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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KALI ORFF, et al.,
Plaintiffs,
v.
CITY OF IMPERIAL, et al.,
Defendants.

Case No.: 17-CV-0116 W (AGS)

ORDER:

**(1) GRANTING DEFENDANT
ANDREW SMITHSON’S MOTION
TO DISMISS [DOC. 8]; AND**

**(2) GRANTING IN PART AND
DENYING IN PART DEFENDANT
CITY OF IMPERIAL AND
MICHAEL COLON’S MOTION TO
DISMISS [DOC. 7]**

Pending before the Court are: (1) Defendant Andrew Smithson’s Motion to Dismiss [Doc. 8]; and (2) Defendant City of Imperial and Michael Colon’s Motion to Dismiss. [Doc. 7.] The first motion is unopposed. [Doc. 9.] The second is opposed. [Doc. 10.] The Court decides the matters on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons that follow, the Court **GRANTS** the first motion and **GRANTS IN PART AND DENIES IN PART** the second.

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1 **I. BACKGROUND**

2 Plaintiff Kali Orff is a Detective with the Brawley Police Department. (*Compl.*
3 [Doc. 1] ¶ 12.) Her wife, Plaintiff Michelle Kristol, is a Detective with the Ventura
4 County Sheriff’s Office. (*Id.*)

5 According to the Complaint, “[o]n or about January 31, 2016,” Detective Orff
6 attended a birthday party at a friend’s home. (*Compl.* [Doc. 1] ¶ 13.) Along with several
7 acquaintances, she stayed the night at that home. (*Id.* [Doc. 1] ¶¶ 13–14.) The Complaint
8 alleges that Defendant Andrew Smithson, a U.S. Customs and Border Protection Agent
9 who was dating one of her friends at the time, sexually assaulted Orff several hours after
10 she went to bed. (*See id.* [Doc. 1] ¶ 14.) It alleges that upon being awakened by the
11 assault, “Detective Orff punched her attacker in the face, called 911, and reported the
12 sexual battery to the responding officers of [the Imperial Police Department].”
13 (*Id.* [Doc. 1] ¶ 15.) Orff was then evaluated at Pioneers Memorial Hospital. (*Id.* [Doc. 1]
14 ¶ 16.)

15 The Complaint alleges that Defendant Smithson confessed to the assault. (*Compl.*
16 [Doc. 1] ¶ 19.) Nevertheless, it alleges, “[the Imperial Police Department] made no
17 attempt to determine the assailant’s blood alcohol content or to gather any biological
18 evidence” from him. (*Id.* [Doc. 1] ¶ 18.) Moreover, the Complaint alleges that
19 “[f]ollowing the assault, [the Imperial Police Department] failed to submit Detective
20 Orff’s case to the District Attorney’s office for over 100 days.” (*Id.* [Doc. 1] ¶ 20.)
21 Ultimately, according to the Complaint, “the District Attorney’s Office declined to
22 prosecute, citing an unknown level of intoxication of the assailant.” (*Id.* [Doc. 1] ¶ 25.)
23 It alleges, “[t]o date, . . . Smithson has not been charged with any crime, and [he] remains
24 free to work in a position of authority on the United States border[.]” (*Id.* [Doc. 1] ¶ 19.)

25 The Complaint further alleges that Defendant Michael Colon, Chief of the Imperial
26 Police Department, “made an active effort to interfere with the case.” (*Compl.* [Doc. 1] ¶
27 20.) According to the Complaint, “[s]hortly after the assault,” Chief Colon “called
28 Detective Orff’s boss at the Brawley Police Department . . . and gave him the details of

1 Orff’s sexual assault.” (*Id.* [Doc. 1] ¶ 21.) During that call, Chief Colon allegedly
2 “blamed Orff for being victimized” and “accused Orff of being immoral because of her
3 sexual orientation.” (*Id.*) Thereafter, “on or about May 16, 2016, Detective Orff’s wife,
4 Detective Kristol, contacted [the Imperial Police Department] to get an explanation as to
5 why Detective Orff’s case had not been submitted to the District Attorney.” (*Id.* [Doc. 1]
6 ¶ 22.) “In response, Chief Colon contacted Detective Kristol’s boss, and began to
7 divulge details of Detective Orff’s assault to him and to attack Detective Orff’s character
8 and fitness as an officer.” (*Id.*)

9 The Complaint asserts eleven causes of action: (1) violation of 42 U.S.C. § 1983
10 against Chief Colon and Doe Defendants; (2) violation of 42 U.S.C. § 1983 against the
11 Imperial Police Department and the City of Imperial; (3) violation of Cal. Civ. Code §
12 51(b) and 52(a); (4) violation of Cal. Civ. Code § 52.1; (5) intentional infliction of
13 emotional distress; (6) negligent infliction of emotional distress; (7) public disclosure of
14 private facts; (8) false light; (9) defamation; (10) sexual battery; and (11) battery.
15 (*Compl.* [Doc. 1].)

