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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

BLAIR REDMOND,
Plaintiff,
v.
SAN JOSE POLICE DEPARTMENT, et al.,
Defendants.

Case No. [14-cv-02345-BLF](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS’
MOTION TO DISMISS WITH LEAVE
TO AMEND**

[Re: ECF 57]

Before the Court is the motion to dismiss filed by all defendants in this civil rights action. Defs.’ Mot., ECF 57. *Pro se* plaintiff Blair Redmond (“Plaintiff”) did not file any written opposition but appeared at the August 6, 2015 hearing on the motion to verbally oppose dismissal. For the reasons stated herein, the defendants’ motion is GRANTED IN PART and DENIED IN PART with leave to amend.

I. BACKGROUND

This civil rights lawsuit stems from an April 17, 2013 incident in the parking lot of Roosevelt Park in San Jose, CA. For purposes of the motion to dismiss, the following facts are assumed to be true.

Plaintiff and her boyfriend, Joseph, were seated in her parked car when San Jose Police Department Officers Tony Diep, Daniel Pfeifer, and Matthew Blackerby approached the car and began questioning them for no apparent reason. Second Am. Compl. (“SAC”) ¶¶ 28-39, ECF 48. Plaintiff indicated that she wanted to speak with the officers’ sergeant, that she would not answer their questions without an attorney present, and began to film the encounter on her phone. *Id.* ¶¶ 40-42. This conduct purportedly angered Officer Diep, who demanded that Plaintiff and Joseph exit the car. They refused and instead attempted to roll up the car windows, whereupon Diep

1 yelled “Knife” and reached in through the still open window to unlock the car door. *Id.* ¶¶ 43-45.
2 Diep and Blackerby dragged Joseph from the car and all three officers “attacked” him. *Id.* ¶¶ 46-
3 50. When Plaintiff exited the car to film the violent encounter on her cell phone, Officer Pfiefer
4 attempted to arrest her. As she asked the reason for her arrest while continuing to film, Pfiefer
5 charged Plaintiff, attempting to grab her phone. He then stomped on Plaintiff’s foot to pin her in
6 place, punched her in the face, and then continued to “rain[] more blows to her head” as she
7 crouched to protect herself. Finally, Pfiefer wrenched Plaintiff’s right arm behind her and
8 dislocated her shoulder. *Id.* ¶¶ 51-59. Pfiefer and another officer who arrived later kept Plaintiff
9 subdued, face down on the ground, until Sergeant Donald Perrier arrived on the scene. *Id.* ¶¶ 60-
10 61. Perrier promptly accused Plaintiff of assaulting his officers. *Id.* ¶ 61.

11 Plaintiff was transported to booking, where she attempted to tell her side of the story to
12 Sergeant Richard Galea, the direct supervisor for Officers Diep, Pfiefer, and Blackerby. He also
13 placed the blame on Plaintiff and her boyfriend and asked her “leading and untrue questions.” *Id.*
14 ¶¶ 65-67. Galea then informed Plaintiff that she was facing felony assault charges against the
15 three officers. *Id.* ¶ 68. Plaintiff was arrested and incarcerated at Elmwood Jail overnight and
16 released on supervised release the following day. The charges were dismissed on August 12, 2013
17 “due to lack of evidence.” *Id.* ¶¶ 73-74, 80. Because of the ordeal, Plaintiff withdrew from her
18 last semester at CSU East Bay and sought counseling. *Id.* ¶¶ 76-79. She also alleges that she
19 sustained continuing physical, cognitive, behavioral, and emotional damage from the encounter.
20 *Id.* ¶¶ 82-87.

