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21

22 **UNITED STATES DISTRICT COURT**
23 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
24

25 CORY SPENCER, an individual;
26 DIANA MILENA REED, an
individual; and COASTAL
27 PROTECTION RANGERS, INC., a
28 California non-profit public benefit

CASE NO. 2:16-cv-02129-SJO (RAOx)
**PLAINTIFFS' SUPPLEMENTAL
BRIEF IN OPPOSITION TO
DEFENDANTS CITY AND KEPLEY'S
MOTION FOR SUMMARY
JUDGMENT**

Case No. 2:16-cv-02129-SJO (RAOx)

1 corporation,

2 Plaintiffs,

3 v.
4

5 LUNADA BAY BOYS; THE
6 INDIVIDUAL MEMBERS OF THE
7 LUNADA BAY BOYS, including but
8 not limited to SANG LEE, BRANT
9 BLAKEMAN, ALAN JOHNSTON
10 AKA JALIAN JOHNSTON,
11 MICHAEL RAE PAPAYANS,
12 ANGELO FERRARA, FRANK
13 FERRARA, CHARLIE FERRARA,
14 and N. F.; CITY OF PALOS VERDES
15 ESTATES; CHIEF OF POLICE JEFF
16 KEPLEY, in his representative
17 capacity; and DOES 1-10,

18 Defendants.

Complaint Filed: March 29, 2016
Trial Date: December 12, 2017

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1 I. INTRODUCTION

2 On cue with the Individual Defendants, the City: (1) failed to produce
3 evidence responsive to Plaintiffs' requests during discovery; (2) brought a motion to
4 take this matter from a jury without providing the evidence; and (3) produced
5 additional evidence after it filed its motion, after Plaintiffs filed their opposition to
6 the City's motion, and after ordered to do so by the Court.

7 At the same time it was withholding evidence, the City took aim in its motion
8 at a straw man, resting on *DeShaney v. Winnebago County Dept. of Social Serv.*,
9 489 U.S. 189 (1989)¹ – minimizing the problem, and asserting it had no duty to
10 protect Plaintiffs Spencer and Reed from the bullying Bay Boys. But with their
11 motion, the City does not get to change Plaintiffs' legal theory or ignore the
12 evidence showing a long-documented pattern of discrimination in the City. Their
13 continued emphasis on *DeShaney* remains misplaced – as all three Plaintiffs have
14 long telegraphed that their legal argument against the City is not that it failed to take
15 steps to protect Spencer and Reed from the Bay Boys.

16 Instead, Plaintiffs assert that the City directly discriminates against Spencer,
17 Reed, and others like them based on: (1) outsider status (rational basis – all
18 Plaintiffs); (2) gender (intermediate scrutiny – Plaintiffs Reed and Coastal
19 Protection Rangers ("CPR")); and (3) race (strict scrutiny – CPR only). In short, to
20 avoid having Plaintiffs and people like them on their shoreline who do not fit the
21 City's historic exclusivity patterns, the City encourages the Bay Boys and their dirty
22 _____

23 ¹ In footnote 1 in the City's reply brief, the City states that Plaintiffs do not allege
24 membership to a protected class. Not so. It is true Spencer, Reed, and CPR
25 represent outsiders who stand up to illegal bullying, and illegal City discrimination.
26 However, it is also true that Reed is a woman, and that CPR celebrates diversity and
27 people of color – including its members who attend the Martin Luther King Day Jr.
28 Celebrations held at Lunada Bay. See, Pltfs. Opp. to Defts. City and Kepley's MSJ
or in the Alternative, MSA, section III, B, 1-3, and section IV, A – C.

1 work to keep outsiders away. The City hides behind a surfing problem that it never
2 intends to cure.

