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

MARY B. O'SHEA,

Plaintiff,

v.

COUNTY OF SAN DIEGO, ERICA  
LEE, *et al.*,

Defendants.

Case No. 19-cv-1243-BAS-BLM

**ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS**

**[ECF No. 3]**

Defendant County of San Diego ("the County") moves to dismiss Plaintiff Mary B. O'Shea's Complaint under Federal Rule of Civil Procedure 12(b)(6). Because the Court agrees that the causes of action are barred by the applicable statute of limitations, the Court **GRANTS** the Motion, but gives Plaintiff leave to amend.<sup>1</sup>

**I. ALLEGATIONS IN THE COMPLAINT**

Plaintiff brings this Complaint under 42 U.S.C. § 1983 for a violation of the

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<sup>1</sup> Plaintiff requested that the Court defer ruling on the Motion to Dismiss for thirty days while she considered the possibility of filing an amended complaint. The Court agreed to do so. (ECF No. 17.) The thirty days has expired without a new complaint. Therefore, the Court moves forward with the Motion to Dismiss, but gives Plaintiff the opportunity to amend.

1 Fourteenth Amendment, interference with familial association, and fabrication of  
2 evidence. She also alleges intentional and negligent infliction of emotional distress  
3 as well as a violation of state civil rights. (“Complaint,” ECF No. 1-2.)

4 Plaintiff alleges Child Welfare Case worker Erica Lee made false statements  
5 about Plaintiff’s parenting and threatened to force Plaintiff’s minor daughter out of  
6 her home. Specifically, Plaintiff claims on October 8, 2014, Erica Lee lied on official  
7 documents. (*Id.* ¶ 9.) On October 26, 2014, Plaintiff wrote a letter to the County  
8 challenging Ms. Lee’s false accusations. (*Id.* ¶ 12.) In response, on October 28,  
9 2014, Ms. Lee threatened to have Plaintiff’s minor daughter removed from the home.  
10 (*Id.* ¶ 13.) On October 30, 2014, Plaintiff confronted Ms. Lee regarding her lies and  
11 abuse of power. (*Id.* ¶ 14.) On November 18, 2014, in response to a request filed by  
12 Plaintiff, Plaintiff received a copy of her Child Welfare Services file and discovered  
13 many falsities and misstatements. (*Id.* ¶ 15.)

14 Plaintiff filed a Complaint against the County and Erica Lee on May 10, 2019.  
15 The County removed the case to federal court. At the time of removal, Plaintiff had  
16 not served the correct Erica Lee. (*See* ECF No. 14 (the Court granted the County’s  
17 motion to quash service of process on the wrong Erica Lee). Plaintiff has since filed  
18 a certificate of service of process for another Erica Lee. The County moves to  
19 dismiss the Complaint against it. (ECF No. 3.)<sup>2</sup> Erica Lee is not part of the Motion.

20 **II. LEGAL STANDARD**

21 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
22 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.  
23 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court  
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25  
26 <sup>2</sup> The County requests that this Court take judicial notice of an earlier lawsuit filed by Plaintiff.  
27 (ECF No. 3-2.) Because this earlier case does not factor into the Court’s decision, and because the  
28 Court did not review the case in analyzing the County’s Motion, the Court declines to take judicial  
notice of the document.

1 must accept all factual allegations pleaded in the complaint as true and must construe  
2 them and draw all reasonable inferences from them in favor of the nonmoving party.  
3 *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996).

4 Despite the deference the court must pay to the plaintiff’s allegations, it is not  
5 proper for the court to assume that “the [plaintiff] can prove facts that [he or she] has  
6 not alleged or that defendants have violated the . . . laws in ways that have not been  
7 alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of*  
8 *Carpenters*, 459 U.S. 519, 526 (1983).

9 Courts may not usually consider material outside the complaint when ruling  
10 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d  
11 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in the  
12 complaint whose authenticity is not questioned by parties may also be considered.  
13 *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superseded by statute on  
14 other grounds). Moreover, the court may consider the full text of those documents  
15 even when the complaint quotes only selected portions. *Id.* It may also consider  
16 material properly subject to judicial notice without converting the motion into one  
17 for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

### 18 **III. ANALYSIS**

#### 19 **A. Statute of Limitations**

20 The County moves to dismiss all of Plaintiff’s claims on statute of limitations  
21 grounds. “A claim may be dismissed under Rule 12(b)(6) on the ground that it is  
22 barred by the applicable statute of limitations only when ‘the running of the statute  
23 is apparent on the face of the complaint.’” *Von Saher v. Norton Simon Museum of*  
24 *Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (quoting *Huynh v. Chase*  
25 *Manhattan Bank*, 465 F.3d 992, 9976 (9th Cir. 2006)).