16 17 **II. LEGAL STANDARDS**

18 **A. Motion to Dismiss for Lack of Standing**

19 The Court must dismiss a cause of action for lack of subject matter jurisdiction.
20 Fed. R. Civ. P. 12(b)(1). “The party asserting federal subject matter jurisdiction bears the
21 burden of proving its existence.” Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d
22 1115, 1122 (9th Cir. 2010) (citing Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375,
23 377 (1994)). Article III of the United States Constitution limits the subject matter
24 jurisdiction of federal courts to “Cases” and “Controversies.” See Lujan v. Defs. of
25 Wildlife, 504 U.S. 555, 559 (1992). This limitation forms “the core component of
26 standing[,]” a doctrine that ensures federal courts decide only those cases “that are of the
27 justiciable sort referred to in Article III[,]” those that are “ ‘appropriately resolved
28

1 through the judicial process[.]’ ” Id. (quoting Whitmore v. Arkansas, 495 U.S. 149, 155
2 (1990)).

3 As an “irreducible constitutional minimum[.]” standing is a fundamental part of
4 every federal case, a limitation on their subject matter jurisdiction. See Chandler, 598
5 F.3d at 1122; Lujan, 504 U.S. at 560. It consists of three elements—all of which the
6 party asserting federal jurisdiction must establish: (i) injury; (ii) causation; and (iii)
7 redressability. See id.

8 **First, the plaintiff must prove that he suffered an “injury in fact”, i.e., an “invasion of a
9 legally protected interest which is (a) concrete and particularized, and (b) actual or
imminent, not conjectural or hypothetical.”**

10 **Second, the plaintiff must establish a causal connection by proving that [his] injury is fairly
11 traceable to the challenged conduct of the defendant.**

12 **Third, the plaintiff must show that [his] injury will likely be redressed by a favorable
13 decision.**

14 Chandler, 598 F.3d at 1122 (quoting and citing Lujan, 504 U.S. at 560–61).

16 **B. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)**

17 The Court must dismiss a cause of action for failure to state a claim upon which
18 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
19 tests the legal sufficiency of the complaint. See Parks Sch. of Bus., Inc. v. Symington, 51
20 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either
21 for lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
22 Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988). In ruling on the
23 motion, a court must “accept all material allegations of fact as true and construe the
24 complaint in a light most favorable to the non-moving party.” Vasquez v. L.A. Cnty.,
25 487 F.3d 1246, 1249 (9th Cir. 2007).

26 A complaint must contain “a short and plain statement of the claim showing that
27 the pleader is entitled to relief[.]” Fed. R. Civ. P. 8(a)(2). The Supreme Court has
28 interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to

1 relief above the speculative level[.]” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
2 (2007). The allegations in the complaint must “contain sufficient factual matter, accepted
3 as true, to ‘state a claim to relief that is plausible on its face.’ ” Ashcroft v. Iqbal, 556
4 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

5 Well-pled allegations in the complaint are assumed true, but a court is not required
6 to accept legal conclusions couched as facts, unwarranted deductions, or unreasonable
7 inferences. See Papasan v. Allain, 478 U.S. 265, 286 (1986); Sprewell v. Golden State
8 Warriors, 266 F.3d 979, 988 (9th Cir. 2001), *opinion amended on denial of reh’g*, 275
9 F.3d 1187 (9th Cir. 2001).

10 11 **C. Motion to Strike Pursuant to Rule 12(f)**

12 Rule 12(f) allows a court to “strike from a pleading an insufficient defense or any
13 redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The
14 court may act . . . on its own[,] or . . . on motion made by a party either before responding
15 to the pleading or, if a response is not allowed, within 21 days after being served with the
16 pleading.” Id. “ ‘The function of a 12(f) motion to strike is to avoid the expenditure of
17 time and money that must arise from litigating spurious issues by dispensing with those
18 issues prior to trial’ ” Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th
19 Cir. 2010) (quoting Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d*
20 *on other grounds* by 510 U.S. 517 (1994)). Motions to strike are generally disfavored
21 and are “usually . . . denied unless the allegations in the pleading have no possible
22 relation to the controversy, and may cause prejudice to one of the parties.” See Travelers
23 Cas. & Sur. Co. of Am. v. Dunmore, 2010 WL 5200940, at *3 (E.D. Cal. 2010).

24 Redundant matter is the needless repetition of assertions. See Dunmore, 2010 WL
25 5200940, at *3. “ ‘Immaterial matter is that which has no essential or important
26 relationship to the claim for relief or the defenses being plead.’ ” Whittlestone, 618 F.3d
27 at 974 (quoting Fogerty, 984 F.2d at 1527). “Impertinent matter consists of statements
28 that do not pertain, and are not necessary, to the issues in question.” Id. (internal

1 quotation omitted). “Scandalous matters are allegations that unnecessarily reflect . . . on
2 the moral character of an individual or state . . . anything in repulsive language that
3 detracts from the dignity of the court.” Consumer Solutions REO, LLC v. Hillery, 658 F.
4 Supp. 2d 1002, 1020 (N.D. Cal. 2009) (quoting Corbell v. Norton, 224 F.R.D. 1, 5
5 (D.D.C. 2004)).

6 7 **III. DISCUSSION**

8 **A. Smithson’s Unopposed Motion to Dismiss Will be Granted.**

9 As a Preliminary matter, Plaintiffs do not oppose Defendant Andrew Smithson’s
10 motion to dismiss the fifth and sixth causes of action against him as to Plaintiff Kristol,
11 for intentional infliction of emotional distress and negligent infliction of emotional
12 distress, respectively. (*Smithson Mot.* [Doc. 8]; *Pls.’ Non-opp’n* [Doc. 9].) Good cause
13 appearing, Smithson’s motion will be granted.

