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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JOHN B. KENNEY,
12 Plaintiff,
13 v.
14 THE CITY OF SAN DIEGO; SAN
15 DIEGO POLICE DEPARTMENT;
16 KASEYLEE LAWRENCE; and
17 MATTHEW KOERBER,
Defendants.

Case No.: 13cv248-WQH-AGS

ORDER

18 HAYES, Judge:

19 The matter before the Court is the motion for summary judgment filed by Defendants
20 the City of San Diego and the San Diego Police Department. (ECF No. 591).

21 **I. PROCEDURAL BACKGROUND**

22 On October 21, 2013, Plaintiff John B. Kenney initiated this action by filing a First
23 Amended Complaint alleging that he was subjected to the deprivation of his rights under
24 federal and state law as a result of his involvement with the Occupy San Diego protests in
25 late 2011 and early 2012. (ECF No. 21). The Complaint alleged facts describing five
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1 incidents involving the San Diego Police Department (“SDPD”), three named San Diego
2 Police Officers, and Doe San Diego Officers 1-200.

3 On January 28, 2014, the Court granted the motion to dismiss portions of the
4 Complaint filed by the City Defendants and the Sheriff’s Department. (ECF No. 33).

5 On August 13, 2015, Defendants Lawrence, Thompson, Stum, City of San Diego
6 (“the City”), and the SDPD filed separate motions for full or partial summary judgment.
7 (ECF Nos. 330, 331, 332, 333).

8 On March 29, 2016, this Court entered an Order which stated in part:

9 IT IS FURTHER ORDERED that 1) the motion for summary judgment (ECF
10 No. 330) filed by Defendant Lawrence is denied in part and granted in part,
11 2) the motion for summary judgment (ECF No. 331) filed by Defendant
12 Thompson is granted, 3) the motion for summary judgment (ECF No. 332)
13 filed by Defendant Stum is granted, and 4) the motion for summary judgment
14 (ECF No. 333) filed by Defendants City of San Diego and San Diego Police
15 Department is denied in part and granted in part.

16 All claims in the Complaint against Doe Defendant Police Officers, Defendant
17 Lawrence, SDPD, and the City of San Diego for acts which took place on
18 January 31, 2012 for excessive force, illegal search, Sixth Amendment, right
19 to counsel, Eighth Amendment, Ninth Amendment, equal protection, Article
20 four, false arrest, negligence, intentional infliction of emotional distress, and
21 invasion of privacy are dismissed.

22 All claims in the Complaint for negligence (third claim), assault (fourth
23 claim), battery (fifth claim), negligent or intentional infliction of emotional
24 distress (seventh claim), and invasion of privacy (twelfth claim) against
25 Defendants San Diego Police Department and City of San Diego are
26 dismissed.

27 All claims in the Complaint against all Defendants for the alleged actions
28 taken on November 2, 2011 and March 24, 2012 are dismissed for the reasons
stated in this order.

1 (ECF No. 385 at 20–21). With respect to the unlawful policies and procedures claim
2 against the City and the SDPD, the Court stated,

3 The facts in this record establish that the SDPD had constitutional policies and
4 procedures and that the officers were trained and instructed regarding these
5 policies. There are no facts in the record regarding the application of these
6 policies on October 14, 2011 and December 9, 2011. The Court concludes
7 that there is a genuine issue of material fact as to whether Plaintiff may prevail
8 on his claim regarding actions taken by officers on January 31, 2012. At this
stage in the proceedings, the Court does not conclude that Defendant City of
San Diego and SDPD are entitled to summary judgment in their favor.

9 (ECF No. 385 at 19).

10 On December 16, 2016, Defendants Kevin Armentano, Steven Eraca, Matthew
11 Koerber, David Mitchell, James Milano, Rodolphe Sainte-Agathe, Craig Shumate, and
12 Erick Valdez filed a motion for full or partial summary judgment. (ECF No. 461). On
13 June 14, 2017, the Court granted in part and denied in part the motion for full or partial
14 summary judgment. The Court stated:

15 IT IS HEREBY ORDERED that the motion for full or partial summary
16 judgment (ECF No. 461) filed by Defendants Kevin Armentano, Steven
17 Eraca, Matthew Koerber, David Mitchell, James Milano, Erick Valdez,
18 Rodolphe Sainte-Agathe, and Craig Shumate is denied in part and granted in
part. The following claims remain for trial:

- 19 1) claim pursuant to 42 U.S.C. § 1983 of excessive force and violation of
20 First Amendment against Defendant Koerber with respect to October
21 14, 2011;
- 22 2) claim pursuant to 42 U.S.C. § 1983 of violation of the First Amendment
23 and Fourth Amendment against Defendant Lawrence as to January 31,
24 2012; and
- 25 3) claim against Defendant City of San Diego and Defendant SDPD as to
26 unlawful policies.