#### 26 **1. First Cause of Action: 42 U.S.C. §1983**

27 Plaintiff’s first claim is brought under 42 U.S.C. §1983. Whether a claim  
28 under section 1983 is timely depends on a combination of state and federal law that

1 determines (1) the length of the applicable limitations period, (2) the accrual date of  
2 the claim, and (3) whether the limitations period was tolled. *See, e.g., Wallace v.*  
3 *Kato*, 549 U.S. 384, 387–88 (2007); *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691,  
4 694 (9th Cir. 2003).

5 The first issue, the length of the statute of limitations, is determined by state  
6 law. *Wallace*, 549 U.S. at 387. “It is that which the State provides for personal  
7 injury torts.” *Id.* (citing *Owens v Okure*, 488 U.S. 235, 249–50 (1989)). In  
8 California, the statute of limitations for personal injury actions is two years. Cal.  
9 Code Civ. Proc. § 335.1. Thus, the statute of limitations for a § 1983 claim arising  
10 in California is two years. *See Wallace*, 549 U.S. at 397.

11 The second issue, the accrual date, is generally not resolved by reference to  
12 state law. *Id.* at 399. Instead, the court applies “federal rules conforming in general  
13 to common-law tort principles.” *Id.* “The general common law principle is that a  
14 cause of action accrues when ‘the plaintiff knows or has reason to know of the  
15 injury.’” *Bonneau v. Centennial Sch. Dist. No. 28J*, 666 F.3d 577, 581 (9th Cir.  
16 2012) (quoting *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999)). To this  
17 Court’s knowledge, the Ninth Circuit has not addressed specifically when a *Monell*  
18 claim under 42 U.S.C. §1983 accrues. However, the Second Circuit has reasoned  
19 that because “an actionable claim under § 1983 against a county or municipality  
20 depends on a harm stemming from the municipality’s ‘policy or custom,’ a cause of  
21 action against the municipality does not necessarily accrue upon the occurrence of a  
22 harmful act, but only later when it is clear, or should be clear, that the harmful act is  
23 the consequence of a county ‘policy or custom.’” *Pinaud v. County of Suffolk*, 52  
24 F.3d 1139, 1157 (2d Cir. 1995); *but see Lawson v. Rochester City Sch. Dist.*, 446 F.  
25 App’x. 327, 329 (2d Cir. 2011) (disagreeing with *Pinaud* in a summary disposition  
26 and noting “§ 1983 cause of action accrues when ‘the plaintiff becomes aware that  
27 she is suffering from a wrong for which damages may be recovered in a civil action.’”  
28 (quoting *Eagleston v. Guido*, 41 F.3d 865, 872 (2d Cir. 1994)).

1 As discussed below, since Plaintiff fails to adequately allege a policy or  
2 practice that would state a *Monell* claim, it is impossible at this stage to determine  
3 when the claim under *Monell* accrued. Neither party addresses this issue, and both  
4 assume the statute of limitations has run, focusing instead on the third prong, that is,  
5 whether the limitations period has been tolled. The only allegation pertaining to a  
6 policy is Plaintiff’s assertion that a Regional Manager at Child Welfare Services  
7 admitted on December 18, 2014 that “some policies were not followed.” At the very  
8 latest, it appears that Plaintiff alleges she knew about a violation of policy in  
9 December 2014. Therefore, Plaintiff’s Complaint filed in May of 2019 was far  
10 outside the two-year statute of limitations.

11 Plaintiff argues that the two-year statute of limitations has been equitably  
12 tolled, first because Defendant actively misled Plaintiff into filing a late Complaint  
13 and, second, because extraordinary reasons (she lists several) prevented her from  
14 asserting her rights sooner.<sup>3</sup>