14 15 **B. Plaintiff Kristol and Article III Standing**

16 Defendants City of Imperial and Miguel Colon contend that Plaintiff Kristol lacks
17 standing to pursue her causes of action. (*Def.’ Mot.* [Doc. 7-1] 14:27–15:7.)

18 As noted above, to show the existence of Article III standing, “the plaintiff must
19 prove that [she] suffered an ‘injury in fact’, i.e., an ‘invasion of a legally protected
20 interest which is (a) concrete and particularized, and (b) actual or imminent, not
21 conjectural or hypothetical.’ ” Chandler, 598 F.3d at 1122 (quoting and citing Lujan, 504
22 U.S. at 560–61).

23 The Complaint asserts the first and second causes of action, for violation of 42
24 U.S.C. § 1983, and the fifth and sixth causes of action, for intentional and negligent
25 infliction of emotional distress, respectively, on behalf of Detective Kristol. (*Compl.*
26 [Doc. 1] ¶¶ 27–38, 52–67.)

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1 **1. First and Second Causes of Action**

2 As to the first and second causes of action, for violation of § 1983, the Complaint
3 does not allege a clear theory as to how Defendants’ conduct violated Detective Kristol’s
4 constitutional rights, as opposed to those of her wife. Even the telephone call to
5 Detective Kristol’s supervisor following her May 16, 2016 inquiry is alleged to have
6 focused on the details of her wife’s assault, and on her wife’s “character and fitness as an
7 officer”—not on her own. (*See Compl.* [Doc. 1] ¶ 22.) The Court does not decide at this
8 time whether Detective Kristol suffered a constitutional injury that could confer standing
9 to assert a § 1983 cause of action—only that the Complaint as drafted does not
10 sufficiently allege facts to support such an injury.

11 The first and second causes of action will be dismissed with leave to amend as to
12 Plaintiff Kristol for lack of Article III standing.¹

13
14 **2. Fifth and Sixth Causes of Action**

15 As to the fifth and sixth causes of action, for intentional and negligent infliction of
16 emotional distress, respectively, Plaintiffs adequately allege that Detective Kristol
17 suffered emotional harm as a result of Chief Colon’s discussion of the details of her
18 wife’s sexual assault case with her own supervisor. (*See Compl.* [Doc. 1] ¶¶ 53, 62–63.)
19 This is sufficient injury to confer Article III standing. *See Chandler*, 598 F.3d at 1122.
20 As to causes of action grounded in violations of California state tort law, “[t]he doctrine
21 of respondeat superior applies to public and private employers alike.” *Mary M. v. City of*
22 *Los Angeles*, 54 Cal. 3d 202, 209 (1991). Thus, Plaintiffs have also alleged causation
23 and redressability against all defendants as to these causes of action. *See id.*; *Chandler*,
24 598 F.3d at 1122.

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¹ “The court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15.

1 Defendants' motion to dismiss the fifth and sixth causes of action as to Plaintiff
2 Kristol for lack of standing is denied.

3
4 **C. 42 U.S.C. § 1983**

5 Defendants City of Imperial and Miguel Colon move to dismiss the first and
6 second causes of action, for violation of 42 U.S.C. § 1983. (*Def's. ' Mot.* [Doc. 7-1] 3:4–
7 7:2.) Plaintiffs oppose. (*Pls. ' Opp'n* [Doc. 10] 3:21–8:1.)

8
9 **1. The First Cause of Action—Defendant Colon**

10 **a) Discrimination**

11 First, Defendants contend that the Complaint does not adequately allege a violation
12 of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth
13 Amendments because “there is no constitutional right to an adequate police
14 investigation.” (*Def's. ' Mot.* [Doc. 7-1] 3:4–5:4 (citing Gomez v. Whitney, 757 F.2d 1005
15 (9th Cir. 1985).) Plaintiffs, on the other hand, argue that their § 1983 Due Process and
16 Equal Protection causes of action are not grounded in inadequate investigation, but rather
17 a theory of discrimination on the basis of Detective Orff's sexual preferences. (*Pls. '*
18 *Opp'n* [Doc. 10] 3:22–6:3.)

19 There is no constitutional right to an adequate police investigation. See Gomez v.
20 Whitney, 757 F.2d 1005, 1006 (9th Cir. 1985). “There is a constitutional right, however,
21 to have police services administered in a nondiscriminatory manner—a right that is
22 violated when a state actor denies . . . protection to disfavored persons.” See Estate of
23 Macias v. Ihde, 219 F.3d 1018, 1028 (9th Cir. 2000) (internal citation omitted).

24 The Complaint does not clearly allege a discrimination theory. Rather, it seems to
25 ground its allegations of wrongdoing as to Chief Colon's official duties in terms of his
26 interference with the course of the investigation and prosecution of the Orff matter. (*See,*
27 *e.g., Compl.* [Doc. 1] ¶ 29 (“Officer Defendants . . . deprived Plaintiffs of rights . . . by
28 interfering with the prosecution of the sexual assault to which Detective Orff was

1 subjected”) Plaintiffs urge the Court to read a discrimination theory between the
2 lines—based on the slow pace of the investigation, combined with allegedly
3 discriminatory remarks Chief Colon made in two phone calls. (*See, e.g., Pls.’ Opp’n*
4 [Doc. 10] 5:2–17.) This the Court cannot do. The Complaint simply does not allege the
5 relevant theory. Defendants are entitled to “a short and plain statement of the claim
6 showing that the pleader is entitled to relief[.]” Fed. R. Civ. P. 8. If Plaintiffs’ theory is
7 that discrimination caused the investigatory delay, the Complaint must allege as much.
8 See Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570 (summarizing the relevant
9 pleading standards).

