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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 DELPHINE ALLEN; et al;

21 Pl aintiff,
22 vs.

23 CITY OF OAKLAND, et al.,

24 Defendant.

MASTER CASE NO. C-00-4599 TEH

**JOINT STATUS CONFERENCE
STATEMENT RE NON-MONETARY
SETTLEMENT ISSUES**

Date: January 26, 2012

Time: 10:30 a.m.

Courtroom 2, 17TH FLOOR

Honorable Thelton E. Henderson

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INTRODUCTION

This status conference is to discuss the progress of City of Oakland's ("City") efforts to achieve compliance with the 2010 Memorandum of Understanding (MOU), which ends on January 22, 2012. Plaintiffs will state their position and discuss their concerns with the rate and extent of the progress City has achieved during the last compliance period. City will set forth its plans to achieve full compliance under the Amended Memorandum of Understanding (AMOU) which covers the period of January 2012 through January 2014. City will also address the concerns of the Court and the Monitor regarding compliance with the remaining Active Tasks and will respond to other concerns raised by the Monitor in the Eighth Quarterly Report.

PLAINTIFFS' CURRENT POSITION

This is a further status conference concerning the progress of the non-monetary settlement in the "the "Riders Litigation" which was approved by the Court on January 22, 2003.

I. Eighth Quarterly Report of the Independent Monitor

January 22, 2012 marks the commencement of yet another extension of the NSA/MOU. It is now nine (9) years since the agreement was signed. Substantial compliance by the OPD is not yet in sight and progress toward this end has stagnated. In its most recent report, the Monitor noted that "in our two years on task here, we have reported little measurable progress by the Department". (Eighth Quarterly Report, page 80.) No overall compliance improvement was achieved during the Monitor's most recent reporting period. In fact, the task compliance level was higher in the Fifth and Sixth Quarterly Reports than it is now (See Chart in the Eighth Quarterly Report, page 79). Moreover, Task 40, the critical "Personnel Assessment System—Purpose" has now fallen out of compliance because (in part) the OPD "cannot report the number of arrests under the specific categories required by the NSA including disorderly conduct, interfering and assault on officers." This is a critical part of the information that goes into IPAS because it can identify officers who might use these arrests as "cover charges" for misconduct. The OPD also remained out of compliance with Task 41 (Use of the Personal Assessment System).

The OPD again has not attained full compliance in the critical areas including Task 5 (Complaint Procedures for IAD), Task 20 (Span of Control for Supervisors), Task 24 (Use of Force

Reporting Policy), Task 25 (Use of Force Investigations and Report Responsibility), Task 34 (Vehicle Stops, Field Investigation and Detentions or “Stop Data”), and Task 45 (Consistency of Discipline Policy).

The failure of the OPD to attain compliance is particularly disturbing given the fact that the OPD only has 22 remaining tasks that are under active monitoring. The IMT has not regularly audited the inactive tasks despite the fact they are permitted to do so. One would think that the OPD could more easily attain compliance given this fact, but they have made virtually no progress even though less than half of the original tasks remain under active monitoring.

The Eighth Quarterly Report also contained an appendix concerning the Parole and Probation Searches and “the high incidence of searches conducted by OPD personnel based on a citizen’s status as a parolee or probationer.” One of their major conclusions is that “There appears to be a potential disparate use of these searches with respect to race. The overwhelming number of cases we reviewed involved Blacks.” (IMT Report page 88)

Parole searches in California are authorized under Penal Code Section 3067. This law allows parole searches without a warrant or probable cause. The California Legislature, however, did not give police officers unfettered discretion to harass parolees under this law and expressly said so in the statute. Cal. Penal Code Section 3067(a) and (d) provide as follows:

“(a) Any inmate who is eligible for release on parole pursuant to this chapter or post release community supervision pursuant to Title 2.05 (commencing with Section 3450) of Part 3 shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.

XXX

(d) It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.” (Emphasis added)

Prior to enactment of Penal Code Section 3067(d) in 1996, California Courts had already determined that arbitrary, capricious or harassing parole or probation searches would be unreasonable under the Fourth Amendment. *See, e.g., People v. Clower* (1993) 16 Cal.App.4th 1737, 1741 (Parole search unreasonable if done too often, at an unreasonable hour, unreasonably prolonged or for other

evidence of arbitrary or oppressive conduct by the officer); *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 (Parole search arbitrary and capricious where motivation for the search is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes, or motivated by personal animosity); *People v. Bravo* (1987) 43 Cal.3d. 600, 610 (Applying arbitrary or capricious standard to probation searches).

In *United States v. Follette*, 282 F. Supp. 10, 13 (S.D.N.Y. 1968), *cert. denied*, 402 U.S. 984 (1971), the Court also stated parole searches could be unreasonable if made too often, at an unreasonable hour, if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct.

In 1998, the California Supreme Court also held that parole searches did not violate the Fourth Amendment, as long as they were not conducted for “arbitrary, capricious or harassing” purposes. *People v. Reyes* (1998) 19 Cal.4th 743, 752–753. See also, *In re Randy G.* (2001) 26 Cal. 4th 556, 564 (Noting the arbitrary, capricious standard applied to parole searches).

With the backdrop of the aforementioned precedent, the California Court of Appeal reviewed the appeal of Donald Curtis Samson from the denial of a suppression motion following his arrest after drugs were found on him during a parole search in 2002. *Samson v. California*, 547 U.S. 846-847 (2006).

In affirming denial of the suppression motion, the Court of Appeal determined that Penal Code Section 3067(a) authorized the search and that it was not “arbitrary or capricious.” *Id.* Relying on *People v. Reyes, supra*, the Court held that a parole search was “reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing”; and specifically determined that the search did not violate this requirement. *Id.*

The United States Supreme Court affirmed the California Court of Appeal’s decision. While recognizing parolees have a diminished expectation of privacy, Justice Thomas, writing for the Court, acknowledged that parolees do not waive all protection under the Fourth Amendment while on parole. *Id.* at 850, fn2. Addressing concerns raised by the dissent that suspicionless parole searches could result in the loss of all procedural safeguards for parolees against unreasonable searches, Justice Thomas wrote:

Nor is there merit to the argument that California's parole search law permits "a blanket grant of discretion untethered by any procedural safeguards,"[citation omitted] The concern that California's suspicionless search system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California's prohibition on "arbitrary, capricious or harassing" searches. [citations omitted]. The dissent's claim that parolees under California law are subject to capricious searches conducted at the unchecked "whim" of law enforcement officers, [citation omitted], ignores this prohibition.

Id. at 856-857.

The "Riders" case involved a large number of people who were on parole, were stopped by the OPD (often for no reason) and then were beaten and/or had drugs planted on them. Only one of the 129 Riders plaintiffs was white, nearly all were African American. Seven years after the Allen case damages case was resolved, the Oliver v. City of Oakland (CASE NO: C08-04914 TEH) was resolved. The Oliver clients also consisted of a large number of people who were on parole and/or probation and whose houses were searched pursuant to search warrants that contained factual misstatements and/or outright perjury. There were 100 Oliver plaintiffs: only one of them was white, the rest were people of color.

The Monitor's findings on parole and probation searches, coming over eleven years after the Allen case was filed, show that the OPD has not improved upon its stated commitment to treat all of its citizens equally under the law even after seven years of active monitoring. The overwhelming concentration of racial minorities in the Riders (2000-2003) and Oliver (2008-2010) cases, demonstrates the continuation of civil rights abuses towards minorities during the very period when the OPD was subjected to a court order that it address this very issue. Both the monitors' findings and the facts of these cases demonstrate that the OPD has made little or no improvement on a core issue that gave rise to the Allen case and the NSA.

II. Developments since the last Case Management Conference

In addition, there have been three new very disturbing developments since the last Case Management Conference.

The first is the discovery that a large majority of Internal Affairs findings have been classified as "unfounded" or exonerated (see Exhibit 1). The NSA defined unfounded as "The investigation

disclosed sufficient evidence to determine that the alleged conduct did not occur” or when “the individuals named in the complaint were not involved in the alleged act” (NSA Page 10).

The NSA defined exonerated as “The investigation disclosed sufficient evidence to determine the alleged conduct did occur, but was in accord with law and with all Oakland Police Department rules, regulations, or policies.” Unfounded and exonerated complaints are lumped together with “frivolous” complaints in California Penal Code Section 832.5. “Frivolous”, unfounded, and exonerated complaints cannot be used for any punitive or promotional purposes.

The classification of a complaint as “unfounded” essentially means that the complainant has lied and made up a largely or totally false complaint against the officer. It is not the same as “not sustained” where it is not clear from the evidence whether the complainant is being truthful or there is not enough evidence to support the allegation. The reason unfounded complaints are not allowed to be used for punitive or promotional purposes is a legitimate concern that an officer not be punished for complaints which are basically lies. However, this concern should never justify the classification of a complaint as “unfounded”, unless it is in fact a patently false allegation. Plaintiffs’ attorneys have had potential clients make false allegations against police officers in their collective 65 + years of civil rights litigation. However, this number is very small. Most potential clients who do not have viable cases simply cannot prove their case, or it is not clear from the evidence whether their complaint is valid or not. Such cases would be “not sustained” if they were reported to Internal Affairs. As such, even though the officer would not be punished, the classification of their case as “not sustained” would allow the police department to look at the officer more closely if that officers’ number of not sustained complaints was very high in comparison to other officers engaged in similar police work. Such an “early warning system” would not be possible if these complaints were classified as “unfounded.”

The OPD’s wholesale classification of complaints as “unfounded” basically undermines the entire IPAS system, the early warning system, and the ability of even the most well intentioned supervisor to identify problem officers. Moreover, the classification of a high number of complainants (most of whom live and work in Oakland) as essentially people who knowingly filed false or factually baseless complaints is an insult to those who are often trying to bring important

1 matters to the OPD's attention. These individuals often provide the best early warning system to
 2 identify problem officers. To cite but one example, it was a citizen's complaint which brought the
 3 sexual misconduct of Officer Valerga to the attention of appropriate OPD official after he had been
 4 sexually abusing immigrant Asian women for years without anyone in the OPD recognizing his often
 5 public behavior. See, Jane Smith No. 1, et al. v. City of Oakland, et al., Case No. C06-07171 MJJ

6 The Monitor's most recent report states that "a serious matter relevant to the Department's
 7 unusually high number of "unfounded" Internal Affairs investigation surfaced as a result of data
 8 compiled by the department itself" (Eighth Quarterly Report, page 6).

9 The IMT promised to closely scrutinize "the manner in which such determinations are made
 10 as a means to ensure that credibility and other assessments are undertaken in such a way that the
 11 rights and remedies that should be afforded complainants are, in fact, being respected and assured".
 12 Plaintiffs' attorneys welcome this investigation. We simply do not believe that the number of
 13 unfounded complaints is an accurate reflection of the complaints against the OPD and that if this
 14 proves true, OPD cannot possibly be found in compliance with Task 5 and Task 40 for the
 15 foreseeable future.

16 The second development is the quality of some of the OPD's recent promotions. This issue
 17 has been the subject of extensive discussion between the OPD and plaintiffs' attorneys over the past
 18 two months. Plaintiffs' attorneys concerns have not been resolved by these discussions. While we
 19 do agree that police officers, like everyone else, are capable of redeeming themselves, we do not
 20 believe officers who are assessed punitive damages for lying in the course of their official duties
 21 should be promoted when there are so many other capable police officers in OPD who do not engage
 22 in such conduct. See Exhibit 2, especially pages 31:10-32:6, 37:25-39:12, 53:19-54:6 and Exhibit 3
 23 page 3:19-25. We do not believe that officers who are involved in major police misconduct incidents
 24 that costs the city millions of dollars should be promoted when there are hundreds of Oakland Police
 25 Officers who are never sued once in their entire career and are more than capable of being promoted
 26 to a more important position in the OPD. And we do not believe that someone with numerous
 27 lawsuits, punitive damage awards and/or complaints should be allowed to re-enter the OPD when
 28 there are so many police officers with clean records who are more than capable of teaching officers

1 how to do their job.

2 The third development is OPD's response to the "Occupy Oakland" demonstrations. The
 3 "Occupy" movement had demonstrations all over the country that were handled by hundreds of
 4 police departments. They were undoubtedly some individuals in those demonstrations (including
 5 Oakland) who resorted to violence and deserved to be arrested and to be subjected to an appropriate
 6 use of force to stop them from endangering police officers and destroying property. However, the
 7 response by some members of the OPD, like their response to the demonstrations against the War in
 8 Iraq in 2003, was singled out by the media and others as excessive and unnecessary. Plaintiffs'
 9 attorneys note that the IMT is going to do a complete analysis of the OPD's response to Occupy
 10 Oakland and have already noted that although they were satisfied with the performance of the OPD in
 11 some instances, "yet in others we were, thoroughly dismayed by what we observed." (IMT Eight
 12 Quarterly Report Page 82). We welcome this decision and are looking forward to a full and frank
 13 discussion of the OPD response to Occupy Oakland. We agree with the Monitor that "although
 14 progress on compliance has been slow, even those advancements may have been put in doubt in the
 15 face of these events."

16 **III. The future of the NSA**

17 The last nine years have brought improvements to the OPD. Many antiquated policies have
 18 been rewritten and the OPD has been trained under these new policies. The IPAS system has the
 19 promise of identifying "problem officers" and helping them and the City avoid expensive lawsuits,
 20 negative publicity, and damage to the Department's reputation. The Internal Affairs Bureau has been
 21 avoided missing 3304 deadlines for several years and the quality of their investigations has improved.
 22 Officers are in much greater compliance with Task 34 (Stop Data) and there is a real possibility that
 23 the OPD can identify and correct some problems that have damaged its standing with minority groups
 24 and others for many years. There is some evidence of a culture change in the OPD that could make
 25 Oakland a police department that enjoys the widespread support of its citizens.

26 However, the history of the OPD since 2003 shows that the NSA has not accomplished much
 27 of what it set out to do. Recently, the local media did a study of which city had paid out the most for
 28 alleged victims of police abuse over the past ten years. San Jose, with a population of one million

1 residents, has paid \$8.6 million. San Francisco, with 800,000 people paid nearly \$28 million.
 2 Leading all cities was Oakland, with 400,000 residents. The City of Oakland paid out over \$57
 3 million dollars over the past 10 years, almost the exact time period of the NSA. (See Exhibit 4.)
 4 Even discounting the instant Allen case, Oakland has paid \$46 million, which is more than San
 5 Francisco and San Jose combined. Moreover, most of these payments were for jury verdicts, or cases
 6 where the main police officer defendant was convicted of a crime, fled the country and/or was
 7 terminated.

8 During the NSA period, the OPD has suffered from scandals, adverse legal verdicts and
 9 settlements and jury verdicts, and changeover in command staff personnel. This is reflected in its
 10 failure to achieve compliance with the NSA itself, even though we are at a point far beyond the time
 11 parameters conceived by the original agreement. Implementing the agreement has cost millions of
 12 dollars in attorney fees, police hours, and monitors' fees. It is clear that the number one reason for
 13 the failure of the OPD to achieve substantial compliance is the lack of accountability and particularly
 14 supervisory accountability. Not one dollar of these settlements and verdicts has been paid by the
 15 police officers responsible for them. Until recently, no one was ever disciplined for compliance
 16 related failures. The OPD has simply asked the taxpayers and others to pay the bill and has gone on
 17 as if there were no problem.

18 The failure of the OPD to increase the tasks in compliance is almost incredible given the time
 19 and money spent to date. While some officers and command staff are totally dedicated to working to
 20 achieve compliance, the lack of concern by more than a few OPD members has resulted in a problem
 21 that must be addressed: The OPD may not be in compliance during this new extension and may
 22 never be in compliance given their lack of progress over the past nine years. In their most recent
 23 report, the Monitor stated it succinctly: "...we find ourselves facing an uncomfortable reality: The
 24 path forward is not clear."

