No. 21-

IN THE

Supreme Court of the United States

DANIEL GARZA, AN INDIVIDUAL,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL L. HOFFMAN
Counsel of Record
SCHONBRUN SEPLOW HARRIS
HOFFMAN & ZELDES, LLP
200 Pier Avenue, Suite 226
Hermosa Beach, California 90254
(310) 717-7373
hoffpaul@aol.com

Counsel for Petitioner

309459

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1) May a municipality be held liable for ratification, under Monell v. Department of Social Services, when the final policy maker has constructive notice of a subordinate's unconstitutional conduct, deliberately takes no action, and affirms the conduct?

2) Can a jury be deprived of directly relevant evidence of ratification in the form of a letter, with the Chief of Police's letterhead, affirming the unconstitutional conduct as "justified, lawful, and proper"?

NOTICE OF RELATED CASES

Pursuant to Supreme Court rule 14.1(b), please take notice of the following related cases:

- Garza v. City of Los Angeles, No. 19-55952: Ninth Circuit Court of Appeal. Judgment entered on July 26, 2021; rehearing denied September 7, 2021.

- Garza v. City of Los Angeles, Mario Cardona, 2:16-cv-03579: United States District Court, Central District of California. Judgment for Plaintiff against Mario Cardona entered on June 27, 2017. Judgment for the City of Los Angeles entered on July 16, 2019.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

CODES

PETITION FOR WRIT OF CERTIORARI

Daniel Garza, an individual, by and through his counsel, respectfully petitions this court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The decision by the Ninth Circuit Court of Appeals denying Mr. Garza's direct appeal, in which Judge Rawlinson dissented, is an unreported order. *Garza v. City of Los Angeles*, No. 19-55952 (9th Cir. July 26, 2021). The order and Judge Rawlinson's dissent is attached at Appendix A ("App."). The Ninth Circuit denied Mr. Garza's petition for rehearing and Mr. Garza's petition for rehearing *en banc* on September 7, 2021. *Garza v. City of Los Angeles*, No. 19-55952 (9th Cir. Sept 7, 2021); App. F.

JURISDICTION

Mr. Garza's petition for rehearing and rehearing *en banc* was denied on September 7, 2021. Mr. Garza invokes the Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari within ninety days from the denial of his timely filed petition for rehearing and rehearing *en banc*.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Over forty years ago, this Court held that municipalities and other local government units are included among those persons to whom § 1983 applies. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978). In *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), a plurality of the Supreme Court recognized the relevance of ratification to what may be chargeable to a municipality in the § 1983 context. *Id.* at 127.

There is a circuit split regarding what type of action by a policymaker is required under the theory

of ratification. The Ninth Circuit holds that ratification occurs when the official policymaker involved has adopted and expressly approved of the acts of others who caused the constitutional violation. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir.1996). However, the Second and Seventh Circuit (in *dicta*) allow a finding of ratification when a policymaker acts with constructive acquiescence or deliberate inaction. *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469–70 (7th Cir. 2001), *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 126 (2nd Cir. 2004). The theory of ratification as followed in the Second and Seventh Circuit supports the fundamental purposes behind 42 U.S.C. § 1983 of deterrence as it does not allow a municipality to deliberately ignore known constitutional violations.

The panel opinion essentially allows a municipality to avoid liability by intentionally keeping its policymaker unaware of constitutional violations occurring in its department and misinformed on the law. The outcome is untenable, and the knowledge requirement for ratification under *Monell* should include the well-established doctrine of constructive notice. In *Price v. Sery*, 513 F.3d 962, 973 (9th Cir. 2008) the Ninth Circuit recognized that a "'conscious' or 'deliberate' choice on the part of a municipality in order to prevail on a failure to train claim… does permit a fact finder to infer 'constructive' notice of the risk where it was 'obvious'—but this is another way of saying that there needs to be some evidence that tends to show a conscious choice." *Id*. at 973. Ratification is also necessarily established when a municipal policymaker's obliviousness to a subordinate's constitutional violation is so obviously willful that it reflects a deliberate choice – an endorsement of ignorance.

In this case, the Ninth Circuit's decision encourages municipalities to deliberately insulate "final policymakers" from known constitutional violations. *See* Dkt. 59-1 at p. 10, n.2 (Rawlinson, J., dissenting); App. A at 10a, ("Under the majority's view, a policymaker may avoid *Monell* exposure by simply denying knowledge of the contents of a document prepared pursuant to his policies. That is simply not the law.") The majority recognized the City's "opportunistic flip-flopping" where its City Attorney condemned the malicious, unlawful actions of Officer Mario Cardona, to a jury, while that same City exonerated and *promoted* Cardona, internally, at the same time. Cardona was found both liable and guilty of actual malice in the first trial. The City's calculated attempt to avoid paying the judgment was only successful because the trial judge allowed the City to conceal the details of Cardona's wrongful conduct and the City's exoneration of his conduct from a new jury tasked only with deciding whether Beck or the City ratified Cardona's misconduct. (Dkt. 59-1 at p. 6); App. A at 3a.

The perverse incentive in this holding undermines the fundamental purposes behind 42 U.S.C. § 1983 of deterrence and compensation and conflicts with well-established law; as recognized under *Monell* and its progeny, ratification occurs when a final policymaker has constructive notice of a subordinate's unconstitutional conduct, is informed of the incident, and makes a conscious choice to affirm the conduct without inquiry.

The injustice in this case is of paramount importance. A Federal Court jury found Mario Cardona used excessive force, violated Daniel Garza's Constitutional Rights and that Cardona acted with actual malice while doing so. Within weeks, LAPD Chief Beck promoted Cardona to

Sergeant despite his admitted knowledge of the verdict. However, the City was able to avoid *Monell* ratification liability by denying knowledge of the underlying facts uncovered in the investigation exonerating Cardona despite the fact that it was done under Chief Beck's watch. Instead, Chief Beck was allowed to rely on false assertions that he was informed that his hands were legally tied. Plaintiff's counsel was denied the right to impeach him with his deposition testimony where he testified to the contrary and the jury was deprived of the "ratification" letter on Chief Beck's signature block stating the conduct was "justified, lawful and proper." The Court's misapplication of the constructive knowledge doctrine and its abuse of discretion in excluding directly relevant and compelling evidence resulted in a travesty of justice. Police excessive force is not deterred because the offending Officer got promoted sending a dangerous message to LAPD Officers. Additionally, compensation to the Plaintiff has been effectively thwarted because the offending Officer, now Sergeant Cardona, has been able to avail himself of bankruptcy protection. The United States Supreme Court is Mr. Garza's last chance to right this terrible wrong.

This case presents the critical questions of whether, under *Monell* ratification, a policymaker can make a conscious, affirmative choice when they make a conscious choice to ignore an obvious constitutional violation and whether a jury can be deprived of directly relevant evidence of ratification.

1. The City of Los Angeles and Chief Beck Made the Conscious Choice to Ignore its Officer's Unconstitutional Conduct and Affirmatively Promoted the Officer

On May 14, 2015, Officer Mario Cardona punched Daniel Garza and acting under color of state law, kept Garza in a pain compliance hold while handcuffed. Cardona's force was objectively unreasonable because Garza was prone face down on the ground and clearly not resisting. (3-ER-614:20-615:6, 622:22-627:5, 659: 13-21). Subsequently, Plaintiff complained to the LAPD, prompting an internal affairs investigation which included interviews with Garza, Cardona and others. (5-ER-942-952). The IA Report contained references to two percipient witnesses' sworn summaries and a video. (5-ER-942, 1054-1056).

On February 29, 2016, Captain Greg McManus, Acting Commanding Officer of the Metropolitan Division, signed a letter on Chief Beck's signature block, informing Garza that his allegations of unauthorized force were "unfounded" and his allegation that Cardona had twisted his wrists was "exonerated," meaning that "the investigation determined that the act occurred, but was **justified, lawful, and proper**." (4-ER-804–805 (emphasis added).

On May 23, 2016, Plaintiff filed suit in U.S. District Court (C.D. Cal.), alleging § 1983 claims against Cardona, supervisor liability against Chief Beck, and *Monell* liability against the City. (4-ER-854–881). Cardona was represented by independent counsel, because the City maintained the position that it was not at all liable, under

any cause of action, due to the fact that it contended that Cardona was not acting within the course and scope of employment during the incident. (4-ER-839–853). Just prior to and throughout trial, the City further argued that, regardless of whether or not he was acting in the course and scope of employment, Cardona had acted with actual malice, a finding which allowed it to avoid being compelled to pay the judgment under California's Government Code. (4-ER-830-832).

After granting summary judgment to the City on Garza's *Monell* claims, the district court bifurcated the first trial: Phase I would resolve Cardona's individual liability, including the question of course and scope of employment, and Phase II would resolve damages and whether Cardona acted with malice. (1-ER-83). In its Phase II closing argument, the City argued forcefully that Cardona acted with malice. (3-ER-590:23-592:11). After describing Cardona's actions, the City told the jury: "**If that isn't malice, I don't know what is**." (3-ER-595:8-9 (emphasis added)).

The jury found that Cardona acted with actual malice, acted within the course and scope of his employment and under color of state law, and awarded Plaintiff $210,000 in compensatory damages. (1-ER-82). Due to the City's position, the jury's finding of actual malice, and the City of Los Angeles's refusal to indemnify Cardona, the District Court ordered "Cardona takes nothing from the City." (1-ER-75).

After trial, Plaintiff timely moved for reconsideration of the Court's prior order granting summary judgment to the City on *Monell*. (3-ER-561–572). Plaintiff's motion

presented new evidence that Cardona had been promoted from Officer to Sergeant within weeks **after** a jury found that Cardona maliciously violated Garza's Fourth Amendment rights. (3-ER-561-572). On April 12, 2019, the Court granted Plaintiff's motion for reconsideration. (1-ER-33-43).

However, the district court unfairly restricted the evidence Plaintiff was permitted to introduce during the ensuing *Monell* trial. Despite its ruling on summary judgment that "[a] finding that the letter condoned excessive twisting while making arrests would be unreasonable, **absent further supporting evidence**," the court prohibited Plaintiff from introducing the February 29, 2016, letter or other supporting evidence relating to the IA investigation stating, **without authority** or further explanation: "the internal investigation clearance of Officer Cardona is not a basis for ratification and can't be argued as such." (1-ER-4:8-18, 1-ER-20, 1-ER-99). The district court also limited the scope of the arguments Plaintiff could make at the second trial, ruling that Plaintiff could not argue that the knowledge of the City Attorney was imputed to Chief Beck (1-ER-3:21-4:3), rejected Plaintiff's estoppel argument (1-ER-22) and rejected Plaintiff's proposed jury instructions on agency. (3-ER-508–519).

As Chief of the LAPD from November 2009 to June 2018, Beck had the authority to decide whether an officer should be disciplined for misconduct. (2-ER-174:16-25; 2-ER-175:1-10). Beck signed off on Cardona's promotion on July 17, 2017 (2-ER-189:13-19, 2-ER-227:16–228:6, 5-EW-1109-1117), which became effective August 6, 2017 (2-ER-229:5-8, 5-EW-1109-1117).

Prior to trial, in response to interrogatories asking for all facts and documents supporting the determination that Garza's allegations of misconduct against Cardona were either unfounded or exonerated, (2-ER-178:8-23, 180:8-181:25, 3-ER-582–585), Beck specifically referred to all the documents and materials comprising the LAPD's IA Investigation, including the witness statements and video from the incident. (2-ER-180:8–181:25, 2-ER-182:9-14, 3-ER-582-585). Beck signed verifications swearing that his responses were true and correct. (2-ER-179:17-25, 3-ER-584). However, at the *Monell* trial, Plaintiff was not allowed to present the contents of the IA Report, the video of the incident, any other substantive evidence pertaining to the incident, or the exoneration letter.

In particular, the trial judge found that because Beck testified at trial that – *contrary to his interrogatory responses* – he did not review these materials, Plaintiff was not allowed to introduce them. (1-ER-30:17-31:8, 2-ER-180:16–181:20, 3-ER-573–585).

Despite Beck's involvement in the lawsuit and the City Attorney representing his interests in the first trial, at the second trial Beck testified that he had never reviewed Garza's complaint and did not know the specific allegations, nor had he seen the video. (2-ER-185:25-186:10). Despite the clear impeachment value and probative relevance of this evidence, Plaintiff was not allowed to show the video to the jury during the *Monell* trial nor was he allowed to present evidence that the Captain who assumed charge of the scene of the incident admitted that Cardona's conduct was unreasonable and excessive. (1-ER-6:11-15, 5 ER-953).

In effect, with the trial court's assistance, the City was able to avoid liability by having Beck assert ignorance when

Beck's agent was fully aware of all the facts and argued in front of a different jury that Cardona had acted with malice. The injustice was compounded when the second jury was denied any context or substantive evidence of Cardona's unlawful conduct or the City's expressed position that it found the conduct to be "justified, lawful and proper" prior to promoting Cardona.

In addition, at the *Monell* trial, Beck claimed (for the first time, as he had not mentioned this in his deposition) that the investigation into Cardona's use of force was "past statute" and therefore he was not able to open the investigation absent new evidence. (2-ER-214:15–215:7). Beck relied on California Government Code Section 3304, (2-ER-215:24–216:12), which provides, in part, that no denial of promotion on grounds other than merit "shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation . . ." except, as here, when the limitations period is tolled. *Id.* at 3304(d)(1). The statute states "[i]f the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, **the one-year time period shall be tolled while that civil action is pending.**" *Id.* at (d)(2)(F) (emphasis added).[1]

1. In deposition, Beck never brought up the issue of the Statute of Limitation in deposition but instead admitted that he had the discretion to deny the promotion and reopen the investigation and deliberately chose not to. With another nail into the coffin of death to justice, the District Court denied Counsel's request to read this impeachment testimony or have the video of this portion of the deposition played to the jury. (1-ER-9:3-11:16).