10 The Complaint does not allege a viable claim as to how Chief Colon’s alleged
11 interference with either the investigation or the prosecution of Detective Orff’s case
12 amounts to a constitutional violation. Accordingly, the Due Process and Equal Protection
13 claims within the first cause of action will be dismissed with leave to amend as to
14 Plaintiff Orff.

16 **b) Violation of Privacy**

17 Second, Defendants contend that the “the alleged acts of Chief Colon [do not]
18 amount to a violation of any right of privacy.” (*Def’s.’ Mot.* [Doc. 7-1] 5:5–7:2.) This
19 line of argument is misguided.

20 The Fourteenth Amendment protects “the individual interest in avoiding disclosure
21 of personal matters.” Whalen v. Roe, 429 U.S. 589, 599, 599 n.25 (1977). “[T]he
22 security of one’s privacy against arbitrary intrusion by the police is basic to a free society
23 and is therefore ‘implicit in the concept of ordered liberty,’ embraced within the Due
24 Process Clause of the Fourteenth Amendment.” York v. Story, 324 F.2d 450, 455 (9th
25 Cir. 1963) (citing Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled on other grounds*
26 *by Mapp v. Ohio*, 367 U.S. 643 (1961)). The Constitution shields the privacy of one’s
27 sexual activities. See Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983)
28 (internal citations omitted). “The desire to shield one’s unclothed figured from view of

1 strangers, and particularly strangers of the opposite sex, is impelled by elementary self-
2 respect and personal dignity.” York, 324 F.2d at 455.

3 **[A] historic social stigma has attached to victims of sexual violence. In particular, a**
4 **tradition of “blaming the victim” of sexual violence sets these victims apart from**
5 **those of other violent crimes. Releasing the intimate details of rape will therefore not**
6 **only dissect a particularly painful sexual experience, but often will subject a victim**
7 **to criticism and scrutiny concerning her sexuality and personal choices regarding**
8 **sex.**

9 Bloch v. Ribar, 156 F.3d 673, 685 (6th Cir. 1998).

10 Defendants analogize to Davis v. Bucher, 853 F.2d 718 (9th Cir. 1988), in arguing
11 that the Complaint implicates no privacy issue of constitutional import. (*Compl.* [Doc. 7-
12 1] 5:5–7:2.) In Davis, an inmate in the custody of Washington state sued a state
13 correctional officer for violation of § 1983. The inmate had brought several nude
14 photographs of his wife into the prison. Upon a move from one part of the prison to
15 another, the inmate’s possessions were inventoried. At that point, the correctional officer
16 found the photographs and “exhibited [them] to at least two inmates before replacing
17 them.” Id. at 719. He later made remarks to the desk sergeant about the inmate’s wife’s
18 anatomy, which at least one guard and one inmate overheard. Id.

19 The court held that the correctional officer’s “indiscretions [did] not constitute the
20 type of governmental abuse which demands a constitutional response.” Davis, 853 F.2d
21 at 721. It counseled discretion in circumscribing § 1983, lest the statute begin to displace
22 state tort law—with courts branding every tort committed by a state actor as a
23 constitutional harm. See id. at 720. The court noted the fact that the inmate himself had
24 brought the photos into the prison environment, thereby “presenting an inherent risk of
25 disclosure and a cognizable diminution in [the inmate’s] reasonable expectations of
26 privacy.” Id. It characterized the correctional officer’s conduct as “two isolated
27 instances of poor judgment”—“tasteless, unwise, and unwarranted[.]” but not an
28 “aggravated abuse of authority . . . warranting the displacement of state tort law as the
appropriate, and exclusive, vehicle of redress.” See id. at 720–21 (internal citations
omitted).

1 Several factors distinguish the instant case from Davis. First, whereas the inmate
2 in Davis assumed some risk of disclosure by choosing to bring private images into a
3 prison environment, the Complaint does not allege that Detective Orff took any
4 analogous steps. She was the victim of a sexual assault. She is entitled to privacy
5 surrounding the details of that assault, lest she suffer the “historic social stigma has
6 attached to victims of sexual violence[,]” subjecting her to “criticism and scrutiny
7 concerning her sexuality and personal choices regarding sex.” See Bloch, 156 F.3d at
8 685. Second, the alleged disclosure of the details of Detective Orff’s assault was not
9 limited to an enclosed environment like a prison, but was instead purposefully directed at
10 the victim’s direct supervisor, and at the supervisor of the victim’s wife.² (*See Compl.*
11 [Doc. 1] ¶¶ 21–22.) Third, and on a related note, the allegation that Chief Colon directed
12 his disclosure at the supervisors of the victim and her spouse gives rise to an implication
13 of malice, changing the character of the conduct alleged from isolated indiscretions to an
14 “aggravated abuse of authority.” See Davis, 853 F.2d at 720–21.

15 For the reasons stated above, Defendants’ motion to dismiss the violation of
16 privacy claim within the first cause of action will be denied.

