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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULEANA STEWART,  
Plaintiff,  
v.  
CITY OF OAKLAND, et al.,  
Defendants.

Case No. [17-cv-04478-MMC](#)

**ORDER GRANTING CITY OF  
OAKLAND AND SEAN WHENT'S  
MOTION TO DISMISS; VACATING  
HEARING**

Re: Dkt. No. 46

Before the Court is the Motion to Dismiss, filed March 11, 2018, by defendants City of Oakland ("City") and former Chief of Police Sean Whent ("Chief Whent") (collectively, "City Defendants"). Plaintiff Juleana Stewart ("Stewart") has filed opposition, to which City Defendants have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for decision on the parties' respective written submissions, VACATES the hearing scheduled for April 20, 2018, and rules as follows.

In the operative complaint, the First Amended Complaint ("FAC"), Stewart alleges that defendant Frank Morrow ("Morrow"), a police officer employed by the City (see FAC ¶ 6), obtained a warrant for Stewart's arrest by "wrongfully withholding pertinent information of which he was aware or should have been aware, and by asserting information that he knew or should have known was not true" (see FAC ¶ 18), and that, thereafter, "based upon [the] wrongfully obtained arrest warrant," she was arrested by two City police officers,<sup>1</sup> who, during the course of the arrest, "pulled out firearms and

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<sup>1</sup>The two officers are sued in the FAC as "Doe defendants." (See FAC ¶ 8.)

1 aimed them at her without cause" (see FAC ¶ 17). Stewart further alleges that "it was the  
2 custom and policy of the Oakland Police Department, and their members, to use  
3 excessive force" and to "provide misleading information to obtain arrest warrants." (See  
4 FAC ¶ 32.) Additionally, Stewart alleges, City Defendants "fail[ed] to train, supervise,  
5 discipline and/or investigate complaint and/or charges against Oakland Police  
6 Department officers, and/or defendant Morrow." (See FAC ¶ 31.) Based on the above-  
7 cited allegations, Stewart asserts a single cause of action against City Defendants,  
8 specifically, the Second Cause of Action, titled "Violation of Civil Rights, 42 U.S.C.  
9 § 1983."<sup>2</sup>

10 By the instant motion, City Defendants argue Stewart has failed to state a claim  
11 against either the City or Chief Whent. The Court considers in turn Stewart's claim  
12 against each of the City Defendants.

13 **A. Chief Whent**

14 On November 24, 2017, City Defendants filed a motion to dismiss the claims  
15 alleged against them in the then operative pleading, Stewart's initial complaint. In  
16 particular, City Defendants argued that Stewart had failed to allege any facts to support a  
17 finding that Chief Whent had violated § 1983. By order filed January 18, 2018, the Court,  
18 at Stewart's request that Chief Whent "be dismissed without prejudice" (see Pl.s' Opp. to  
19 City Defs.' Mot., filed January 5, 2018, at 6:3), dismissed Stewart's claims against said  
20 defendant. In the instant motion, City Defendants, after noting Stewart, without  
21 explanation, has pleaded in the FAC her § 1983 claim against Chief Whent, argue  
22 Stewart again fails to state a claim against him.

23 Stewart has sued Chief Whent in both his "official" and his "individual" capacity.  
24 (See FAC ¶ 11.) For the reasons stated by City Defendants, none of which Stewart  
25 addresses in her opposition, the Court finds Stewart's claim against Chief Whent is

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28 <sup>2</sup>The remaining causes of action are alleged against Morrow and/or Doe defendants.

1 subject to dismissal. Specifically, Stewart's claim against Chief Whent in his official  
2 capacity is duplicative, in light of Stewart's having sued the City, see Center for Bio-  
3 Ethical Reform, Inc. v. Los Angeles County Sheriff Dep't, 533 F.3d 780, 799 (9th Cir.  
4 2008) (holding where plaintiff names as defendants "local government entity" and  
5 "municipal officer" in his "official capacity," district court "may dismiss the officer as a  
6 redundant defendant"), and Stewart's claim against him in his individual capacity lacks  
7 any facts to support her conclusory allegation that he personally violated Stewart's  
8 constitutional rights, see Ashcroft v. Iqbal, 556 U.S. 662, 676, 678 (2009) (holding,  
9 "[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that  
10 each Government-official defendant, through the official's own individual actions, has  
11 violated the Constitution"; further holding courts "are not bound to accept as true a legal  
12 conclusion couched as a factual allegation").