25 **IV. A New Approach is Needed**

26 **A. Receivership**

27 In a Joint Case Management Conference Statement filed by the parties on December 2, 2010,
 28 over a year ago, Plaintiffs' counsel expressed serious concerns about the continuing failure of the

1 City of Oakland to reach substantial practice compliance with the NSA. Plaintiffs' counsel cited to
 2 excerpts from the transcript of a previous Case Management Conference where City officials had
 3 admitted to the Court that the City had failed to come into substantial practice compliance with the
 4 remaining tasks of the NSA.

5 At that time, Plaintiffs' counsel requested that a date be set for Plaintiffs to bring a motion
 6 concerning the City's lack of substantial compliance if the City of Oakland remained out of
 7 substantial compliance by March 2011 and if the parties did not reach an agreement to extend the
 8 NSA. (Joint Case Management Conference Statement, December 2, 2011, 5:26-6:10). No motion
 9 dates were set at that time and, instead, the NSA was extended and further Case Management
 10 Conferences were held in 2011. Nevertheless, during the course of 2011, it became painfully obvious
 11 that the City of Oakland would never reach substantial practice compliance by the end of January
 12 2012.

13 The IMT's Eighth Report, the recent developments described above, and the one year
 14 compliance period make it certain that the OPD will not be in compliance at any time in 2012. The
 15 OPD's lack of progress in attaining compliance makes it very unlikely the OPD will achieve
 16 compliance in the current extension period which ends in January 2014. If the City is allowed to
 17 pursue its "business as usual" approach, it is a virtual certainty that millions of dollars will be wasted
 18 and no compliance will be achieved.

19 In its October 3, 2011 Case Management Order, the Court directed Plaintiffs' counsel to make
 20 proposals for further proceedings in the event that they continued to be dissatisfied with the progress
 21 made by Defendant City of Oakland toward practice compliance with the remaining tasks of the
 22 NSA/AMOU.

23 It is patently clear from the Monitor's Eighth Report that Defendant City of Oakland has
 24 failed to make any substantial progress toward substantial practice compliance with the remaining
 25 tasks under the NSA. As a result, Plaintiffs' counsel remain dissatisfied with the progress made by
 26 the City of Oakland and believe it is time for the Court and the parties to seriously consider the
 27 appointment of a receiver.

28 Given the bleak forecast for substantial practice compliance given in the Monitor's Eighth

Report, the City's lack of will to take the action necessary to come into substantial practice compliance and the prospects that there will be continuing delays with an accompanying waste of the City's limited resources, Plaintiffs believe that the court needs to set a firm date for the filing of a motion for receivership, an appropriate briefing schedule and a hearing date for the motion.

This Court possesses the authority to implement any remedies necessary to correct constitutional violations. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 695-96 (1979). Pursuant to its equity jurisdiction, the Court has the power to take broad remedial action to effectuate compliance with its orders. *Lewis v. Kugler*, 446 F.2d 1343, 1351-52 (3rd Cir. 1971).

This equitable power includes the power to appoint a receiver. *Id.* at 1351; *Plata v. Schwarzenegger*, No. C01-1351, 2005 U.S. Dist. LEXIS 43796 (N.D. Cal. Oct. 3, 2005) (Receiver appointed re: state prison health services); *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir.1976) (approving temporary receivership of South Boston High School for purpose of desegregation); *Dixon v. Barry*, 967 F. Supp. 535, 550-52 (D.D.C. 1997) (upholding appointment of a receiver over the District of Columbia's Commission on Mental Health Services); *Shaw v. Allen*, 771 F. Supp. 760, 762 (S.D. W. Va. 1990) (appointing a receiver over a jail); *Newman v. Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979) (appointing receiver for Alabama State Prisons); *Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1966) (maintaining receivership in school desegregation context).

In addition, the Court may appoint a receiver to force public officials to comply with court orders. *Lewis*, 446 F. Supp. at 1351-52; see also *Dixon*, 967 F. Supp. at 550 (citing *Morgan*, 540 F.2d at 534-35) (receivership justified given the local authorities' failure to comply with the court's desegregation orders).

The Court has the discretion to appoint a receiver where such action is reasonable under the particular circumstances of the case. See *Dixon*, 967 F. Supp. at 550. Courts have developed a multi-pronged test to guide this determination. The test includes the following elements, the first two of which are typically given predominant weight:

- (1) whether there is a grave and immediate threat or actuality of harm to plaintiffs;
- (2) whether the use of less extreme measures of remediation has been exhausted or proven

1 futile;

2 (3) whether continued insistence that compliance with the Court's order would lead only to
3 confrontation and delay;

4 (4) whether there is a lack of leadership to turn the tide within a reasonable period time;

5 (5) whether there is bad faith;

6 (6) what resources are being wasted; and

7 (7) whether a receiver is likely to provide a relatively quick and efficient remedy.

8 *Plata*, 2005 U.S. Dist. LEXIS 43796 ; *Dixon*, 967 F. Supp. at 550; *Morgan*, 540 F.2d at 533.

9 As this Court noted in *Plata*, *supra*, this Court "is not required to restrict its powers to those
10 means that have proven inadequate, or that show no promise of being fruitful '[F]ederal courts
11 are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued,
12 an injunction may be enforced.'" *Plata*, *supra* (quoting *Hutto v. Finney* 437 U.S. 678, 690 (1979)).

13 In this case, each of the *Plata* factors weigh heavily in favor of the Court ordering the
14 imposition of a receivership in this case. Defendant City of Oakland's history of non-compliance with
15 the Court Ordered reforms spans some nine (9) years.

16 Residents of Oakland, visitors, working people and other traveling through Oakland remain in
17 grave danger as a result of continuing violations of the NSA/ AMOU reforms. The appointment of a
18 receiver will provide competent leadership over the OPD and bypass many of the obstacles that have
19 prevented the City of Oakland from coming into practice compliance with the remaining tasks under
20 the NSA/AMOU.

21 The Court can easily draw on its own experience and the Monitor's reports to conclude that
22 maintaining the *status quo* will only result in more delays. Over the past nine years, Defendant City
23 of Oakland has repeatedly missed deadlines for compliance and/or has requested repeated extensions
24 to the deadlines agreed upon by the parties. Given past performance, future missed deadlines are
25 likely, and it is unlikely that the defendants would comply with further Court orders given their
26 inability and/or outright refusal to comply with the NSA, which itself is an order of this Court.

27 This case is similar to *Dixon v. Barry*, 967 F. Supp. 535 (D.D.C. 1997), where the Court
28 determined that the appointment of a receiver was necessary due to the Defendants' repeated delays

1 and failure to comply with Court Ordered reforms. In *Dixon*, the District of Columbia entered into a
 2 Consent Order with the plaintiff class of mentally ill residents to overhaul its delivery of community
 3 mental health services to those individuals. The parties initially envisioned the reforms would be
 4 completed by 1985. However, by 1985, the District still was not in compliance, and the Court issued
 5 a series of additional orders between 1985 and 1992 which set various time tables for compliance.
 6 When the District of Columbia still failed to comply, the Court first appointed a Special Master, but
 7 the District still failed to comply with its obligations under the consent decree. *Dixon*, 967 F. Supp. at
 8 540.

9 Ultimately, the plaintiffs moved for the appointment of a receiver. In response, the District of
 10 Columbia argued that it was beginning to make progress and that the appointment of a receiver was
 11 unnecessary given its recent efforts. The Court, however, refused to accept the District's claims of
 12 improvement given its repeated failure to comply with the consent decree. *Id.* at 553.

13 In the instant case, Defendant City of Oakland has continuously made similar empty promises
 14 of reaching substantial practice compliance. Sadly, it appears that there is no chance that the City of
 15 Oakland will reach substantial practice compliance without the imposition of a receivership.

16 Moreover, it appears that Defendant City of Oakland lacks the leadership necessary to reach
 17 substantial practice compliance. The OPD has experienced a revolving door in the Chief's office
 18 during the pendency of this case and it currently lacks a permanent Chief. Interim Chief Jordan has
 19 already served in this position and his tenure did not result in the OPD achieving substantial
 20 compliance. He will have to do far more than tell the court and plaintiffs' counsel that he believes in
 21 the NSA and intends to comply with it. He must motivate his officers to achieve compliance
 22 which neither he nor any other city official has done to date. This motivation must consist of
 23 appropriate harsh punishment to those who waste City resources and continue to be responsible for
 24 the OPD's failure to achieve compliance. So far, there is no real evidence that this has happened and
 25 no concrete evidence that it will happen. While a few OPD members have labored tirelessly to
 26 achieve compliance, a more significant number has opposed the reforms or remained indifferent
 27 towards them. A "business as usual" approach will not change this very longstanding trend.

28 It is now patently clear that the OPD leadership is incapable of reaching substantial practice

1 compliance with the remaining tasks under the NSA/AMOU unless it shows a will to take positions it
 2 has avoided for nine years. The setting of a date for a receivership motion will force these
 3 individuals to act without delay, or no longer be in charge of the compliance effort.

4 The City's repeated failure to reach substantial compliance is in bad faith given the OPD's
 5 repeated and systemic civil rights violations, the wholesale classification of those who complain
 6 against the OPD as de facto liars, the widespread lack of equal protection afforded to the minority
 7 community, and the willful failure to follow the two teams of Monitors and plaintiffs' counsels'
 8 suggestions on achieving compliance. Although this Court previously noted in *Plata* that a finding of
 9 bad faith is not required before the Court may appoint a receiver, it is a factor which the Court may
 10 consider in doing so. Moreover, this Court in *Plata* found that a lack of will was a key factor
 11 contributing to the defendant's failure to comply with the Court's order. Such a lack of will is clearly
 12 evident in this case, even if the Court were not to find that the City's failure to reach substantial
 13 compliance was not in bad faith.

14 Another factor for the Court to consider in appointing a receiver is whether the City's lack of
 15 effective leadership has resulted in a waste of limited resources and has contributed to their ongoing
 16 failure to comply with the Court ordered reforms. Clearly, this is the case here. Despite the passage
 17 of nine years, in which two separate Monitoring teams have found problems with the City's
 18 compliance with the NSA, the most recent Monitor's report shows that the City has failed to make
 19 any substantial progress in reaching substantial compliance with the remaining tasks under the NSA.
 20 All the while, the City of Oakland wasted its limited resources, and will likely continue to deplete its
 21 limited resources while failing to reach substantial compliance. Therefore, a receivership is
 22 necessary to prevent the continuing waste of the City's limited resources.

23 Finally, a receivership is likely to force the City and OPD to comply with the Court ordered
 24 reforms under the NSA/AMOU. One of the reasons the appointment of a receiver would offer more
 25 efficient and effective relief than the current structure is that a receiver would be able to bypass the
 26 internal bureaucracy and politics which have prevented the City of Oakland to reach substantial
 27 compliance with the remaining tasks under the NSA/AMOU. The receiver would have the authority
 28 and power to take swift and decisive action – something that has eluded the current and past

1 leadership of the OPD which have had to contend with internal OPD politics as well as the politics of
 2 City Hall. With the elimination of these political concerns, a receiver can focus on reaching practice
 3 compliance with the remaining tasks under the NSA.

4 **B. Alternatives to Receivership**

5 Plaintiffs' counsel strongly urge the court to set a date for appropriate motions by the parties
 6 concerning receivership and related actions. This date is necessary given the number of parties, the
 7 need for experts and others to save the date of this motion on their calendars, and most importantly,
 8 for the OPD and the City of Oakland to realize the gravity of the situation at hand.

9 However, plaintiffs' counsel are willing to meet with the City to explore alternatives to
 10 receivership providing the meet and confer sessions are productive and the City makes proposals that
 11 recognizes that the current progress towards compliance is so inadequate that a new approach is
 12 needed. Plaintiffs' counsel are also open to the suggestions by the Monitor that might result in more
 13 rapid progress towards compliance.

14 Meet and confer on these issues cannot be used as it has been in the past, to give the City an
 15 opportunity which only results in more wasted time and no progress towards reform. If the City is
 16 not serious in exploring meaningful new approaches, plaintiffs' counsel ask the court leave to pursue
 17 a receivership motion without any further delay.

18 **DEFENDANT CITY OF OAKLAND'S POSITION**

19 The Negotiated Settlement Agreement (NSA) between plaintiffs and City requires City to
 20 demonstrate that the core operational areas of the Oakland Police Department function at the highest
 21 levels of professional and constitutional policing.

22 City submits this Statement to set forth the efforts of its staff and officials to achieve
 23 compliance with the tasks set forth in the NSA and to affirm City's commitment to implement the
 24 NSA reforms as quickly and completely as possible. To support the City's efforts, City officers are
 25 working closely together to focus attention on this important goal. Attached as Exhibit "5" is a letter
 26 to the Court from Mayor Jean Quan, City Administrator Deanna Santana and City Attorney Barbara
 27 Parker which expresses support of the City's compliance efforts. City's good will and commitment
 28 to compliance is reflected in the work achieved since the last CMC hearing of September 22, 2011

1 and during the term of the NSA. City has formed a cohesive team of high-level City officers charged
 2 with identifying and removing impediments to NSA compliance. These City representatives
 3 communicate with Chief Warshaw for advice, guidance and recommendations. City is confident that
 4 its continuing work will achieve NSA compliance under the new Amended Memorandum of
 5 Understanding.

6 **A. Moving Forward Under Chief Howard Jordan**

7 City Administrator Santana and Chief Jordan demonstrate a stronger organizational
 8 partnership and management tone relative to mutual leadership priorities, performance expectations,
 9 and overall accountability to achieve compliance. With the support of City Administrator Santana,
 10 Interim Chief of Police Howard Jordan and his administration have renewed the Department's efforts
 11 to attain police standards mandated by the NSA.

12 The goal of meeting compliance goes beyond creating reporting requirements, drafting
 13 policies, implementing systems, and conducting audits and inspections to ensure sound management
 14 practices, risk management, and accountability. The purpose of the NSA was to change the culture of
 15 the police department, along with its management practices and to employ best police practices. The
 16 police department is different than it was over eight years ago. The culture has changed, albeit more
 17 is needed. The recent creation of the Risk Management Bureau recognizes the critical and important
 18 role of the Office of Inspector General (OIG), Internal Affairs, and Training. It elevates the OIG
 19 position to the level of a Deputy Chief, currently commanded by Deputy Chief Anthony Toribio.
 20 The former Internal Affairs Commander, Sean Whent has been promoted to Captain and now
 21 oversees the daily operations of the OIG. Attached as Exhibit "7" is the OPD Organizational Chart
 22 showing the establishment of the Risk Management Bureau.

23 Three other examples that highlight the change in culture are:

- 24 • The development of a proactive integrity testing unit. What is noteworthy is not the fact that
 25 the overwhelming number of officers pass integrity tests, but that Oakland Police officers are
 26 requesting integrity testing on officers that may be engaged in misconduct.
- 27 • The development of an early warning system (PAS) for identifying at-risk or problematic
 28 behavior. PAS has thresholds which trigger supervisory and command performance review.
 More officers are recommended to formal monitoring or intervention and supervisors and

1 commanders to initiating reviews and intervention strategies to correct behavior and enhance
2 performance.

- 3 • The reorganization of the Department which emphasizes monitoring and oversight of police
4 performance.

5 Chief Jordan and City Officials understand the need to further change the Department's
6 culture. Chief Jordan, in cooperation with the Monitor, the Plaintiffs, and the community plans on
7 assessing the organizational structure to identify problems that are in the way of compliance, culture
8 change, and sustainability. From this assessment a roadmap will be developed to address cultural
9 change, compliance, and consistent with the best police practices of the 21st Century. Furthering
10 cultural change includes the following goals:

- 11 • Enhancing hiring practices to employ the best candidates, preferably from Oakland and other
12 urban communities.
- 13 • Improving the Department's community policing efforts.
- 14 • Improving the relationship between the police and youth to foster understanding, mutual
15 respect, with the hope of developing interest in the law enforcement profession.

