 *Nadell v. Las Vegas Metro. Police Dep’t*, 268 F.3d 924, 929 (9th Cir. 2001) (noting that a municipal
5 “policy must result from a deliberate choice made by a policy-making official, and may be inferred
6 from widespread practices or ‘evidence of repeated constitutional violations for which the errant
7 municipal officers were not discharged or reprimanded’”).

8 The Court ruled that evidence related to the alleged use of excessive force by Officer
9 Waybright on a prior occasion is inadmissible. Subsequently, Plaintiff withdrew his *Monell* claim
10 thus making this motion moot.

11 This order disposes of Docket Nos. 155, 168, and 169.

12
13 IT IS SO ORDERED.

14
15 Dated: May 10, 2010



EDWARD M. CHEN
United States Magistrate Judge