Beck acknowledged that a civil suit tolls the limitations period while the suit is pending. (2-ER-216:23–217:3). Beck was aware that the limitations period could be tolled if the lawsuit was filed within one year of the incident. (2-ER-217:7-17). However, he ignored the possibility that the statute was tolled. (2-ER-217:18–218:4).

The one-year period was, as a matter of law, tolled. The incident occurred on May 14, 2015. (2-ER-217:4-6). Garza's lawsuit was initially filed in Superior Court in October 2015—well within the one-year period. (2-ER-263:22–264:1). At the conclusion of the *Monell* trial, Plaintiff moved for judgment as a matter of law under FRCP 50, which was denied. (1-EW-14:14-15:16). The entire *Monell* trial lasted a single day and resulted in a defense verdict. (2-ER-360:19–361:2). In its dissent, Judge Rawlinson agreed that Plaintiff should have prevailed as a matter of law stating, "[t]his collective imprimatur from the City adequately established that the City ratified the actions taken by Cardona" and "I would reverse the judgment in favor of the City and direct entry of judgment in favor of Garza on his Monell claim." App. A at 9a, 12a.

REASONS FOR GRANTING THE WRIT

a. The Ninth Circuit's Holding Conflicts With The Decisions Of Other Circuits

Two circuits have recognized that a policy maker's deliberate inaction is sufficient for a finding of *Monell* liability under the theory of ratification. *See e.g. Amnesty America v. Town of West Hartford*, 361 F.3d 113, 126-127 (2nd Cir. 2004) (holding "[a]nother method of implicating a policymaking official through subordinates' conduct is to

show that the policymaker was aware of a subordinate's unconstitutional actions, and consciously chose to ignore them, effectively ratifying the actions…because a single action on a policymaker's part is sufficient to create a municipal policy, a single instance of deliberate indifference to subordinates' actions can provide a basis for municipal liability"); *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 470 (7th Cir. 2001)("*Deliberate* inaction might be convincing evidence of delegation of final decisionmaking authority, or of ratification.") The panels' reasoning that the District Court did not abuse its discretion when it refused an instruction addressing the principles of constructive knowledge and refused to allow evidence which constituted Beck's general knowledge of the constitutional violation because "ratification under Monell requires a conscious, affirmative choice by a policymaker" is directly in conflict with the Second and Seventh Circuits findings that the an affirmative choice to ignore obvious violations constitutes a policymaker's conscious decision to ratify the conduct. Accordingly, certiorari is required to bring uniformity to the circuits.

b. The Ninth Circuit's Decision Goes Against the Purposes of *Monell* Liability and Allows Municipalities to Engage in Opportunistic Flip Flopping

It is well established that *Monell* liability can be based on constructive notice or knowledge. In *Castro v. City. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), for example, the Ninth Circuit recognized that where "a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or **constructive notice** that the particular omission is substantially certain to

result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied." *Id.* at 1076 (quoting *City of Canton v. Harris*, 489 U.S. 378, 396 (1989)) (emphasis added). Similarly, the requisite notice in supervisory liability under Section 1983 is "actual or constructive knowledge." *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994). "Constructive knowledge may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of these." *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir.1987).

Here, the LAPD advantageously, but unfairly, argued that Chief Beck did not ratify Cardona's unconstitutional action because he claimed that he did not have actual knowledge of the facts of the underlying constitutional violation – despite Beck's name and letterhead appearing on exoneration documents, Beck signing verified discovery responses attesting that he reviewed the IA Report, and Beck ultimately promoting Cardona within weeks of the jury's verdict that Cardona acted with malice, a finding to which Beck was aware. To evade *Monell* liability, Beck claimed ignorance of Cardona's underlying conduct, could not be tested on his reliance of a flawed investigation, could not be questioned on the letter showing his office approved of the conduct and the basis for it, and implicitly claim he was misinformed on the law regarding promotion.

Allowing Beck to claim "ignorance" flies in the face of the fundamental purposes behind Section 1983, which "was intended not only to provide *compensation* to the victims of past abuses, but to serve as a *deterrent* against future constitutional deprivations, as well." *Owen v. City*

of Independence, Mo., 445 U.S. 622, 651 (1980) (emphases added). The judgment for the City completely undermines these policies.

On one hand, because the City successfully argued that Cardona acted maliciously and therefore could not be indemnified, Garza was not able to collect his judgment from the bankrupt Cardona, thereby thwarting the policy of compensation. On the other, more critically, Cardona's subsequent promotion to Sergeant utterly eviscerates the policy of deterrence: rather than facing discipline or demotion for his unconstitutional and malicious misconduct, Cardona was *rewarded* with a promotion to Sergeant because Beck made the conscious choice not to ignore Cardona's constitutional violation.

A finding of constructive notice would also address the dissent's concern regarding the City's "self-serving and misleading interpretation of California Government Code § 3304 to avoid *Monell* liability." Dkt. 59-1, at p. 12, App. A at 11a-12a. At trial, Beck testified that he could not stop the promotion because the Government Code tied his hands. However, this was incorrect as a matter of law: the Act's tolling provision would have allowed Chief Beck to reopen the earlier internal affairs investigation due to Garza's civil lawsuit—which the City Attorney (representing Chief Beck) was actively litigating. The majority's analysis entirely neglects *the City*, as a municipal entity. If constructive notice and deliberate inaction is insufficient to establish ratification by a municipality, then *Monell* and the Circuit precedent interpreting it have lost all meaning. The majority's incentivization of compartmentalized, opportunistic "flip-flopping" and willful ignorance cries out for reconsideration.

CONCLUSION

For the foregoing reasons, Mr. Garza respectfully requests that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Dated: January 14, 2022

Respectfully submitted,

Paul L. Hoffman
Counsel of Record
Schonbrun Seplow Harris
Hoffman & Zeldes, LLP
200 Pier Avenue, Suite 226
Hermosa Beach, California 90254
(310) 717-7373
hoffpaul@aol.com

Counsel for Petitioner

APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 26, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-55952

DANIEL GARZA, AN INDIVIDUAL,

Plaintiff-Appellant,

v.

CITY OF LOS ANGELES,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California.
Stephen V. Wilson, District Judge, Presiding.

Argued and Submitted November 19, 2020
Pasadena, California

D.C. No. 2:16-cv-03579-SVW-AFM

Appendix A

MEMORANDUM[*]

Before: LINN,[**] RAWLINSON, and FORREST[***], Circuit Judges. Dissent by Judge RAWLINSON.

Off-duty Los Angeles Police Officer Mario Cardona assaulted Plaintiff-Appellant Daniel Garza, who was dating Cardona's stepdaughter. After a jury returned a $210,000 verdict against Cardona, Garza went to trial against Defendant-Appellee City of Los Angeles under a ratification theory of *Monell* liability.[1] He argued that the City ratified Cardona's unconstitutional actions by promoting him shortly after the jury verdict against Cardona in the first trial. The jury in the second trial found the City not liable, and Garza appeals. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

Evidentiary rulings. Garza argues it was error to exclude an Internal Affairs' investigation report (IA report) exonerating Cardona issued before the first trial, a letter sent to Garza summarizing the IA report, and portions of Police Chief Charlie Beck's deposition testimony. We find no abuse of discretion because the district court's decision

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

[***] Formerly known as Danielle J. Hunsaker.

1. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)

was not "beyond the pale of reasonable justification under the circumstances." *Est. of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016). As stated, Garza's ***sole*** ratification theory in his second trial and this appeal is that the City ratified Cardona's illegal conduct *by promoting him* after the jury's unfavorable verdict in the first trial, not by exonerating Cardona following an internal affairs investigation. Garza sought to introduce the IA report and summarizing letter as evidence of what Chief Beck knew when Cardona was promoted. After Chief Beck testified that he did not review the IA report, introducing its contents and the summarizing letter into evidence would not have helped the jury assess whether Chief Beck reviewed those documents before signing off on Cardona's promotion—the only probative purpose consistent with Garza's ratification theory. The district court allowed Chief Beck to be questioned about the IA report so the jury could assess his credibility regarding his knowledge of it. Under these circumstances, far from being "quintessential ratification evidence," as the dissent argues, these documents were not themselves probative of the issue presented by Garza.[2] For this reason, exclusion

2. To the extent the dissent argues that *Monell* ratification occurs anytime a letter summarizing an internal affairs report exonerating an officer is mailed on official letterhead—even if the *Monell* policymaker *never reviewed* said letter or the underlying report—and the investigated officer is later found guilty of the previously-exonerated conduct, such a proposition contradicts well-established caselaw. *See, e.g., Gillette v. Delmore*, 979 F.2d 1342, 1347-49 (9th Cir. 1992) (per curiam) (explaining *Monell* ratification requires the policymaker to make a "conscious, deliberate choice"). Still, this is beside the point, given Garza's sole ratification-by-promotion theory.

of the IA report and summarizing letter also was not prejudicial. *Wagner v. Cnty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013) (explaining evidentiary rulings are reversed only when "the exercise of discretion is both erroneous and prejudicial").

Nor did the district court abuse its discretion in excluding Chief Beck's deposition testimony. Chief Beck's testimony at trial and at his deposition were not contradictory. Rather, his trial testimony expanded upon his deposition testimony. It was not an abuse of discretion to exclude deposition testimony that offered little, if any, impeachment value. *See United States v. Parker*, 991 F.2d 1493, 1497 (9th Cir. 1993) ("When the trial court excludes evidence tending to impeach a witness, it has not abused its discretion as long as the jury has in its possession sufficient information to appraise the biases and motivations of the witness." (citation omitted)).

Judicial estoppel. Garza argues that the City took contradictory positions in the first trial against Cardona and the second trial against the City. *See Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1044-45 (9th Cir. 2016) (citation omitted) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position."). Again, we find no error. The City's position in the first trial—that Cardona acted with actual malice—is not inconsistent with the City's position in the second trial—that Cardona's promotion was dictated by the City's civil-service rules and was not a "conscious, deliberate"

ratification of his actions by the City. *Gillette*, 979 F.2d at 1347. Thus, while it does appear that the police department played "fast and loose" with the facts in its IA report, the City did not take contradictory litigation positions before the district court. *See Rissetto v. Plumbers & Steamfitters Loc. 343*, 94 F.3d 597, 601 (9th Cir. 1996) (citation omitted).

Imputed knowledge. Garza argues the district court abused its discretion in refusing to formulate a jury instruction that addressed "principles of agency and constructive/imputed knowledge," yet he concedes the jury instructions accurately presented his theory of the case. *See United States v. Knapp*, 120 F.3d 928, 930 (9th Cir. 1997). Because ratification under *Monell* requires a "conscious, affirmative choice" by a policymaker, *Gillette*, 979 F.2d at 1347, the district court did not abuse its discretion in declining to give Garza's requested instruction.

Judgment as a matter of law. Finally, Garza's conclusory argument for setting aside the jury's verdict fails because there is "evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008) (citation omitted). Namely, Chief Beck's testimony that he understood California law to prohibit him from reopening the investigation into Cardona following the jury's verdict in the first trial and, accordingly, to stall Cardona's promotion, directly contradicts Garza's ratification theory and is consistent with the jury's verdict.

The dissent focuses heavily on whether in fact California's "Public Safety Officers' Bill of Rights Act ["the Act"] negated Chief Beck's ability as the final policymaker to deny Cardona's promotion." Dissent at 4. Whether Chief Beck lacked the authority to prevent Cardona's promotion was discussed at length in Chief Beck's trial testimony and in the parties' arguments to the jury. Specifically, the City argued that Chief Beck could not withhold Cardona's promotion under governing law, including applicable civil service regulations, and thus promoting him was not a ratification of his conduct. Garza disputed this claim, arguing that Chief Beck could have stopped Cardona's promotion because the Act's tolling provision would have allowed Chief Beck to reopen the earlier internal affairs investigation. Contrary to the dissent's assertion, it was not error for the district court to allow the City to present its interpretation of the Act—as evidence that Chief Beck *did not* ratify Cardona's actions by promoting him—just as it was not error for the district court to allow Garza to present his tolling interpretation of the Act—as evidence that Chief Beck *did* ratify Cardona's actions by promoting him.[3] *See* Dissent at 5. The jury was presented with both parties' positions concerning whether

3. To be clear, neither party's interpretation of the civil service promotion statute, or the effect of its tolling provision, was deemed correct by the district court. Instead, the jury heard the parties' debate regarding whether Chief Beck could have stopped Cardona's promotion, and each side argued that the statute supported its conclusion. At the end of the day, for purposes of resolving the issues presented on appeal, it matters not which interpretation was correct—the contrasting interpretations were relevant only as evidence of whether Chief Beck deliberately and consciously ratified Cardona's unconstitutional acts in approving his promotion.

Chief Beck made a "conscious, affirmative choice" to ratify Cardona's actions—as *Monell* requires. *Gillette*, 979 F.3d at 1347. This was not error.

* * *

Although Garza's legal arguments fail, we share his frustration with the City and its police department's opportunistic flip-flopping from exonerating Cardona internally in its IA report to denouncing him publicly in a trial seeking monetary accountability. A group of citizens duly empaneled to serve as jurors, however, heard the evidence on this issue, assessed the City's conduct, and declined to hold it liable. Whereas Garza failed to show error by the district court, we will not disturb the jury's judgment.