16 Chief Jordan has infused new energy, focus, and commitment to the compliance work of the
17 OPD and has ordered greater emphasis on police ethics and integrity. Chief Jordan has established
18 positive communications with Monitor Warshaw and has ordered all OPD personnel to work
19 collaboratively with the Monitoring team. Chief Jordan's leadership and priorities will significantly
20 improve the City's effort to create a police culture of fairness, integrity, and respect for the
21 constitutional rights of individuals. Chief Jordan's Letter to the Court, attached as Exhibit "6" sets
22 forth his efforts, commitment, and expectations toward achieving full NSA compliance and of his
23 vision of what he would like the OPD to become.

24 **B. Progress Achieved Since the Last CMC Hearing**

25 The Monitor reports that City must become more retrospective about compliance efforts in order
26 to end the slow progress with task compliance. (IMT 8th Quarterly Report.) City acknowledges the
27 validity of the Monitor's observations and agrees that retrospection is necessary to move compliance
28 forward. As such, City reinforces its commitment to continue and enhance its effort to identify and
resolve the constraints that impede compliance.

Since the last CMC hearing, City has intensified its efforts to achieve systemic reform and

high professional policing standards through training, leadership, supervision, and accountability measures. Under the leadership and direction of City Administrator Santana and Chief Jordan, City continues its work in the following areas:

- The City Administrator began regular meetings to focus City staff efforts to achieve compliance and cultural change within OPD. The goal of cultural change is to create and institutionalize behavioral norms that all members of a modern, professional police department should accept as the guide for constitutional policing.
- Initiating meetings with the Oakland Police Officers Association's (OPOA) new leadership to further compliance and reform efforts.
- Strengthening communication and collaboration with the Monitor regarding compliance and reform.
- Reassigning or promoting command officers to enhance compliance and reform efforts, ensuring that the appropriate resources needed to support NSA progress are in place.
- The Chief is establishing his team that reflects his values and vision of the Department.
- Publishing OPD policies on the OPD website to promote transparency.
- Continuing to hold OPD members accountable for compliance deficiencies, policy violations and misconduct, and offering training and information bulletins to ensure continuous education in NSA compliance.
- Using the Action Plan to track compliance efforts, ensure that the Monitor's recommendations are followed and hold Commanders accountable for compliance deficiencies.
- **Task 3** (Integrity Testing): Robust unit began conducting integrity tests related to members/employees who may be abusing sick or injury leave.
- **Task 5** (IAD Investigations): Command review of Internal Affairs or division level investigations requires listening to complainant statements before approving investigations where complainant is deemed not credible. The Department has also provided extensive training on credibility assessments and preponderance of evidence standards.
- **Task 6** (Refusal to Accept or Refer Citizen Complaints): No longer utilizing Informal Complaint Resolution for Class II allegations of this type and now requires initiation of formal internal investigation.
- **Task 20.2** (Consistency of Supervision): Concept of team supervision and increased assignment of sergeants to patrol to improve consistency of supervision. A new shift plan is being implemented on February 4th.
- **Task 24** (Use of Force Reporting): Enhanced firearms training to include training scenarios where no force or display of force is needed. Pointing of firearm perception issue added to training on cultural diversity, perception, and bias; community member who has been subject to Level 4 Use of Force participates in discussion regarding perception and police conduct and professionalism. Providing additional training to supervisors at Continuing Professional Training.

- **Task 34** (Stop Data): On December 30 2011, issued Information Bulletin on Stop Data Statistics. A more detailed report is under final review. Additionally, a holistic, strategic plan is being developed that will impact all levels to address the issue with current officers but will also focus on who and how we recruit.
- **Task 41** (Use of PAS): Lowered Level 4 pointing of firearm thresholds for PAS review. In the process of adding normative comparison of arrest versus Level 4 pointing of firearm. Increasing required number of follow up meetings for personnel on monitoring or intervention.
- **Task 43** (Training): Enhanced training for Police Evidence Technicians to include participation in Continuing Professional Training, and development of additional training from the drug lab.
- **Task 45** (Consistency of Discipline): Standardized data entry process and modified IAD database to more accurately capture disciplinary action.

The Monitor has also brought focus to the Department's ability to effectively "spread the message of reform" throughout the organization. City is working diligently with the Monitor to address these concerns. The City's Action Plan incorporates the deficiencies and includes the Monitor's recommendations and next steps for resolving the concerns. The Action Plan serves to guide the City's compliance efforts. Attached hereto as Exhibit "8" is a copy of the City's current Action Plan. These matters are discussed with the Monitor and plaintiffs' attorneys during Working Group meetings and we encourage continued collaboration in this area. The Department has taken the following steps to address the concerns:

- The Department provides continuing training on the conditions that led to the NSA and its purpose and goals during supervisory and officer training courses.
- The Chief of Police and the executive staff attend lineups and hold meetings to discuss the importance of compliance and reform.
- The Chief of Police and the executive staff meet with commanders and supervisors to discuss performance deficiencies related to compliance, clarify expectations and hold personnel accountable.
- The Department developed a two-day Internal Affairs course for new investigators, supervisors, and commanders that covers the technical aspects of compliance in investigating IAD cases but focuses on the risk management and community trust values furthered by proper handling of the investigations.
- The Department held a two-day leadership seminar for commanders and managers.

In addition, City's efforts to achieve compliance have included the following initiatives:

- A Working Team supported by Mayor Quan, City Administrator Santana and City Attorney Parker was created to ensure that the correct focus is given to the City's compliance effort. (Joint Letter of City officials.) The Monitor acknowledges the leadership of the Mayor and City Administrator in this renewed effort. (IMT PPS 8TH Quarterly Report.)
- Howard Jordan was appointed interim Chief of Police. Chief Jordan and representatives from the offices of the Mayor, City Administrator, and City Attorney, are now leading compliance efforts in a manner that is aligned with shared priorities. The Monitor acknowledges the new leadership and open communication brought about by Chief Jordan. (IMT PPS 8TH Quarterly Report.)
- The OPD has been reorganized with an emphasis in overseeing and monitoring police performance. The reorganization establishes a Bureau of Risk Management, emphasizes the role of the Office of Inspector General (OIG), Internal Affairs, and Training, and elevates it to the level of a Deputy Chief commanded by Deputy Chief Anthony Toribio. The former Internal Affairs Commander, Sean Went has been promoted to Captain and now oversees the daily operations of the OIG. (OPD Organizational Chart.)

Communication between Chief Jordan and Chief Warshaw has improved in substance and in frequency. And, collaboration between City and Chief Warshaw has increased. More effective meetings are occurring between police representatives and the Monitoring Team during Technical Assistance sessions and in Working Group monthly meetings. City has continued focused and candid face to face meetings with Monitor Warshaw and Deputy Monitor Reynolds, and with plaintiffs' attorneys. In the Working Group monthly meetings, City has been able to demonstrate its ability to self-identify problems, listen to criticisms, and discuss solutions in collaboration with plaintiffs' counsel and the Monitoring Team. City also discusses its Action Plan and shares its compliance efforts with the Monitor and plaintiffs' counsel. Areas of discussion where City has followed the Monitor's recommendations have covered consistency of supervision and quality of Internal Affairs and force investigations. City believes that its open communication, collaboration, and transparency, along with its interest in following the Monitor's recommendations demonstrate City's commitment to the reform process and cultural change. (See Exhibit 8, OPD Action Plan.)

Lack of accountability for poor performance and failures in command and supervision have also been noted by the Monitor as concerns. As reported in the last CMC statement, City continues to hold command and supervisors accountable for policy violations and performance deficiencies which show that the goals of the NSA are being realized. OPD commanders and supervisors are accountable for failure to meet compliance requirements assigned to them under the Compliance

1 Action Plan and the IAD is in process of examining the “unfounded” complaints to determine
 2 validity, areas for investigation changes, and overall, to obtain a deeper understanding of this
 3 pattern. Specifically, since the September 22, 2011 CMC hearing, the Department has taken the
 4 following actions to hold commanders and supervisors accountable for work and performance
 5 deficiencies:

- 6 • Initiating 25 internal affairs investigations involving 29 command and supervisory personnel. The
 7 matters include command and supervision staff and their concerns involving performance of duty,
 8 conduct towards others, reporting violations of laws and departmental orders, and refusing to accept
 or refer a complaint.
- 9 • Sustaining six command and supervisory members for Manual of Rules violations, including four
 10 sergeants for improper supervision, performance of duty, and conduct towards others; and two
 11 commanders for failures in command, reporting violations of rules and orders, and for refusing to
 accept or refer a complaint.
- 12 • Taking corrective action for performance deficiencies and issuing 21 supervisory notes file entries,
 13 one letter of discussion and two performance deficiency notices.

14 **C. Progress Achieved During the Term of the NSA**

15 **1. Important Institutional Changes That Support Culture Change Were Achieved** 16 **Under the NSA and Have Continued.**

17 The progress achieved under the NSA and which continues to this day cannot be overlooked.
 18 In executing the NSA, City understood the need to change the culture of the Police Department
 19 through institutional and organizational changes. The Department was required to develop new
 20 operational systems and protocols to operate a professional police department committed to effective
 21 policing and protecting the constitutional rights of all persons. When the NSA was executed, the
 22 OPD lacked a strong structural foundation and the operational systems necessary to run a strong,
 23 professional organization. System improvements were needed for the Department to properly
 24 supervise and monitor officer conduct, and for holding members accountable for policy violations.
 25 Enhancements to policies and training were also needed in the areas of police force, detentions and
 26 arrests, vehicle stops, biased policing, and other high-risk areas such as vehicle pursuits. NSA
 27 compliance and progress with establishing the required policies is reflected in the 8th Quarter report
 and has long been achieved.

28 The work environment that permeated the OPD in 2003 and which led to alleged

1 unconstitutional practices by some officers is long gone. There is more work to be done and isolated
 2 instances of misconduct may still occur, but the Department now has stronger operational systems
 3 and the institutional structure to ensure constitutional policing and promote effective and professional
 4 police practices. In this regard, the goals of the NSA to remedy past unconstitutional practices, and
 5 prevent patterns or practices that lead to constitutional violations, are being realized. (Alabama
 6 Disabilities Advocacy Program v. Walley, et al., 475 F.Supp.2d 1118 (2007) - consent decrees are
 7 intended to address elimination of institutional conditions that lead to constitutional violations.)

8 Some of the structural and operational changes that have been institutionalized within the OPD are:

- 9 • The police department has been reorganized with an emphasis on effective and
 10 professional policing. The Bureau of Risk Management has been established to focus on
 11 monitoring and overseeing high risk police actions and to incorporate risk assessment into
 12 the regular work of all personnel. The Office of Inspector General Internal Affairs,
 13 Training and Research and Planning have been incorporated into the Risk Management
 14 Bureau.
- 15 • The Patrol Division has been reorganized under the concepts of geographical command
 16 and team supervision. This reorganization will further the practice of effective and
 17 professional policing, while enhancing supervision and accountability.
- 18 • Internal Comp Stat and Risk Management and Policy Compliance meetings are being held
 19 to emphasize the goals of effective and professional policing and risk management and
 20 commanders are responsible for developing effective crime reduction strategies in their
 21 areas and for the performance of their subordinates.
- 22 • The Office of Inspector General conducts regular audits, reviews, and line inspections of
 23 police operations.
- 24 • The Internal Affairs Division's Integrity Unit regularly conducts misconduct
 25 investigations and initiates integrity tests.
- 26 • The Personnel Assessment System (PAS) serves as an early warning system that allows
 27 for intervention and accountability when officers engage in improper conduct or exhibit
 28 at-risk behavior.

2. Compliance Slowed Under the MOU But City Efforts Continue to Show Progress.

City acknowledged that it needed more time to complete the reform work and agreed to

1 extend the MOU for two additional years. The new AMOU commences on January 23, 2012 and
 2 ends on January 22, 2014. Under the MOU and AMOU, Monitor Warshaw emphasizes “substantive
 3 compliance” in the compliance process. This requires that all members of OPD understand and accept
 4 the overall purpose and objectives of the NSA in order to change the culture of the Department. City
 5 is realigning its efforts to create a more robust communication and training effort that ensures that
 6 compliance efforts are understood, but that also acknowledge the organizational and cultural values
 7 that require embracing to more holistically achieve sustaining results.

8 City is aware that it is at a critical juncture in this case and that it must demonstrate renewed
 9 commitment to complete the NSA reforms. This is especially true at a time when the Court and the
 10 Monitor have expressed concern and frustration about the slow pace of implementation of eight of the
 11 22 remaining tasks, as reported in the Monitor’s 8th Quarterly Report which covers the period of July
 12 through September, 2011. The report states that City is failing to show progress in achieving full
 13 compliance with eight tasks that have remained under partial compliance for a considerable time.
 14 City understands these concerns and is working to overcome the factors that have delayed
 15 compliance with these specific tasks. We believe that recent efforts advanced under Chief Jordan
 16 will demonstrate a higher level of compliance in April 2012.

17 City recommends further collaboration with the Monitor and Plaintiffs’ Attorneys to establish
 18 timelines for achieving compliance. A work plan must be developed that integrates the Monitor and
 19 Plaintiffs’ input and guidance. This effort will further ensure accountability and speed up compliance.
 20 The Monitor is also assisting the City to address the slow progress in several areas that have remained
 21 in “partial compliance” for long periods. These include Task 40 – PAS Purpose and Use; Task 20.2 –
 22 Consistency of Supervision; Task 34 - Stop Data; Task 24 - Use of Force.

23 City respectfully asks the Court to consider all that has been accomplished during the term of
 24 the NSA and the City’s commitment to improve compliance, along with its ability to work
 25 collaboratively with the Monitor and follow recommendations. Relevant to the assessment of City’s
 26 overall efforts to reach compliance are the following factors which City asks the Court to consider:

- 27 • City continues to show institutional capacity to maintain the reforms achieved under the NSA.

- City continues to demonstrate its ability to resolve barriers toward achieving compliance, notwithstanding challenges brought about by changes in City and OPD leadership, budget reductions and layoffs, OPD's reorganization, and changes in OPD's operations.

City thinks it noteworthy that it has achieved and maintains compliance with 28 NSA tasks and their hundreds of subtasks achieved under the NSA. Based on City's progress with compliance, the Court removed the compliant tasks from active monitoring when the NSA was terminated in 2010. Since January 2010 to the present, City continues to show consistent compliance with 12 of the 22 active tasks and that progress is continuing with eight tasks deemed in partial compliance. City has reduced the tasks "not in compliance" from five to one. (IMT 8th Quarterly Report.) This overall improvement in task compliance and the structural, operational and preliminary cultural changes made within the OPD show continuing progress. As a next step, with structure and organization in place, we endeavor to ramp up efforts to promote organizational cultural change.

Although specific task/subtask compliance has fluctuated during the nine years of this case, overall compliance has improved. For example, in 2006/2007 City reached full compliance with all the required policies of the NSA and this compliance has continued under the MOU and continues to date. (IMT 8th Quarterly Report.) Training compliance was also achieved during this time and has continued to date. (IMT 8th Quarterly Report.) In reviewing the practice compliance fluctuations that have occurred during the lifetime of this case, Defendants note that overall progress continued during these time periods. For instance, a review of the IMT's Quarterly Reports from 2005 through 2009 shows that City increased partial and full compliance in 2006 from four Tasks to 10 Tasks; in 2007 compliance was increased to 31 Tasks; in 2008 to 41 Tasks; and in 2009 to 45 Tasks. (IMT Quarterly Reports, 2005 to 2009.) This meaningful progress led the former Monitors to recommend - and the Court to approve - the termination of the NSA and the filing of a new MOU under which the Parties reduces the Tasks from 51 to 22 for active monitoring. During the MOU, City was able to increase full and partial compliance levels from 16 Tasks in 2010 to 20 Tasks in 2011. (IMT 8th Quarterly Report.)