27 All other claims and parties are dismissed.

28 (ECF No. 499). On January 25, 2018, the Court held a hearing on motions in limine and
other pretrial matters. (ECF No. 586). The Court ruled on a number of motions in limine

1 and granted the City and the SDPD leave to file a motion for summary judgment. (ECF
2 No. 588). The remaining claim against the City and the SDPD is a claim for unlawful
3 policies, customs, or procedures pursuant to 42 U.S.C. § 1983 in relation to the alleged
4 excessive force and First Amendment violations on October 14, 2011 and the alleged First
5 Amendment and Fourth Amendment violations on January 31, 2012 by members of the
6 SDPD.

7 On February 1, 2018, the City and the SDPD filed a motion for summary judgment.
8 (ECF No. 591). On February 8, 2018, Plaintiff filed a response in opposition to the motion.
9 (ECF No. 598). On February 15, 2018, the City and SDPD filed a reply. (ECF No. 608).
10 On February 15, 2018, the Court allowed Plaintiff additional briefing time on the motion
11 for summary judgment. (ECF No. 611). On February 15, 2018, Plaintiff filed another
12 response in opposition to the motion for summary judgment. (ECF No. 606). On February
13 21, 2018, the City and the SDPD filed another reply.¹ (ECF No. 615).

14 **II. FACTUAL BACKGROUND**

15 Trial is set on Plaintiff's claims that his constitutional rights were violated by
16 Defendant Koerber on October 14, 2011 and by Defendant Lawrence on January 31, 2012.

17 On October 14, 2011, the SDPD was conducting an enforcement action to clear the
18 Civic Plaza of personal property believed to be in violation of the encroachment ordinance
19 of the City. Protestors, including Plaintiff, had formed "human chains" by linking arms
20 and surrounding the tents and other equipment to prevent officers from removing them. In
21 an effort to move Plaintiff out of the way, Defendant Koerber tried to pry Plaintiff's arm
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25 ¹ The City and the SDPD request that the Court strike Plaintiff's second opposition to the motion for
26 summary judgment as untimely and without leave of Court. Because the Court later granted Plaintiff's
27 request for additional briefing time on the motion for summary judgment, this request is denied. (ECF
28 No. 608 at 4–5; ECF No. 615 at 5).

1 free, used a pressure point tactic and head control takedown, and issued an oleoresin
2 capsicum (“OC”) spray in Plaintiff’s direction.

3 On January 31, 2012, two SDPD police officers informed Defendant Lawrence that
4 a bag had been left alone in the Civic Center Plaza and appeared to be abandoned. After
5 walking over to the area and observing that no one was standing near the bag, Defendant
6 Lawrence directed the police officers to impound the bag. Plaintiff subsequently stated
7 that it was his bag.

8 Defendants Koerber and Lawrence are employed by the SDPD. The SDPD is a
9 municipal department of the City of San Diego.² San Diego Municipal Code § 22.1801(b).
10 The Court has previously concluded, “The facts in this record establish that the SDPD had
11 constitutional policies and procedures and that the officers were trained and instructed
12 regarding these policies.” (ECF No. 385 at 19).

13 The City and the SDPD provide a Declaration by Boyd Long, the Assistant Chief
14 for the SDPD at the time of the alleged incidents. (Boyd Decl., ECF No. 591-5). Boyd
15 states,

16 As the Assistant Chief of Patrol Operations I was either personally present or
17 received reports during the events which occurred in the Civic Center in
18 connection with the protest known as . . . “Occupy San Diego” or “Occupy
19 SD” in late 2011 and early 2012. Moreover, I was personally present on
20 October 14, 2011, during the events which occurred in the Civic Center that
21 are the subject of this lawsuit.

22 *Id.* at ¶ 4. Boyd states that he is familiar with the policies, procedures, and customs of the
23 SDPD and the City in effect at the time of the incidents relating to the use of force, the
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25 ² Pursuant to Federal Rule of Evidence 201, the Court grants the City and SDPD’s request for judicial
26 notice and takes judicial notice of the fact that “the San Diego Police Department is a municipal
27 department of the City of San Diego as set forth in San Diego Municipal Code, Chapter 2, Article 2,
28 Division 18, section 22.1801.” (ECF No. 591-6)

1 impounding of property, arrests, custodial issues, and the training and supervision of SDPD
2 officers. *Id.* at ¶¶ 5, 10, 15.