15 “Federal courts also apply a forum state’s law regarding tolling, including  
16 equitable tolling, when not inconsistent with federal law.” *Fink v. Shedler*, 192 F.3d  
17 911, 914 (9th Cir. 1999) (citing *Hardin v. Straub*, 490 U.S. 536, 537–39 (1989)).  
18 The Ninth Circuit has drawn a distinction between “equitable tolling” and “equitable  
19 estoppel.” *Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1051 (9th Cir.  
20 2008). “‘Equitable tolling’ focuses on ‘whether there was excusable delay by the  
21 plaintiff.’” *Id.* (quoting *Johnson v. Henderson*, 314 F.3d 409 (9th Cir. 2002)).  
22 “Equitable estoppel, on the other hand, focuses primarily on actions taken by the  
23 *defendant* to prevent the plaintiff from filing suit, sometimes referred to as  
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25 <sup>3</sup> Unfortunately, the two cases cited by Plaintiff in her Opposition arguing that the statute of  
26 limitations has been equitably tolled have both been recognized as abrogated in other cases—  
27 factors Plaintiff omits from her citations. Shepardizing might be a useful activity in the future. *See*  
28 *Oshiver v. Levin, Fishbein, Sedran and Berman*, 38 F.3d 1380 (3rd Cir. 1994), abrogated by  
*Rotkiske v. Klemm*, 890 F.3d 422, 428 (3rd Cir. 2018); and *In re Balko*, 382 B.R. 717 (W.D. Penn.  
2008), abrogation recognized by *Lewis v. Ford Motor Co.*, 263 F.R.D. 252, 262 n. 14 (W.D. Pa.  
2019).

1 ‘fraudulent concealment.’” *Id.*

2 “[A] litigant is entitled to equitable tolling of the statute of limitations only if  
3 the litigant establishes two elements: ‘(1) that he has been pursuing his rights  
4 diligently, and (2) that some extraordinary circumstance stood in his way and  
5 prevented timely filing.’” *Menominee Indian Tribe of Wisconsin v. United States*,  
6 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010));  
7 *see also Rodriguez v. Williams*, 447 F. App’x. 850, 851 (9th Cir. 2011) (“Equitable  
8 tolling is unavailable in most cases and is appropriate only if *extraordinary*  
9 circumstances beyond [plaintiff’s] control make it impossible to file a [complaint]  
10 on time.”) (quoting *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)).  
11 Equitable tolling focuses on the plaintiff’s excusable ignorance of the limitations  
12 period and cannot be used to avoid the consequences of plaintiff’s own negligence.  
13 *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998).

14 To show equitable estoppel under California law, the plaintiff must establish:  
15 (1) that defendant knew the true facts; (2) that defendant intended that its misleading  
16 conduct be acted on and the misleading conduct must be to convince plaintiff to  
17 believe that she need not move forward timely; (3) plaintiff was ignorant of the true  
18 state of facts; and (4) plaintiff relied on defendant’s misleading conduct to her  
19 detriment. *Lukovsky*, 535 F.3d at 1051–52 (citing *Honig v. San Francisco Planning*  
20 *Dept.*, 127 Cal. App. 4th 520, 529 (2005).)

21 As a preliminary matter, the Court is limited to facts pleaded in the Complaint.  
22 Plaintiff files a lengthy declaration detailing additional facts regarding various facts  
23 that prohibited her from filing this Complaint sooner. (ECF No. 10.) Since the  
24 declaration contains facts that remain disputed and are not appropriate for judicial  
25 notice, the Court declines to consider the declaration in considering this Motion to  
26 Dismiss, but will give Plaintiff leave to amend the Complaint if she wishes to include  
27 any of these facts in her Complaint.  
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1           Looking only at the allegations in the Complaint, Plaintiff clearly alleges that  
2 she discovered Ms. Lee’s lies and abuse of power by the end of October 2014.  
3 (Complaint ¶¶ 9. 12. 13. 14.) By November 18, 2014, Plaintiff alleges she had  
4 received a copy of her Child Welfare Service file and discovered many falsities and  
5 misstatements. (*Id.* ¶ 15.) Yet she filed this Complaint in May 2019, almost five  
6 years after learning of the grounds for the causes of action.

7           In the Complaint, Plaintiff does allege that she was delayed because she was  
8 obtaining her telephone records needed to prove that Ms. Lee had lied. (*Id.* ¶¶ 9, 15.)  
9 However, these allegations fail to rise to the level of either equitable estoppel or  
10 equitable tolling. With respect to equitable tolling, even if Plaintiff was delayed in  
11 obtaining telephone records to prove her case, she fails to allege why this prevented  
12 her from filing a Complaint sooner. Nothing prevented her from filing a lawsuit and  
13 then obtaining discovery to prove her case.

14           With respect to equitable estoppel, Plaintiff fails to allege any misleading  
15 conduct on the part of Defendant. Even more importantly, she alleges that she knew  
16 the true state of facts. She knew Ms. Lee had allegedly lied and abused her power,  
17 so nothing Defendant did apparently misled her from filing a Complaint sooner.  
18 Because sufficient facts are stated on the face of the Complaint to lead the Court to  
19 conclude that the claims are barred by the statute of limitations and because Plaintiff  
20 fails to allege facts showing either equitable estoppel or equitable tolling, the Court  
21 **GRANTS** Defendant’s Motion to Dismiss the first cause of action.