21 In her original and first amended complaint, Plaintiff asserted a number of claims against
22 defendants Diep, Pfiefer, Blackerby, Galea, and Perrier under 42 U.S.C. §§ 1983, 1985, and 1986
23 for violations of her constitutional rights. On May 14, 2015, the Court granted in part Plaintiff’s
24 unopposed motion for leave to file a Second Amended Complaint to add eight additional officer
25 defendants. Order, ECF 45. The Court denied Plaintiff’s attempt to assert claims against a
26 proposed civilian defendant who had witnessed the incident and allegedly provided a false account
27 to the police. *Id.* at 4. In the SAC, Plaintiff alleges that Officers Wendy Hoskin, Christopher
28 Proft, Alan Mishaga, Andrew Wong, and Eric Magnuson conspired to violate her civil rights by

1 collecting false accounts of the incident, SAC ¶ 69, that Officer Paul Talus aided the conspiracy
2 by falsely stating in a police report that Plaintiff had consented to copy her phone, *id.* ¶ 70, and
3 that Officers Raquel Melo and Jorge Gutierrez also conspired by neglecting to investigate
4 Plaintiff’s statement, *id.* ¶ 71. *See also id.* ¶ 72. Officer Hoskin is also charged with battery for
5 frisking Plaintiff, exposing her midriff, and placing her in the back of squad car. *Id.* ¶ 107.

6 In total, Plaintiff asserts nine causes of action against Diep, Pfiefer, Blackerby, Galea,
7 Perrier, Hoskin, Proft, Mishaga, Wong, Talus, Melo, Gutierrez, and Magnuson (collectively,
8 “Defendants”) as follows: (1) excessive force in violation of the Fourth Amendment¹ against
9 Officer Pfiefer (First Claim); (2) unlawful arrest and detention in violation of the Fourth
10 Amendment against all Defendants (Second Claim); (3) unlawful search of person in violation of
11 the Fourth Amendment against all Defendants (Third Claim); (4) battery against Officer Hoskin
12 (Fourth Claim); (5) unlawful search of vehicle in violation of the Fourth Amendment against all
13 Defendants (Fifth Claim); (6) violation of the Bane Civil Rights Act, Cal. Civ. Code § 52.1,
14 against all Defendants (Sixth Claim); (7) intentional infliction of emotional distress against all
15 Defendants (Seventh Claim); (8) false arrest/imprisonment against all Defendants (Eighth Claim);
16 and (9) negligent infliction of emotional distress against all Defendants (Ninth Claim).

17 **II. LEGAL STANDARD**

18 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
19 sufficiency of the claims alleged in the complaint. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199-200
20 (9th Cir. 2003).

21 To survive a motion to dismiss, a complaint must plead sufficient “factual matter, accepted
22 as true” to “plausibly suggest an entitlement to relief, such that it is not unfair to require the
23 opposing party to be subjected to the expense of discovery and continued litigation.” *Ashcroft v.*
24 *Iqbal*, 556 U.S. 662, 678 (2009). The plausibility standard “asks for more than a sheer possibility
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26 ¹ Plaintiff alleges her excessive force claim under the Fourteenth Amendment, but the Court
27 construes her excessive force claim against Officer Pfiefer to be one made pursuant to 42 U.S.C. §
28 1983 for violation of the Fourth Amendment because there are no allegations that Pfiefer used
force against Plaintiff while she was in pretrial detention. *See Graham v. Connor*, 490 U.S. 386,
395 n.10 (1989).

1 that a defendant has acted unlawfully,” and a complaint that pleads facts that are “merely
2 consistent with” a defendant’s liability “stops short of the line between possibility and
3 plausibility.” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007))
4 (internal quotation marks omitted). The emphasis is on factual pleadings, as a pleading that offers
5 “labels and conclusions,” “a formulaic recitation of the elements of a cause of action,” or “naked
6 assertions devoid of further factual enhancement” will not do. *Id.* (citing and quoting *Twombly*,
7 550 U.S. at 557). In § 1983 cases, the Ninth Circuit has affirmed that this pleading standard
8 applies not only to allegations against individual defendants, but also to claims based on
9 supervisory and *Monell* theories of liability. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.
10 2011); *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) (confirming
11 *Starr*’s interpretation of *Iqbal* applies to *Monell* claims); *see also Dougherty v. City of Covina*, 654
12 F.3d 892, 900-01 (9th Cir. 2011).