AFFIRMED.[4]

4. The parties' motions to take judicial notice (Dkt. Nos. 30, 53) are denied as moot.

Appendix A

***Garza v. City of Los Angeles,* No. 19-55952**
Rawlinson, Circuit Judge, dissenting:

The majority expresses its disapproval of the police department's "opportunistic flipping from exonerating [Police Officer] Cardona in its [Internal Affairs] report to denouncing him publicly in a trial seeking monetary accountability." The majority nevertheless upholds the judgment in favor of the Los Angeles Police Department because a jury "assessed the City's conduct and declined to hold it liable." But because the district court excluded crucial relevant evidence revealing the City's duplicity, the jury's assessment was not fully informed. I respectfully dissent.

It is undisputed that the Internal Affairs Division of the City's Police Department exonerated Cardona of any wrongdoing. Importantly, Plaintiff Daniel Garza (Garza) was informed in a letter that an investigation was conducted "through several levels of review" at the Los Angeles Police Department, including Captain McManus, the Acting Commanding Officer of the Metropolitan Division "and the command staff of Internal Affairs." Following this review, the Los Angeles Police Department stated in the letter to Garza that Cardona's actions were "justified, lawful and proper." This statement alone was sufficient to establish ratification by the City of Los Angeles for the purpose of liability under *Monell v. Dept. of Soc. Svcs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The letter contained the seal of the Los Angeles Police Department and was written on Police Department letterhead with Los Angeles Mayor Eric Garcetti and

Police Chief Charlie Beck listed as the senders of the letter. Finally, the letter contained Chief Beck's signature block. This collective imprimatur from the City adequately established that the City ratified the actions taken by Cardona. *See Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) (explaining that ratification occurs when "authorized policymakers approve a subordinate's decision and the basis for it") (citations omitted).[1]

But the story doesn't end there. In Garza's civil action against Cardona, the City did a complete about face, arguing that Cardona's use of excessive force against Garza was malicious, rather than "justified, lawful, and proper," as determined by the Police Department's Internal Affairs Division. This tactic was successful for the City, resulting in a jury verdict against Cardona, but no *Monell* liability for the City. Shortly after the trial and adverse verdict against Cardona, the City promoted Cardona to the rank of sergeant. This promotion prompted Garza to request a new trial on the City's *Monell* liability, and the district court granted the request.

At the new trial of the City's *Monell* liability, the district court inexplicably excluded from evidence the Internal Affairs Report exonerating Cardona. As previously discussed, this report was quintessential ratification evidence. *See id.*[2] The district court abused its

1. The district court should have granted judgment in favor of Garza at this point.

2. The majority makes much of the fact that Chief Beck denied reading the Internal Affairs Report. However, Chief Beck could

discretion in excluding this critically relevant evidence. *See Obrey v. Johnson*, 400 F.3d 691, 701-02 (9th Cir. 2005) (concluding that the district court's exclusion of directly probative evidence required reversal). But even without the evidence of the Internal Affairs exoneration, Chief Beck's promotion of Cardona in the face of his knowledge that Cardona had been found liable for the use of excessive force also constituted ratification of Cardona's actions by the City.

As a preliminary matter, the district court committed no error in finding that Chief Beck was a policymaker. *See Barone v. City of Springfield, Oregon*, 902 F.3d 1091, 1108 (9th Cir. 2018) (concluding *de novo* that the City Manager was the policymaker). To determine whether a public official is a policymaker, we consult state law. *See Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004). The California Supreme Court has declared that the Police Chief for the

---

not deny that the City of Los Angeles sent a letter to Garza over the signature line of both the mayor and Chief Beck endorsing the exoneration of Cardone by the Los Angeles Police Department Internal Affairs Division. *See Harper v. City of Los Angeles*, 533 F.3d 1010, 1025 (9th Cir. 2008) (reiterating that ratifying a constitutional deprivation "suffice[d] for official liability"). The summarizing letter and Internal Affairs Report were direct evidence of *Monell* liability and were improperly excluded. *See Obrey v. Johnson*, 400 F.3d 691, 701-02 (9th Cir. 2005) (reversing exclusion of directly probative evidence). And Chief Beck never denied reading the letter. Under the majority's view, a policymaker may avoid *Monell* exposure by simply denying knowledge of the contents of a document prepared pursuant to his policies. That is simply not the law. *See Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) (explaining that ratification occurs when "policymakers approve a subordinate's decision").

City of Los Angeles Police Department is "[t]he appointing authority for the [Police] Department." *Riveros v. City of Los Angeles*, 41 Cal. App. 4th 1342, 1350, 49 Cal. Rptr. 2d 238, *as modified on denial of rehearing* (1996), thereby making him the policymaker for the Department. *See Lytle*, 382 F.3d at 983 (defining a policymaker as someone "in a position of authority such that a final decision by that person may appropriately be attributable" to the government agency). It is indisputable that a final decision by the Chief of the Los Angeles Police Department "may appropriately be attributable" to that Police Department. *Id.*; *see also Harper v. City of Los Angeles*, 533 F.3d 1010, 1025 (9th Cir. 2008) (confirming that a decision by the Chief of the Los Angeles Police Department to ratify a constitutional deprivation "suffice[d] for official liability").

The City argued that a provision of the Public Safety Officers' Bill of Rights Act negated Chief Beck's ability as the policymaker to deny Cardona's promotion. The City specifically relied on California Government Code § 3304(d)(1), which provides that no promotion may be denied unless an investigation of the incident used as the basis for denial of the promotion is completed "within one year of the public agency's discovery" of the incident. However, as the City conceded, the statute expressly tolls the one-year period of investigation "while [a] civil action is pending" in a case "where the public safety officer is named as a party defendant." California Government Code § 3304(2)(F).

The district court ignored § 3304(2)(F), and erred in allowing the City to present this argument to the jury

based on its self-serving and misleading interpretation of California Government Code § 3304 to avoid *Monell* liability. Indeed, at oral argument before us, counsel for the City was unable to satisfactorily answer the question of what would have happened if Chief Beck had not signed the promotion order. In my view, the inability to address that question strongly supports an inference that Chief Beck actually had the authority to deny the promotion as the appointing authority.[3] The parties then could have possibly litigated whether or not the denial violated the Public Safety Officers' Bill of Rights. But it was error for the district court to allow the City to introduce its interpretation of the statute as negating Chief Beck's ratification of Cardona's use of excessive force without permitting Garza to introduce evidence that would establish Chief Beck's ratification. *See Harper*, 533 F.3d at 1026 (upholding *Monell* liability when the Los Angeles Chief of Police "approved of the Task Force's [unconstitutional] tactics").

Because the district court committed several critical evidentiary errors in this case,[4] I would reverse the judgment in favor of the City and direct entry of judgment in favor of Garza on his *Monell* claim.

---

3. In his deposition, Chief Beck acknowledged that he could have reopened the investigation into Cardona's misconduct. But the district court excluded this testimony together with the letter to Garza and the Internal Affairs Report.

4. The majority states that the jury heard the evidence and ruled against Garza. But because of the district court's erroneous evidentiary rulings, the jury did not hear ALL the evidence.

APPENDIX B — TRANSCRIPT OF THE PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, DATED JULY 16, 2019

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV 16-03579-SVW

HONORABLE STEPHEN V. WILSON,
DISTRICT JUDGE PRESIDING

DANIEL GARZA,

Plaintiff,

vs.

CITY OF LOS ANGELES, *et al.*,

Defendants.

REPORTER'S TRANSCRIPT
OF JURY TRIAL PROCEEDINGS

TRIAL DAY 1

LOS ANGELES, CALIFORNIA

TUESDAY, JULY 16, 2019

Appendix B

***

[5]issues continuously arise. First, let me say that it appears that the plaintiff wants to argue that there is imputed knowledge to former Chief Beck regarding what the City knew and so forth. In my view, there is no opportunity for imputed knowledge in this case. It is [6]what Beck says he knew and what he -- and whether what he did was deliberate under the instructions and whether that amounted to ratification. The plaintiff can

***

With regard to -- and the other issue was the plaintiff's argument that they ought to be allowed to argue that the earlier internal investigation which cleared Officer Cardona ought to be part of the theory of ratification. The Court found earlier that that could not be a basis for ratification and allow the plaintiff further discovery when it found out that the promotion was made after the jury verdict; but the internal investigation clearance of Officer Cardona is not a basis for ratification and can't be argued as such. Certainly, the former Chief Beck can be questioned about his knowledge or involvement in the earlier investigation. This morning the parties -- both sides filed requests for judicial notice. And with regard to plaintiff's request for judicial notice, there are ten items in their submission. With regard to item one that the City attorney for the City of Los Angeles took the position, I guess at trial that Officer Cardona [7]acted with malice when he used excessive force against Garza, the issue again is what Beck knew and if he knew that. And the

City -- I mean, the plaintiff can question former Chief Beck about that; but at this point, the Court will not take judicial notice of that.

With regard to items 2 through 6, those are

***

[182]MR. DeSIMONE: -- 3304 -- I'm sorry, Your Honor -- 3304; that pursuant to that, he did not need new information. The evidence that was introduced at trial was that there was a -- without any rebuttal was that a lawsuit was filed within that year which would have tolled some of the absolute opportunity to open it up. So in this instance, I think that the only element that remains to be decided by a jury is whether Chief Beck approved of the conduct of Officer Cardona and the basis for it, and we would submit that in signing off o that promotion within three weeks of knowing of that verdict, that he did approve that conduct and the basis for it, and the directed verdict should be entered in favor of the plaintiff.

THE COURT: Your motion is denied. I'm going to give you a chance to read the instructions.

***

APPENDIX C — TRANSCRIPT OF THE PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, DATED JULY 10, 2019

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV 16-03579-SVW

HONORABLE STEPHEN V. WILSON,
DISTRICT JUDGE PRESIDING

DANIEL GARZA,

Plaintiff,

vs.

CITY OF LOS ANGELES, *et al.*,

Defendants.

REPORTER'S TRANSCRIPT
OF FURTHER PRETRIAL PROCEEDINGS

LOS ANGELES, CALIFORNIA

TUESDAY, JULY 10, 2019

Appendix C

***

[10]the City, as well as the excerpts from the summary judgment.

THE COURT: I don't think you have to get into that. You can just ask him. I don't see any need to get to the transcript. He wasn't here. It what's he knew. You can ask him whether he read the transcript, but don't -- don't misuse the transcript. If he says he didn't, that's the end of it.

***

[25]issues as you have presented them. So the clear answer is, I think if that's what happens, then you would have a right to -- to get into what may have been developed at the trial that wasn't in the investigation if -- if Beck knows about these things. It isn't just what -- what the difference is. You would have to lay a basis for it -- that Beck read the -- the investigative report or someone summarized it to him and -- and he wasn't here for the trial probably and someone told him what [26]happened at the trial. I mean, you could inquire -- in other words, it's fair -- did you know that -- that at the trial, these additional facts were developed that weren't in the -- you could ask them. If he says he didn't, then it's a credibility call for the jury to know whether he did or didn't. So I don't think he -- you have a right to get into the trial itself. You can inquire.

***

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED APRIL 12, 2019

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:16-cv-03579-SVW-AFM

DANIEL GARZA

v.

CITY OF LOS ANGELES *et al.*

Decided April 12, 2019
Filed April 12, 2019

CIVIL MINUTES - GENERAL

Present: The Honorable STEPHEN V. WILSON, U.S. District Judge

I. Introduction

The facts of this case have been discussed in the Court's previous orders and need not be recited in detail here. Prior to the jury's verdict that Defendant Mario Cardona used excessive force against Plaintiff Daniel Garza, the Court granted summary judgment for City Defendants on one of Plaintiff's *Monell* theories, holding that Plaintiff failed to raise a triable issue of fact with respect to City Defendants' ratification of Cardona's twisting Plaintiff's wrists based on an LAPD letter exonerating Cardona.

Dkt. 150 at 11-13. However, the Court denied summary judgment for City Defendants on another ratification theory regarding Cardona's use of a wrist lock. *Id.* at 13-14. After the trial, the Court judged as matter of law that Plaintiff's second ratification theory regarding a wrist lock was inadequate because a reasonable jury would not have a legally sufficient evidentiary basis to find that Cardona acted pursuant to an official policy. Dkt. 197 at 15. Thus, the Court rejected both of Plaintiff's *Monell* ratification theories as a matter of law.

Also after the trial, Plaintiff obtained information that Cardona was promoted from Officer to Sergeant. Dkt. 226 at 2. Based on this new evidence, and pursuant to Local Rule 7-18, Plaintiff moved for reconsideration of the Court's prior summary judgment order as it pertained to City Defendants' *Monell* liability on May 25, 2018. *Id.* at ii. The relief that Plaintiff requested in his motion for reconsideration was "leave to seek discovery pertaining to Cardona's promotion." *Id.* at 10.

The Court held a hearing on July 23, 2018, after which the Court ordered City Defendants to confirm when Cardona had been promoted. Dkt. 234. City Defendants submitted a declaration of Sergeant John Vasquez, which stated that Cardona was put on a certified "promotional list" on November 16, 2016—which was over seven months before the June 26, 2017 verdict in this case. Dkt. 235 ¶ 3. The declaration also stated that the "effective date" of Cardona's promotion was August 6, 2017—less than two months after the jury verdict. *Id.* The Court found the declaration inadequate and ordered Sergeant Vasquez to

personally appear. Dkt. 238. Sergeant Vasquez appeared at a hearing on September 20, 2018. Dkt. 244. The Court concluded that Plaintiff had made a sufficient showing and granted Plaintiff's motion for reconsideration, reopening discovery for a period of sixty days. *Id.*

Plaintiff initially deposed three individuals involved in personnel decisions, including Sergeant Vasquez. Dkt. 248 at 3-4. However, discovery disputes arose and Plaintiff filed a motion to compel further depositions and responses by City Defendants. *See id.* The Court held a hearing on December 10, 2018, at which it permitted Plaintiff to take the depositions of former Chief Beck and former Assistant Chief Villegas. Dkt. 259. The Court held a status conference on January 14, 2019, at which it ordered further briefing on the issue of City Defendants' *Monell* liability given the new evidence uncovered by Plaintiff. Dkt. 262.