22           **2. Plaintiff’s Remaining Causes of Action**

23           The County moves to dismiss Plaintiff’s entire Complaint but fails to spend  
24 any time discussing Plaintiff’s second, third, or fourth causes of action. The Court  
25 will analyze the claims here, but in the future will not do so without the County first  
26 putting in the work and providing the analysis.

27           The statute of limitations for Plaintiff’s second and third causes of action  
28 (intentional and negligent infliction of emotional distress) is two years. *See* Cal. Civ.

1 Proc. Code § 335.1. The analysis above regarding accrual of the causes of action and  
2 tolling applies here. Therefore, the Court **DISMISSES WITHOUT PREJUDICE**  
3 the second and third cause of action.

4 Plaintiff's fourth cause of action is titled "violation of state civil rights" and  
5 Plaintiff alleges Defendants' conduct violated "her rights under California  
6 Government Code Section 820.21 and California Civil Codes Sections 43, 49, 51, 52  
7 (The Unruh Civil Rights Act) and 52.1." (Complaint ¶ 28.) Plaintiff fails to separate  
8 the code sections to allege a violation of each, and instead creates a vague violation  
9 of all together. The basis behind each claim is unclear. In any event, the claims  
10 similarly are barred by the statute of limitations.

11 As to the claims under the Unruh Act, courts are divided on the statute of  
12 limitations for such claims. Some hold California's two-year personal injury statute  
13 of limitations applies to Unruh claims, like it does to section 1983 claims. *See, e.g.,*  
14 *Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 760 (2002); *Hartline v. Nat'l Univ.*,  
15 No. 2:14-cv-0635 KJM AC, 2015 WL 4716491 (E.D. Cal. August 7, 2015). Others  
16 have applied a three-year statute of limitations to claims under the Unruh Act. *See,*  
17 *e.g., Kramer v. Regents of Univ. of Cal.*, 81 F. Supp. 2d 972, 978 (N.D. Cal. 1999);  
18 *see also Olympic Club v. Those Interested Underwriters at Lloyd's London*, 991 F.2d  
19 497, 501 n.11 (9th Cir.1993) (indicating in dicta that the three-year statute of  
20 limitations of California Code of Civil Procedure § 338(a) should apply to claims  
21 under the Unruh Act). Under either rule, Plaintiff's Unruh claims are barred.<sup>4</sup> The  
22 Court **DISMISSES WITHOUT PREJUDICE** Plaintiff's fourth cause of action.

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25 <sup>4</sup> Similarly, as to Plaintiff's reference to Civil Code § 52.1, "the statute of limitations applicable to  
26 a claim under Section 52.1 is California's statute of limitations for personal injury actions, now a  
27 two-year statute of limitations." *Fenters v. Yosemite Chevron*, No. CV-F-05-1630 OWW/DLB,  
28 2006 WL 2016536, at \*16 (E.D. Cal. July 17, 2006). Therefore, this claim is also barred.



1           **B.     Monell Claim**

2           To the extent Plaintiff brings a section 1983 claim against the County, it must  
3 be brought under *Monell*. Plaintiff does not specifically reference *Monell*, but the  
4 County moves to dismiss any *Monell* claims. The County argues that even if the  
5 statute of limitations had not expired for Plaintiff’s first cause of action, the claim  
6 still fails.

7           A municipality like the County can be sued under section 1983 where a  
8 municipal policy or custom has caused an alleged violation of constitutional rights.  
9 *Monell v. Dep’t of Soc. Servs. Of City of New York*, 436 U.S. 658, 690–91 (1978).  
10 However, a municipality cannot be held liable under Section 1983 “solely because it  
11 employs a tortfeasor—or, in other words, a municipality cannot be held liable under  
12 §1983 under a *respondeat superior* theory.” *Id.* at 691; *see also Bd. of Cty. Comm’rs*  
13 *v. Brown*, 520 U.S. 397, 403 (1997) (“We have consistently refused to hold  
14 municipalities liable under a theory of *respondeat superior*”). In a *Monell* claim  
15 there are three ways to show a municipal policy or custom: (1) by showing “a  
16 longstanding practice or custom which constitutes the standard operating procedure  
17 of the local government entity”; (2) “by showing that the decision-making official  
18 was, as a matter of state law, a final policymaking authority whose edicts or acts may  
19 fairly be said to represent official policy in the area of decision”; or (3) “by showing  
20 that an official with final policymaking authority either delegated that authority to,  
21 or ratified the decision of, a subordinate.” *Villegas v. Gilroy Garlic Festival Ass’n*,  
22 541 F.3d 950, 964 (9th Cir. 2008) (quoting *Ulrich v. City & Cty. of San Francisco*,  
23 308 F.3d 968, 984–85 (9th Cir. 2002)).