13 Here, the Court is mindful that “a document filed pro se is ‘to be liberally construed,’ and
14 ‘a pro se complaint, however inartfully pleaded, must be held to less stringent standards than
15 formal pleadings drafted by lawyers.’” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting
16 *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). “Unless it is absolutely clear that no amendment can
17 cure the defect . . . a pro se litigant is entitled to notice of the complaint’s deficiencies and an
18 opportunity to amend prior to dismissal of the action.” *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248
19 (9th Cir. 1995) (quoted with approval in *Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1041
20 (9th Cir. 2014)).

21 **III. DISCUSSION**

22 **A. Claim Against City of San Jose**

23 In her SAC, Plaintiff names the City of San Jose and the San Jose Police Department as
24 defendants. Defendants argue that the Police Department is not a proper defendant because it is a
25 department of the City. Defs.’ Mot. 2-3. Plaintiff does not dispute this, as she alleges that the
26 Police Department “is a governmental agency” and that she refers to the City and the Police
27 Department interchangeably in her SAC. SAC ¶ 6.

28 Defendants furthermore contend that Plaintiff has asserted no claims against the City.

1 Defs.’ Mot. 3. While it is true that Plaintiff has not alleged any claim against the City pursuant to
2 *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), nor any claim
3 specifically identifying the City as a defendant, she has alleged that the Police Department, as “a
4 city governmental agency,” has promulgated policies and procedures and failed to train its
5 employees in a manner that caused the individual officers’ misconduct alleged in the complaint.
6 SAC ¶ 6. In light of Plaintiff’s *pro se* status, the Court liberally construes this allegation as an
7 attempt to assert a *Monell* claim against the City. To the extent Plaintiff wishes to pursue such a
8 claim, she shall have leave to amend her pleading to clearly articulate that claim and provide
9 further factual enhancement to plausibly suggest an entitlement to relief against the City. *AE ex*
10 *rel. Hernandez*, 666 F.3d at 637.

11 In any case, to the extent the individual officer defendants are not immune, California law
12 makes the City vicariously liable for their actions. *See* Cal. Gov’t Code § 815.2; *Rivera v. Cnty. of*
13 *Los Angeles*, 745 F.3d 384, 393 (9th Cir. 2014). As such, Plaintiff has properly asserted state law
14 claims against the City. The Court therefore DENIES Defendants’ motion to dismiss the City
15 from this lawsuit but will allow Plaintiff to amend her complaint to (1) clearly indicate which
16 claims she is asserting against the City; (2) clarify whether she is pursuing a *Monell* claim against
17 the City; and (3) if she is pursuing a *Monell* claim, allege facts to support that claim.

18 **B. Claims Against Officers Diep, Pfeifer, and Blackerby**

19 Defendants in their motion to dismiss seek to dismiss all of Plaintiff’s claims on the ground
20 that she has failed to factually allege a plausible entitlement to relief. The motion is spurious with
21 respect to Officers Diep, Pfeifer, and Blackerby. *See* Defs.’ Mot. 4-7. Contrary to Defendants’
22 assertions, the factual allegations recited above, when taken as true with reasonable inferences
23 drawn in Plaintiff’s favor, clearly demonstrate that these three officers acted unlawfully.
24 Furthermore, though the Court credits Defendants’ assertion that Diep’s and Blackerby’s actions
25 revolved around Plaintiff’s boyfriend, Plaintiff has alleged sufficient facts to warrant an inference
26 that all three officers acted in concert and were integral participants in the constitutional violations
27 committed against Plaintiff. *See, e.g., Boyd v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir. 2004).
28 That facts adduced at trial may tell a different story is not sufficient to dismiss the claims at this

1 stage. Defendants’ motion to dismiss is therefore DENIED with respect to Plaintiff’s claims
2 against Diep, Pfiefer, and Blackerby.

3 **C. Claims Against Sergeants Perrier and Galea**

4 Defendants seek to dismiss Plaintiff’s claims against Sergeants Perrier and Galea on the
5 ground that she alleges no facts that either Perrier or Galea personally arrested her or searched her
6 person or vehicle. Defs.’ Mot. 8-9.