17

18 **2. The Second Cause of Action—Monell Liability**

19 Defendants move to dismiss the second cause of action, for violation 42 U.S.C. §
20 1983 against the Imperial Police Department and the City of Imperial per Monell v. Dep’t
21 of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978), on the ground that it does not meet
22 the pleading standard of Rule 8. (*Defs.’ Mot.* [Doc. 7-1] 12:11–14:25.)

23 The Complaint alleges the following, in relevant part, as to municipal § 1983
24 liability:

25 _____
26
27 ² Defendants urge the Court to construe “law enforcement” as a limited environment analogous to the
28 prison in Davis, despite the fact that Chief Colon’s alleged disclosure spanned three such agencies
across as many distinct jurisdictions. (*See Defs.’ Mot.* [Doc. 7-1] 6:16–7:2.) They present no authority
that would support such an interpretation.

1 **Defendants City of Imperial and Imperial Police Department knowingly, with gross**
2 **negligence, and in deliberate indifference to the Constitutional rights of citizens,**
3 **maintain and permit and official policy and custom of permitting the occurrence of**
4 **the types of wrongs set forth hereinabove and hereafter.**

5 **These policies and customs include, but are not limited to, the deliberately**
6 **indifferent training of law enforcement officers in the mishandling of criminal cases**
7 **to be prosecuted, the misuse of confidential information that officers come to know**
8 **in the exercise of their law enforcement duties, the ratification of police misconduct,**
9 **and the failure to conduct adequate unbiased investigations of police misconduct**
10 **such that future violations do not occur.**

11 (*Compl.* [Doc. 1] ¶¶ 34–35 (paragraph number omitted).) The Complaint does not allege
12 in what manner the law enforcement officers are poorly trained, how confidential
13 information is misused, how police misconduct is ratified, or how any of this alleged
14 malfeasance caused injury to Detective Orff. This falls far short of satisfying Rule 8.
15 See Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570.

16 The second cause of action will be dismissed with leave to amend as to all
17 defendants.³

18 **D. The Cal. Civ. Code § 51(b) Cause of Action**

19 Defendants move to dismiss the third cause of action in the Complaint, for
20 violation of Cal. Civ. Code §§ 51(b) and 52(a), on the ground that the statute does not
21 apply because the Imperial Police Department does not fall within the statutory definition
22 of “business establishment.” (*See Defs.’ Mot.* [Doc. 7-1] 7:3–12.)

23 **(b) All persons within the jurisdiction of [California] are free and equal, and no**
24 **matter what their sex, race, color, religion, ancestry, national origin, disability,**
25 **medical condition, genetic information, marital status, sexual orientation,**
26 **citizenship, primary language, or immigration status are entitled to the full and**
27 **equal accommodations, advantages, facilities, privileges, or services in all business**
28 **establishments of every kind whatsoever.**

³ The same reasoning applies to both the City of Imperial and the Imperial Police Department.

1 Cal. Civ. Code § 51. Section 51 reaches “ ‘all business establishments of every kind
2 whatsoever.’ ” Curran v. Mount Diablo Council of the Boy Scouts, 17 Cal. 4th 670, 696
3 (1998) (quoting Cal. Civ. Code § 51). “[T]he term ‘business establishments’ must
4 properly be interpreted ‘in the broadest sense reasonably possible.’ ” Id. (quoting Burks
5 v. Poppy Const. Co., 57 Cal. 2d 463, 468 (1962)). However, the term is not to be
6 interpreted to include organizations “whose formation and activities are unrelated to the
7 promotion or advancement of the economic or business interests of its members.” See id.
8 at 697. A public entity “is not a business establishment within the meaning of section 51
9 unless it engages in behavior involving sufficient ‘businesslike attributes.’ ” See Carter
10 v. City of Los Angeles, 224 Cal. App. 4th 808, 825 (internal citation omitted). “[A]n
11 entity providing sidewalks and curbs to its citizens does so as a public servant, not a
12 commercial enterprise.” Id.; see also Qualified Patients Ass’n v. City of Anaheim, 187
13 Cal. App. 4th 734, 765 (2010) (declining to apply section 51 to the actions of a city’s
14 legislative body); Burnett v. San Francisco Police Dep’t, 36 Cal. App. 4th 1177, 1192
15 (1995) (declining to apply section 51 to the ordinance of a city’s legislative body, or to
16 the allegedly age-discriminatory actions of a police chief and police department in
17 enforcing that ordinance).

18 In Curran, the California Supreme Court declined to extend the contours of the
19 Unruh Act to cover “the membership policies or decisions” of a Boy Scouts council, “an
20 expressive social organization whose primary function is the inculcation of values in its
21 youth members, and whose small social group structure and activities are not comparable
22 to those of a traditional place of public accommodation or amusement.” See 17 Cal. 4th
23 at 699. The Court focused on the limited scope of the commercial activity conducted by
24 the group, emphasizing that “the business transactions with nonmembers engaged in by
25 the Boy Scouts do *not* involve the sale of access to the basic activities or services offered
26 by the organization.” Id. at 700. The Court held:

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1 [W]e have no doubt that the [Unruh Act] would apply to . . . the actual business
2 transactions with nonmembers engaged in by the Boy Scouts in its retail stores and
3 elsewhere . . . we conclude that such transactions do not render the Boy Scouts a
4 business establishment so as to bring its membership within the reach of the [Unruh
5 Act]. Those business transactions are distinct from the Scouts' core functions and
6 *do not demonstrate that the organization has become a commercial purveyor of the
7 primary incidents and benefits of membership in the organization.*