3 Defendants' late-produced information provides further evidence supporting
4 Plaintiffs' claim that the City unlawfully discriminates against outsiders. Indeed,
5 each piece of late-produced evidence reveals more of the wall that the City has
6 erected to keep the so-called undesirables away from their shoreline. The further
7 late-provided evidence includes:

- 8 • Former Defendant Chief Jeff Kepley,² who had joined the City mid-2014,
9 and who initially attempted to address the Bay Boy problem, was forced
10 out of his job because of his public tough-on-shoreline-crime enforcement
11 position. Having actively served less than three years, he resigned on
12 August 28, 2017. (Kepley's leaving the City was not confirmed by the
13 City until September 2017, and then only after Plaintiffs announced they
14 were bringing Kepley's departure to the Court's attention out of a requisite
15 duty of candor to the Court.)
- 16 • Chief Kepley's September 24, 2015 email to City Manager Dahlerbruch,
17 Captain Best, Captain Velez, and Sgt. Barber, which stated that the Los
18 Angeles County Deputy District Attorney in the hardcore gang division
19 believed that future crimes related to surfing localism *can and should be*
20 *prosecuted with gang enhancements*, and saying that if the City prosecuted
21 a case in this fashion it would be the first time ever and put an end to the
22 problem. (Produced by the City.)

23
24 ² Having been sued only in his representative capacity, Jeff Kepley is no longer a
25 defendant. The current Chief of Police is Mark Velez, and he replaces Kepley as
26 both Chief of Police and as a defendant in this matter. *See*, footnote 1 to Pltfs.' Opp.
27 to Defts. City and Kepley's MSJ or, in the Alternative, MSA [Dkt. No. 322]; Pltfs'
28 Suggestion Under FRCP 25(D) on Record to Substitute Official Named In His
Representative Capacity Due To Resignation [Dkt. No. 455].

- 1 • Chief Kepley's December 31, 2015 email to the City Manager and the
2 Police Department that the City's prior chiefs had attempted to take on the
3 Bay Boys without success; thus it was time for a new day. (Produced by
4 the City.)
- 5 • Defendant Papayans' texts regarding the Bay Boy's coordinated effort to
6 put pressure on the City Manager to remove Jeff Kepley as Chief of
7 Police. (Produced by Papayans.)
- 8 • A City memo indicating that it prepared for the January 20, 2014 Martin
9 Luther King Day Jr. event by assuming it would be the outsiders who
10 would instigate trouble by agitating the locals. (Produced by City.)
- 11 • Video evidence of the January 20, 2014 Martin Luther King Day Jr. event
12 demonstrating that the City's assumptions about the outsiders instigating
13 trouble were wrong. (Produced by City.)
- 14 • Sgt. Steve Barber's memorandum to all City police personnel who
15 attended CPR's January 16, 2017 Martin Luther King Day Jr. event,
16 calling the event a success but also calling out an officer for "ogling"
17 women on the bluff. (Produced by City.)

18 Beyond the belated production of evidence, the City also has destroyed and
19 suppressed evidence, including by failing to maintain N.F.'s³ cell phone in a state
20 that information could be extracted from it, failing to preserve information on the
21 City-owned cell phone that Defendant Blakeman used to plan and carry out the Bay
22 Boys' assault against Spencer and Reed, and failing to preserve relevant

23
24 ³ Defendant N.F. was dismissed from this action without prejudice on July 27,
25 2017. [Dkt. No. 297] However, the Court maintains jurisdiction to require him to
26 comply with outstanding discovery requests. N.F.'s cell phone was booked into the
27 City's evidence locker for an unrelated crime prior to the filing of this action, and
28 even though the matter was fully adjudicated the City refused to release it without a
Court order. [Dkt. No. 487]

1 information off of targeted police officer's personal devices, who were known by
2 the City to maintain close relationships with the Bay Boys.⁴

3 For the reasons described here and in Plaintiffs' Opposition to the City's
4 Motion for Summary Judgment, Plaintiffs ask this Court to deny the City's Motion
5 and permit a jury to weigh the veracity of the City's claimed innocence.