This historical record of effort and compliance should encourage the continued collaboration and collective effort of all stakeholders so that the work that began in 2003 can be completed under

1 the AMOU.

2 **3. City Response to Inquiries Regarding the Occupy Oakland Incidents**

3 The Monitor is conducting a review of the Occupy Oakland events and included a preliminary
4 report with the Eighth Quarterly Report. City welcomes this assessment and will work with the
5 Monitor to address any deficiencies identified in police operations during the Occupy Oakland
6 incidents.

7 City notes that its police department has handled numerous events related to the Occupy
8 Oakland movement. Calculating the number of officers and the number of Occupy participants,
9 multiplied by the number of days of Occupy protests and activities, there have been thousands of
10 police-citizen interactions during Occupy activities that included thousands of officers and tens of
11 thousands of protesters. With the exception of isolated incidents involving individual officers, the
12 Department was able to facilitate lawful and peaceful activity during the daily marches, meetings,
13 and gatherings, which were accomplished without serious incident, injury, use of force, or significant
14 arrests by police.

15 The City will investigate all complaints and allegations of misconduct and will take
16 appropriate action for any violation of laws and policies. An independent investigator will investigate
17 the misconduct complaints and review the Department's response to the October 25, 2011 and related
18 Occupy incidents, including the City decisions and actions related to police planning, command and
19 control, use of force, and coordination of mutual aid agencies. To further transparency, City posted
20 on its website video recordings made by officers on duty during Occupy events and its operational
21 plans and department policies on police force and crowd control.

22 **4. City Response to Inquiries Regarding "Stop and Frisk" Practices Involving Parolees** 23 **and Probationers**

24 City is reviewing the concerns of the Monitor included in the Eighth Quarterly Report and will
25 work with the Monitor on a resolution. City will prepare an Action Plan to track its efforts to resolve the
26 concerns. City has already taken steps to train officers on the legal and policy requirements for stopping
27 and searching parolees and probationers, and to educate officers about the unintended negative impact of
28 certain police interactions on this community.

On November 23, 2011, the Department published Training Bulletin (TB) I-O.4 - Legal Aspects of Searching Persons on Parole/Probation. This TB discusses the legal and policy mandates of conducting parole or probation searches, reporting requirements, and provides guidance for confirming parole/probation status. Lineup training on this policy has been provided. And on November 7, 2011, the Department provided training at the Transitional Academy about cultural diversity, perception and bias. The Department invited a community representative who talked about negative interactions with police and that they erode trust and respect. The training also covered unintended assumptions that police officers may make about certain individuals. The Department is also working with Oakland community representatives to develop a cultural competency class which will be taught in the Police Academy and the Continuing Professional Training Course for supervisors and officers.

CONCLUSION

City respectfully submits that although there are certain Tasks of which it has not been able to achieve full compliance, its overall record since 2008 demonstrates a steady effort to work through many institutional obstacles impeding compliance. City believes that its overall record of NSA reforms that have been implemented, either in whole or in part, are evidence of its good faith effort to achieve compliance. Through this Court oversight process, City is acutely aware that it needs to identify and remove the root causes that have impeded compliance with the NSA reforms. As Chief Jordan will remark, City intends to retain expertise that will enable it to identify the root impediments to NSA compliance and implement strategies to permanently remove the impediments.

POSITION OF INTERVENOR: OAKLAND POLICE OFFICERS ASSOCIATION

Intervenor Oakland Police Officers Association ("OPOA") believes that significant progress has been made in achieving full compliance with the Negotiated Settlement Agreement ("NSA"). While the Independent Monitoring Team identifies areas of concern in its most recent Quarterly Report, the OPOA asserts that the recently issued Quarterly Report is not reflective of the current state of affairs at the Oakland Police Department ("OPD" or "Department"). Since the appointment of Howard Jordan as the chief of police, there have been material and significant advances made by the Department toward full compliance with the NSA. The commitment of Chief Jordan to achieve full compliance has been communicated to the rank and file as well as to the leadership of the OPOA.

1 Chief Jordan's leadership style and direction reflects a clear and focused effort to achieve full
2 compliance with the NSA.

3 With the encouragement of Chief Jordan, the OPOA and OPD commanders have formed an
4 "OPD/OPOA Working Group" and are meeting on a regular basis to focus efforts and discussions on
5 implementation issues relative to the NSA. None of the prior chiefs of police had formally reached
6 out to the OPOA and established a formal structure to have ongoing dialogue and interaction between
7 the OPOA and OPD on NSA issues. These "working group" meetings have led to numerous
8 accommodations and arrangements which are clearly moving the Department in a much more
9 accelerated and positive direction relative to the NSA. The meetings are attended by the Executive
10 Board of the OPOA and Chief Jordan as well as all of the Deputy Chiefs. Chief Jordan has
11 demonstrated his willingness to develop action plans and make immediate decisions at these meetings
12 to accelerate full compliance. The OPOA has been a willing and cooperative participant in these
13 efforts. Significant progress has been made on key issues as a result of this OPD/OPOA Working
14 Group.

15 In addition to the appointment of Chief Jordan, the hiring of Deanna Santana as the city
16 administrator has also brought a renewed focus and energy toward securing compliance with the
17 NSA. Ms. Santana has been unwavering in her commitment to achieve full compliance with the
18 NSA. The level of cooperation and coordination between Ms. Santana, Chief Jordan and the OPOA
19 is a dynamic not previously seen or experienced by the OPOA. Despite the political and economic
20 challenges facing the City of Oakland, Ms. Santana has been relentless in her pronouncements that
21 the Department will secure full compliance with the NSA as soon as possible. While resources are
22 limited and at times strained, Ms. Santana has not compromised on dedicating resources to the NSA.

23 As the Court is fully aware, Officer Hargraves and Sergeant Wong have been involved in
24 proceedings relative to a matter that occurred during an "Occupy Oakland" incident. On January 9,
25 2011 all parties attended a hearing to address the Plaintiff's motion for sanctions against Officer
26 Hargraves and Sgt. Wong. According to the "Civil Minutes" issued by the court, the hearing lasted
27 one hour and fifty minutes, and there was a partial hearing held *In Camera under seal* for forty
28 minutes.

At no time during the open court hearing was there any discussion related to the disciplinary actions taken and *pending* against Officer Hargraves and Sgt. Wong. The Court and parties agreed to discuss the Department's disciplinary response in chambers. During the *In Camera under seal* hearing, where the Department, City, OPOA and Plaintiff's counsel were all present, it was first communicated to the Court and Plaintiff's counsel what actions the Department had taken relative to discipline. Prior to engaging in any discussions in chambers, the record reflects that the discussions were "under seal".

On January 10, 2011, the day after the hearing referenced above, *The Bay Citizen* published a story titled: "2 Oakland Officers Disciplined for Occupy Misconduct: Bystander's video offered evidence of violations," written by Shoshana Walter. This story reported some details of the disciplinary actions taken against Hargraves and Wong. The information had not previously been made public.

Officer Hargraves and Sgt. Wong have long-standing and unrefuted privacy interests and protections afforded under California law. Their privacy interests and the confidential nature of the administrative/disciplinary process are well-defined in the California Government and Penal Codes. (See: Govt. Code Section 3303; Penal Code Sections 832.5, 832.7, 832.8). Moreover, the California Supreme Court in *Copley Press Inc. v. Superior Court* (2006) 39 Cal.4th 1272 has held that the confidentiality of peace officer records extends to an administrative proceeding where the officer is appealing disciplinary action. In that same case, the court went as far as precluding the disclosure of the officer's identity. Further, in *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385 the court held that investigative materials and findings by a city police review commission were deemed confidential personnel records and thus were precluded from disclosure.

Unfortunately, as of the writing of this CMC statement, the OPOA as well as the representatives of Officer Hargraves and Sgt. Wong are unaware of the identity of the individual(s) who are responsible for this egregious breach of the Court's order and California law. The Court should be aware that Messrs. Burris and Chanin have personally indicated that they did not disclose the confidential information. The matter is clearly one of significant import to the affected officers and the members of the OPOA. In light of the sensitive nature of this matter, and the impact that it

1 may or may not have on pending matters before the Court, the OPOA is certainly interested in
 2 bringing the matter to the attention of the Court and exploring the Court's interest in pursuing the
 3 matter. Officer Hargraves and Sgt. Wong will look to the Court's direction in determining what
 4 further action they may pursue.

5 Finally, despite the transgressions associated with the disclosure of the confidential personnel
 6 information of Officer Hargraves and Sgt. Wong, the OPOA remains enthusiastically optimistic that
 7 the Police Department has recently taken great strides toward securing full compliance with the NSA.

8
 9 Dated: January 19, 2012

10 /s/
 JOHN L. BURRIS
 Attorney for Plaintiffs

11
 12 Dated: January 19, 2012

13 /s/
 14 JAMES B. CHANIN
 Attorney for Plaintiffs

15
 16 Dated: January 19, 2012

17 /s/
 18 GREGORY M. FOX
 Attorney for the Defendant

19
 20 Dated: January 19, 2012

21 /s/
 22 ROCIO V. FIERRO
 Attorney for the Defendant

23
 24 Dated: January 19, 2012

25 /s/
 26 ROCKNE A. LUCIA JR.
 Attorney for the OPOA

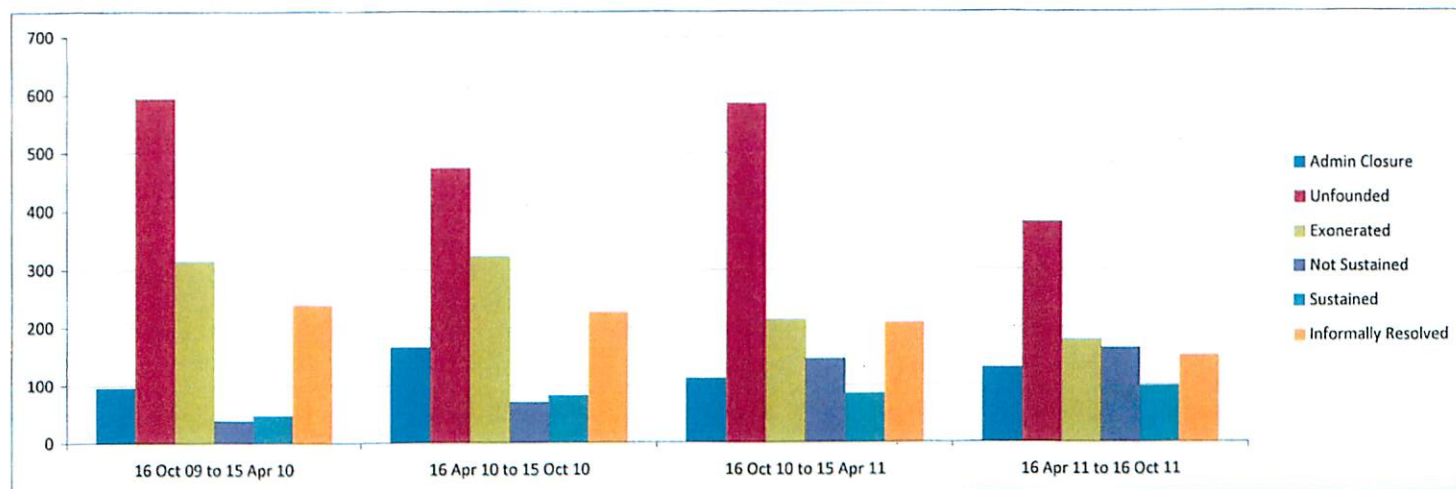
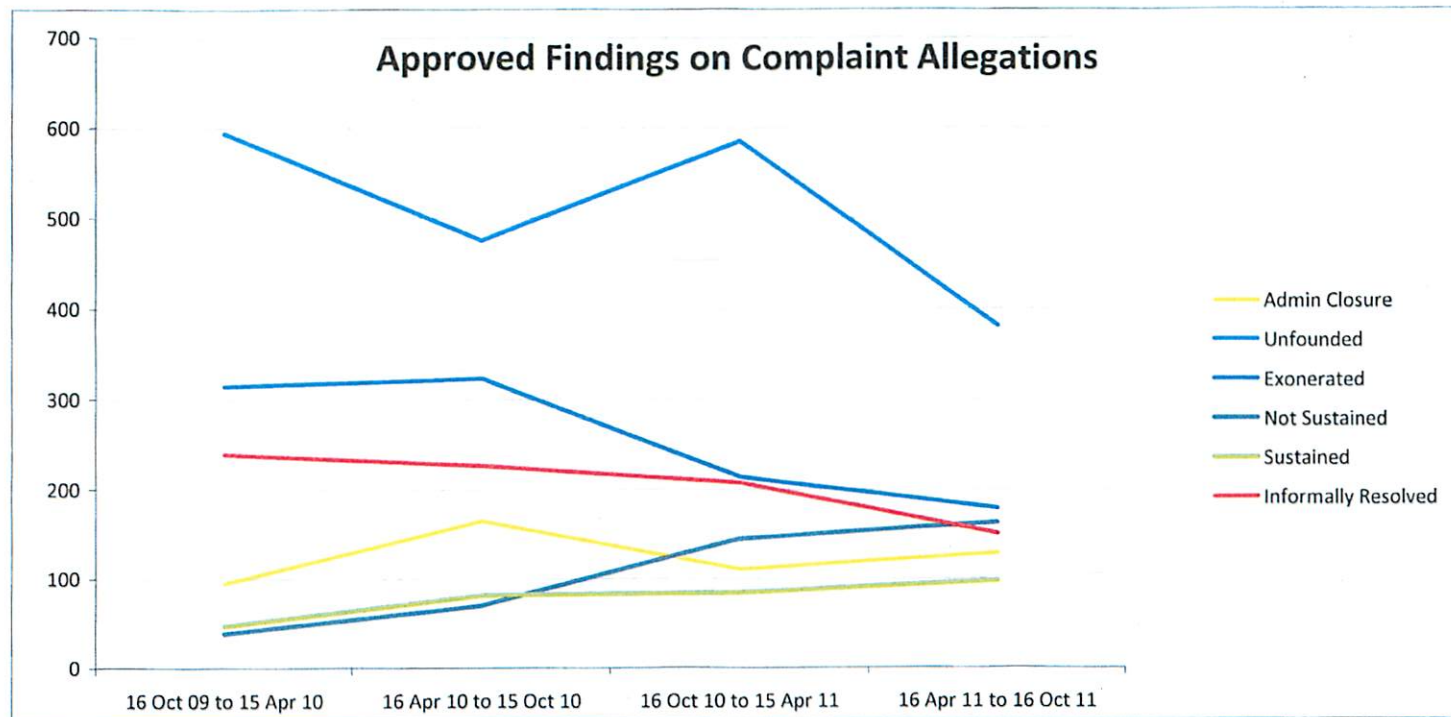
ATTORNEY ATTESTATION

I hereby attest that I have received telephonic or email authorization for any signatures indicated by a "conformed" signature (/s/) within this E-filed document.