On January 28, 2019, Plaintiff filed a brief regarding City Defendants' *Monell* liability. Dkt. 265. As a technical matter, no motion is currently pending before the Court. However, the Court construes Plaintiff's *Monell* brief as a new motion for reconsideration, pursuant to L.R. 7-18, of the Court's prior summary judgment and judgment as a matter of law orders as they pertained to City Defendants' *Monell* liability on a ratification theory.

II. Legal Standard

As discussed in this Court's June 20, 2017 order, a plaintiff may establish municipal liability under 42 U.S.C. § 1983 if "an official with final policy-making authority

ratified a subordinate's unconstitutional decision or action." *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992) (internal citations omitted); *see also Christie v. Iopa*, 176 F.3d 1231, 1238 (9th Cir. 1999) ("A municipality . . . can be liable for an isolated constitutional violation if the final policymaker 'ratified' a subordinate's actions."). To establish ratification, "a plaintiff must prove that the 'authorized policymakers approve a subordinate's decision and the basis for it.'" *Christie*, 176 F.3d at 1239 (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). "Accordingly, ratification requires both knowledge of the alleged constitutional violation, and proof that the policymaker specifically approved of the subordinate's act." *Lytle v. Carl*, 382 F.3d 978, 988 n.2 (9th Cir. 2004).

The ratification doctrine's causation element is distinct from *Monell* liability's generally. The ratification doctrine "is based on a municipal policymaker's decision that occurs *after* the constitutional deprivation and endorses a subordinate's conduct causing the injury." *Tubar v. Clift*, No. C05-1154-JCC, 2008 WL 5142932, at *5 (W.D. Wash. Dec. 5, 2008) (emphasis added). Thus, a "plaintiff need only show a causal link between the subordinate's conduct and the constitutional injury." *Id.* (quoting *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996) (holding that ratification occurs where an official adopts and approves of "the acts of others who *caused* the constitutional violation") (emphasis added)).[1]

1. The Ninth Circuit Manual of Model Civil Jury Instructions sheds additional light on causation in the context of the ratification doctrine. "The concept of ratification often causes confusion in light of the causation requirement; because ratification occurs after an

Where a plaintiff alleges that a "single decision by a municipal policymaker" is "sufficient to trigger section 1983 liability under *Monell*," "[t]here must . . . be evidence of a conscious, affirmative choice"—that is, a "deliberate choice to follow a course of action [that] is made from among various alternatives" by the final policymaker. *Gillette*, 979 F.2d at 1347. "[T]he identification of those officials whose decisions represent the official policy of the local governmental unit is . . . a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (emphasis in original). However, generally, "[o]nce those officials . . . have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue . . . ." *Id.* (emphasis in original).

III. Discussion

A. Relevant New Factual Allegations

What follows are Plaintiff's new factual allegations related to this new motion for reconsideration. On June 26, 2017, a jury determined that Cardona used excessive and unreasonable force against Plaintiff. Less than two months after the jury verdict, effective on August 6, 2017, Cardona was promoted to Sergeant. Dkt. 265 at 8. Former Chief Beck has now testified that he became aware of the

---

allegedly wrongful act, it cannot have caused that underlying act. . . . Establishing ratification requires proof of the affirmance of a prior act."). Ninth Circuit Manual of Model Civil Jury Instructions No. 9.7 (2017).

jury verdict soon after the jury's decision through a *Los Angeles Times* article that was published on June 29, 2017 and by two individuals in the LAPD's risk management department. *Id.* In addition, former Chief Beck was made aware of the case, verdict, and jury findings during a July 25, 2017 police commission meeting, when Plaintiff's mother spoke for two minutes before him. *Id.*

Former Assistant Chief Villegas has now also testified that he became aware of the jury verdict within a day or two of the June 29, 2017 *Los Angeles Times* article. *Id.* at 9. Former Assistant Chief Villegas also testified that he would have a one-on-one meeting with Sergeant Vasquez to discuss each promotion. *Id.* The meeting about Cardona's promotion appears to have occurred on July 7, 2017, at which time Sergeant Vasquez sent an email stating that Cardona was "good to go." *Id.* Former Assistant Chief Villegas testified that seeing the *Los Angeles Times* article would have been a "red flag" that would have caused him to reach out to members of internal affairs. *Id.*

On July 17, 2017, former Chief Beck signed Transfer Order No. 8, which promoted Cardona to Sergeant effective August 6, 2017. *Id.* Former Chief Beck later testified that he "could have begun a process that would have [placed Cardona's promotion on hold and opened up a new inquiry]," and that "[he] did [deliberately choose not to open up that process]." Dkt. 265-2, Ex. A at 46:1-13.

B. The Parties' Contentions

There is no dispute as to former Chief Beck's role; both parties acknowledge that, as Chief, he was the final

policymaking authority of the LAPD. Rather, the dispute relates to the significance of former Chief Beck's action (or inaction).

Plaintiff argues that the facts show that former Chief Beck ratified Cardona's unconstitutional actions by making a conscious and affirmative choice to promote Cardona after learning of the jury verdict. Dkt. 265 at 10. According to Plaintiff, former Chief Beck testified that he deliberately decided to promote Cardona rather than placing the promotion on hold. *Id.* at 11. This, according to Plaintiff, "clearly and unambiguously demonstrates that Chief Beck made the deliberate decision to ratify Cardona's unconstitutional and malicious actions." *Id.* Plaintiff cites a Ninth Circuit case, which, according to Plaintiff, held that a chief of police's comments to reporters about his reaction to a jury verdict—that the plaintiff was lucky that he had only gotten a broken nose—could be used as evidence on the issue of ratification. *Id.* at 10; *Larez v. City of Los Angeles*, 946 F.2d 630, 636 (9th Cir. 1991). In addition, the Court stated that, "[t]o the extent the opinions of [a final policymaker] shed light on the operation, custom, or policy of his department, or on his ratification or condonation of the injurious acts, his statements, if admi[ssible . . .], may, of course, be used as evidence on the issue of his liability and that of the [c]ity." *Larez*, 946 F.2d at 645.

In opposition, City Defendants generally characterize Plaintiff's position as "request[ing] that this Court make new law that a promotion after an adverse jury verdict . . . is tantamount to ratification" and contend that there is

"no legal authority that necessitates this determination." Dkt. 269 at 1. City Defendants also make several specific arguments. First, they argue that, if Cardona's "promotion, like the letter [that Plaintiff relied on for his first ratification theory], was based on the LAPD's internal investigation and subsequent determination that Plaintiff's allegations of unauthorized force were unfounded, then the promotion, like the letter, could not have ratified Cardona's conduct." *Id.* at 9. Second, City Defendants contend that Plaintiff's motion for reconsideration is untimely. *Id.* at 10-12. Third, they argue that "no case has required that a police department reevaluate its internal investigation and findings because a jury subsequently disagreed with the department's assessment." *Id.* at 12.

C. Ratification Analysis

Given Plaintiff's reliance on *Larez*, the case is worth considering in greater depth. *Larez* involved a civil rights action that arose out of an LAPD search of the Larezes's home. *Larez*, 946 F.2d at 634. The search was made regarding a suspected gang killing. *Id.* Despite the fact that another man had already confessed to the murder, LAPD officers obtained a search warrant for the Larezes's home on the belief that the murder weapon might be found there (because the suspect was friends with one of the Larezes). *Id.* The "CRASH" unit conducted the search. *Id.* Upon entering the home, the officers physically and verbally mistreated members of the family, including "hurl[ing] Jessie [Larez] across the room," "kick[ing] him and smash[ing] his face into the floor." *Id.* One officer "pointed his service revolver at Jessie's head and said to

him, 'I could blow your fucking head off right here and nobody can prove you did not try to do something.'" *Id.* Jessie Larez sustained a broken nose during the incident.[2] *Id.*

Jessie Larez lodged a complaint with the LAPD. *Id.* at 635. The department's Internal Affairs division assigned a CRASH detective to investigate the complaint.[3] Larez was ultimately notified, in a letter signed by former Chief Gates, that none of the allegations in his complaint could be sustained. *Id.* Consequently, the Larezes filed a lawsuit. *Id.* The Larezes' theory was that the officers involved in the search had violated their constitutional rights to be free from unreasonable searches and the use of excessive force. *Id.* Against former Chief Gates and the City, the Larezes alleged the "perpetuation of unconstitutional policies or customs of excessive force, illegal searches . . ., and inadequate citizen complaint procedures which have the effect of encouraging the excessive use of force." *Id.*

The trial was bifurcated between the case against the officers and the case against Gates and the City. *Id.* The Larezes prevailed against the officers and so the case proceeded to trial on the liability of Gates and the City. *Id.* The Larezes called an expert—a professor and former New York City police officer—who criticized the LAPD's investigation of Jessie Larez's complaint

---

2. The search involved many other alleged violations—too numerous to list here. *See id.* at 634-35.

3. The detective had not personally participated in the search but was from the same unit as those who had. *Id.*

given that "CRASH, the unit responsible for the alleged constitutional violations, rather than Internal Affairs, conducted the investigation." *Id.* He also testified about a two-year comparative study he had conducted, which "found that complaints brought against officers by the department were almost always sustained while citizen complaints were rarely sustained . . .[, which] supported the Larezes' theory that officers were encouraged . . . to use excessive force, knowing that complaints involving a credibility duel between citizen and officer are never sustained." *Id.* at 635-36.

Former Chief Gates also testified at the trial. *Id.* at 636. After he left the courtroom, he was questioned by reporters about his reaction to the jury verdict against his officers in the first phase of the trial. *Id.* At least three Los Angeles newspapers attributed several statements to him, including that "Jessie Larez had been lucky that he only had gotten a broken nose." *Id.* All of former Chief Gates' statements to the newspapers were admitted over objection at trial. *Id.* Ultimately, the jury found former Chief Gates and the City liable. *Id.*

Former Chief Gates and the City appealed. In particular, they argued that former Chief Gates' reported statements should not have been admitted. *Id.* at 639. The Ninth Circuit agreed, concluding that the statements were erroneously admitted hearsay and that their admission was not harmless. *Id.* at 641-42. However, the court nonetheless affirmed former Chief Gates' official capacity liability and the City's liability on the ground that there was sufficient evidence of a departmental policy or custom of resorting to the use of excessive force. *Id.* at 647-48.

Appendix D

Larez's utility in resolving the instant case is ultimately limited. First, the Ninth Circuit did not rely on the police chief's statements in affirming the jury's finding of *Monell* liability because those statements were deemed improperly admitted at trial; rather, the court engaged in a typical *Monell* analysis based on a city's policy or custom. Second, even if former Chief Gates' comments to the newspaper reporters had supported a finding of ratification in *Larez*, his comments were entirely different from the purported ratification in this case. In *Larez*, when explicitly asked about his reaction to the jury verdict against his officers, former Chief Gates stated that Jessie Larez had been lucky that he only had gotten a broken nose. The clear implication was that Larez deserved the broken nose—or worse—and the officer's actions were justified notwithstanding the verdict. Crucially, former Chief Gates was expressly commenting on the specific, unconstitutional actions of his officer. By contrast, here former Chief Beck's alleged ratification is that he signed off on promoting Cardona rather than placing the promotion on hold once he learned of the jury verdict against Cardona. *Larez* supports Plaintiff's argument only in its general statement of law that the opinions of a final policymaker may be used as evidence of ratification. However, this legal principle is not contested. Indeed, that former Chief Beck's statements are relevant to ratification is in large part why the Court reopened discovery.

The parties have not identified, and the Court has not found, cases that are closely analogous to the instant facts. Two district court cases involve the promotion of officers after the officers engaged in allegedly unlawful conduct.

However, these cases are also ultimately unhelpful. In *Bennett v. Cty of Shasta*, No. 2:15-cv-01764-MCE-CMK, 2017 WL 3394128, at *4 (E.D. Cal. Aug. 8, 2017), the plaintiff alleged that an officer unlawfully entered his property and used excessive force. After the purportedly[4] unlawful property raid, the officer was promoted by the Sheriff, which, according to the plaintiff, meant that the officer's conduct during the raid was condoned by the Sheriff and the county. *Id.* The court rejected this argument because the plaintiff "point[ed] to no authority standing for the proposition that the promotion of an officer alone constitutes ratification of that officer's conduct absent some facts from which it can be inferred that the entity's final policymaker actually had knowledge of and approved of the purportedly unconstitutional conduct." *Id.* In other words, there was no evidence in the record to suggest that the Sheriff approved of the allegedly unlawful raid or even knew about it. Lacking such allegations, the court dismissed the *Monell* claim.

---

4. Notably, no legal determination was ever made—by either the court or a jury—that the property raid was unlawful. Unlike the instant case, Plaintiff pursued only municipal liability, and so there was no separate threshold finding that an individual acted unconstitutionally. *Id.* at *3. Rather, the court, in considering a motion to dismiss, noted that it had "previously concluded that Plaintiff failed to state a claim on any of his theories because," as a threshold matter (and among other reasons), "the facts did not support a finding of a constitutional violation." *Id.* at *4. The court then dismissed the plaintiff's Second Amended Complaint, which "fare[d] no better," "[f]or the same reasons" as before. *Id.* Thus, for the purpose of its one-sentence ratification analysis, the court refers to "*purportedly* unconstitutional conduct." *Id.* (emphasis added).