6 **II. PROCEDURAL HISTORY**

7 On July 14, 2017, the City filed its motion for summary judgment. [Dkt. No.
8 268] On July 21, 2017, Defendant Lee filed his motion for summary judgment.
9 [Dkt. No. 274] On July 24, 2017, Defendants Papayans, Angelo Ferrara, Johnston,
10 Blakeman, Charlie Ferrara and Frank Ferrara⁵ filed their motions for summary
11 judgment. [Dkt. Nos. 278, 279, 283-86] On July 31, 2017, Plaintiffs filed their
12 opposition to the City's' summary judgment motion. [Dkt. No. 299] On August 7,
13 2017, Plaintiffs filed their opposition to the Individual Defendants' summary
14 judgment motion. [Dkt. No. 328] On August 7, 2017, the City filed its reply and,
15 on August 17, 2017, the Individual Defendants filed their replies. [Dkt. Nos. 338,
16 409-418]

17 On August 8, 2017, Plaintiffs filed their Rule 56(d) Motion. [Dkt. No. 397]
18 On October 3, 2017, the Court granted Plaintiffs' Rule 56(d) motions against certain
19 of the Individual Defendants, and in part against the City. [Dkt. No. 471] As to the
20 City, the Court denied Plaintiffs' request seeking discovery from PVE police
21 officers' personal devices because Plaintiffs did not move to compel sooner and
22 before discovery was closed. Because, however, the City produced additional
23

24 ⁴ Plaintiffs intend to file a separate motion against the City and other Defendants for
25 the destruction or spoliation of evidence.

26 ⁵ On October 15, 2017, with Plaintiffs' sanctions motion for spoliation of evidence
27 against them pending, Defendants Charlie and Frank Ferrara withdrew their motions
28 for summary judgment. [Dkt. No. 491]

1 discovery late (after it filed its motion for summary judgment and after discovery
2 cutoff), the Court allowed Plaintiffs to submit this supplemental brief. (*Id.*)⁶

3 **III. STATEMENT OF FACTS**

4 Plaintiffs filed their Opposition to the City’s Motion on July 31. After this,
5 the City produced previously requested videos along with approximately 480 pages
6 of relevant documents. And the Individual Defendants produced about an additional
7 7,500 pages after filing motions for summary judgment. Indeed, as of this filing,
8 Defendants still are producing requested discovery, long after the close of discovery
9 and while their dispositive motions are pending. The late-produced evidence is
10 material, favorable to Plaintiffs, and shows that the City is complicit with the
11 individual defendants and their co-conspirators in excluding outsiders.

12 **A. Welcoming Outsiders Is Not Tolerated: The City Supports Exclusion Of** 13 **Outsiders At Lunada Bay.**

14 As the new evidence supports, the City discriminates against outsiders with
15 regard to Lunada Bay. In particular, the City badgered Jeff Kepley – who was new
16 to the City and had publicly said he wanted to stop the Bay Boys – away from
17 serving in the Chief of Police position and out of City service. (Plaintiffs’
18 Supplemental Additional Material Facts in Opposition to the City’s Motion (“City
19 PSAMF”) 213.) In new text messages produced to the Plaintiffs, it is evident that
20 Bay Boys, including Defendants Blakeman and Papayans, encouraged each other on
21 February 5, 2016 to “write the mayor, city manager and council. Keep it calm and
22 rational, but clearly express your concerns and outrage at the chief’s behavior.”
23 (*Id.*) One Bay Boy, Charlie Mowat, texted: “That tony dallenbach [sic] guy is the
24 _____

25 ⁶ While the City may file a reply in line with the Court’s order, it may not introduce
26 new evidence to support its motion in its reply. *See, e.g., Graves v. Arpaio*, 623
27 F.3d 1043, 1048 (9th Cir. 2010); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.
28 1996).

1 city commissioner who hired this douche bag,” referring to City Manager Anton
2 Dahlerbruch and Chief Kepley. (*Id.*) On or around February 7, 2016, City Manager
3 Dahlerbruch responded to Mr. Mowat, referenced the Bay Boys’ displeasure with
4 the potential removal of their unauthorized patio on the beach at Lunada Bay, and
5 invited him to a meeting. (*Id.*) After the Bay Boy’s meeting with Dahlerbruch, the
6 City Manager reported to Kepley that his planned undercover operation for the
7 weekend was compromised. Kepley cancelled the operation, and on Saturday,
8 February 13, 2016, the Bay Boys carried out their sexual harassment against Reed in
9 the Rock Fort, led by Defendants Blakeman, Johnston, and Charlie Ferrara. (PAMF
10 ISO City 119, 121, 122.)