8 Id. (emphasis added).

9 Plaintiff urges the Court to construe a police department as a business
10 establishment within the ambit of section 51. (*See Pls. ' Opp'n* [Doc. 10] 8:23–10:23.)
11 Such a decision would contradict both the plain meaning of the statutory language and
12 compelling authority from the California Supreme Court and the California Courts of
13 Appeal interpreting that language. Curran, 17 Cal. 4th at 700; Carter, 224 Cal. App. 4th
14 at 825; Qualified Patients Ass'n, 187 Cal. App. 4th at 765; Burnett, 36 Cal. App. 4th at
15 1192. A police department is unrelated to the promotion or advancement of economic or
16 business interests. See Curran, 17 Cal. 4th at 697. It is not a business establishment.

17 The third cause of action will be dismissed without leave to amend.

18 **E. The Cal. Civ. Code § 52.1 Cause of Action**

19 Defendants move to dismiss Plaintiffs' fourth cause of action, for violation of the
20 Bane Act, Cal. Civ. Code § 52.1, on the ground that the Complaint does not allege the
21 coercive conduct necessary to sustain such a cause of action. (*Def's. ' Mot.* [Doc. 7-1]
22 7:13–26.)

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1 (a) If a person or persons, whether or not acting under color of law, interferes by
2 *threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or*
3 *coercion, with the exercise or enjoyment by any individual or individuals of rights*
4 *secured by the Constitution or laws of the United States, or of the rights secured by*
5 *the Constitution or laws of this state*

6 (b) Any individual whose exercise or enjoyment of rights secured by the
7 Constitution or laws of the United States, or of rights secured by the Constitution or
8 laws of this state, has been interfered with, or attempted to be interfered with, as
9 described in subdivision (a), may institute and prosecute in his or her own name and
10 on his or her own behalf a civil action for damages, including, but not limited to,
11 damages under Section 52, injunctive relief, and other appropriate equitable relief
12 to protect the peaceable exercise or enjoyment of the right or rights secured,
13 including appropriate equitable and declaratory relief to eliminate a pattern or
14 practice of conduct as described in subdivision (a).

15 Cal. Civ. Code § 52.1 (emphasis added).

16 Coercion is “[c]ompulsion of a free agent by physical, moral, or economic force or
17 threat of physical force[.]” COERCION, BLACK’S LAW DICTIONARY (10th ed. 2014).

18 Moral coercion, or undue influence, is defined as “[t]he improper use of power or trust in
19 a way that deprives a person of free will and substitutes another’s objective; the exercise
20 of enough control over another person that a questioned act by this person would not
21 have otherwise been performed, the person’s free agency having been overmastered.”

22 UNDUE INFLUENCE, Black’s Law Dictionary (10th ed. 2014).

23 Plaintiffs allege:

24 **Defendant Chief Colon’s interference with Detective Orff’s rights violated Civil**
25 **Code section 52.1 because (1) Defendant Chief Colon unfairly refused to forward**
26 **Detective Orff’s case to the District Attorney in violation of Chief Colon’s duty as a**
27 **law enforcement officer, and (2) because Defendant Chief Colon violated Detective**
28 **Orff’s right to privacy and dignity by attempting to coerce Defendant Orff’s**
commanding officer into terminating Detective Orff through Defendant Chief
Colon’s allegations that Detective Orff was unfit for duty.

(*Compl.* [Doc. 1] ¶ 50.) The Bane Act cause of action contains no further allegations as
to coercive conduct, threats, intimidation, or attempts thereof, on the part of Chief Colon.
In essence, the Complaint premises Bane Act liability on the basis that Chief Colon: (1)
improperly refused to forward the case to the District Attorney; and (2) somehow tried to
coerce the victim’s superior by calling him on the phone, disclosing details of the sexual

1 assault, and impugning Detective Orff’s moral character. (*See id.* [Doc. 1] ¶¶ 21, 47–51.)
2 None of these allegations add to a plausible theory as to how Chief Colon compelled “a
3 free agent by physical, moral, or economic force or threat of physical force.” See
4 COERCION, BLACK’S LAW DICTIONARY (10th ed. 2014) Iqbal, 556 U.S. at 678;
5 Twombly, 550 U.S. at 570.

6 The fourth cause of action will be dismissed with leave to amend.

7 8 **F. Remaining State-law Causes of Action and § 821.6 Immunity**

9 Defendants argue that all remaining state-law causes of action against Chief Colon
10 should be dismissed because Cal. Gov. Code § 821.6 immunizes him from liability. (*See*
11 *Def.’ Mot.* [Doc. 7-1] 7:27–10:2.)

12 “A public employee is not liable for injury caused by his instituting or prosecuting
13 any judicial or administrative proceeding within the scope of his employment, even if he
14 acts maliciously and without probable cause.” Cal. Gov. Code § 821.6. “Government
15 tort immunity is jurisdictional[.]” Richardson-Tunnell v. Sch. Ins. Program for
16 Employees (SIPE), 157 Cal. App. 4th 1056, 1061 (2007). “Section 821.6 immunity
17 applies only to conduct within the scope of employment. An employee is acting in the
18 course and scope of his employment when he is engaged in work he was employed to
19 perform, or when the act is incident to his duty and is performed for the benefit of his
20 employer, not to serve his own purposes or convenience.” *Id.* at 1062. “ ‘California
21 courts construe section 821.6 broadly in furtherance of its purpose to protect public
22 employees in the performance of their prosecutorial duties from the threat of harassment
23 through civil suits.’ ” *Id.* (quoting Gillan v. City of San Marino, 147 Cal. App. 4th 1033,
24 1048 (2007)).