3 Boyd states that, with respect to the use of force, at the time of the subject incidents,
4 it was “the policy, practice, procedure and custom of the SDPD” (1) “to train its personnel
5 in the use of the safest most humane restraint procedures and force options currently
6 known;” (2) “that force may be used to effect a detention or arrest, control a subject who
7 is in lawful custody, prevent an escape, or protect the officer, the subject, or another person
8 from injury or death;” (3) “that an officer who encounters a person exhibiting passive
9 resistance behavior may use lesser controlling force techniques on that person;” (4) “that
10 an officer who encounters a person exhibiting active resistance behavior may use greater
11 controlling force techniques on that person.” *Id.* at ¶ 7. Boyd states,

12 Officers were also trained and instructed at the San Diego Regional Police
13 Academy and at In-Service training sessions to use only reasonable force in
14 making arrests, and in the defense of officers and others to injury. The training
15 related to the use of force was provided to San Diego police officer met or
16 exceeded the required number of training hours established by the State of
17 California.

18 *Id.* Boyd further states,

19 With respect to found or abandoned property, it was the policy, practice,
20 procedure, and custom of the SDPD to impound property that appeared to be
21 found abandoned, lost, or otherwise unclaimed. Personal property found on
22 public property without a readily identifiable owner is presumed to be
23 abandoned property pursuant to San Diego Municipal Code section 54.0212.
24 All abandoned or found property that was determined to be of some
25 evidentiary or monetary value, with a few exceptions for perishable,
26 dangerous or hazardous items, was to be impounded in the SDPD Property
27 Room. When impounded a impound entry into FileOnQ, the automated
28 property management system, is required. The entry indicates information
including the nature of the property (i.e. found, evidence, etc.), a description
or inventory of each item impounded, when and where it was found, and the
identification of the officer recovering property. A Property Release Form
must be completed any time a member of SDPD relinquishes physical custody

1 of impounded property. SDPD officers may not authorize the release of
2 impounded property to themselves.

3 *Id.* at ¶ 12.

4 With respect to free speech activities, it was the policy, practice, procedure
5 and custom at the time of the subject incidents to allow protestors to legally
6 protest or engage in free speech activities, but to also create a safe
7 environment for everyone involved and ensure that no laws are violated.
8 Officers were trained and instructed at the Police Academy and at In-Service
training sessions regarding SDPD’s policy regarding enforcement in relation
to protests and other free speech activities.

9 *Id.* at ¶ 17. Boyd states that these policies, procedures, and customs were in effect and
10 applicable on October 14, 2011 and January 31, 2012. *Id.* at ¶¶ 8, 13, 18. Boyd states, “No
11 officer was instructed to disregard or ignore these policies, procedures, and customs in
12 relation to the Occupy San Diego or Occupy SD Movement.” *Id.* at ¶¶ 9, 14, 19.³

13 **III. LEGAL STANDARD**

14 “A party may move for summary judgment, identifying each claim or defense—or
15 the part of each claim or defense—on which summary judgment is sought. The court shall
16 grant summary judgment if the movant shows that there is no genuine dispute as to any
17 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
18 56(a). A material fact is one that is relevant to an element of a claim or defense and whose
19 existence might affect the outcome of the suit. *See Matsushita Elec. Indus. Co., Ltd. v.*
20 *Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). The materiality of a fact is determined
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25 ³ The description of the policies, procedures, and customs in the Boyd Declaration is consistent with the
26 description of the policies, procedures, and customs in declarations filed in support of the City and the
27 SDPD’s motion for summary judgment filed on August 13, 2015. (ECF Nos. 333-13, 333-14, 333-15,
28 333-8).

1 by the substantive law governing the claim or defense. *See Anderson v. Liberty Lobby,*
2 *Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986).

3 The moving party has the initial burden of demonstrating that summary judgment is
4 proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The burden then shifts
5 to the opposing party to provide admissible evidence beyond the pleadings to show that
6 summary judgment is not appropriate. *See Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S.
7 at 322, 324. The opposing party’s evidence is to be believed, and all justifiable inferences
8 are to be drawn in her favor. *See Anderson*, 477 U.S. at 255. To avoid summary judgment,
9 the opposing party cannot rest solely on conclusory allegations of fact or law. *See Berg v.*
10 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, the nonmovant must designate
11 which specific facts show that there is a genuine issue for trial. *See Anderson*, 477 U.S. at
12 256.