7 “Absent vicarious liability, each Government official, his or her title notwithstanding, is
8 only liable for his or her own misconduct.” *Iqbal*, 556 U.S. at 677. Where a government official
9 is also a supervisor—as Sergeants Perrier and Galea are alleged to be—he may also be liable in an
10 individual capacity for “culpable action or inaction in the training, supervision, or control of his
11 subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a
12 reckless or callous indifference to the rights of others.” *Watkins v. City of Oakland*, 145 F.3d
13 1087, 1093 (9th Cir. 1998) (internal alteration and quotation marks omitted) (quoted with approval
14 in *Starr*, 652 F.3d at 1207). For example, a supervisor may be liable for causing the constitutional
15 harm to a plaintiff “by setting in motion a series of acts by others, or by knowingly refus[ing] to
16 terminate a series of acts by others, which [the supervisor] knew or reasonably should have known
17 would cause others to inflict a constitutional injury.” *Starr*, 652 F.3d at 1207-08 (alteration in
18 original) (internal citations and quotation marks omitted).

19 Here, the only allegation of Perrier’s own conduct is his aggressive manner and his
20 immediate accusation that Plaintiff assaulted his police officers. SAC ¶¶ 61-62. Likewise, the
21 allegations as to Galea also reflect an unwillingness to hear Plaintiff’s story and a willingness to
22 blame her for the incident and, ultimately, charge her with assaulting a peace officer. *Id.* ¶¶ 66-68.
23 Standing alone, these allegations are insufficient to state claims against Sergeants Perrier and
24 Galea. However, they do suggest that Perrier and Galea are possibly liable as supervisors for the
25 conduct of the officers on the scene. As such, Defendants’ motion to dismiss is GRANTED with
26 respect to all of Plaintiff’s claims against Sergeants Perrier and Galea. Plaintiff shall have leave to
27 amend with facts that either demonstrate Perrier’s and Galea’s liability for their own conduct or
28 that demonstrate their supervisory liability for the other officer defendants’ alleged misconduct.

1 **D. Claims Against Officer Hoskin**

2 Defendants assert that Officer Hoskin is immune from Plaintiff’s claim for battery under
3 California Government Code § 820.2, which shields public employees from liability for injuries
4 arising out of his or her discretionary acts. Defs.’ Mot. 10. Section 820.2 does not immunize a
5 police officer against claims for false arrest or false imprisonment. Cal. Gov’t Code § 820.4.
6 Plaintiff’s claim for battery flows from her premise that her detention and arrest by the officers on
7 the scene was unlawful. Although Officer Hoskin did not participate in the initial encounter, she
8 is alleged to be the officer who convinced Plaintiff to forego going to the hospital and the one who
9 frisked Plaintiff, lifted her shirt, and put her in the squad car. SAC ¶¶ 65, 107. Accepting
10 Plaintiff’s allegations as true, this is sufficient to state claims for unlawful arrest under the Fourth
11 Amendment, false arrest, and battery. To be sure, evidence at trial may show that Hoskin acted
12 reasonably and in reliance on an “understanding that Plaintiff was under arrest and was being
13 taken into custody.” Defs.’ Mot. 10. The Court, however, considers only the allegations in the
14 SAC and finds them sufficient, when taken as true, to sustain all of Plaintiff’s claims against
15 Hoskin at this stage in the proceeding. Defendants’ motion to dismiss Plaintiff’s claims against
16 Officer Hoskin is therefore DENIED.

17 **E. Claims Against Officers Proft, Mishaga, Wong, Talus, Melo, Gutierrez, and**
18 **Magnuson**

19 Finally, Defendants assert that Plaintiff has alleged little to establish entitlement to relief
20 on her claims against Officers Proft, Mishaga, Wong, Talus, Melo, Gutierrez, and Magnuson.²
21 The Court agrees with Defendants. Because these officers are not alleged to have been present at
22 the park on April 17, 2013, they cannot be liable to Plaintiff as integral participants in the
23 underlying constitutional violations. *Hopkins v. Bonvicino*, 573 F.3d 752, 769-70 (9th Cir. 2009).
24 Other than the officers’ participation in the subsequent taking of witness statements and in the
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26 ² Defendants ask the Court to consider excerpts from Plaintiff’s deposition, wherein she admits
27 that these officers were not present at the scene. *See* Defs.’ Mot. 11-13. The Court cannot
28 consider evidence outside of the pleadings without converting Defendants’ motion into one for
summary judgment. Fed. R. Civ. P. 12(d). In any case, Plaintiff does not allege that these officers
were on the scene.