24           To withstand a motion to dismiss, a *Monell* claim must consist of more than  
25 mere “formulaic recitations of the existence of unlawful policies, conduct, or habits.”  
26 *Valentine v. City of Concord*, No. 16-cv-00279-MEJ, 2016 WL 2851661, at \*5 (N.D.  
27 Cal. May 16, 2016) (quoting *Bedford v. City of Hayward*, No. 3:12-cv-00294-JCS,  
28 2012 WL 4901434, at \*12 (N.D. Cal. Oct. 15, 2012)); *see also AE v. County of*

1 *Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) (determining that *Iqbal's* pleading  
2 requirements apply to *Monell* claims). Accordingly, Plaintiff's "factual allegations  
3 'must plausibly suggest an entitlement to relief, such that it is not unfair to require  
4 the opposing party to be subjected to the expense of discovery and continued  
5 litigation.'" *Save CCSF Coal. v. Lim*, No. 14-cv-05286-SI, 2015 WL 3409260, at  
6 \*12 (N.D. Cal. May 27, 2015) (quoting *AE*, 666 F.3d at 637).

7 Even if Plaintiff's claims against the County were not barred by the statute of  
8 limitations, she fails to sufficiently allege a *Monell* claim. Plaintiff makes only two  
9 substantive allegations against the County in her Complaint. First, she alleges that  
10 Valesha Bullock, a Regional Manager of San Diego Child Welfare Services,  
11 "admitted that 'some policies were not followed.'" But Plaintiff then alleges that  
12 Ms. Bullock "refused to specify which rules were violated." (Complaint ¶16.)  
13 Second, Plaintiff alleges that the County is vicariously responsible for the conduct of  
14 Child Welfare Services. (*Id.* ¶ 24.) These allegations are insufficient to show a  
15 longstanding practice or custom, any decision by an official who was the final policy-  
16 making authority leading to the complained-of behavior, or the delegation of this  
17 decision to a subordinate. The allegations that Ms. Lee was an employee of the  
18 County and that the County is vicariously liable for the actions of its Child Welfare  
19 Service workers is simply insufficient. Therefore, Defendant's Motion to Dismiss  
20 all *Monell* claims is also **GRANTED**.

21 **C. Injunctive Relief**

22 Finally, Defendant moves to dismiss the fifth cause of action for Injunctive  
23 Relief, correctly arguing that injunctive relief is not a cause of action. *See Rockridge*  
24 *Trust v. Wells Fargo, NA*, 985 F. Supp. 2d 1110, 1166 (N.D. Cal. 2013) ("Injunctive  
25 relief is a remedy and not, in itself, a cause of action, and a cause of action must exist  
26 before injunctive relief may be granted." (quoting *McNeary-Calloway v. JP Morgan*  
27 *Chase Bank, NA*, 863 F. Supp. 2d 928, 964 (N.D. Cal. 2012)). According  
28 Defendant's Motion to Dismiss the Fifth Cause of Action for Injunctive Relief is

1 **GRANTED** with prejudice, although Plaintiff may amend the Complaint to seek  
2 injunctive relief as part of her other causes of action.

3 **IV. CONCLUSION**


4 For the reasons stated above, Defendant's Motion to Dismiss is **GRANTED**.  
5 The County of San Diego is dismissed as a Defendant. The first through fourth  
6 causes of action are dismissed against the County without prejudice. The fifth cause  
7 of action is dismissed with prejudice.

8 As noted above, Plaintiff has only recently filed a proof of service for Erica  
9 Lee. (*See* ECF No. 15.) Ms. Lee has not yet responded to the Complaint. For  
10 efficiency's sake, the Court also **DISMISSES** the Complaint against Ms. Lee,  
11 granting Plaintiff leave to amend so that she may file one operative complaint  
12 containing all of her allegations against both Defendants.

13 If Plaintiff chooses to file an amended Complaint against the County and/or  
14 Erica Lee, she must do so on or before October 24, 2019. *Failure to do so may result*  
15 *in her complaint being dismissed.*

16 **IT IS SO ORDERED.**

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18 **DATED: September 24, 2019**

  
**Hon. Cynthia Bashant**  
**United States District Judge**

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