11 Chief Kepley left work on leave of absence for most of this year before he
12 reportedly retired, as described in Plaintiffs’ Suggestion Under FRCP 25(D) On
13 Record To Substitute Official Named In His Representative Capacity Due To
14 Resignation. [Dkt. No. 455, 2:25-3:7] Mark Velez has been the Acting Chief of
15 Police since July 1, 2017. (*Id.*) Chief Kepley reportedly retired around late August
16 2017. (*Id.*) To summarize, after the City received considerable pressure from the
17 Bay Boys to remove Chief Kepley, he went on a long-term leave before resigning
18 from the City’s employment. (City PSAMF 206.)

19 **B. The City Knew And Knows About The Exclusion Of Outsiders At**
20 **Lunada Bay – Yet Has Publicly Called The Bay Boys An Urban Legend.**

21 The City should have taken action against the Bay Boys because it has been
22 aware of their exclusion of outsiders by violent means for years. Despite numerous
23 pledges to address the problem, it has persisted for decades. (City PSAMF 199.) In
24 new evidence provided to Plaintiffs, the City admits to receiving calls and
25 complaints about harassment, intimidation, vehicle tampering, and exclusion of
26 outsiders at certain public areas at Lunada Bay. (*Id.*) The City is aware that
27 outsiders anticipate harassment at Lunada Bay, and that Lunada Bay is
28 underutilized. (City PSAMF 200, 201, 202.) The City directly acknowledges that

1 this is a problem that requires a solution. (City PSAMF 199.) Its then-Police Chief
2 Kepley wrote to the City Manager and “PDALL” that “We need to really make a
3 difference and set the tone for a new day in Lunada Bay.” (*Id.*) The City hired
4 public relations firm Wolcott Company to provide positive updates to the
5 community and secure broader public support, but writes that it does not want it to
6 look like it is trying to “hide the blemishes.” (*Id.*)

7 **C. The City Fails To Take The Problem Of Excluding Outsiders Seriously.**

8 The new evidence shows that the City made a number of promises throughout
9 the years to address its localism problem, but the promises neither had follow
10 through nor impact. (City PSAMF 204, 205.) For example, patrol officers were
11 allegedly instructed to help deter surf-related incidents and crimes, and the police
12 began to “explore the possibility of conducting an undercover surfing operation
13 focusing on the reported ‘localism’ issues occurring in Lunada Bay by individuals,
14 referred to as ‘The Bay Boys.’” (*Id.*; City PSAMF 207.) Then-Police Chief Jeff
15 Kepley also made efforts in this regard by: (1) writing to the City Manager and
16 “PDALL” that “We need to really make a difference and set the tone for a new day
17 in Lunada Bay” and (2) writing to the City Manager and top police officers that “I
18 firmly believe that if we prosecuted only one case in this fashion, with publicity, it
19 would be the first and strongest effort to date to dissuade others from committing
20 similar offenses.” (City PSAMF 199, 207.)

21 But these efforts were for naught. The undercover operation was canceled
22 because news of it leaked to the Bay Boys – as reported by the City Manager after
23 his meeting with Michael Thiel. (PAMF 185; City PSAMF 213.) And the Bay
24 Boys began a writing campaign to remove Chief Kepley, who then left. (*Id.*; *see*
25 *also, supra*, § II.A.) Even Chief Kepley admitted the Bay Boys resemble a gang,
26 but he did not pursue addressing it as one due to the risk of angering City residents,
27 the City Manager, and the politically connected who support the Bay Boys. (City
28 PSAMF 203, 213.) For its part, the City decided to focus on its image, rather than

1 addressing the cause of the exclusion of outsiders, by hiring a public relations firm,
2 Wolcott Company. (City PSAMF 199.)