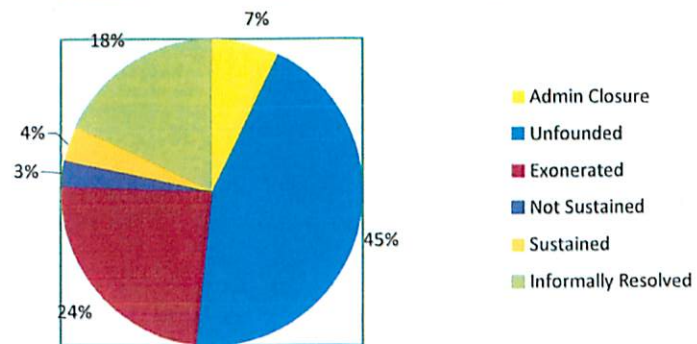
Dated: January 19, 2012

/s/
GREGORY M. FOX

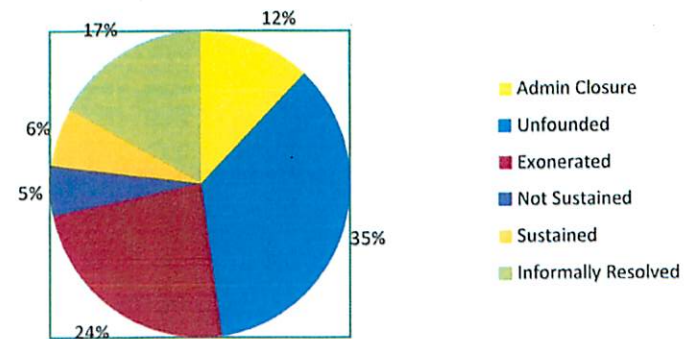
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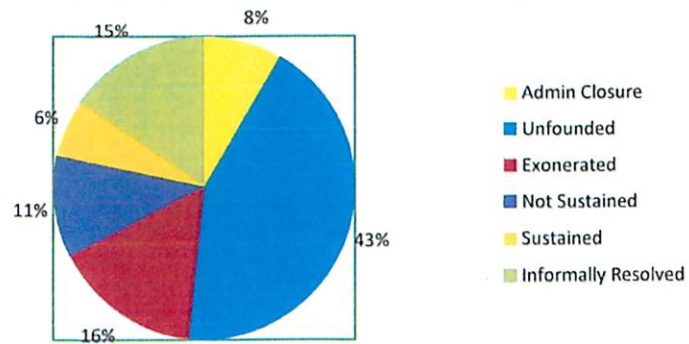
Findings by Percentage 16 Oct 09 to 15 Apr 10



Findings by Percentage 16 Apr to 15 Oct 2010



Findings by Percentage 16 Oct 10 to 15 Apr 2011



Findings by Percentage 16 Apr 11 to 16 Oct 11

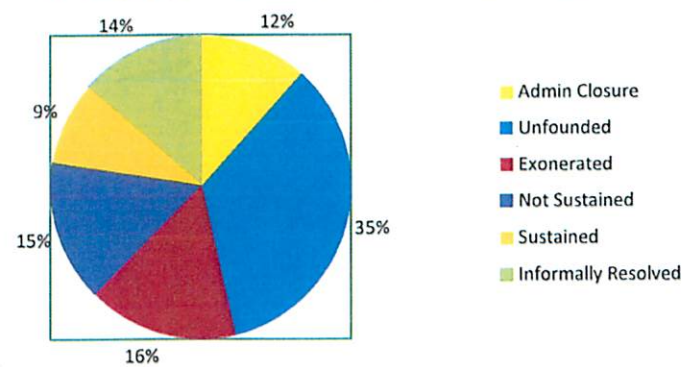


EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UGANDA KNAPPS,
Plaintiff,

vs.

CITY OF OAKLAND, et al.,
Defendants.

No. 05-2935 MEJ

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

ORDER THEREON

I. INTRODUCTION

This case is before the Court for claims arising out of an incident on August 10, 2004 between Plaintiff Uganda Knapps ("Plaintiff") and Oakland Police Officers Michael Cardoza, Francisco Rojas and Sergeant James Kelly. On July 19, 2005, Plaintiff filed a Complaint alleging excessive force and malicious prosecution under 42 U.S.C. § 1983, as well as supplemental state law claims for negligence, false arrest/imprisonment, battery, and statutory claims for the violation of his rights under California Civil Code sections 51.7 and 52.1.

The parties waived a jury trial, and the case was tried before the Court on October 17, 23, and 24, 2007. After considering and weighing all the evidence and the parties' arguments, and having assessed the credibility of the witnesses, the Court enters the following findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a).

II. FINDINGS OF FACT

As a preliminary matter, the Court notes that the trial in this case was largely about witness credibility, as the parties presented contradictory versions of the incident. For purposes of the findings of fact, the Court states the conflicting testimony as appropriate, with credibility determinations made in the conclusions of law.

A. Background

1. Plaintiff Uganda Knapps, an African-American male, was 29 years old at the time of the August 10, 2004 incident. (Trial Tr., Day 3, 113:3-6; Pl.'s Ex. 6, Audio CD ("CD").)
2. In June of 2004, Plaintiff began work at the Hodges Residential Facility ("Hodges") in Oakland, California. Hodges is an adult residential facility that cares for developmentally-disabled adults. (Trial Tr., Day 3, 121:8-11; 208:9-16.)
3. His responsibilities included helping the residents with their daily activities, monitoring their behaviors, charting information, dispensing medications, and helping with basic household chores. Plaintiff testified that he received brief training from Marsha Jones. (Trial Tr., Day 3, 121:22-122:9; 209:11-14.)
4. Michael Fowler, a mentally-challenged adult, was a resident at Hodges. (Trial Tr., Day 3, 122:1-15; 136:25-137:2; 208:19-23.) Mr. Fowler died at an unknown time after the incident from an unrelated cause. (Pl.'s Ex. 2, p. 9.)
5. Prior to August 10, 2004, Plaintiff had been involved in two prior incidents with Mr. Fowler. In the first, Mr. Fowler threatened Plaintiff with a butter knife. (Trial Tr., Day 3, 122:16-123:4.) In the second, Mr. Fowler went to a nearby park with a group of patients and a counselor from Hodges, but did not return with the group. (Trial Tr., Day 3, 124:22-125:19.) On both occasions, Plaintiff sought law enforcement assistance, and he testified that there were no major problems with police in either incident. (Trial Tr., Day 3, 124:16-21; 126:2-4.)
6. Defendant Oakland Police Officer Michael Cardoza graduated from the Oakland Police Department ("OPD") Academy in 2000 and, at the time of the August 10, 2004 incident, had been a police officer for a little under four years. (Trial Tr., Day 1, 5:6-12.)
7. Defendant Oakland Police Officer Francisco Rojas also graduated from the OPD Academy in 2000 and, at the time of the August 10, 2004 incident, had been a police officer for a little under four years. (Trial Tr., Day 3, 8:9-9:1.)
8. On the night of August 10, 2004, Officers Cardoza and Rojas were members of a Crime

1 Reduction Team ("CRT") called to assist an Alameda County unit with an auto theft
2 investigation in the same area as the incident at issue in this case. Officer Cardoza was an
3 acting sergeant and supervisor of the CRT team involved in the investigation. (Trial Tr., Day
4 1, 5:13-6:20; Trial Tr., Day 3, 9:2-9.)

5 9. On the night of the incident, Officer Cardoza was dressed in a utility uniform bearing patches
6 identifying him as an Oakland Police officer. (Trial Tr., Day 1, 8:5-20.)

7 10. Officer Rojas was dressed in street clothes. (Trial Tr., Day 3, 15:2-5.)

8 11. Both officers were in a white SUV driven by Officer Rojas. Although it was an OPD
9 vehicle, it did not have any markings identifying it as such. (Trial Tr., Day 3, 14:21-15:1;
10 Trial Tr., Day 1, 11:8-10.)

11 12. Both officers had hand-held police radios tuned to a tactical channel dedicated to the vehicle
12 theft operation. They did not receive any broadcast from the regular broadcast channels, and
13 they therefore did not receive any information about the incident involving Plaintiff and Mr.
14 Fowler. (Trial Tr., Day 1, 11:11-12:12; 50:17-21, Trial Tr., Day 3, 15:9-16:16.)

15 13. Defendant Oakland Police Sergeant James Kelly had been a police officer with the OPD for
16 fourteen years at the time of the incident. On that night, he was acting in a capacity as
17 sergeant, and had been a sergeant for about seven years. (Trial Tr., Day 3, 69:3-13.)

18 14. On August 14, 2004, Sgt. Kelly was driving a marked City of Oakland police patrol car.
19 (Trial Tr., Day 3, 14-16.)

20 15. Sgt. Kelly was also in the area trying to apprehend the auto thief suspect, although not as part
21 of CRT. (Trial Tr., Day 3, 91:14-22.)

22 **B. Details of the August 10, 2004 Incident**

23 16. During his shift on the night of August 10, 2004, Plaintiff became aware that Mr. Fowler had
24 left the facility unaccompanied, and he attempted to retrieve him. (Trial Tr., Day 3, 126:13-
25 21; Trial Tr., Day 1, 52:13-14.)

26 17. Mr. Fowler was not authorized to leave the building that night. Anthony Hodges, owner of
27 the Hodges Residential Facility, testified that he directed Plaintiff to follow Mr. Fowler and
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- 1 direct traffic so that he would not get hit by a car. (Trial Tr., Day 3, 209:18-210:15.)
- 2 18. Shortly after leaving the facility, Plaintiff found Mr. Fowler running in and out of the street,
3 ignoring traffic. (Trial Tr., Day 3, 127:11-15.) Concerned for Mr. Fowler's safety, Plaintiff
4 used his cell phone to dial "911" and contact the OPD dispatch to request police assistance.
5 (Trial Tr., Day 3, 127:9-15.)
- 6 19. While on the phone with OPD dispatch, Plaintiff followed Mr. Fowler eastbound on Suter
7 Street, informing dispatch of his location and giving pertinent information concerning Mr.
8 Fowler's whereabouts. (Trial Tr., Day 3, 127:19-128:7.) This conversation was recorded by
9 OPD dispatch. (CD.)
- 10 20. The relevant portion of the recorded dispatch conversation begins approximately 3 minutes
11 and 25 seconds after Plaintiff placed the 911 call. In the recording, the dispatcher can be
12 heard asking Plaintiff for Mr. Fowler's location and whether or not Mr. Fowler is armed, and
13 then attempting to find a patrol car to assist Plaintiff with Mr. Fowler. (CD.)
- 14 21. Approximately eleven minutes and twenty-five seconds into the recording, the dispatcher
15 asks, "What's he doing now?" Plaintiff responds, "He's just sitting on the pavement." The
16 dispatcher then asks if Mr. Fowler is making suicidal threats and Plaintiff responds, "Yes, he
17 says he wants to kill himself." (CD.)
- 18 22. Approximately twelve minutes and thirty seconds into the recording, Plaintiff informs the
19 dispatcher that he and Mr. Fowler are at the intersection of 38th Avenue and Suter Street. He
20 then tells Mr. Fowler, "You can't go into the street, Mike," and informs Mr. Fowler that he
21 (Plaintiff) has the right to stop him from harming himself. (CD.)
- 22 23. Plaintiff testified that he understood he was authorized to restrain a client if they were about
23 to harm themselves, and that he had been given such authorization at Hodges. (Trial Tr.,
24 Day 3, 171:21-172:1.)
- 25 24. Approximately thirteen minutes into the recording, Plaintiff tells Mr. Fowler that he can walk
26 all he wants, but he cannot go into the street. Mr. Fowler asks why he can't walk in the
27 street, and tells Plaintiff to move out of the way. (CD.)
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25. At approximately thirteen minutes and forty seconds, Mr. Fowler tells Plaintiff, "You can't block me. You can't block me. . . ." Plaintiff responds, "Come on, Mike, we don't have to do this tonight," and offers to take Mr. Fowler to the store to get some water and a soda for his stomach. (CD.)

26. At approximately fourteen minutes and three seconds, the dispatcher tells Plaintiff not to hang up, that she's going to put him on hold for a second. She returns approximately eleven seconds later and asks where Plaintiff and Mr. Fowler are. Plaintiff responds that they are at Suter and 38th. (CD.)

27. The dispatcher again asks what Mr. Fowler is doing, and Plaintiff calmly responds that he is "on someone's garage door." (CD.)

28. At this point, Plaintiff saw Sgt. Kelly's marked patrol car approach. (Trial Tr., Day 3, 130:14-17.)

29. Plaintiff stepped out to the street to try to flag down Sgt. Kelly, at which time Mr. Fowler attempted to run around Plaintiff and get to the street. (Trial Tr., Day 3, 130:7-23; 131:7-21; 132:15-21.)

30. Sgt. Kelly testified that he was driving eastbound on Suter Street towards 38th Avenue, when he saw Plaintiff and Mr. Fowler in the vicinity of a home at that intersection. (Trial Tr., Day 3, 69:22-70:25.)

31. Prior to arriving on Suter, Sgt. Kelly heard a radio transmission from OPD Dispatch concerning a possible "5150" in the area.¹ Sgt. Kelly testified that the only OPD report that he has ever seen referencing a possible 5150 subject in the area that night related to this incident involving Plaintiff and Mr. Fowler. (Trial Tr., Day 3, 69:24-70:18.)

32. As Sgt. Kelly drove past Plaintiff and Mr. Fowler, he noted that they were waving at him, but

¹ "5150" refers to California Welfare and Institutions Code section 5150, which provides that: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, . . . or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation."