13 **B. The City**

14 By order filed January 18, 2018, the Court dismissed Stewart's § 1983 claim as  
15 asserted against the City in the initial complaint, for failure to allege "facts regarding the  
16 specific nature" of any challenged municipal policy, custom or practice. (See Order, filed  
17 January 18, 2018, at 4:22-24 (quoting AE ex rel. Hernandez v. County of Tulare, 666  
18 F.3d 631, 637 (9th Cir. 2012)), and afforded Stewart leave to amend. In the instant  
19 motion, City Defendants argue Stewart has failed to cure the deficiency identified in the  
20 Court's prior order.

21 In her opposition, Stewart fails to identify, and the Court has not located, any facts  
22 she has added to support her conclusory allegation that the "Doe defendants" who  
23 allegedly used excessive force during the course of her arrest were acting pursuant to a  
24 municipal policy, custom or practice. Accordingly, to the extent Stewart's § 1983 claim  
25 against the City is based on an alleged policy, custom or practice pertaining to use of  
26 force, Stewart has failed to cure the deficiency identified in the Court's prior order.

27 Stewart does argue, however, that she has added sufficient factual allegations to  
28 support her claim that when Morrow allegedly made false or misleading statements in the

1 application for her arrest, he acted pursuant to a City "custom and policy" under which  
2 officers "provide misleading information to obtain arrest warrants." (See FAC ¶ 32.)  
3 Specifically, Stewart relies on the following allegations: (1) in 2004, the City settled a  
4 lawsuit filed against the City and Morrow in which the plaintiff therein alleged she had  
5 been "sexually assaulted" by Morrow; (2) in 2006, the City was named as a defendant in  
6 a lawsuit in which Morrow "was accused of assaulting a young man and brandishing his  
7 firearm"; and (3) in 2011, Morrow "was quoted in the New York Times as saying, in  
8 support of a disciplined, terminated, OPD [Oakland Police Department] supervising  
9 officer who lied about personally approving a felony arrest at the scene of the arrest, that,  
10 'you shouldn't be terminated for being overwhelmed with work and making a shortcut that  
11 didn't cause any harm'." (See FAC ¶ 29.) Relying on the principle that "a custom or  
12 practice can be inferred from evidence of repeated constitutional violations for which the  
13 errant municipal officers were not discharged or reprimanded," see Velasquez v. City of  
14 Long Beach, 793 F.3d 1010, 1027 (9th Cir. 2015), Stewart argues the above-referenced  
15 three incidents support a finding that Morrow, when he made the allegedly false or  
16 misleading statements, acted pursuant to a municipal policy.

17 The principle on which Stewart relies is inapplicable to the instant claim. First, the  
18 alleged sexual assault and the alleged brandishing are dissimilar in nature and, more  
19 importantly, bear no similarity to Morrow's having allegedly made false statements in an  
20 application for a warrant. Consequently, the two incidents on which Stewart relies are  
21 insufficient to support an inference that the City has a policy of allowing officers to make  
22 false statements in the course of obtaining warrants. The statement Morrow made to the  
23 New York Times likewise does not support an inference that the City has such a policy.  
24 As described in the article,<sup>3</sup> a police sergeant was terminated, apparently for having

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26 <sup>3</sup>The Court takes judicial notice of the article, which has been submitted in the  
27 instant case by Stewart. (See Helbraun Decl., filed January 5 2018, Ex. F); Branch v.  
28 Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (holding court, when considering motion to  
dismiss, may consider "documents whose content are alleged in the complaint and  
whose authenticity no party questions, but which are not physically attached to the  
pleading").

1 misrepresented that he had complied with an internal, departmental procedural rule, and,  
2 read in context, the quoted comment by Morrow cannot reasonably be understood as  
3 supportive of the sergeant's conduct, but, rather, as a disagreement with the level of  
4 punishment imposed.

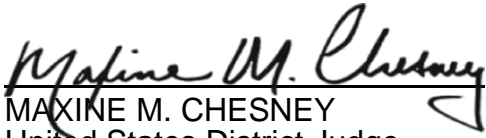
5 Accordingly, as Stewart has not cured the deficiency identified in the Court's prior  
6 order, Stewart's claim against the City is subject to dismissal.

7 **CONCLUSION**

8 For the reasons stated above, City Defendants' motion to dismiss is hereby  
9 GRANTED, and the Second Cause of Action, to the extent alleged against City  
10 Defendants, is hereby DISMISSED, without further leave to amend.

11 **IT IS SO ORDERED.**

12  
13 Dated: April 18, 2018

  
MAXINE M. CHESNEY  
United States District Judge