13 **IV. DISCUSSION**

14 The City and the SDPD assert that Plaintiff has provided no evidence to dispute the
15 prior finding of the Court that constitutional policies and procedures were in effect and
16 applied on October 14, 2011 and January 31, 2012. The City and the SDPD contend that
17 Plaintiff fails to produce any admissible evidence of inadequate training, failure to
18 discipline, or ratification of any wrongful conduct. The City and the SDPD contend that
19 they are entitled to summary judgment on the remaining *Monell* claims because Plaintiff
20 has failed to present any disputed issue of fact and instead offers “speculation, conclusions,
21 and theories with no evidentiary support[.]” (ECF No. 608 at 2). The City and the SDPD
22 filed objections to evidence provided by Plaintiff on the ground that it is improperly
23 authenticated, lacking in foundation, and irrelevant. (ECF Nos. 608-2; 615-2).

24 Plaintiff contends that the Court is biased in favor of Defendants and that disputed
25 issues of material fact preclude summary judgment. Plaintiff contends that “COSD/SDPD
26 . . . ratified the behavior of their SDPD personnel, such that it is their ‘official policy.’”
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1 (ECF No. 598 at 7). Further, Plaintiff asserts “no one has ever shown that any training,
2 follow-up, or discipline was applied to any of the SDPD involved in any of the ‘incidents’
3 specifically detailed in the *FAC*.” *Id.* at 11. Plaintiff contends that “COSD/SDPD targeted,
4 assaulted, stole from, harmed and abused Plaintiff for years on end. This was SDPD
5 ‘policy.’” *Id.* at 16

6 Title 42 U.S.C. § 1983 provides a cause of action against any person who, under
7 color of state law, deprives any citizen of any rights, privileges, or immunities secured by
8 the Constitution and laws of the United States. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).
9 “The purpose of § 1983 is to deter state actors from using the badge of their authority to
10 deprive individuals of their federally guaranteed rights and to provide relief to victims if
11 such deterrence fails.” *Id.* “A person deprives another of a constitutional right, where that
12 person ‘does an affirmative act, participates in another’s affirmative act, or omits to
13 perform an act which [that person] is legally required to do that causes the deprivation of
14 which complaint is made.’” *Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007) (quoting
15 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)), vacated on other grounds, 556 U.S.
16 1256 (2009). A municipality or governmental entity cannot be found liable under section
17 1983 on a respondeat superior theory. Rather, such liability can be imposed only for
18 injuries inflicted pursuant to a governmental “policy or custom.” *Monell v. Dept. of Social*
19 *Servs. of New York*, 436 U.S. 658, 694 (1978). In addition, there must be an affirmative
20 link shown between the policy or custom and the particular constitutional violation alleged.
21 *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985); *Mendiola–Martinez v. Arpaio*,
22 836 F.3d 1239, 1247 (9th Cir. 2016) (citing *Castro v. Cty. of Los Angeles*, 833 F.3d 1060,
23 1075 (9th Cir. 2016)) (“Instead, to establish municipal liability under § 1983, a plaintiff
24 must show ‘a direct causal link between a municipal policy or custom and the alleged
25 constitutional deprivation.’”). The alleged policy or custom must be the “moving force”
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1 of the constitutional violations in order to establish liability under § 1983. *Polk County v.*
2 *Dodson*, 454 U.S. 312, 326 (1981) (citing *Monell*, 436 U.S. at 694).

3 In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court stated that
4 “without more” a city is not “automatically . . . liable under § 1983 if one of its employees
5 happened to apply the [constitutional] policy in an unconstitutional manner, for liability
6 would then rest on *respondeat superior*.” *Id.* at 387. However, the Court concluded that
7 that under “limited circumstances” a municipality can be held liable for an unconstitutional
8 application of a valid policy “if the employee has not been adequately trained and the
9 constitutional wrong has been caused by that failure to train.” *Id.* The Court held that a
10 municipality may be held liable under § 1983 only where its failure to adequately train
11 police officers amounts to a “deliberate indifference to the rights of persons with whom the
12 police come into contact.” *Id.* at 388. “Only where a failure to train reflects a ‘deliberate’
13 or ‘conscious’ choice by a municipality . . . can a city be liable for such a failure under §
14 1983.” *Id.* at 389.