Moua v. McAbee is similar. No. 1:06-cv-00216 OWW SMS, 2007 WL 3492157 (E.D. Cal. Nov. 14, 2007). In *Moua*, an officer was promoted after an allegedly[5] unlawful search conducted by the officer. *Id.* at *10, 13. The plaintiff argued that the officer's promotion was a ratification by the City of Merced of the officer's alleged unconstitutional conduct. *Id.* at *13. The court first recited the *Christie* standard—that to establish ratification, "a plaintiff must prove that the authorized policymakers approve a subordinate's decision and the basis for it." *Christie*, 176 F.3d at 1239 (internal citation and quotation marks omitted). The court then stated that the plaintiff had "not submitted any evidence that any command level policymaker promoted [the officer] or that any supervisor had knowledge of the alleged conduct, let alone that such a person made a conscious affirmative choice to ratify the conduct in question." *Moua*, 2007 WL 3492157, at *13 (internal citation and quotation marks omitted). The court ultimately granted summary judgment in favor of the City of Merced as to the *Monell* claim. *Id.*

City Defendants argue that these cases demonstrate that "promotion does not constitute *per se* ratification." Dkt. 269 at 16. This is certainly true; an officer's promotion that occurs after the officer's unconstitutional action is not *necessarily* ratification. But this does not preclude the *possibility* that the promotion is ratification. *Bennett*

5. As in *Bennett*, in *Moua* there was no prior legal determination made that the search was unlawful. Rather, the Court considered ratification based on the plaintiff's allegation that an officer was promoted after the officer engaged in "*alleged* unconstitutional conduct." *Id.* at *13.

and *Moua* do not demonstrate or even suggest that a promotion can *never* constitute ratification; rather, ratification requires a certain evidentiary basis that was lacking in those cases. In sum, a promotion of an officer that occurs after the officer's unlawful act is neither *per se* ratification nor *per se* not ratification; whether it constitutes ratification depends on the factfinder's findings and inferences based on the evidence in the record. In other words, unless the undisputed evidence is so compelling that no reasonable jury could conclude otherwise, ratification in this context is not a question of law that is suitable on motions for summary judgment or judgment as a matter of law. Thus, the relevant inquiry at this stage is whether, given the facts before the Court, the Court can hold—as it did in its previous orders—that, as a matter of law, there is no triable issue regarding City Defendants' *Monell* liability on a ratification theory. If not, the Court must grant Plaintiff's motion for reconsideration and permit the case to proceed to a jury.

The evidence in the record on the issue of Cardona's promotion is not so compelling in favor of City Defendants that no reasonable jury could rule in favor of Plaintiff. It is undisputed that former Chief Beck knew about the jury verdict when he signed Transfer Order No. 8, which formalized Cardona's promotion. Former Chief Beck has now testified that he could have begun a process that would have placed Cardona's promotion on hold and opened a new inquiry, but he chose not to do so by signing Transfer Order No. 8. The significance of these facts is within the purview of a jury. Specifically, a reasonable jury could—but would not necessarily—find

that former Chief Beck's testimony is sufficient evidence to establish that former Chief Beck approved of Cardona's unconstitutional conduct and made a deliberate choice to permit Cardona's promotion to proceed rather than overruling the promotion or opening an investigation, and that such a deliberate choice constitutes ratification.

City Defendants' arguments in opposition to Plaintiff's motion are unavailing. First, this situation is distinguishable from the letter that the Court considered and rejected as evidence of ratification in its June 20, 2017 order. Dkt. 150. That letter, an internal LAPD document that exonerated Cardona, was written before the jury verdict. Thus, it is entirely different from the ratification theory that Plaintiff is now advancing. Second, Plaintiff's motion is not untimely. By its plain text, L.R. 7-18 "provides for no time limitation for a motion for reconsideration." *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1185 n.13 (C.D. Cal. 2003); *Ketab Corp. v. Mesriani Law Grp.*, No. 2:14-cv-07241-RSWL (MRW), 2015 WL 2084469, at *2 n.4 (C.D. Cal. May 5, 2015). Courts have interpreted the rule as "providing for a reasonable time within which to seek reconsideration." *Meredith v. Erath*, No. 99CV13100, 2001 WL 1729626, at *1 (C.D. Cal. Sept. 19, 2001); *see also In re Katz Interactive Call Processing Patent Litig.*, No. CV 2:07-2134-RGK-FFMx, 2012 WL 12906389, at *2 (C.D. Cal. Dec. 18, 2012) (noting that L.R. 7-18 "requires parties to file such motions within a reasonable time period"). The Court does not view the delay in this case as necessarily unreasonable. Third, at this stage it is not relevant whether, as City Defendants allege, any case has required that a police department

reevaluate its internal investigation and findings when a jury subsequently disagrees with the department's assessment. The Court is not concluding as a matter of law that former Chief Beck ratified Cardona's unconstitutional conduct; rather, the Court is merely stating that, on this record, it cannot make any determination as to ratification as a matter of law.[6]

IV. Conclusion

For the above reasons, the Court GRANTS Plaintiff's new motion for reconsideration of the Court's prior summary judgment order, Dkt. 150, and judgment as a matter of law order, Dkt. 197, insofar as the orders held that City Defendants are not liable on a *Monell* ratification theory as a matter of law.

A trial on the issue of City Defendants' *Monell* liability will take place on June 18, 2019 at 9 a.m., with a pre-trial conference on June 10, 2019 at 3 p.m.

IT IS SO ORDERED.

---

6. This statement, of course, does not preclude City Defendants from arguing at trial that former Chief Beck did not ratify Cardona's conduct because, for example, in signing Transfer Order No. 8 former Chief Beck was simply relying on the police department's internal investigation and findings, which he found persuasive despite the jury verdict. A jury would then assess the weight of this and other arguments in light of the fact that City Defendants were apparently convinced even before the trial that Cardona had acted unlawfully because they declined to defend him and argued before the jury that Cardona had acted with malice and had knowingly deprived Plaintiff of his rights.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED JUNE 20, 2017

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

2:16-cv-03579-SVW-AFM

DANIEL GARZA,

v.

CITY OF LOS ANGELES; MARIO CARDONA; CHARLIE BECK.

June 20, 2017, Decided;
June 20, 2017, Filed

Honorable STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [73].

Plaintiff Daniel Garza ("Plaintiff") brings this action against the City of Los Angeles ("City"), Chief of Police Charlie Beck,[1] and Officer Mario Cardona, for violation

1. The Plaintiff has brought claims against Chief Beck in both his official and individual capacities.

of his civil rights under 42 U.S.C. § 1983, in addition to various state law torts. Dkt. 1. The Plaintiff alleges that he was detained, arrested, and handcuffed by Officer Cardona because of a personal vendetta Cardona had against him as the result of the Plaintiff's relationship with Cardona's stepdaughter. The Plaintiff has brought § 1983 claims for excessive force against Cardona as well as municipal liability claims against the City and Chief Beck ("City Defendants"). Additionally, Cardona has brought crossclaims against City Defendants for failure to indemnify and defend him as required by state law.

Presently before the Court is City Defendants' Motion for Summary Judgment. City Defendants contend that the undisputed facts do not support a finding of municipal liability under *Monell*. Additionally, they argue that Cardona's crossclaims should be dismissed because the undisputed facts demonstrate that Cardona was acting in purely a personal capacity and therefore was not acting with the scope of his employment at the time of the incident. For the following reasons, the Motion is **GRANTED IN PART and DENIED IN PART**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Significantly, many of the material facts in this case are disputed. All three parties have different accounts of what happened leading up to and including the incident in question, especially regarding who was responsible for starting the fight at the center of this controversy.

Appendix E

A. Plaintiff and Villanueva's Relationship

Plaintiff Garza and Defendant Cardona had been neighbors since late 2012/early 2013. Dkt. 74, UMF ¶ 1. Cardona was living with his wife, Cherie, who had a daughter named Naomi Villanueva ("Villanueva").

In September 2013, the Plaintiff and Villanueva began to date. Dkt. 74, UMF ¶ 7. City Defendants claim that the Plaintiff and Villanueva's relationship had become romantic, *id.*, whereas Cardona notes that Villanueva did not refer to her relationship with the Plaintiff as romantic but stated she did not understand what a dating relationship was. Dkt. 91, SGI ¶ 7. The Plaintiff claims that Villanueva and he began to date exclusively. Dkt. 94, SGI ¶ 7. Cardona and Cherie then forbid the Plaintiff from dating Villanueva because they believed the Plaintiff was too old for Villanueva. Dkt. 74, UMF ¶ 8. The Plaintiff was 24, and Villanueva had just turned 18. *Id.* at ¶ 10. Despite Cardona and Cherie's disapproval, the Plaintiff and Villanueva secretly dated. *Id.* at ¶ 11. The date on which the couple broke up is disputed. City Defendants contend that the couple broke up on the night of May 1, 2015. *Id.* at ¶ 11. On the other hand, Villanueva testified that they had broken up a few days before May 1, 2015. Dkt. 91, SGI ¶ 11.

B. Night of May 1, 2015

Cardona and the Plaintiff offer diametrically opposing descriptions of what occurred on May 1 and 2, 2015.

Appendix E

Cardona alleges that on the night of May 1, 2015, the Plaintiff entered Villanueva's bedroom via the window without her knowledge or consent. Dkt. 91, SGI ¶ 60. When Villanueva and her roommate asked the Plaintiff to leave, the Plaintiff left and returned with a metal baseball bat from his trunk. *Id.* at ¶¶ 61, 62. The Plaintiff then grabbed Villanueva's arm, and without her consent, took her to his car. *Id.* at ¶ 63. The Plaintiff drove around for fifteen to twenty minutes while holding Villanueva against her will. *Id.* at ¶ 65. The Plaintiff forced Villanueva to go to Cardona's house and knocked on the door, while Villanueva screamed for her mother. On the early morning of May 2, 2015, Cardona watched Plaintiff flee his house and did not follow him. *Id.* at 67.

According to the Plaintiff, on the night of May 1, 2015, Villanueva opened the front door of her apartment for him and they went into her room together to talk. Dkt. 94, PSSUMF ¶ 126. The Plaintiff asked Villanueva if Michael, whom the Plaintiff believed Villanueva was "hooking up with," was at the residence, and she admitted he was. *Id.* at ¶¶ 177, 129. When the Plaintiff told Villanueva they were done and walked out of the residence, Villanueva followed him saying she needed to talk to him. *Id.* at ¶¶ 130, 132-33. Villanueva got into the passenger's side of the car willingly and they drove directly to Cardona's home. *Id.* at ¶¶ 135-36. When Villanueva said that the Plaintiff would never be able to see her again if he went home without talking to her, the Plaintiff began knocking on Cardona's door and ringing the doorbell. *Id.* at ¶ 137. Villanueva then got out of the car, approached the door and began yelling "Mom, Mom, Mom, Mom." *Id.* Villanueva ran inside as soon as the

door opened, and Cardona told Plaintiff to "get the fuck off the property." *Id.* at ¶ 136. Plaintiff backed away and said, "That's fine. I don't want anything to do with her. I caught her cheating on me." *Id.* Plaintiff then walked home. *Id.*

C. Incident Report

On May 2, 2015, Villanueva and Cherie went to the Downey Police Department to report the incident. Dkt. 94, PSSUMF ¶ 139. However, Villanueva told the officer she did not want to prosecute, so they did not file an incident report. *Id.* at ¶ 140.

On the morning of May 14, 2015, Cherie filed an incident report[2] on her own with the Downey Police Department and so informed Cardona via text message. *Id.* at ¶ 141; dkt. 74, UMF ¶ 19.

City Defendants claim that Cardona was only aware a report had been made, and that he was not aware of its specific allegations. Dkt. 74, UMF ¶ 20. On the other hand, the Plaintiff claims that Cardona knew "what kind of report would have been taken" since Cardona stated that as a police officer, he was able to "put a title to all of the crimes that [he believed Garza] had done." Dkt. 94, PSSUMF ¶ 145. According to Cardona, although he did not talk with his wife regarding the specifics of the police report, he expected that the report would document the fact that the Plaintiff had committed a burglary, kidnapping, and domestic violence. Dkt. 91, SGI ¶ 76.

---

2. Cherie testified that she went to make a report, not an incident report. Dkt. 91, SGI ¶ 19.

D. May 14 Incident

Cardona and the Plaintiff again offer diametrically opposing description of what occurred on May 14, 2015.

According to the Plaintiff, on May 14, 2015, at approximately 11:30 a.m., he was exercising in front of his house when Cardona pulled his truck into his own driveway across the street. Dkt. 94, PSSUMF ¶ 28. Getting out of his truck, Cardona yelled, "Hey, come here," at the Plaintiff. *Id.* at ¶ 54. They met at the corner of the Plaintiff's property, and Cardona then hit Plaintiff on the right side of his head with his left fist. *Id.* The Plaintiff testified that Cardona punched him four to six times while he was standing. *Id.* at ¶ 57. Cardona then caused the Plaintiff to fall to the ground on his side by grabbing the Plaintiff's sweater, *id.* at ¶¶ 58, 59, and punched the Plaintiff at least twenty times. *Id.* at ¶ 60. At Cardona's request, his mother, who had been in the car with him, brought him his bag, which contained LAPD handcuffs. *Id.* at ¶ 63. Cardona handcuffed the Plaintiff's right arm and threatened to break Plaintiff's shoulder unless Plaintiff gave Cardona his left arm. *Id.* at ¶ 65. The Plaintiff pulled out his left arm, and Cardona pulled it back hard and handcuffed it. *Id.* Cardona straddled Plaintiff, while he was laying down on his stomach, and twisted the Plaintiff's wrists for an extended period of time, despite the fact that Plaintiff was not resisting. *Id.* at ¶ 66. The Plaintiff notes that although he did not attempt to strike or resist Cardona at any time, Cardona commanded the Plaintiff to "stop resisting" loud enough for witnesses to hear. *Id.* at ¶ 67. The Plaintiff claims he was handcuffed for at least 20 to 25 minutes while Cardona was on his back. *Id.* at ¶ 75.