- 1 he thought they were just being friendly and therefore did not stop. He did not sense any
2 urgency or emergency situation at that time. (Trial Tr., Day 3, 74:8-22.)
- 3 33. At approximately fourteen minutes and forty-eight seconds into the recording, there are
4 sounds of a scuffle, which lasts for between one and two seconds. (CD.)
- 5 34. Sgt. Kelly testified that he glanced in his rearview mirror and saw Plaintiff push Mr. Fowler
6 out of the street and toward the house. (Trial Tr., Day 3, 76:2-77:23; Pl.'s Ex. 40, Audio CD
7 of Sgt. Kelly's statement to the Oakland Civilian Review Board.)
- 8 35. He estimates that he was about 50 feet away from Plaintiff and Mr. Fowler at the time. (Trial
9 Tr., Day 3, at 77:20-79:4; 94:6-8.)
- 10 36. Sgt. Kelly did not see Mr. Fowler hit the garage door, and he never saw Plaintiff punch Mr.
11 Fowler. (Trial Tr., Day 3, 77:24-78:3; 80:6-14.)
- 12 37. Plaintiff testified that it was at this point that he took Mr. Fowler to the ground to prevent
13 him from entering the roadway. (Trial Tr., Day 3, 131:1-3; 132:3-4.)
- 14 38. Plaintiff testified that he did not push Mr. Fowler into the garage door, nor did he ever punch
15 Mr. Fowler when he was standing or on the ground. (Trial Tr., Day 3, 132:25-133:5.)
- 16 39. At fourteen minutes and fifty-two seconds into the recording, Plaintiff tells the dispatcher,
17 "He was trying to run into the middle of the street." (CD.)
- 18 40. At the same time, Officers Cardoza and Rojas were traveling eastbound on Suter Street
19 towards 38th Avenue, in Officer Rojas' undercover SUV, following approximately two car
20 lengths and just seconds behind the patrol car driven by Sgt. Kelly. (Trial Tr., Day 1, 15:8-
21 22; Trial Tr., Day 3, 17:2-21.)
- 22 41. Though they followed close behind Sgt. Kelly, Officer Cardoza testified that he never saw
23 Plaintiff or Mr. Fowler near the street as testified by Sgt. Kelly, nor did he see them wave.
24 (Trial Tr., Day 1, 16:4-18:9; 54:10-13.)
- 25 42. Officer Rojas also testified that he never saw Plaintiff or Mr. Fowler waving at anyone, and
26 that he never saw either of them in the roadway. (Trial Tr., Day 3, 21:10-21.)
- 27 43. Officer Cardoza testified that he saw Plaintiff push Mr. Fowler against the garage door of a
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- 1 residence, punch Mr. Fowler in the right eye, drop his cell phone, throw Mr. Fowler to the
2 ground, then punch him in the face twice more while Mr. Fowler lay on the ground (Trial
3 Tr., Day 1, at 16:24-17:18; 18:17-23:7.)
- 4 44. Officer Cardoza testified that he thought a robbery or battery was taking place because of the
5 manner in which Plaintiff threw Mr. Fowler down. (Trial Tr., Day 1, 25:13-26:1.)
- 6 45. Officer Rojas testified that he saw Plaintiff throw Mr. Fowler into the garage door and punch
7 him in the right eye with his left hand, and then take Mr. Fowler to the ground and punch
8 him two more times. (Trial Tr., Day 3, 25:15-27:6.)
- 9 46. Officer Rojas testified that he stopped the SUV because he believed they were witnessing a
10 robbery. (Trial Tr., Day 3, 25:7-24.)
- 11 47. Officer Rojas testified that he and Officer Cardoza were still in the unmarked SUV at the
12 time they saw Plaintiff take Mr. Fowler to the ground, and that they both got out of the SUV
13 at about the same time. (Trial Tr., Day 3, 28:10-16)
- 14 48. Sgt. Kelly saw Officer Cardoza get out of the unmarked SUV within a couple of seconds
15 after he saw Plaintiff push Mr. Fowler out of the roadway. (Trial Tr., Day 3, 78:16-20.)
- 16 49. Although he did not recognize Officer Cardoza, Sgt. Kelly knew he was a police officer
17 because he recognized his utility uniform. (Trial Tr., Day 3, 94:9-21.)
- 18 50. When Officer Cardoza exited the unmarked SUV, he testified that he identified himself as
19 "Oakland Police," although no such statement can be heard on the 911 recording. (Trial Tr.,
20 Day 1, 26:10-31; 69:16-18; CD.)
- 21 51. Even though it cannot be heard on the dispatch tape, Officer Rojas testified that he also
22 identified himself as "Oakland police" after exiting the SUV. (Trial Tr., Day 3, 28:20-29:6;
23 CD.)
- 24 52. Plaintiff and Mr. Fowler fell to the ground facing in different directions. (Trial Tr., Day 3,
25 131:22-132:3.)
- 26 53. Officer Rojas testified that when he and Officer Cardoza exited the unmarked vehicle, Mr.
27 Fowler was on the ground with Plaintiff straddling him. (Trial Tr., Day 3, 31:19-25.)
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- 1 54. At approximately fifteen minutes into the recording, Officer Cardoza can be heard yelling at
2 Plaintiff, "What the fuck are you doing?!" (CD.)
- 3 55. Plaintiff testified that, within seconds of stopping Mr. Fowler from running into the street, all
4 he remembers is some people hopping out of a car, saying, "What the fuck are you doing?!"
5 He further testified that neither officer identified themselves as "Oakland Police." (Trial Tr.,
6 Day 3, 132:5-7; 133:13-15; 134:4-7.)
- 7 56. Officer Rojas testified that he did not hear Officer Cardoza make the profane statement.
8 (Trial Tr., Day 3, 30:1-6.)
- 9 57. Plaintiff responded that he was doing his job. (Trial Tr., Day 3, 133:16-134:2; CD.)
- 10 58. Plaintiff saw Officer Cardoza first, and saw the embroidered OPD badge on his utility
11 uniform. (Trial Tr., Day 3, 132:11-14.)
- 12 59. Because Officer Rojas wasn't wearing a uniform, Plaintiff testified that he was confused as to
13 who Officer Rojas was and what was going on. (Trial Tr., Day 3, 134:14-18.)
- 14 60. Since Plaintiff believed that Sgt. Kelly, who had arrived first in the marked patrol car, was
15 the officer responding to his dispatch call, he did not think that Officers Rojas and Cardoza
16 were responding to the call. (Trial Tr., Day 3, 134:22-25.)
- 17 61. Even though he considered this to be a felony stop, Officer Cardoza testified that before
18 making his remark, he never asked Plaintiff to stop what he was doing to Mr. Fowler, never
19 asked him to step away from Mr. Fowler, never asked him to put his hands behind his back,
20 and never ordered Plaintiff to get down on the ground. (Trial Tr., Day 1, 31:2-32:1.)
- 21 62. After responding to Officer Cardoza's statement, Plaintiff got off the ground and stood up.
22 (Trial Tr., Day 3, 135:1-3.)
- 23 63. Officer Cardoza told Plaintiff to put his hands behind his back, but Plaintiff testified that he
24 misunderstood him and raised his hands above his head to show that he was holding a cell
25 phone and not a weapon. (Trial Tr., Day 3, 135:1-25.)
- 26 64. Officer Cardoza testified that he asked Plaintiff two or three times to put his hands behind his
27 back, but he never told him to put his hands on his head, and at no time did he see Plaintiff
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1 put his hands on his head. (Trial Tr., Day 1, 34:23-25; 51:7-17.)

2 65. Officer Rojas testified that he heard Officer Cardoza tell Plaintiff to put his hands behind his
3 back at least twice, and that he himself also told Plaintiff to put his hands behind his back.
4 (Trial Tr., Day 3, 35:19-36:7.)

5 66. Plaintiff asked Officer Cardoza what he was doing, to which he responded that he was doing
6 his job. (Trial Tr., Day 1, 35:2-4.)

7 67. Officer Cardoza next tried to grab Plaintiff's right arm from behind, but Plaintiff jerked his
8 arm away when he tried to grab it. (Trial Tr., Day 1, 34:16-17, 35:5-9.)

9 68. Officer Cardoza testified that Plaintiff stood up and moved away from him and, since he did
10 not know what his intent was, he placed Plaintiff in a carotid hold by putting his arm around
11 Plaintiff's neck and dropping him to the ground. In the carotid hold, Officer Cardoza placed
12 his forearm over Plaintiff's carotid artery. (Trial Tr., Day 1, 35:12-36:17; 37:9-15.)

13 69. The carotid hold constricts blood flow through the carotid artery, which supplies oxygenated
14 blood to the brain. Unconsciousness occurs, which causes the individual's body to relax
15 completely, but breathing continues uninterrupted. (Defs.' Ex. I, 2000 OPD Use of Force
16 Policy Re: Carotid Holds, pp.4-5.)

17 70. Pursuant to the OPD's "Use of Force" policy, the application of a carotid hold is permissible
18 as part of the continuum of force options, but an officer should use it only when less forceful
19 options, such as verbal persuasion and physical strength (excluding carotid holds) are not
20 effective in light of the circumstances presented. (Defs.' Ex. H, 2000 OPD Use of Force
21 Policy, p.3.)

22 71. The time frame between Officer Cardoza's profane comment and the carotid hold was within
23 six seconds or less. (Trial Tr., Day 2, 54:2-8.)

24 72. Officer Cardoza testified that Plaintiff never tried to strike any of the officers, nor did he try
25 to harm Mr. Fowler while he was on the scene. (Trial Tr., Day 1, 37:16-38:2.)

26 73. After Officer Cardoza placed him in the carotid hold, Plaintiff dropped to the ground. (Trial
27 Tr., Day 1, 37:13-15.)

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- 1 74. Once in the carotid hold, Plaintiff began yelling out, "I'm his counselor, I'm his counselor. I
2 take care of him." Officer Cardoza responded, "Okay. I hear that you're his counselor, but
3 I'm still going to handcuff you until I can sort all this out." (Trial Tr., Day 1, 89:6-18.)
- 4 75. Plaintiff testified that he began choking and gagging after Officer Cardoza placed him in the
5 hold. (Trial Tr., Day 3, 136:1-7.)
- 6 76. Between the time he saw Officer Cardoza jump out of the SUV and the time he himself got
7 out of his vehicle, Sgt. Kelly testified that he tried unsuccessfully to transmit using his radio.
8 He was not looking into the rearview mirror while attempting to transmit. (Trial Tr., Day 3,
9 95:4-14; 93:7-11.)
- 10 77. Sgt. Kelly got out of his car and went back to the scene. It took him approximately five
11 seconds to jog from his car to where Plaintiff, Mr. Fowler, and Officer Cardoza were. The
12 first thing he observed was that Officer Cardoza had his arm around Plaintiff's neck and was
13 either putting Plaintiff down or had just pulled Plaintiff down on his buttocks. (Trial Tr.,
14 Day 3, 95:15-23.)
- 15 78. Sgt. Kelly testified that he did not hear Officer Cardoza give any oral commands to Plaintiff
16 before putting his arm around his neck. (Trial Tr., Day 3, 83:6-9.)
- 17 79. Officer Cardoza testified that while Plaintiff was in the carotid hold, he never applied any
18 pressure to Plaintiff's neck or throat; he therefore believes that it was impossible for him to
19 have choked Plaintiff. (Trial Tr., Day 1, 60:8-14; 62:3-11.)
- 20 80. Officer Rojas testified that while Plaintiff was in the carotid hold, he did not hear any noises
21 emanating from Plaintiff that sounded like he was choking, but Plaintiff was complaining
22 that Officer Cardoza was choking him and that he could not breathe. (Trial Tr., Day 3, 39:7-
23 40:16; 56:18-20.)
- 24 81. Officer Cardoza testified that Plaintiff did not say he was Mr. Fowler's counselor until after
25 he was on the ground. (Trial Tr., Day 1, 36:18-23.)
- 26 82. However, Officer Rojas testified that he heard Plaintiff say, "I am his counselor," prior to
27 being placed in the carotid hold. (Trial Tr., Day 3, 66:12-67:4.)

- 1 83. Sgt. Kelly heard Plaintiff repeatedly yell, "I'm his counselor," though he testified that at the
2 time he did not understand what Plaintiff meant. During the struggle, he heard Officer
3 Cardoza giving some commands, but he does not recall what they were. (Trial Tr., Day 3,
4 83:10-17; 96:5-8; 97:8-16.)
- 5 84. Sgt. Kelly testified that he never heard Plaintiff either gag or gasp for air during the time he
6 was in the carotid hold. (Trial Tr., Day 3, 81:22-82:7.)
- 7 85. As senior supervisor, Sgt. Kelly was required to take control of the scene, but he did not
8 attempt to stop Officer Cardoza from using the carotid hold on Plaintiff. (Trial Tr., Day 3,
9 82:8:14.)
- 10 86. When Plaintiff was placed in the carotid hold, he lost control of his cell phone and it fell to
11 the ground. (Trial Tr., Day 3, 141:23-142:6.)
- 12 87. Sgt. Kelly could not recall where Officer Rojas was at this point, though he testified that
13 Officer Rojas was close by. (Trial Tr., Day 3, 96:13-17.)
- 14 88. When Officer Cardoza released Plaintiff from the carotid hold, Plaintiff testified that he felt
15 dizzy for approximately ten seconds, but did not lose consciousness. (Trial Tr., Day 3,
16 193:2-8.)
- 17 89. With Sgt. Kelly's help, Officer Rojas then handcuffed Plaintiff while he was still seated on
18 the ground. After he was handcuffed, Officer Cardoza used a bent wrist control hold to bring
19 Plaintiff to his feet. (Trial Tr., Day 1, 38:9-39:25; Trial Tr., Day 3, 83:18-23.)
- 20 90. A bent wrist hold is a force applied to a restrained person in handcuffs to get a subject to
21 their feet. It bends the wrist against its natural movement and pinches the nerves in the wrist.
22 It can be quite painful. (Trial Tr., Day 2, 58:19-59:10.)
- 23 91. Plaintiff testified that he complained that the wrist hold was hurting him, but Officer Cardoza
24 continued to use the hold as he walked Plaintiff to Sgt. Kelly's patrol car. He further testified
25 that Sgt. Kelly was present when Plaintiff complained that the hold was hurting his wrist.
26 (Trial Tr., Day 3, 137:3-138:23.)
- 27 92. After being handcuffed, Plaintiff was initially escorted and placed in Sgt. Kelly's patrol car
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- 1 by Officers Cardoza and Rojas. (Trial Tr., Day 3, 84:25-85:2; 137:15-16; 182:22-183:4.)
- 2 93. At the time Officer Cardoza had Plaintiff in the bent wristlock, Plaintiff told Officer Cardoza
- 3 that he had choked him, that he had subjected him to excessive force by choking him because
- 4 he was a black man, and that he was going to retain John Burris as an attorney to sue him.
- 5 (Trial Tr., Day 1, 42:3-13.)
- 6 94. Officer Cardoza knew that Mr. Burris represented people who sued the police. (Trial Tr.,
- 7 Day 1, 45:24-46:1.)
- 8 95. After Plaintiff was in handcuffs, Sgt. Kelly knelt down next to Mr. Fowler. He did not notice
- 9 any injuries or redness to Mr. Fowler's face, or to any other part of Mr. Fowler's body. Sgt.
- 10 Kelly never heard Mr. Fowler complain of any pain. (Trial Tr., Day 3, 83:24-84:8; 84:21-
- 11 24.)
- 12 96. After talking to Mr. Fowler and seeing the paramedics (who had arrived on the scene) place
- 13 Mr. Fowler on a 5150 hold and take him away in an ambulance, Sgt. Kelly started to piece
- 14 together that Plaintiff had been the one talking to Oakland police dispatch concerning the
- 15 5150 call that he had heard earlier. (Trial Tr., Day 3, 83:24-84:20.)
- 16 97. At no time before Mr. Fowler was taken away did anyone tell Sgt. Kelly that they saw
- 17 injuries to Mr. Fowler. (Trial Tr., Day 3, 84:9-12.)
- 18 98. Officer Rojas testified that he told the paramedics that Mr. Fowler had been assaulted. He
- 19 further testified that he might have also told them that Mr. Fowler had been punched in or
- 20 around the eye. He is sure that he never named Plaintiff as the one that assaulted or punched
- 21 Mr. Fowler. (Trial Tr., Day 3, 42:8-43:14.)
- 22 99. Under Sgt. Kelly's orders, Plaintiff was then taken out of the police vehicle and released from
- 23 the handcuffs. (Trial Tr., Day 3, 85:3-11.)
- 24 100. After some discussion, Sgt. Kelly decided that Plaintiff would not be arrested that night.
- 25 Officer Cardoza testified that he did not agree with Officer Kelly's decision because he
- 26 believed that Plaintiff had battered Mr. Fowler. (Trial Tr., Day 1, 67:2-9; 86:4-87:5.)
- 27 101. Sgt. Kelly talked to Plaintiff for 15 to 20 minutes, at which time Plaintiff told him that
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- 1 Officer Cardoza had no reason to take him into custody and that he was going to file a
2 complaint. (Trial Tr., Day 3, 86:8-12; 99:8-14; 100:18-23.)
- 3 102. Plaintiff admitted to Sgt. Kelly that he pushed Mr. Fowler down to stop him from running in
4 the street. (Trial Tr., Day 3, 103:2-9.)
- 5 103. Sgt. Kelly testified that he did not recall Plaintiff complaining of any injuries arising from the
6 incident, or that he was hurt and needed medical assistance. He further testified that, though
7 paramedics were at the scene, he did not see Plaintiff request treatment. (Trial Tr., Day 3,
8 98:21-99:7.)
- 9 104. Sgt. Kelly testified that Plaintiff never told him that he passed out or lost consciousness, and
10 that, if Plaintiff had made such a statement, he would have been required to write a special
11 use of force report.² (Trial Tr., Day 3, 102:5-12.)
- 12 105. Sgt. Kelly took a written statement from Plaintiff, but did not take one from Mr. Fowler.
13 (Trial Tr., Day 3, 85:12-22.)
- 14 106. Sgt. Kelly testified that Plaintiff told him that he believed the officers had used force on him
15 because he was black and that he planned to make a complaint about the officers conduct.
16 Based on Plaintiff's statements, Sgt. Kelly provided him with a complaint pamphlet. (Trial
17 Tr., Day 3, 86:4-15.)
- 18 107. After he left Plaintiff, Officer Cardoza spoke to Anthony Hodges, who had arrived at the
19 scene of the incident. Officer Cardoza briefed Mr. Hodges on what had occurred, including
20 telling Mr. Hodges that Plaintiff had hit Mr. Fowler in the face. (Trial Tr., Day 1, 43:21-
21 44:2; 65:21-66:2.)