25 “[S]ection 821.6 is not limited to suits for damages for malicious prosecution,
26 although that is a principal use of the statute.” Kayfetz v. State of California, 156 Cal.
27 App. 3d 491, 497 (1984). “ ‘[T]he test of immunity is not the timing of the publication
28 [of allegedly defamatory statements] but whether there is a causal relationship between

1 the publication and the prosecution process. If the making and publication of . . .
2 statements were part of the process, they [are] protected by the immunity in section
3 821.6.’ ” Ciampi v. City of Palo Alto, 790 F. Supp. 2d 1077, 1108–09 (N.D. Cal. 2011)
4 (quoting Ingram v. Flipppo, 74 Cal. App. 4th 1280, 1292–93 (1999)). “Under California
5 law the immunity statute is given an ‘expansive interpretation’ in order to best further the
6 rationale of the immunity, that is to allow the free exercise of the prosecutor’s discretion
7 and protect public officers from harassment in the performance of their duties.” Ingram,
8 74 Cal. App. 4th at 1292 (internal quotation omitted).

9 The fifth and sixth causes of action allege liability through interference with or a
10 failure of the investigative process. (*See Compl.* [Doc. 1] ¶¶ 53, 62, 64.) Furthermore, all
11 remaining state-law causes of action against Chief Colon contain an allegation that Colon
12 disclosed details of Detective Orff’s sexual assault to her superior. (*Compl.* [Doc. 1] ¶¶
13 53, 63, 69, 76, 82.) These causes of action—the fifth, sixth, seventh, eighth, and ninth—
14 also incorporate paragraph 21 of the Complaint, which contains the following language:

15 **Shortly after the sexual assault, Chief Colon called Detective Orff’s boss at the**
16 **Brawley Police Department, and gave him the details of Orff’s sexual assault.**
17 **During his conversation with Orff’s boss, Chief Colon also accused Orff of being**
18 **immoral because of her sexual orientation. He further blamed Orff for being**
19 **victimized**

20 (*Compl.* [Doc. 1] ¶ 21.)

21 As a preliminary matter, Chief Colon’s alleged interference with the Orff
22 investigation—and the resulting slow progress of that investigation—would appear to be
23 causally connected to the prosecution of her case. (*See Compl.* [Doc. 1] ¶¶ 53, 62, 64.)
24 See Cal. Gov. Code § 821.6; Ciampi, 790 F. Supp. 2d at 1108–09; Ingram, 74 Cal. App.
25 4th at 1292–93; Iqbal, 556 U.S. at 678. Thus, Chief Colon is immune from resulting tort
26 liability. See Cal. Gov. Code § 821.6.

27 Claims within the fifth and sixth causes of action premised on Chief Colon’s
28 interference with the prosecution of the Orff matter will be dismissed with leave to
amend.

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1 In order for Chief Colon to be liable for his call to Detective Orff’s supervisor, the
2 call must have no causal link with the prosecution process. See Cal. Gov. Code § 821.6;
3 Ciampi, 790 F. Supp. 2d at 1108–09; Ingram, 74 Cal. App. 4th at 1292–93. “A claim has
4 facial plausibility when the plaintiff pleads factual content that allows the court to draw
5 the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal,
6 556 U.S. at 678. Chief Colon allegedly chose to call Detective Orff’s supervisor at work,
7 to disclose intimate details of the sexual assault to which she had been subjected, to
8 accuse her of being immoral because of her sexual preferences, and then to blame her for
9 being the victim of a crime. (*See Compl.* [Doc. 1] ¶ 21.) The Court must assume these
10 allegations true at this stage of the proceedings. Iqbal, 556 U.S. at 678. Given the
11 foregoing, it is reasonable to infer that the call was not caused by the prosecution of the
12 case. See id.; Cal. Gov. Code § 821.6.

13 Defendants’ motion to dismiss Plaintiffs’ fifth, sixth, seventh, eighth, and ninth
14 causes of action will otherwise be denied.

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1 **G. Motion to Dismiss Punitive Damages Prayer**

2 Defendants move to dismiss⁴ Plaintiffs’ punitive damages prayer on the ground
3 that it does not comply with a particularity pleading standard followed by California
4 courts interpreting Cal. Civ. Code § 3294. This is not the standard applicable to pleading
5 a cause of action in federal court.

6 **(a) In an action for the breach of an obligation not arising from contract, where it is**
7 **proven by clear and convincing evidence that the defendant has been guilty of**
8 **oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may**
9 **recover damages for the sake of example and by way of punishing the defendant.**

10 Cal. Civ. Code § 3294. “ ‘Malice’ means conduct which is intended by the defendant to
11 cause injury to the plaintiff or despicable conduct which is carried on by the defendant
12 with a willful and conscious disregard of the rights or safety of others.” Cal. Civ. Code §
13 3294(c)(1).