According to Cardona, when he had arrived home and was trying to remove his baby from the car seat, the Plaintiff yelled at him from his front yard, "What the fuck are you looking at? I don't care that you're a police officer. I'll kick your ass." Dkt. 91, SGI ¶ 78. Cardona responded by stating, "Fuck you," which he claims is an example of tactical language consistent with the LAPD training he received. *Id.* at ¶¶ 79, 80. The Plaintiff continued making threatening comments, and started advancing on Cardona and his family with clenched fists, telling Cardona to meet him in the street. *Id.* at ¶ 81. When they met at the intersection, the Plaintiff threw a punch at Cardona's face but Cardona deflected it to his chest. *Id.* at ¶ 87. Using leg sweeps, Cardona took the Plaintiff to the ground. *Id.* at ¶ 89. Cardona used the LAPD handcuffs his mother brought him from his car to handcuff the Plaintiff. *Id.* at ¶ 96. Cardona claims that the Plaintiff kept moving his head from side to side, kicking his legs, and trying to get up despite his command to stop resisting. *Id.* at ¶¶ 91, 92. Cardona claims he never struck, kicked, or punched Plaintiff in any way during the process of getting control over Plaintiff. *Id.* at ¶¶ 93, 94.

City Defendants highlight the fact that Cardona was driving a personal vehicle and was not being paid by the LAPD for being on duty. Dkt. 74, UMF ¶ 21. City Defendants also note that the jacket Cardona was wearing did not have an LAPD badge embroidered on it, and that his badge, uniform, duty belt, duty gun, and handcuffs were still in his vehicle at the time he and the Plaintiff had their physical altercation. *Id.* at ¶¶ 23, 24. City Defendants further point out Cardona never unholstered his firearm

during the incident. *Id.* at ¶ 25. Additionally, they allege that Cardona did not believe there was actually a warrant for Plaintiff's arrest at the time of the underlying incident, and that the information Cardona received from Cherie the morning of the incident did not play a role in his decision to detain the Plaintiff. Dkt. 74, UMF ¶¶ 40, 41.

E. 911 Calls

There is no dispute among the parties that Cardona called 911 twice. Dkt. 94, PSSUMF ¶ 69. The parties do, however, highlight different aspects of the call. City Defendants emphasize that in the first call, Cardona identified himself as an off-duty Los Angeles police officer because Department policy requires officers to so identify themselves whenever dealing with a law enforcement agency from another jurisdiction. Dkt. 74, UMF ¶ 36. City Defendants also note that Cardona made no mention of his status as a police officer in his second 911 call. *Id.* at ¶ 37. The Plaintiff emphasizes that when Cardona called 911 he told the dispatcher he "took a kidnap suspect into custody" and stated "[t]here's a report with Downey. We took it this morning." Dkt. 94, PSSUMF 69. The Plaintiff also states that on the 911 call, Cardona described the situation as "Code 4", a situation "when the suspect is in custody and there is no longer a threat." *Id.* at ¶¶ 69, 70. Cardona stresses that he said he had a kidnap suspect in the 911 calls so the sheriffs would come faster. Dkt. 91, SGI ¶ 101. City Defendants also took this view, noting that Cardona told the 911 operator that he had a kidnapping suspect in order to get local law enforcement officers to respond more quickly than if he had told them he just had a battery suspect. Dkt. 74, UMF ¶ 42.

F. Bystanders

While waiting for local authorities to arrive, Cardona told passerby, including another off-duty LAPD Officer Garcia, that he was a police officer and the Plaintiff was a kidnapping suspect in a report made at the Downey Police Department that morning. Dkt. 74, UMF ¶ 38. Garcia recognized that Cardona was a law enforcement officer based on Cardona's attire and his use of police tactics. Dkt. 91, SGI ¶ 98. Garcia testified that he did not see Cardona strike or hit the Plaintiff in any way, and that Cardona seemed to have everything under control. *Id.* at ¶ 106. Garcia stated that Cardona was "cradling" the Plaintiff by maintaining a top position, which he recognized as a standard LAPD technique to control a suspect and to prevent escape. *Id.* at ¶ 108. Garcia also saw that Cardona used a wrist lock to keep the Plaintiff under control. Garcia stated he did not see any injuries on the Plaintiff. *Id.* at ¶ 107. When Cardona told Garcia that he had control of the incident, Garcia gave Cardona his contact information if it was needed for any reason and left the scene. *Id.* at ¶ 113; dkt. 94, PSSUMF ¶ 78.

Daniel Laughlin, one of the bystanders, began videotaping the incident on his phone. When he told Cardona, "Wow, that looks like it hurts," Cardona responded, "Yeah, it does, now get back." Dkt. 94, PSSUMF ¶ 74. Laughlin testified he was aware Cardona was an officer because he addressed himself as Officer Cardona of LAPD on a phone call, loud enough for witnesses to hear. *Id.* When other bystanders told Cardona to let the Plaintiff go, Cardona responded that he would

not let the Plaintiff go because he has a "kidnap suspect out of Downey." Dkt. 91, SGI ¶ 112.

G. Investigation

When Sgt. II Hoskins and Sgt. II Wehr, Cardona's supervisors, arrived at the scene, Cardona was placed on-duty from the beginning of the incident and was ordered to submit overtime slips for all those hours. Dkt. 91, SGI ¶ 115. Captain, now Commander, Prokop was in agreement. *Id.* Sgt. II Hoskins testified that under the circumstances, Cardona's actions were within LAPD policy. *Id.* at ¶ 118. Prokop testified that at the time of the incident, he believed Cardona was acting in the course and scope and employment with the LAPD when he arrested the Plaintiff. Dkt. 94, PSSUMF 88. Prokop has since changed his position and stated that Cardona should have called 911 and waited for back up before addressing the Plaintiff. *Id.* at ¶¶ 89, 90. A protection detail was subsequently assigned and surveillance cameras were installed to protect Cardona and his family from the Plaintiff. Dkt. 91, SGI ¶ 117.

After a completed nine-month investigation, the LAPD sent a letter to the Plaintiff informing him that three of his allegations of misconduct were determined to be "unfounded," meaning that the allegation did not occur, and that the fourth allegation was determined to be "exonerated," meaning that the action occurred but was found to be within LAPD policy. Dkt. 91, SGI ¶ 122; dkt. 94, PSSUMF ¶ 95. The Internal Affairs Investigation and the Use of Force Investigation were both completed before

the letter was sent to Plaintiff on February 29, 2016. Dkt. 91, SGI ¶ 123. The letter reflects that both investigations were concluded in Cardona's favor. *Id.* The Plaintiff claims that internal affairs had the discretion to broaden the investigation to determine whether Cardona violated policy but they did not do so. Dkt. 94, PSSUMF ¶ 97.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Id.* at 248. However, no genuine issue of fact exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

It is not the Court's task "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1278 (9th Cir. 1996). Counsel have an obligation to lay out their support clearly. *Carmen v. San Francisco Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001).

III. DISCUSSION

In their Motion for Summary Judgment, City Defendants contend that they cannot be held liable for Defendant Cardona's actions, either by being forced to defend and indemnify Cardona or through a *Monell* claim. First, City Defendants claim that they cannot be liable for a *Monell* claim under § 1983 because Cardona did not act under the color of state law. Second, even if Cardona did act under the color of state law, an unconstitutional policy, practice, custom, or ratification by City Defendants did not cause the alleged constitutional violation. Finally, City Defendants contend that it does not have a duty to either defend or indemnify Cardona either because he was not acting within the course and scope of his employment or because he was acting with actual fraud, corruption, or actual malice. The Court will address each one of City Defendants' contentions and whether they are entitled to a finding as a matter of law on any of them.

A. *Monell* Claim Against City Defendants

City Defendants argues that it cannot be found liable for Cardona's actions under a *Monell* theory of liability for two reasons. First, Cardona did not act under color of state law when he arrested the Plaintiff, as Cardona was

pursuing a purely personal agenda related to his prior relationship with the Plaintiff. Therefore, since Cardona cannot be liable under § 1983 because he did not act under color of state law, City Defendants also cannot be liable. Second, City Defendants contend that even if Cardona did act under color of state law, an unconstitutional policy, practice, custom, or ratification of City Defendants did not cause the alleged constitutional violation, as required for *Monell* liability. Thus, City Defendants are entitled to summary judgment on the Plaintiff's claims against them.

1. The Color of State Law

The Plaintiff has brought a cause of action against City Defendants for municipal liability under 42 U.S.C. § 1983. To state a cause of action pursuant to 42 U.S.C. § 1983, a plaintiff must demonstrate that "(1) the defendants acted under color of state law and (2) deprived plaintiff of rights secured by the Constitution or federal statutes." *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). In determining whether an officer acted under color of state law, courts employ a totality of the circumstances approach. *See Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980). City Defendants contend that it cannot be held liable under 42 U.S.C. § 1983 because the undisputed facts demonstrate that Cardona did not act under the color of state law when he detained the Plaintiff.

In general, "a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997).

A police officer acts under color of state law if he acts "under pretense of law," meaning that his actions "are in some way related to the performance of his official duties." *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1058 (9th Cir. 1998) (internal quotations and citations omitted). An officer who pursues his own goals and is not subject to control by his employer does not act under color of law, *unless he purports or pretends to do so*." *Id.* (emphasis added). In other words, the police officer's actions must be performed while the police officer was acting, purporting to act, or pretending to act in the performance of his or her official duties. *See McDade v. West*, 223 F.3d 1135, 1140 (9th Cir. 2000).

City Defendants contend that Cardona was motivated purely by personal animus against the Plaintiff related to the Plaintiff's romantic relationship with Cardona's stepdaughter, and therefore his actions could not possibly have been related to the performance of his official duties. City Defendants point to several undisputed facts that support this conclusion. For instance, Cardona was upset when he discovered he had been deceived about the relationship. Cardona's badge, uniform, duty belt, duty gun, and handcuffs were still in Cardona's vehicle at the time of the altercation. Cardona's clothing, although containing a patch representing Cardona's specific division within LAPD, was not a uniform and did not contain any sort of badge. Cardona did not mention he was a police officer during his second 911 call. The Plaintiff was not the target of any LAPD investigations at the time of the incident.

However, City Defendants acknowledge that the incident involved certain indications associating Cardona with being a police officer. For instance, the Plaintiff knew that Cardona was a police officer at the time of the incident. However, the Ninth Circuit has held, "Merely because a police officer is recognized as an individual employed as a police officer does not alone transform private acts into acts under color of state law." *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 839 (9th Cir. 1996). Additionally, Cardona repeatedly identified himself as a police officer during the incident, both during his first call to 911 and to passerby who witnessed the detainment of the Plaintiff. However, City Defendants argue that such identification does not transform Cardona's purely private actions into actions performed under color of state law, as private citizens are also permitted to detain someone in order to effectuate an eventual arrest. *See* Cal. Pen Code § 837. Therefore, City Defendants argue that simply because Cardona happened to be a police officer during his day job does not mean his wholly private altercation constituted actions taken under color of state law.

However, despite City Defendants' arguments, the Court now finds that there are clearly triable issues of fact regarding whether Cardona acted under color of state law. While one interpretation of the facts is that Cardona acted due to purely personal motivations based on his previous relationship with the Plaintiff, another is that he acted as an officer is trained to act, whether he is on duty or off duty. According to Cardona's account of the incident, he never engaged in a fight with the Plaintiff. Instead, when the Plaintiff started punching him, Cardona

used police tactics to subdue the Plaintiff. He then used his department-issued handcuffs to restrain the Plaintiff until backup arrived.[3] While City Defendants argue that a private citizen may have been legally allowed to take the same actions under Cal. Pen Code § 837, private citizens certainly would not have accomplished the detainment in the same way Cardona did, including using police-issued gear and tactics to accomplish his goals. Finally, making an arrest is undisputedly within the official duties of a police officer, even an off-duty one. Under Cardona's version of events, the detainment is easily distinguishable from other incidents in which police officers get into an altercation while off duty, participate in a fight for personal reasons, and then attempt to leave without making an arrest. *See, e.g., Barna v. City of Perth Amboy*, 42 F.3d 809, 816-17 (3d Cir. 1994). Cardona undisputedly detained and arrested the Plaintiff, strongly suggesting that he acted under the color of state law. At the very least, the jury will have to decide whether Cardona acted as a private citizen in an altercation or as a police officer arresting a suspect. *See, e.g., Van Ort*, 92 F.3d at 836, 838-41 (finding that an off-duty deputy did not act under color of state law because his

3. The Court recognizes that absent other factors, Cardona's use of police tactics and police handcuffs to execute his arrest of the Plaintiff may not be determinative regarding whether he acted under color of state law. The same is true regarding Cardona's identification of himself as a police officer to 911 operators, as an off-duty police officer who had engaged in a purely personal altercation might presumably act the same way. However, given the other indications of a proper arrest, especially his knowledge of a kidnapping complaint against the Plaintiff, the Court finds that a reasonable jury might conclude that Cardona was acting as a police officer and under color of state law.

actions had nothing to do with official police business, but rather whose purpose was to rob and assault plaintiffs).

Further, even if Cardona was motivated purely by personal animus, an officer may still be considered to act under color of state law if he purports or pretends to act in the performance of his official duties. *See McDade*, 223 F.3d at 1140. There are facts in this case from which a reasonable jury might conclude that Cardona purported to act as a police officer during his altercation with the Plaintiff, even if he was motivated by personal reasons. For instance, the Plaintiff already knew Cardona was a police officer.[4] Additionally, Cardona repeatedly identified himself as a police officer throughout the encounter, both to the 911 operators[5] and to passerby. These identifications are important because they arguably helped Cardona accomplish the detainment more easily. Identifying himself as a police officer to 911 operators ensured that police backup would arrive quicker, while identifying

4. The Court acknowledges that simple knowledge on the Plaintiff's part that Cardona was a police officer is not enough, on its own, to transform private acts into acts under color of state law. *Van Ort*, 92 F.3d at 839. This holding is logical, as otherwise a great many purely personal altercations involving off-duty police officers would be considered to have occurred under the color of state law, even if there were no other indications that the police officer purported to act in his official capacity. However, it may still be considered a factor in deciding whether the police officer purported or pretended to act in the performance of his or her official duties, and may be considered in the analysis in conjunction with other factors.