3 **D. The City Engaged In The Spoliation And/Or Suppression Of Evidence.**

4 The City has failed to preserve and produce evidence and has, in fact,
5 engaged in spoliation and/or suppression of evidence. The City’s failure with regard
6 to its evidence continues to impact Plaintiffs’ ability to respond to its Motion for
7 Summary Judgment to this day. To begin with, the City failed to produce relevant
8 and incriminating text messages that were received by Defendant Brant Blakeman
9 on his City-owned phone. (PSAMF 215.) It is clear that such text messages exist
10 because other Defendants have produced text messages that were sent to Blakeman.
11 (*Id.*) Next, the City failed to inform Plaintiffs that a cell phone used by Blakeman
12 was within the police department’s possession, custody or control. (City PSAMF
13 216.) Due to the City’s failure to preserve the phone, Plaintiffs were unable to
14 access the contents on the phone as of the date of this filing. (*Id.*) Further, the City
15 failed to produce nearly 480 pages of relevant documents before Plaintiffs opposed
16 the City’s Motion for Summary Judgment. (City PSAMF 217.) These documents
17 eventually were produced more than one week after briefing was originally
18 completed on the City’s Motion. (*Id.*)

19 Moreover, the City is not relieved of its failures to preserve and produce
20 records from police officers’ cell phones based upon this Court’s ruling on
21 Plaintiffs’ Motion for Administrative Relief Pursuant to FRCP 56(d). [Dkt. No.
22 471] Although the Court held that Plaintiffs had not timely pursued these records, it
23 made no ruling as to whether the City was obligated to preserve and produce these
24 records. (*Id.* at 8-12.) A jury might find the individual police officers’ failure to be
25 forthcoming with data available on their personal devices is significant, as it directly
26 relates to their connection with the Bay Boys and purported “community policing.”

27 ///

28 ///

1 **IV. ARGUMENT**

2 A local governing body is not liable under § 1983 “unless action pursuant to
3 official municipal policy of some nature caused a constitutional tort.” *Monell v.*
4 *Dep’t of Social Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978). “The ‘official
5 policy’ requirement ‘was intended to distinguish acts of the municipality from acts
6 of employees of the municipality,’ and thereby make clear that municipal liability is
7 limited to action for which the municipality is actually responsible.” *Pembaur v.*
8 *City of Cincinnati*, 475 U.S. 469, 479-80 (1986). Indeed, there are several ways to
9 establish “Monell liability.” *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999).
10 For example, the plaintiff may prove (1) that a city employee committed the act
11 pursuant to a formal governmental policy or a longstanding custom or practice, (2)
12 the person who committed the act had final policy-making authority, or (3) that a
13 person with final policy-making authority ratified the act. *Trevino v Gates*, 99 F. 3d
14 911, 918 (9th Cir. 1996). The Ninth Circuit has held that “a custom or practice can
15 be supported by evidence of repeated constitutional violations which went
16 uninvestigated and for which the errant municipal officers went unpunished.”
17 *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1236 (9th Cir. 2011).

18 Here, the evidence proves the City has a longstanding custom and practice of
19 excluding outsiders from Lunada Bay with help from the Bay Boys. (City PSAMF
20 199, 204, 207, 208; PAMF 161, 171, 172, 178.) Victims like Spencer and Reed are
21 discouraged from making complaints and, if they do make a complaint, it is treated
22 lightly, or not seriously investigated. Indeed, the mayor herself referred to the
23 problem as an “urban legend.” (PAMF 177.) In a recent setback, Kepley’s effort to
24 stop the Bay Boys prematurely ended with his ouster. (City SPAMF 206.)

25 **V. CONCLUSION**

26 Plaintiffs have offered ample evidence that the City and the Bay Boys have
27 acted in concert on the beaches of Palos Verdes Estates and in this litigation. The
28 new evidence affirms Plaintiffs’ theory of the case—that the City discriminates

1 against outsiders in favor of the Bay Boys, who harass, bully, and intimidate others
2 who want to visit Lunada Bay. Excluded outsiders include women like Reed, and
3 people of color like those that attending CPR's Martin Luther King Day, Jr. event.
4 For the foregoing reasons, Plaintiffs respectfully ask this Court to allow a jury to
5 decide their claims and deny the City's Motion for Summary Judgment.

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DATED: October 18, 2017

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