1 ensuing investigation, there are no facts tying Proft, Mishaga, Wong, Talus, Melo, Gutierrez, and
2 Magnuson to the events that give rise to Plaintiff’s claims. The existing allegations moreover fail
3 to show that what each officer did was independently sufficient to entitle Plaintiff to relief.³

4 Plaintiff appears to be asserting that Proft, Mishaga, Wong, Talus, Melo, Gutierrez, and
5 Magnuson should be held liable as co-conspirators with Diep, Pfeifer, Blackerby, and Hoskin. *See*
6 SAC ¶¶ 69-71. In order to show that Defendants conspired to violated Plaintiff’s civil rights, she
7 must allege facts indicating that “each member of the conspiracy acted in concert and came to a
8 mutual understanding to accomplish a common and unlawful plan, and that one or more of them
9 committed an overt act to further it.” *Choate v. Cnty. of Orange*, 86 Cal. App. 4th 312, 333
10 (2000), *as modified on denial of reh’g* (Jan. 17, 2001). In other words, there must be a meeting of
11 the minds before the actions of the conspiracy, and “[i]t is not enough that the conspiring officers
12 knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it.” *Id.* In
13 the alternative, if Plaintiff is alleging a “cover-up” conspiracy, she must allege facts to show that
14 “the conspirators shared a common goal to intentionally conceal evidence and that the cover-up
15 actually rendered all state court remedies ineffective.” *Id.* at 354 (internal citations and quotation
16 marks omitted). “The mere failure to investigate fully does not constitute a federal civil rights
17 violation.” *Id.* The allegations in the SAC do not support either theory of conspiracy with respect
18 to Plaintiff’s claims against Officers Proft, Mishaga, Wong, Talus, Melo, Gutierrez, and
19 Magnuson.

20 As such, Defendants’ motion to dismiss is GRANTED with respect to Plaintiff’s claims
21 against Officers Proft, Mishaga, Wong, Talus, Melo, Gutierrez, and Magnuson. Plaintiff shall
22 have leave to amend to either allege each officer’s conduct or to allege facts indicating that these
23 officers conspired with the other defendants in the case to violate Plaintiff’s rights.

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27 ³ For example, Officer Talus is alleged to have “stated in the police report that the Plaintiff gave
28 consent to copy her phone.” SAC ¶ 70. While it may be inferred that Plaintiff did not give
consent to search her phone, this is not alleged, nor is it even alleged that Officer Talus was the
one to search Plaintiff’s phone without consent. The mere assertion that a police officer wrote
something in a police report is not sufficient to give rise to any claim for relief.

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IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is GRANTED IN PART and DENIED IN PART as follows:

1. The motion is DENIED with respect to Plaintiff's claims against Officers Diep, Pfiefer, Blackerby, and Hoskin, and with respect to dismissing the City from this lawsuit.


2. The motion is GRANTED with respect to Plaintiff's claims against Sergeants Perrier and Galea and Officers Proft, Mishaga, Wong, Talus, Melo, Gutierrez, and Magnuson. Those claims are dismissed with leave to amend to address the deficiencies addressed in this order.

3. Plaintiff shall also have leave to clearly identify the claims she is asserting against the City of San Jose and, to the extent she intends to pursue one, to allege a *Monell* claim against the City.

As the Court advised at the August 6 hearing, Plaintiff is not required to amend and may choose not to reassert the dismissed claims if she feels she cannot allege the facts needed to overcome the deficiencies in the SAC. If Plaintiff intends to amend, she must file the Third Amended Complaint **by no later than September 4, 2015**. If no amended complaint is filed on or by September 4, this action will proceed on the remaining claims that were not dismissed from the SAC.

IT IS SO ORDERED.

Dated: August 19, 2015


BETH LABSON FREEMAN
United States District Judge