5. Although Cardona only explicitly identified himself as a police officer in the first 911 call but not the second, he testified that he only did not identify himself a second time because the operator was already aware that he was a police officer.

himself to passerby prevented them from intervening in the altercation. One passerby to whom Cardona identified himself was even an off-duty police officer himself, who surely would have intervened in a fight between two private individuals. Thus, a reasonable jury could conclude on these facts that even if Cardona was acting in his personal capacity, he pretended to act as a police officer in order to accomplish his objectives. Therefore, there are two theories under which the jury might conclude that Cardona acted under color of state law. As a result, the Court cannot find as a matter of law that Cardona did not act under color of state law.

2. An Unconstitutional Policy, Practice, Custom, or Ratification

Alternatively, City Defendants argue that they cannot be held liable for Cardona's actions, even if they were committed under color of state law, because there is no evidence that an unconstitutional policy, practice, custom, or ratification by City Defendants caused the alleged constitutional violation. Thus, the Plaintiff's *Monell* claim cannot survive summary judgment.

The Plaintiff argues that he has at least raised triable issues of material fact regarding whether City Defendants ratified Cardona's unconstitutional behavior. One way a plaintiff may establish municipal liability under § 1983 is if "an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992) (internal citations omitted).

Appendix E

In his main argument regarding *Monell* liability, the Plaintiff identifies a single letter that he claims raises triable issues of fact regarding whether City Defendants ratified Cardona's conduct. Nine months after the incident, the City sent the Plaintiff a letter signed by Greg McManus, Captain Acting Commanding Officer Metropolitan Division, in Chief Beck's signature block. The letter was sent in response to the Plaintiff's allegations of unauthorized force against Cardona. The letter concluded that the City had reviewed the matter and made several determinations. First, the Plaintiff's allegations of unauthorized force were classified Unfounded. Second, his allegation that Cardona twisted his wrists causing pain was classified as Exonerated, meaning that the investigation determined that the act occurred, but was justified, lawful, and proper. The Plaintiff argues that this letter ratified Cardona's unconstitutional actions for the purposes of municipal liability under § 1983.

The Court now finds that this single letter does not constitute ratification by a policy-maker sufficient to raise triable issues of fact that City Defendants should be subject to municipal liability. Although the Plaintiff is correct that a single decision by municipal policymakers can give rise to *Monell* liability, such is not the case here, even making all reasonable inferences in favor of the Plaintiff. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). The holding in *Pembaur* stated that a single decision from a policymaker, such as a legislative body, can establish an act of official government policy. *Id.* In other words, an "official policy" is "intended to, and [does], establish fixed plans of action to

be followed under similar circumstances consistently and over time." *Id.* at 480-81. That holding does not apply to the facts in this case. Here, the letter found that Cardona's twisting of Plaintiff's wrists was justified, lawful, and proper. The letter did not conclude that it was appropriate for police officers to intentionally and unnecessarily hurt detained suspects by twisting their wrists. Instead, it concluded that under the facts as established by the City's investigation, Cardona did not act improperly. It cannot reasonably be argued that this factual finding established a policy for the whole department to follow, or that the policy was unconstitutional. Without more evidence regarding an actual policy regarding twisting the wrists of detainees, the letter does not constitute a decision by a "policymaker" that was intended to be followed under similar circumstances over time.

Additionally, the Plaintiff contends that even if the letter did not intend to govern future situations, it sufficiently ratified Cardona's unconstitutional actions so as to potentially provide the basis for *Monell* liability. *See Lassiter v. City of Bremerton*, 556 F.3d 1049, 1055 (9th Cir. 2009) ("A single decision by a municipal policymaker may be sufficient to trigger Section 1983 liability under *Monell*, even though the decision is not intended to govern future situations, but the plaintiff must show that the triggering decision was the product of a conscious, affirmative choice to ratify the conduct in question.") (internal citation omitted); *see also Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992) (stating that municipal liability exists "if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker.").

Again, the cases cited by the Plaintiff do not support his contention. In *Lassiter*, the Ninth Circuit found that the chief of police and the city were in fact not liable under § 1983 because a single decision not to pursue an additional investigation of excessive force claims could not be fairly characterized as an affirmative choice to ratify allegedly unconstitutional conduct. *Lassiter*, 556 F.3d at 1055. The same is true in this case. The letter in question did not state that the painful and unnecessary twisting of the Plaintiff's wrists occurred and was justified. Instead, it stated that Cardona's actions were justified and proper, meaning that Cardona may have twisted the Plaintiff's wrists while detaining the Plaintiff but did not do so unnecessarily painfully or unconstitutionally. In other words, the twisting was a reasonable force applied under appropriate circumstances and thus not unconstitutional. A finding that the letter condoned excessive twisting while making arrests would be unreasonable, absent further supporting evidence. The Plaintiff provides no such evidence. Therefore, the Court finds that the letter in question concluded that Cardona's twisting of the Plaintiff's wrists was justified given the facts surrounding the arrest, not that excessive and unconstitutional twisting was acceptable. Any other finding would open up municipal defendants to *Monell* liability any time they dismissed a complaint against one of their officers because of factual determinations made by internal investigations, regardless of whether the dismissal was part of a pattern or policy. Thus, the Plaintiff has failed to raise a triable issue of fact with respect to the City Defendants' ratification of any potential unconstitutional acts committed by Cardona. As a result, the *Monell* claim

cannot survive based on the letter sent to the Plaintiff by the City Defendants.

However, the Plaintiff has raised a second theory of *Monell* liability beyond the letter he received. While arguing that Chief Beck should be personally liable for exonerating Cardona, the Plaintiff alleges a potential triable issue of fact regarding his *Monell* claim that is separate and apart from his ratification argument regarding the letter.[6] In a single sentence at the very end of his *Monell* claim opposition, the Plaintiff argues, "Both Cardona and his Sergeant Hoskins contend that the wrist lock the City now admits was malicious was pursuant to the training and policy of the LAPD." Dkt. 92 at 19. This statement is supported by deposition testimony, in which Hoskins testified that Cardona's application of a wrist lock while Garza was handcuffed was justified under LAPD policies, even though the Plaintiff was not resisting at the time. Hoskins Depo., 90:5-25. Cardona also contends that the wrist lock was pursuant to the training and policy of the LAPD. Cardona Depo Vol I., 272:1 – 273:15, 274:15 – 275:13. Additionally, Hoskins concedes that a wrist lock can be painful if an extreme amount of pressure is applied. Hoskins Depo., 77:19 – 78:13.

---

6. To the extent that the Plaintiff is arguing that the letter in question ratifies Cardona's use of the wrist lock as consistent with established department policy, it may be relevant to the Plaintiff's *Monell* claim. However, it is not clear to the Court that the Plaintiff was making such an argument. Even so, because the wrist lock practice is allegedly an official policy of the LAPD, it may indeed form the basis of a *Monell* claim even without any subsequent ratification by the City Defendants.

Thus, given that a potentially painful wrist lock was allegedly used against a non-resisting suspect who was already handcuffed,[7] and there is at least some evidence that this practice is consistent with LAPD policy, the Court finds that it is possible that a triable issue of fact exists regarding *Monell* liability for the wrist lock employed by Cardona. However, the Court finds that it would need further briefing on this issue in order to make a final determination regarding whether the question of *Monell* liability would go to the jury, as there remain several important unanswered questions regarding the wrist lock. Given that the Court has already bifurcated the *Monell* claims from the rest of the case, Dkt. 32, the Court will seek further briefing on the wrist lock issue prior to the *Monell* phase of trial.

3. Chief Beck's Individual Liability

As referenced above, the Plaintiff also contends that Chief Beck should be held personally liable for Cardona's use of excessive force. He argues that it is reasonable to infer that Chief Beck set into motion a policy that condoned police misconduct. Specifically, the Plaintiff was injured due to Cardona acting on the custom of the LAPD to exonerate officers even when there is clear evidence of police misconduct. However, as described

7. The Court notes that it is unclear from the Plaintiff's description whether the reference to a wrist lock refers to actions taken by Cardona prior to the handcuffing of the Plaintiff or after he was handcuffed, or both. Thus, the timing of the wrist lock and its effectiveness or necessity as a restraint tactic will likely be some of the issues the Court seeks clarification on in further briefing.

above, the Plaintiff does not put forward any evidence that Chief Beck has instituted a policy of exonerating officers even when they commit police misconduct. Without more supporting evidence, the Court finds that there is no dispute of material fact that could lead a reasonable jury to conclude that Chief Beck could be responsible under the *Monell* theory of liability for exonerating Cardona for his actions.

Additionally, even considering the Court's above finding regarding the *Monell* claim with respect to the wrist lock, the claims against Chief Beck, both in his individual and official capacities, cannot survive. First, as to his individual capacity, the Plaintiff has not provided any evidence that Chief Beck himself performed any culpable action or inaction in the training, supervision, or control of his subordinates. *See Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). The Plaintiff argues that it is reasonable to infer that Chief Beck set into motion a policy that condoned police misconduct, but he provides no evidence whatsoever that would allow the Court to make such an inference. There is no evidence that Chief Beck was personally involved in this case whatsoever, and there is no evidence that he is responsible for the policy regarding the wrist lock that was used. Thus, the Court finds that the claims against Chief Beck in his individual capacity must be dismissed.

Further, the claims against Chief Beck in his official capacity must also be dismissed. "Section 1983 claims against government officials in their official capacities are really suits against the government employer because the

employer must pay any damages awarded." *Butler v. Elle*, 281 F.3d 1014, 1023 n. 8 (9th Cir. 2002) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). Because the City is still a defendant on the *Monell* claim, the suit against Chief Beck in his official capacity is unnecessary, as local governmental units such as the City can be sued directly under the *Monell* theory of liability. *See Soffer v. Costa Mesa*, 798 F.2d 361, 363 (9th Cir. 1986) (citing *Graham*, 105 S. Ct. at 3106 n.14). As a result, the suit against Chief Beck in his official capacity is duplicative and should be dismissed. *See Estate of Contreras v. County of Glenn*, 725 F.Supp.2d 1157, 1159-60 (E.D. Cal. 2010) (dismissing claims against an officer in his official capacity because they were duplicative of claims against the government employer. Thus, the Court GRANTS City Defendant's Motion with respect to the claims against Chief Beck in both his official and individual capacities.

B. City Defendants' Duty to Indemnify and Defend

City Defendants also contend that it does not have the duty to defend or indemnify Cardona for his actions. The California Tort Claims Act immunizes public entities from liability except as provided by statute. *See Eastburn v. Regional Fire Port. Auth.*, 31 Cal.4th 1175, 1179, 7 Cal. Rptr. 3d 552, 80 P.3d 656 (2003); Cal. Gov't Code § 815(a). In California, a public entity has a statutory duty to provide for the defense of current or former employees who are sued civilly for acts committed in the course and scope of their employment. *See* Cal. Gov't Code § 995. However,

there are exceptions to this duty to defend. For instance, a public entity may refuse to provide for the defense of an employee if the public entity determines that the act was outside the scope of the person's employment; the person acted out of actual fraud, corruption, or actual malice; or if the defense would create a specific conflict of interest. Cal Gov't Code § 995.2(a). On the other hand, if the employee was acting within the course of his employment and did not act with actual fraud, corruption, or actual malice, he can recover the costs and expenses of his defense. Cal. Gov't Code § 996.4. Similar exceptions exist with respect to the public entity's duty to indemnify its employees against civil claims or judgments against them. *See* Cal. Gov't Code § 825.2.

City Defendants contend that Cardona fails to qualify for defense or indemnification by the city because his actions fit within two of the statutory exceptions. First, Cardona was not acting within the scope of his employment during the altercation with the Plaintiff, as the confrontation was based on a personal grievance between the two individuals. Second, Cardona acted with actual fraud, corruption, or actual malice as a matter of law, thereby relieving the City of its duty to indemnify or defend him. For these reasons, City Defendants argue they are entitled to summary judgment on Cardona's crossclaims. However, the Court finds that questions of fact remain regarding whether Cardona's actions fell within the scope of his employment as a police officer. While City Defendants' theory regarding the facts of this case — that Cardona exacted revenge on the Plaintiff as the result of a previous grudge — certainly would

justify a finding that Cardona acted outside the scope of his employment, this interpretation is not supported by undisputed facts. Defendant Cardona maintains that he used his training and experience as a police officer to subdue a person he suspected of a felony, all while wearing police-issue clothing and utilizing his police handcuffs. If the jury believes Cardona's version of events, it might reasonably conclude that Cardona acted within the scope of his employment in detaining the Plaintiff as a felony suspect. Therefore, the jury must resolve the disputed facts before a conclusion can be made about whether Cardona's actions occurred within the scope of his employment.[8]

1. The Scope of Employment

An employee acts within the scope of his employment if: 1) his "conduct occurred substantially within the time and space limits authorized by his employment;" 2) he "was motivated, at least in part, by a purpose to serve

8. The Court notes that the Plaintiff opposed City Defendants' summary judgment motion related to Cardona's crossclaims for defense and indemnification. While the practical benefit to the Plaintiff of the City indemnifying Cardona is clear, he does not have the legal standing to oppose the defense and indemnification aspect of the City Defendants' Motion. Those claims are brought solely by Cardona, and the indemnity and defense statutes are meant to benefit defendants, not plaintiffs. *See Williams v. Horvath*, 16 Cal.3d 834, 845, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976). The plaintiff is merely an incidental beneficiary of the indemnity provisions. *Id.* Therefore, the Court will not address the Plaintiff's opposition to the City Defendants' Motion with respect to the indemnity and defense crossclaims.

the employer;" and 3) his actions were the kinds of acts that he "was hired to perform." *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 775-76 (9th Cir. 2002).