14 Federal courts sitting in diversity apply state substantive law and federal
15 procedural law. See Erie R. Co. v. Tompkins, 304 U.S. 64, 76–80 (1938). Federal Rules

16
17 ⁴ Defendants do not specify the vehicle by which they challenge Plaintiffs’ punitive damages prayer.
18 (*Def.’ Mot.* [Doc. 7-1] 10:3–11:26.) The Ninth Circuit has held that a motion to strike per Rule 12(f) is
19 not a proper means by which to seek to eliminate an improper damages prayer. See Whittlestone, Inc. v.
20 Handi-Craft Co., 618 F.3d 970, 973–74 (9th Cir. 2010).

21 Federal Rule of Civil Procedure 12(f) allows the Court to strike “immaterial” or “impertinent” matter
22 appearing in a complaint. Fed. R. Civ. P. 12(f).

23 However, in Whittlestone, the Ninth Circuit lent these terms a narrow interpretation. See 618 F.3d at
24 973–74. According to the Whittlestone court, not even a finding that state law precluded certain items
25 of damages would render a prayer for those items immaterial or impertinent so as to allow a court to
26 strike it. Id. (“[T]he claim for [lost profits and consequential] damages is not immaterial, because
27 whether these damages are recoverable relates directly to the plaintiff’s underlying claim for relief
28 [T]he claim for [lost profits and consequential] damages is not impertinent, because whether these
29 damages are recoverable pertains directly to the harm being alleged.”). Instead, the Whittlestone court
30 interpreted a damages prayer as a “claim for relief” within the meaning of Rule 12(b)(6), implying that
31 the availability of Rule 12(f) to strike such a “claim” would “be creating redundancies within the Federal
32 Rules of Civil Procedure.” See Whittlestone, 618 F.3d at 974.

33 Per Whittlestone, the Court interprets Defendants’ challenge to Plaintiffs’ punitive damages prayer as a
34 motion to dismiss pursuant to Rule 12(b)(6).

1 of Civil Procedure 8 and 9 control how a plaintiff must plead a prayer for punitive
2 damages pursuant to California law in United States District Court. “A pleading that
3 states a claim for relief must contain . . . a short and plain statement of the claim showing
4 that the pleader is entitled to relief[.]” Fed. R. Civ. P. 8. “Malice, intent, knowledge, and
5 other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b).

6 California courts employ a different, heightened procedural requirement for
7 pleading punitive damages per the substantive component of Cal. Civ. Code § 3294. See,
8 e.g., Smith v. Superior Court, 10 Cal. App. 4th 1033, 1041–42 (1992). This requirement
9 “irreconcilably conflicts with Rules 8 and 9 of the Federal Rules of Civil Procedure” and
10 does not apply in federal court. See Clark v. Allstate Ins. Co., 106 F. Supp. 2d 1016,
11 1018–19 (S.D. Cal. 2000); Alejandro v. ST Micro Elecs., Inc, 129 F. Supp. 3d 898, 917
12 (N.D. Cal. 2015); Rees v. PNC Bank, N.A., 308 F.R.D. 266, 273 (N.D. Cal. 2015).

13 Plaintiffs allege that Chief Colon placed phone calls to the direct supervisor of a
14 victim of a sexual assault—and to the direct supervisor of the victim’s wife—during
15 which he divulged details of that assault and impugned the victim’s morality. (*See*
16 *Compl.* [Doc. 1] ¶¶ 21–22.) This is sufficient to allow the Court to draw a plausible
17 inference that Chief Colon intended to harm Detective Orff. See Cal. Code Civ. Proc. §
18 3294(c)(1) (defining malice); Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570.

19 Defendants’ motion to dismiss Plaintiffs’ prayer for punitive damages will be
20 denied.

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1 **IV. CONCLUSION & ORDER**

2 For the reasons stated above, Defendant Smithson's unopposed motion to dismiss
3 the fifth and sixth causes of action against him as to Plaintiff Kristol only is **GRANTED**.
4 [Doc. 8.] Per the terms of that unopposed motion, the fifth and sixth causes of action
5 against Defendant Smithson by Plaintiff Kristol are dismissed without leave to amend.

6 The motion to dismiss filed by Defendants Colon and City of Imperial is
7 **GRANTED IN PART AND DENIED IN PART**. [Doc. 7.] Specifically:

8 The first and second causes of action are dismissed with leave to amend as to
9 Plaintiff Kristol for lack of Article III standing.

10 The Due Process and Equal Protection claims within the first cause of action are
11 dismissed with leave to amend as to Plaintiff Orff.

12 The second cause of action is dismissed with leave to amend as to Plaintiff Orff.

13 The third cause of action is dismissed without leave to amend.

14 The fourth cause of action is dismissed with leave to amend.

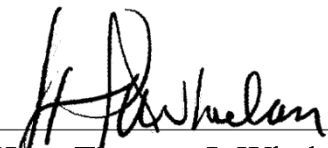
15 Any claims within the fifth and sixth causes of action premised on Chief Colon's
16 interference with the prosecution of the Orff matter are dismissed with leave to amend.

17 The motion filed by Defendants Colon and City of Imperial is otherwise denied.

18 Plaintiffs will have leave to amend, as described herein. If they elect to file an
19 amended complaint in compliance with the terms of this order, they may do so on or
20 before **Monday, June 26, 2017**.

21
22 **IT IS SO ORDERED.**

23
24 Dated: June 12, 2017

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26 
27 Hon. Thomas J. Whelan
28 United States District Judge