22 C. Post-Incident Reports

23 1. Officers Rojas and Cardoza

- 24 108. After the incident, Officer Rojas and Officer Cardoza wrote their reports in the same room at
25 the Eastmont Station, in the CRT office. (Trial Tr., Day 3, 43:25-44:9.)

26 ²According to Sgt. Kelly, the criteria for a use of force report would have been a carotid hold
27 with a loss of consciousness or requiring medical aid. (Trial Tr., Day 3, 102:18-20.)

- 1 109. Officer Rojas testified that he and Officer Cardoza did not talk about their reports as they
2 prepared them. (Trial Tr., Day 3, 45:1-12.)
- 3 110. Prior to writing his report, Officer Cardoza did not take a statement from Mr. Fowler, nor did
4 he take the statements of any witnesses at the scene or at any later time. Because he did not
5 have a camera, Officer Cardoza did not take photographs of Mr. Fowler, and he did not call
6 an evidence technician to do so. (Trial Tr., Day 1, 44:18-45:15.)
- 7 111. Prior to writing his report, Officer Cardoza did not attempt to talk to any medical
8 professional who had rendered treatment to Mr. Fowler, including the paramedics who were
9 dispatched to the scene. (Trial Tr., Day 1, 46:16-47:9.)
- 10 112. Prior to writing his report, Officer Rojas made no attempt to locate any independent
11 witnesses, never took any statement from Mr. Fowler, and never made any arrangement to
12 have photographs taken of any injuries to Mr. Fowler. (Trial Tr., Day 3, 45:13-24; 67:9-14.)
- 13 113. Officer Rojas testified that, before writing his report, he was aware that Plaintiff had
14 threatened to sue him and Officer Cardoza, that Plaintiff had mentioned John Burris as an
15 attorney he planned to retain, and that he knew Mr. Burris represented people who sued
16 OPD. (Trial Tr., Day 3, 12:19-13:7.)
- 17 114. In his narrative summary attached to the crime report, Officer Rojas states that he observed
18 Plaintiff pushing Mr. Fowler into the garage door on Suter Street. As he stopped the vehicle,
19 he saw Plaintiff punch Mr. Fowler in his right eye, slam him to the ground, and punch him
20 two more times on his face and body with his closed fist. (Defs.' Ex. A, OPD Crime Report
21 No. 04-71888, p. 6.)
- 22 115. In his summary, Officer Rojas also states that Mr. Fowler informed him that Plaintiff had
23 "punched him in the right eye, left side of his head, his upper body, and that he slammed into
24 the garage and ground." (Defs.' Ex. A, p. 7.)
- 25 116. At no point in his summary does Officer Rojas document seeing any redness to Mr. Fowler's
26 face, or any other injury to Mr. Fowler. (Defs.' Ex. A.)
- 27 117. When Officer Rojas finished his report, he gave it to Officer Cardoza. He testified that he
28

- 1 did this because Officer Cardoza was his acting supervisor that night, and because Officer
2 Cardoza would submit the entire report. (Trial Tr., Day 3, 44:10-18.)
- 3 118. In his narrative summary attached to the crime report, Officer Cardoza states that he
4 observed Plaintiff use his left closed fist to throw a punch at Mr. Fowler's right eye, violently
5 throw him to the sidewalk, get on top of Mr. Fowler, and punch him with a right-handed
6 closed fist. Officer Cardoza states that he observed Plaintiff punch Mr. Fowler two more
7 times in the face and upper body area. (Defs.' Ex. A, p. 3.)
- 8 119. Officer Cardoza also states that he recommended Plaintiff be arrested as a person causing
9 pain to a dependent adult, and that a complaint warrant be issued for Plaintiff's arrest. (Defs.
10 Ex. A, p. 5.)
- 11 120. In his summary, Officer Cardoza states that he observed some redness to Mr. Fowler's right
12 eye. (Defs.' Ex. A, p. 5.)
- 13 **2. Sergeant Kelly**
- 14 121. Sgt. Kelly knew that the officers were going back to the substation together to write their
15 reports, but he did not feel it was necessary to have them separated because it was a criminal
16 report, which was no different than any time officers view a crime. (Trial Tr., Day 3, 101:9-
17 19.)
- 18 122. Sgt. Kelly signed off on and approved the reports of Officers Cardoza and Rojas. The
19 purpose of reviewing and approving the reports was to make sure they were complete and
20 accurate. He did not write a crime report of his own. (Trial Tr., Day 3, 86:22-24; 87:3-8)
- 21 123. Sgt. Kelly testified that he did not attempt to take Mr. Fowler's statement at the scene
22 because Mr. Fowler was agitated. He never interviewed Mr. Fowler or any other witness at a
23 later time. (Trial Tr., Day 3, 85:20-22.)
- 24 124. Sgt. Kelly did not take any photographs of Mr. Fowler that night or on any other occasion.
25 (Trial Tr., Day 3, 86:1-3; 86:25-87:2; 106:6-13.)
- 26 125. Sgt. Kelly testified that, based on Officer Cardoza's statements about what he believed he
27 saw occur between Plaintiff and Mr. Fowler, there was nothing to cause him to think that
28

Officer Cardoza was not telling the truth. (Trial Tr., Day 3, 100:12-17.)

126. Sgt. Kelly forwarded Plaintiff's statement in a letter of advisement to OPD Internal Affairs. He did this because he knew that Plaintiff planned to make a complaint against the officers. (Trial Tr., Day 3, 86:16-21.)

127. The purpose of the letter of advisement was to inform Internal Affairs that a citizen wanted to make a complaint and to allow Plaintiff to make a statement. Sgt. Kelly attached Officers Rojas and Cardoza's crime report to the letter of advisement. (Trial Tr., Day 3, 106:1-12.)

128. In his letter of advisement to OPD Internal Affairs, Sgt. Kelly made no mention of any injuries to Mr. Fowler. (Trial Tr., Day 3, 87:9-16.)

D. Testimony from Anthony Hodges and Jesse McDaniels

1. Anthony Hodges

129. When Mr. Hodges arrived at the scene of the incident that night, he did not get a chance to examine Mr. Fowler, but he did talk to him. (Trial Tr., Day 3, 211:20-212:3.)

130. He did not observe any injuries on Mr. Fowler. (Trial Tr., Day 3, 215:8-20.)

131. Mr. Hodges drove Plaintiff back to the Hodges facility and told him to write an incident report. (Trial Tr., Day 3, 145:2-8.)

132. Mr. Hodges said that Plaintiff would have to be removed from work until everything died down. (Trial Tr., Day 3, 145:12-15.)

133. August 10, 2004 was the last day Plaintiff worked at Hodges. (Trial Tr., Day 3, 145:15-16.)

134. Mr. Hodges testified that Plaintiff was not authorized to grab Mr. Fowler or throw him down, and that he was terminated because Mr. Fowler and the officers at the scene told him that Plaintiff punched Mr. Fowler. (Trial Tr., Day 3, 210:16-211:7; 212:17-21.)

135. On cross-examination Mr. Hodges testified that even if the only way to stop Mr. Fowler from being hit by a car was the use of force, Plaintiff was not to put his hands on Mr. Fowler. (Trial Tr., Day 3, at 220:7-221:8.) However, on redirect Mr. Hodges testified that it would have been permissible for Plaintiff to grab Mr. Fowler by the arm to prevent him from running into the street, but it wasn't permissible to take Mr. Fowler to the ground. (Trial Tr.,

1 Day 3, 222:7-14.) Mr. Hodges did not consider grabbing a patient's arm "force." (Trial Tr.,
2 Day 3, 223:2-5.)
3 136. On cross-examination, Mr. Hodges was played a portion of a telephonic statement he gave
4 on November 14, 2004, to Sergeant Short, an Oakland Police Department Criminal
5 Investigator, as part of the internal investigation. In that statement, Mr. Hodges told Officer
6 Short that he obtained his information regarding what happened that night from the police
7 officers. (Pl.'s Ex. 39, at 8'50".)

8 137. On the night of the incident, Mr. Hodges filled out a Vendor's Special Incident Report
9 regarding the events that occurred that night. He was required to file the report with the
10 licensing board to inform them that there had been an incident. (Trial Tr., Day 3, 214:17-
11 22.)

12 138. In the incident report, Mr. Hodges wrote, "I observed client. There are no bruises, cuts or
13 lacerations." (Trial Tr., Day 3, 215:16-20; Pl.'s Ex. 42.)

14 139. He did not write in the report that Plaintiff punched Mr. Fowler, or that Mr. Fowler had told
15 him that Plaintiff punched him. (Trial Tr., Day 3, 215:21-216:4.)

16 140. Mr. Hodges did not have worker's compensation at the time of the incident, but he was aware
17 that Plaintiff intended to file a worker's compensation claim shortly after the incident. (Trial
18 Tr., Day 3, 217:20-218:5.)

19 **2. Jesse McDaniels**

20 141. Jesse McDaniels and Plaintiff are close friends who have known each other nearly all their
21 lives. (Trial Tr., Day 2, 19:10-19.)

22 142. At the time of the August 10, 2004 incident, Mr. McDaniels was employed at Hodges as the
23 nighttime facilitator. His shift started at 9:00 p.m. on August 10, 2004, and ended at 9:00
24 a.m. on August 11, 2004. (Trial Tr., Day 2, 11:16-12:6.)

25 143. His duties included charting any injuries to the patients. He and the other employees had to
26 take note immediately of anything they saw that was unusual and inform the owners of
27 Hodges. (Trial Tr., Day 2, 9:4-18.)

28 144. When Mr. McDaniels arrived at Hodges for his shift on August 10, Mr. Fowler was not

1 present. (Trial Tr., Day 2, 12:7-9.)

2 145. Mr. McDaniels testified that Mr. Fowler returned from the hospital on August 10, and the
3 two spent about ten and a half hours together. (Trial Tr., Day 2, 12:18-13:2.) However, the
4 emergency room records from the Alameda County Medical Center establish that Mr. Fowler
5 was in the hospital overnight and not released until sometime after 9:00 a.m. on August 11,
6 2004. (Def. Ex. Q.)

7 146. On cross-examination, Mr. McDaniels testified that it would have been approximately 24
8 hours from the time of the incident until the time he saw Mr. Fowler during his shift on
9 August 11. (Trial Tr., Day 2, 23:3-10.)

10 147. Mr. McDaniels assisted Mr. Fowler in showering the evening following the incident, and he
11 did not see any injuries, bruising, or redness anywhere on his body or face. (Trial Tr., Day 2,
12 13:11-14:18.)

13 148. Mr. Fowler did not complain of any injuries to Mr. McDaniels. (Trial Tr., Day 2, 14:19-21.)

14 149. On the morning of August 12, 2004, Mr. McDaniels helped Mr. Fowler get dressed. He had
15 a full view of the back of Mr. Fowler's neck and did not see any bruising or redness, nor did
16 he see injury to any other part of his body or face. (Trial Tr., Day 2, 15:15-17:2.)

17 150. Mr. McDaniels testified that, had he observed any injuries on Mr. Fowler, he understood that
18 it was his legal duty to report them. (Trial Tr., Day 2, 17:7-16.)

19 151. Mr. McDaniels testified that he did not observe any injuries on Mr. Fowler's face or body
20 within a week after the August 10, 2004 incident. (Trial Tr., Day 2, 18:13-23.)

21 **E. Expert Testimony & Rule 26 Reports**

22 **1. Plaintiff's Expert**

23 152. Roger Clark testified as an expert for Plaintiff. He became a Los Angeles County Deputy
24 Sheriff in December of 1965, and retired as a Los Angeles County Sheriff on April 1, 1993.
25 (Trial Tr., Day 2, 28:13-29:4.)

26 153. As part of his training, Mr. Clark received substantial training on the use of force, including
27 the use of force in terms of physical control holds. (Trial Tr., Day 2, 30:12-22.)

28 154. Mr. Clark's training in the use of force included training in carotid holds. (Trial Tr., Day 2,

1 30:23-25.)

2 155. Mr. Clark testified about the incident based partly upon his understanding of the incident
3 recall ("CAD report"), a computer-generated memorialization of the 911 dispatch operator's
4 conversation with Plaintiff. (Trial Tr., Day 2, 42:22-43:23; Pl.'s Ex. 30.)

5 156. Based on the 911 tape and the CAD report, Mr. Clark testified that Officer Cardoza's use of
6 profanity ("What the fuck are you doing?") was unprofessional, not what a reasonably
7 trained officer would do, and not in accord with Peace Officer Standards and Training.
8 (Trial Tr., Day 2, 49:24-50:14.)

9 157. Officer Cardoza should have used an effective verbalization, which would have been a
10 command and an identification. (Trial Tr., Day 2, 50:14-17.)

11 158. A reasonably trained police officer would be expected to say "Oakland Police Officer," or
12 "Stop, police officer." (Trial Tr., Day 2, 51:3-11.)

13 159. Because Officer Cardoza was wearing a jumpsuit, which is not typically known to the public
14 as a police uniform, his verbalization should have been accompanied by a proper
15 identification. (Trial Tr., Day 2, 51:12-24.)

16 160. In Mr. Clark's opinion, Officer Cardoza's attempt to grab Plaintiff's arm was inappropriate.
17 Specifically, when grabbing in circumstances such as this incident, the expected response
18 would be a jerk or pulling from the sudden intercession rather than an opportunity to comply.
19 (Trial Tr., Day 2, 52:6-19.)

20 161. Whether Plaintiff had his back to Officer Cardoza is a key factor because Plaintiff would not
21 know of his approach from behind, and it would be sudden and unexpected. (Trial Tr., Day
22 2, 52:20-53:5.)

23 162. Mr. Clark opined that Officer Cardoza's choice to put Plaintiff in the carotid hold was far
24 excessive and unnecessary for the circumstances. (Trial Tr., Day 2, 54:9-16.)

25 163. The purpose of the use of force is to gain control and compliance, and it has to be gauged to
26 levels of conduct. The escalation to a very significant chokehold, carotid-type maneuver is
27 not justified by the circumstances in this case. (Trial Tr., Day 2, 54:18-25.)

28 164. Inappropriate or unskilled use of a carotid hold can result in stroke, heart attack, crushing of

- 1 the trachea, and death. (Trial Tr., Day 2, 55:1-10.)
- 2 165. Mr. Clark testified that choking is forbidden because it will only cause further struggle, even
3 on a subconscious and instinctive basis, and is contrary to the objective of the use of force.
4 (Trial Tr., Day 2, 55:19-56:4.)
- 5 166. If a carotid hold is applied improperly, it can interfere with the breathing of the person
6 subjected to the hold. (Trial Tr., Day 2, 56:9-15.)
- 7 167. If the events occurred according to Plaintiff's version of the incident, no force was necessary.
8 Plaintiff was willingly compliant and would have been, had the opportunity been afforded
9 him. (Trial Tr., Day 2, 56:16-57:6.)
- 10 168. Mr. Clark saw nothing in the record that would justify Officer Cardoza's use of the bent wrist
11 lock. (Trial Tr., Day 2, 59:23-60:3.)
- 12 169. Given that Plaintiff was in handcuffs and had not demonstrated an unwillingness to stand up,
13 it would have been preferable for the officers to get Plaintiff to his feet by reaching under his
14 armpits and lifting him. (Trial Tr., Day 2, 83:21-84:6.)
- 15 170. Officer Rojas had a duty to intervene to prevent harm from occurring. (Trial Tr., Day 2,
16 57:13-19.)
- 17 171. Sgt. Kelly had a duty to intervene on two levels - as an officer at the scene and as the person
18 of rank. (Trial Tr., Day 2, 57:20-58:1.)
- 19 172. None of the officers present or in close proximity reported any attempt to stop, or even
20 reduce, the excessive and potentially deadly force inflicted on Plaintiff. Therefore, the
21 officers failed in their duty to intervene. (Pl.'s Ex. 35 (Expert Report of Roger Clark), p. 3.)
- 22 173. In cases involving allegations of force, it is required and necessary for the sergeant doing the
23 investigation to document any injuries (Trial Tr., Day 2, 61:18-62:1.)
- 24 174. Had Officer Rojas seen any injury to Mr. Fowler's face or chest, Mr. Clark would expect that
25 Officer Rojas would have recorded it in his report and taken pictures at the scene or at the
26 hospital. (Trial Tr., Day 2, 62:912-62:19-63.6.)
- 27 175. It was not reasonable for Sgt. Kelly to omit documentation and photographs of Mr. Fowler's
28 injuries. (Trial Tr., Day 2, 64:10-18.)