Of course, an employee may act outside the scope of his employment if his actions are driven by personal motivations. For instance, an employee acting out of personal malice unconnected with his employment acts outside the scope of his employment, and his employer cannot be held liable for the employee's actions. *See, e.g., Farmers Ins. Group v. County of Santa Clara*, 11 Cal.4th 992, 1004-05, 47 Cal. Rptr. 2d 478, 906 P.2d 440 (1995) (finding that a police officer who sexually harassed coworkers acted outside the scope of his employment because he acted for purely personal reasons).

City Defendants concede that whether a tort was committed within the scope of employment is ordinarily a question of fact. However, they argue that they are entitled to a finding as a matter of law that Cardona acted outside of the scope of his employment because the undisputed facts do not support an inference that he acted within the scope of his employment. *See John R. v. Oakland Unified Sch. Dist.*, 48 Cal.3d 438, 447, 256 Cal. Rptr. 766, 769 P.2d 948 (1989). City Defendants point to several undisputed facts to support their contention that Cardona acted for purely personal reasons that were wholly unconnected to his job as a police officer.

For instance, on the day in question, Cardona was driving his personal vehicle to his personal home in Whittier while off-duty. When the altercation between the

Plaintiff and Cardona started, Cardona acted in defense of himself and his family when he swept the Plaintiff's legs and took him to the ground. Although Cardona used his department-issued handcuffs to restrain Garza, he used them for his own personal benefit and not for the benefit of his employer. *See Henriksen v. City of Rialto*, 20 Cal. App. 4th 1612, 1621, 25 Cal. Rptr. 2d 308 (1993) (holding that an officer must have used his firearm for employer business in order to be entitled to indemnification). City Defendants argue that this entire fight, whether it was instigated by the Plaintiff or Cardona, originated from the personal relationship of the two men. Cardona protected himself and his family, and then detained the person who assaulted him and waited for police to arrive, as any private citizen has the right to do. His actions had nothing to do with police business and are completely consistent with the behavior of a private citizen. Therefore, as a matter of law the Court should find that Cardona acted outside the course of his employment when he fought with the Plaintiff and detained him afterward.

However, although the facts cited by City Defendants in support of their argument are indeed undisputed, they once again fail to address other important facts,[9] both disputed and undisputed, that significantly affect the Court's analysis. [10] For instance, although Cardona

9. Many of the facts referenced here overlap with the Court's above analysis on color of state law.

10. Although some of the facts on which the Court relies in this analysis may be disputed, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Anderson*, 477 U.S.at 255. Therefore, any disputed facts are resolved in favor of the nonmoving parties for the purposes of this Motion.

was not wearing his full uniform or police badge, he was wearing clothing issued by the department, including a jacket with a patch signifying his police division. Additionally, the Plaintiff identified Cardona as a police officer during the altercation. Cardona utilized training he received from the police department to restrain the Plaintiff, including a leg sweep maneuver and handcuffing the Plaintiff with his police-issued handcuffs. Further, Cardona identified himself as a police officer multiple times during the events in question, including to 911 operators in order to spur a quicker police response and to third party witnesses, one of whom was also LAPD officer, in order to discourage anybody from intervening. Importantly, Cardona was ordered "on-duty" by his LAPD supervisors, submitted an LAPD overtime slip for the entirety of the incident, and was in fact paid for that time. Finally, according to Cardona's version of the events, he believed that the Plaintiff had had a complaint filed against him for kidnapping.[11] Therefore, while the immediacy of the detainment resulted from the alleged assault and battery of the Plaintiff on Cardona, Cardona may have had two reasons for detaining the Plaintiff and handing him over to other police officers. Thus, making all inferences in favor of Cardona, a reasonable factfinder could find that he was acting within the scope of his duties when he detained the Plaintiff, just as he would detain any suspect he encountered while off-duty. Of course, the

11. Although Cardona testified during his deposition that he did not believe that an arrest warrant had yet issued against the Plaintiff, he confirmed his belief that the Plaintiff had indeed committed a kidnapping and had had a complaint filed against him, which is why he called the Plaintiff a "kidnapping suspect" to the 911 operators.

jury may also determine that Cardona acted purely in his own personal interests in detaining a person who had allegedly assaulted him and threatened his family, but that decision requires the weighing of facts and evidence that is precisely within the province of a jury, not the Court.

California law regarding police officers and indemnification is consistent with the Court's denial of summary judgment on the scope of employment issue. First of all, police officers are on duty 24 hours a day under California law. *Long v. Valentino*, 216 Cal. App. 3d 1287, 1298, 265 Cal. Rptr. 96 (1989) (citing *People v. Derby*, 177 Cal. App. 2d 626, 631, 2 Cal. Rptr. 401 (1960) (stating that police officers are under a special duty at all times to use their best efforts to apprehend criminals)). Second, the authority of police officers extends to any place in the state as to any public offense committed in the police officer's presence. Cal. Pen. Code § 830.1. Therefore, there is no dispute that Cardona had the authority to make a valid arrest of the Plaintiff if he believed what had occurred between them constituted an assault of a police officer. Further, it is in Cardona's employer's interest to arrest a person who has assaulted a police officer and who is suspected of a previous kidnapping. Thus, Cardona may very well have been acting as all off-duty police officers are encouraged to act as a condition of their employment: he arrested a person he believed had committed a crime in front of him, and he used his police training to properly detain that person. According to Cardona's account, he only arrested the Plaintiff after the Plaintiff committed an unprovoked assault, at which point there was probable cause to arrest the Plaintiff for assaulting a police officer.

If the jury believes Cardona, it would be reasonable to conclude he was acting within his duty as a police officer and therefore was within the scope of his employment.

In other words, there is undoubtedly several significantly different ways to interpret the events of May 14, 2015. A jury may ultimately agree with City Defendants: Cardona's actions arose from purely personal motivations, whether that motivation was to exact revenge on a person who hurt his stepdaughter or to detain and ensure the punishment of a person who assaulted him. However, a reasonable jury could also agree with Cardona: the Plaintiff committed a crime in front of him and also was a suspect in another crime, and so he followed his training and utilized the tools of his employment to execute an arrest, just as he had been trained and just as California law allowed him to do. That a citizen may also have legally performed a citizen's arrest does not change the Court's conclusion that a jury might find that Cardona acted as a police officer. Police officers are considered on duty 24 hours a day precisely because they might have to perform an official duty, including executing an arrest, even when they are not officially on the clock. *See Derby*, 177 Cal. App. 2d at 631. The relevant question is whether the services rendered by the officer are within the duties of their office. *Id.* The undisputed facts do not justify a finding that Cardona acted purely for his own personal gain with no thought to his duty as a police officer. Therefore, whether Cardona acted within the scope of his employment is a question of fact that must be decided by a jury. Summary judgment on the scope of employment issue is DENIED.

2. Actual Fraud, Corruption, or Actual Malice

Second, City Defendants contend that they are entitled to summary judgment on the indemnification and defense crossclaims even if Cardona acted within the scope of his employment because he acted with actual fraud, corruption, or actual malice, which relieves the City of its duty to indemnify or defend Cardona. Cal. Gov't Code § 825.2. Actual fraud and actual malice "'requires showing personal animosity, malevolence, ill will, or deliberate wrongful intent on the part of the employee.'" *Allen v. City of Los Angeles*, 92 F.3d 842, 847-48 (9th Cir. 1996) (overruled in part on other grounds) (citing Professor Van Alstyne's treatise on *California Government Tort Liability Practice* app. 781 (1980)). "Corruption" can be defined as the abuse of public office for private gain. World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* 9 (1997).

Again, it is clearly true that the facts of this case may lead a reasonable jury to conclude that Cardona acted with actual fraud, corruption, or actual malice. It is entirely possible that Cardona used his position as a police officer to punish the Plaintiff for his treatment of Cardona's stepdaughter or his alleged assault of Cardona. However, as the Court stated above, the undisputed facts do not mandate such a finding as a matter of law.[12] Cardona's

12. The Court notes that Cardona finds it significant that the *Allen* court found actual malice based on a jury's verdicts, not on the Court's own analysis of the facts. However, it agrees with City Defendants that such a finding does not necessarily mean that all findings of malice must be made by a jury. Nevertheless, the

theory of the case is that he acted appropriately and within police regulations. While there are undoubtedly pieces of evidence that contradict his account, the Court finds that there are simply too many disputed facts to conclude otherwise as a matter of law. The jury will have to weigh all of the available evidence and decide whether Cardona acted with malice or as a law-abiding police officer. Weighing such strongly disputed facts is precisely the role of a jury. Thus, summary judgment on the question of actual fraud, corruption, and actual malice is DENIED.

IV. SCOPE AND PROCEDURE OF TRIAL

The first phase of trial, which will begin on Wednesday, June 21, 2017, will solely consist of the Plaintiff's § 1983 claims against Cardona. First, the jury will hear evidence solely related to Cardona's liability. If the jury finds Cardona liable for any § 1983 violations, the case will be reopened to present evidence on the Plaintiff's damages. Cardona's crossclaims for indemnification may be heard at the same time as damages, although the Court will entertain the preferences of the parties regarding whether the same jury should hear evidence and arguments regarding the indemnification crossclaims. Additionally, as City Defendants' counsel represented at the hearing that Cardona's crossclaims for indemnification and defense are legally barred with respect to § 1983 claims due to

---

procedural posture of the *Allen* case confirms that determinations of actual fraud, corruption, and actual malice are questions of fact and therefore supports the Court's conclusion that summary judgment on this issue would be inappropriate given the significant facts in dispute.

preemption or related legal principles, the Court requires further briefing on the legal issues before the jury makes an ultimate determination. As a result, Cardona and City Defendants[13] should each submit briefs of no more than eight pages regarding whether Cardona's crossclaims for indemnification under Cal. Gov. Code § 825.2 are preempted by *Monell's* finding regarding the preclusion of respondent superior liability for §1983 cases, or any other relevant statute or legal principle. Those briefs should be submitted to the Court no later than Thursday, June 22, 2017, at 12:00 pm. Finally, the Plaintiff's claims against City Defendants for *Monell* liability will be heard at a subsequent trial, if necessary depending on the jury's findings during the first phase.

At the first phase of trial, police witnesses, including Cardona's supervisors or other experts, will not be allowed to testify regarding their opinions on whether Cardona acted under the color of state of law, as such determination is for the jury alone to make. This finding includes the supervisors of Cardona and their determination to place Cardona on duty retroactively, as they arrived on the scene after the relevant events. The supervisors' determination regarding whether Cardona was on duty is not admissible because it was based on factual conclusions[14] that need to be made by the jury, and would inappropriately infringe on

13. As stated above, the Plaintiff lacks legal standing to argue issues related to Cardona's crossclaims against City Defendants.

14. Additionally, it does not appear to the Court that Cardona's supervisors' determination to place him on duty was based on a complete presentation of the relevant facts, which the jury will have.

the duty of the jury to decide the relevant factual disputes. The same is true of any police experts confronted with hypothetical scenarios, including Commander Maislin. Any testimony from Officer Hoskins, Commander Prokop, Commander Maislin, or any other supervisors regarding the decisions they made or would have made after the May 14 incident would unduly prejudice the jury and hinder them from making their own factual determinations from the evidence they hear, which is required for a fair verdict.

If the parties choose, police witnesses may testify generally regarding the official duties of police officers, as such evidence may be relevant to the jury's ultimate determination about whether Cardona's actions "related to the performance of his official duties," which is a part of the color of state law analysis. *Huffman*, 147 F.3d at 1058. However, those witnesses will not be allowed to give testimony regarding Cardona's alleged actions, as the jury alone will be responsible for determining the facts and deciding whether Cardona's actions were performed under the color of state law. Therefore, to the extent this decision contradicts the Court's statements during the hearing regarding the motions *in limine* in Dockets 65 and 83, this Order will control.

V. ORDER

For the foregoing reasons, the Court GRANTS in part and DENIES in part the City Defendants' Motion for Summary Judgment. Specifically, the Court GRANTS the Motion with respect to the *Monell* claim based on the letter sent to the Plaintiff, and the Plaintiff may not rely on that

letter to prove *Monell* liability. The Court withholds ruling on the Motion with respect to the *Monell* claim based on the wrist lock, as the Court will seek further briefing on the issue before the subsequent phase of trial regarding *Monell* liability, if necessary. The Court GRANTS the Motion with respect to all claims against Chief Beck, who is now dismissed from this action. The Court DENIES the Motion with respect to the City Defendants' duty to indemnify and defend Cardona on the basis of the factual contentions contained in the Motion. Cardona and City Defendants will submit their supplemental legal briefs of no more than eight pages on or before Thursday, June 22, 2017, at 12:00 pm.

IT IS SO ORDERED.

APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 7, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-55952

D.C. No. 2:16-cv-03579-SVW-AFM
Central District of California, Los Angeles

DANIEL GARZA, AN INDIVIDUAL,

Plaintiff-Appellant,

v.

CITY OF LOS ANGELES,

Defendant-Appellee.

ORDER

Before: LINN,* RAWLINSON, and FORREST, Circuit Judges.

Judge Linn and Judge Forrest voted to deny the petition for panel rehearing. Judge Forrest voted to deny the petition for rehearing en banc, and Judge Linn

* The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

so recommended. Judge Rawlinson would grant both petitions. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.