15 In this case, trial is set on Plaintiff’s claims that his constitutional rights were violated
16 on October 14, 2011 and January 31, 2012 by members of the SDPD. The City and the
17 SDPD cannot be held liable under 42 U.S.C. § 1983 for the alleged constitutional violations
18 of its police officers on October 14, 2011 and January 31, 2012 on a theory of *respondeat*
19 *superior*. See *Monell*, 436 U.S. at 694; *City of Canton*, 489 U.S. at 387. Plaintiff must
20 demonstrate “a direct causal link” between a municipal policy, custom or procedure and
21 the alleged constitutional violations on October 14, 2011 and January 31, 2012. See
22 *Castro*, 833 F.3d at 1075. The City and the SDPD provide evidence of the relevant policies,
23 procedures, and customs in effect on October 14, 2011 and January 31, 2012. See, e.g.,
24 Boyd Decl., ECF No. 591-5. The Court has ruled that on the dates of the alleged violations
25 of Plaintiff’s constitutional rights by SDPD officers, the policies and procedures relevant
26 to the alleged violations were constitutional and the officers were trained and instructed
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1 regarding these policies. *See* ECF No. 385 at 19 (“The facts in this record establish that
2 the SDPD had constitutional policies and procedures and that the officers were trained and
3 instructed regarding these policies.”). The City and the SDPD provide further evidence
4 that no officer was instructed to disregard or ignore these policies, procedures, and customs
5 in relation to the Occupy San Diego Movement in 2011 and 2012. *See* Boyd Decl., ECF
6 No. 591-5. Plaintiff fails to provide evidence sufficient to create a disputed issue of
7 material fact with respect to any failure to adequately train officers on the relevant policies,
8 customs, and procedures of the SDPD and the City.⁴ *See City of Canton*, 489 U.S. at 387–
9 89.

10 Relying on *Christie v. Iopa*, 176 F.3d 1231 (9th Cir. 1991), Plaintiff also contends
11 that the City and the SDPD can be held liable under *Monell* on a theory of ratification. In
12 *Christie*, the Ninth Circuit Court of Appeals determined that “a municipality can be liable
13 for an isolated constitutional violation if the final policymaker ‘ratified’ a subordinate’s
14 actions” and the basis for those actions. *Id.* at 1238–39. The Court stated that “ratification
15 requires, among, other things knowledge of the alleged constitutional violation.” *Id.* at
16 1239. The Court further stated that, “A policymaker’s knowledge of an unconstitutional
17 act does not, by itself, constitute ratification. Instead a plaintiff must prove that the
18 policymaker approved of the subordinate’s act.” *Id.*; *see also Haugen v. Brousseau*, 339
19 F.3d 857, 875 (9th Cir. 2003) (citing *Gillette v. Delmore*, 979 F.2d 1342 (9th Cir. 1992))
20 (“A single decision by a municipal policymaker ‘may be sufficient to trigger section 1983
21 liability under *Monell*, even though the decision is not intended to govern future situations,’
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23 ⁴ The City and the SDPD file objections (ECF Nos. 608-2, 615-2) to Plaintiff’s declaration and attached
24 exhibits on the grounds of lack of foundation and improper authentication. Plaintiff lacks foundation for
25 many of the statements in his declarations and none of Plaintiff’s exhibits are properly authenticated. The
26 Court has reviewed Plaintiff’s submissions in their entirety (ECF Nos. 598, 606) and has considered all
27 relevant and admissible evidence. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir.
28 2002) (“A trial court can only consider admissible evidence in ruling on a motion for summary
judgment.”); Fed. R. Civ. P. 56(c).

1 . . . but the plaintiff must show that the triggering decision was the product of a ‘conscious,
2 affirmative choice’ to ratify the conduct in question.”), amended by and reh’g denied 351
3 F.3d 372 (9th Cir. 2003), rev’d on other grounds 543 U.S. 194 (2004) (per curiam).

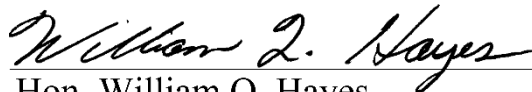
4 There is no evidence in this record that any alleged constitutional violation by SDPD
5 officers on October 14, 2011 or January 31, 2012 was pursuant to a policy, custom, or
6 procedure of the SDPD and the City, or that a final policymaker made a conscious,
7 affirmative choice to approve of an unconstitutional act by a subordinate. Plaintiff fails to
8 “set forth specific facts showing that there is a genuine issue for trial” with respect to the
9 *Monell* claim against the City and the SDPD. Fed. R. Civ. P. 56(e). The Court concludes
10 that the City and the SDPD are entitled to summary judgment as a matter of law.

11 **V. CONCLUSION**

12 IT IS HEREBY ORDERED that the motion for summary judgment filed by the City
13 of San Diego and the San Diego Police Department is GRANTED. (ECF No. 591).

14 IT IS FURTHER ORDERED that the parties shall resubmit proposed jury
15 instructions, statement of the case, and verdict forms on or before March 16, 2018.

16 Dated: February 27, 2018

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18 Hon. William Q. Hayes
19 United States District Court
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