- 1 176. In the context of the allegations made by Plaintiff, protocol dictates that officers would be
2 kept separate until statements and written reports were completed. (Trial Tr., Day 2, 66:11-
3 16.)
- 4 177. Sgt. Kelly failed to follow the expected protocols, and did not meet his responsibility as a
5 sergeant supervisor at the scene to gather the facts and document this incident so it could be
6 truthfully reported. (Trial Tr., Day 2, 66:17-25.)
- 7 178. Even if Officers Cardoza and Rojas were on a special assignment, they should still connect
8 with the regular broadcast channel for the area, and they should have been aware of the 5150.
9 (Trial Tr., Day 2, 71:18-73:14.)
- 10 179. Reasonably trained undercover officers know the fundamental importance of maintaining a
11 constant communications link with the dispatch center during their operations. Officers
12 Rojas and Cardoza's undercover deployment without the requisite equipment to remain in
13 contact with the OPD communications center demonstrated a deliberate disregard for
14 Plaintiff's life and safety. (Pl.'s Ex. 35, p. 2.)
- 15 **2. Defendants' Expert**
- 16 180. Scott Seaman testified as an expert for Defendants. He has been Chief of Police for the Las
17 Gatos/Monte Sereno Police Department for five years, and has been a police officer since
18 1975. (Trial Tr., Day 2, 105:16-106:5.)
- 19 181. Chief Seaman both received and provided extensive training in the areas of use of force and
20 arrest techniques. (Defs.' Ex. R (Expert Report of Scott R. Seaman), p.1.)
- 21 182. Chief Seaman has served as an instructor in arrest techniques at the Koga Institute from 1979
22 to the present, and from 1977 to the present has taught a range of techniques to police
23 academy students and San Jose police officers. (Trial Tr., Day 2, 109:12-110:21.)
- 24 183. Chief Seaman testified based on the depositions of the officers, the internal affairs report,
25 Sgt. Kelly's letter of advisement, and the officers' reports. (Trial Tr., Day 2, 141:15-142:5.)
26 His testimony is based on the assumption that none of the three officers ever saw Mr. Fowler
27 or Plaintiff in the roadway before seeing Plaintiff push Mr. Fowler toward the house. (Trial
28 Tr., Day 2, 142:21-143:1.)

- 1 184. He testified that, assuming the incident occurred according to Officers Rojas and Cardoza's
2 version of the facts, there would have been a lawful basis for them to intercede and he would
3 have expected them to do so. (Trial Tr., Day 2, 122:11-20.)
- 4 185. Where officers approach an incident in an unmarked police car with one officer in
5 plainclothes and the other in a utility uniform, Chief Seaman testified that the response of
6 reasonable officers would be to first identify themselves as police officers. (Trial Tr., Day 2,
7 122:21-123:10.)
- 8 186. Chief Seaman listened to the recording of the 911 call; he never heard Officer Cardoza or
9 Officer Rojas announce themselves as Oakland Police. However, he based his testimony on
10 the assumption that they did announce themselves as Oakland Police, as they both testified.
11 (Trial Tr., Day 2, at 143:23-144:22.)
- 12 187. Chief Seaman opined that Officer Cardoza's statement, "What the fuck are you doing?" was
13 not appropriate, was unprofessional, was not helpful, and may have provoked the incident.
14 (Trial Tr., Day 2, 145:12-147:10.)
- 15 188. If, after identifying themselves as Oakland Police, the officers then gave a verbal command
16 to Plaintiff to put his hands behind his back and he failed to comply, Chief Seaman testified
17 that he could envision that an officer would attempt physical control. (Trial Tr., Day 2,
18 125:2-21.)
- 19 189. An attempt by an officer to grab a subject's arm in this situation would be appropriate. If the
20 suspect were to forcefully jerk his arm away in response, Chief Seaman sees this as a violent
21 resistance to a police officer trying to stop a crime. (Trial Tr., Day 2, 124:22-125:7.)
- 22 190. If the officer's verbal commands, physical presence, and hand methods have been met with
23 resistance, another method to take control of the situation, such as taking the subject to the
24 ground, using a more controlling hold, or using pepper spray on the subject would be
25 appropriate, depending on the circumstances. (Trial Tr., Day 2, 125:13-23.)
- 26 191. An alternative would have been to tell Plaintiff to get down on the ground in a spread-eagle
27 position. This would have limited his ability to flee. (Trial Tr., Day 2, 147:11-148:1.)
- 28 192. If Plaintiff's account was correct and he did put his hands above his head, even though

- 1 Officer Cardoza told him to put his hands behind his back, this is an indication of submission
2 to authority and Officer Cardoza should not have used force to take control of him. (Trial
3 Tr., Day 2, 148:17-149:18.)
- 4 193. Chief Seaman opined that, assuming the officers' version of the facts is correct, the carotid
5 takedown hold that Officer Cardoza employed was a reasonable next alternative. (Trial Tr.,
6 Day 2, 126:17-127:6.) If Plaintiff's account of the incident were correct, that he neither
7 punched Mr. Fowler nor threw him into the garage door, and only restrained him from
8 running in front of the oncoming SUV, then Officer Cardoza's use of the carotid restraint was
9 less appropriate. (Trial Tr., Day 2, at 156:11-24.)
- 10 194. Chief Seaman knew from reading Officer Cardoza's deposition that he had only used the
11 carotid hold on a subject one time before using it on Plaintiff. (Trial Tr., Day 2, at 143:2-22.)
- 12 195. Through his training, Chief Seaman has experience with the takedown method utilized by
13 Officer Cardoza. He testified that the method was a takedown hold where the carotid hold
14 itself was not applied, but where he was able to safely take Plaintiff to the ground and diffuse
15 the situation. (Trial Tr., Day 2, 126:21-128:4.) The hold is slightly different than the one
16 Chief Seaman teaches and was taught, but he found it a proper application of a take down for
17 the situation. (Trial Tr., Day 2, 128:4-8.)
- 18 196. To act in accordance with the OPD bulletin regarding a takedown from the rear, it is
19 important for officers employing the hold Officer Cardoza testified to using to position their
20 arm in order to either apply pressure to or keep pressure away from the neck. (Trial Tr., Day
21 2, 129:19-130:19.)
- 22 197. The pressure applied to a subject's neck in the type of hold Officer Cardoza described and
23 demonstrated at trial is not the same as an actual application of pressure to the carotid artery,
24 although the arm is generally in the same position. (Trial Tr., Day 2, 132:17-133:4.)
- 25 198. Even if pressure is applied to the carotid artery to cause the subject to lose consciousness, the
26 subject is still able to breathe. There should not be any choking with the application of
27 pressure to the carotid artery, though there is a feeling of constriction because the sides of the
28 neck are being compressed. This should not create a choking sensation. (Trial Tr., Day 2,

1 133:5-134:5.)

2 199. Assuming the takedown did follow a violent arm jerk by Plaintiff, the purpose of placing him
3 in handcuffs would have been to ensure the safety of the officers, Mr. Fowler, and Plaintiff.
4 (Trial Tr., Day 2, 134:13-135:3.)

5 200. Once a subject is in handcuffs in the seated position, the preferred method to stand them up is
6 the use of the bent wrist hold. It is an appropriate and recognized method for controlling a
7 person while standing them up. The hold can be used to apply force, but does not necessarily
8 have to be painful. Chief Seaman has been trained in the bent wrist hold and has taught it for
9 30 years. (Trial Tr., Day 2, 135:6-11; 135:17-20; 136:10-12.)

10 201. Standing someone up from a seated position is not easy to do without the subject's help, and
11 the bent wrist hold is designed to allow the officer to get a person to their feet and still be
12 holding on in a way that the officer can regain control, should the subject try to get away.
13 (Trial Tr., Day 2, 137:6-16.)

14 202. If force is applied beyond what is necessary to overcome resistance or achieve compliance,
15 then the use of the bent wrist hold is excessive. (Trial Tr., Day 2, 154:17-155:9.)

16 203. Chief Seaman testified that the conduct of Officer Cardoza, according to the officers' version
17 of the facts, was objectively reasonable. Even if the officers did have information that
18 Plaintiff and Mr. Fowler were awaiting assistance on a 5150 call, had the situation occurred
19 according to Officer Cardoza's testimony, they acted appropriately and reasonably under the
20 circumstances. (Trial Tr., Day 2, 137:25-138:21.)

21 204. It was objectively reasonable for Officers Cardoza and Rojas to be operating on a separate
22 tactical radio channel, and it was not improper that they were not consistently tuned to the
23 regular broadcast channel during the course of the auto theft assignment. (Trial Tr., Day 2,
24 119:19-120:6.)

25 205. Although there is not a specific rule regarding contact with the main broadcast channel, there
26 is a general practice of maintaining communication when on a different channel in the patrol
27 district. (Trial Tr., Day 2, 121:1-14.)

28 206. Chief Seaman would have expected that the officers would have taken steps to better

1 document the evidence of an assault on Mr. Fowler by specifically listing the evidence of
2 injury/redness and by taking a more detailed statement from Mr. Fowler, or by taking
3 photographs of the redness either at the time or at a later time. (Defs.' Ex. R, p. 4.)

4 207. Officer Rojas should have documented his observations of redness on Mr. Fowler in his
5 report. (Defs.' Ex. R, p. 4.)

6 208. Chief Seaman would expect the officers to take steps to determine if there are independent
7 witnesses and take statements from those witnesses. (Defs.' Ex. R, p. 4.)

8 **F. California Department of Social Services Accusation and Exclusion Action**

9 209. As a result of the August 10, 2004 incident, the California Department of Social Services
10 ("DSS") brought an Accusation and Exclusion Action against Plaintiff. The purpose of the
11 exclusion action was to determine whether Plaintiff should be excluded from all of the
12 department's licensed facilities.³ (Pl.'s Ex. 1 (Decision of Administrative Law Judge ("ALJ")
13 Jonathan Lew and dismissal of DSS exclusion action against Plaintiff); Pl.'s Ex. 2 (May 4,
14 2005 DSS Hearing), ¶¶. 5, 9; Trial Tr., Day 3, 160:14-161:6.)

15 210. At the May 4, 2005 DSS hearing before ALJ Lew, Sgt. Kelly, Officer Rojas, and Officer
16 Cardoza all testified against Plaintiff. Plaintiff represented himself.⁴ (Pl.'s Ex. 2; Trial Tr.,
17 Day 3, 160:14-161:12.)

18 211. Officer Rojas testified that he first observed Plaintiff punch Mr. Fowler and then slam him
19 into the garage door on Suter. Officer Rojas further testified that Mr. Fowler fell to the
20 ground, at which point he observed Plaintiff on top of him, punching him a couple more
21 times. (Pl.'s Ex. 2, 21:5-16.)

22 212. Officer Rojas testified that Plaintiff punched Mr. Fowler twice in the face and once on the
23 side of his body. (Pl.'s Ex. 2, 23:19-24:20.)

24 213. Officer Cardoza testified that he observed Plaintiff push Mr. Fowler into the garage door,
25

26 ³ DSS may prohibit a licensee from employing or continuing the employment of any employee
27 who has engaged in conduct inimical to the health, morals, welfare or safety of individuals receiving
services. Cal. Health & Saf. Code § 1558(a)(2).

28 ⁴ On October 16, 2007, the Court granted Defendants' request to exclude testimony regarding
ALJ Lew's decision. However, the Court permitted reference to the ultimate outcome of the case, as
well as the use of sworn testimony taken at the hearing for impeachment purposes. (Dkt. #69.)

1 strike him with a left closed fist, and strike him approximately three to four times total. (Pl.'s
2 Ex. 2, 81:1-16.)

3 214. Officer Cardoza testified that he was "one hundred percent sure . . . that [Plaintiff] punched
4 [Mr. Fowler] several times in [his] presence." (Pl.'s Ex. 2, 93:8-10.)

5 215. Sgt. Kelly testified that he saw Plaintiff and Mr. Fowler motioning to him, but he had
6 "neighbors coming out and asking what was happening, it was like a circus." He further
7 testified that he drove to the stop sign, at which point he saw Plaintiff and Mr. Fowler
8 "pushing, shoving doing something by the sidewalk." (Pl.'s Ex. 2, 71:2-21.)

9 216. Sgt. Kelly testified that he never saw Plaintiff on top of Mr. Fowler, punch Mr. Fowler, or
10 throw him into the garage door. (Pl.'s Ex. 2, 73:6-13.)

11 217. On May 16, 2005, ALJ Lew determined that Plaintiff had not "engaged in any conduct on
12 August 10, 2004, that violated the personal rights, or that was inimical to the health, morals,
13 welfare or safety of [Mr. Fowler]." Accordingly, the exclusion action against Plaintiff was
14 dismissed. (Pl.'s Ex. 1, p. 5.)

15 **G. OPD Internal Affairs Investigation and Alameda County Superior Court Proceedings**

16 218. As a result of Plaintiff's complaint, OPD Internal Affairs conducted an investigation of the
17 August 10, 2004 incident, and criminal charges were also brought against Plaintiff in the
18 Alameda County Superior Court. Although neither party presented much in the way of
19 testimony or other evidence regarding these two proceedings, it appears that the internal
20 affairs investigation resulted in an exoneration of all officers (with the exception of Officer
21 Cardoza's use of the profane statement), while the superior court case was resolved in
22 Plaintiff's favor. (Trial Tr., Day 3, 11:8-12:20, 161:13-22; Dkt. #49 (Pl.'s Trial Brief, 5:22-
23 25.)

24 **H. Medical Expenses Related to the August 10, 2004 Incident**

25 219. On August 11, 2004, the day after the incident, Plaintiff sought medical treatment for his
26 injuries at Kaiser Permanente in Oakland. (Trial Tr., Day 3, 145:22-146:3; Pl.'s Exs. 27.1
27 and 27.2, (Kaiser medical and billing records).)

28 220. Plaintiff complained that his wrist was swollen, he had difficulty swallowing, and that he had

- 1 pain in his throat from the carotid hold. X-rays were taken and Plaintiff was prescribed
2 Vicodin for pain, and his arm was placed in a sling. (Trial Tr., Day 3, 146:7-20; Pl.'s Exs.
3 27.1 and 27.2.)
- 4 221. The following week, on August 18, 2004, when his injuries had not resolved, Plaintiff sought
5 further treatment at the Alameda County Medical Center's Highland Hospital. (Trial Tr.,
6 Day 3, 146:21-25; Pl.'s Exs. 26.1 and 26.2 (Highland Hospital medical and billing records).)
- 7 222. At Highland Hospital, Plaintiff's complaints included continuing pain in his neck, difficulty
8 spitting, and a sensation of compression. X-rays were taken of Plaintiff's neck, and he was
9 informed that he had soft-tissue damage to his neck. (Trial Tr., Day 3, 148:4-12; Pl.'s Exs.
10 26.1 and 26.2.)
- 11 223. After learning that the Hodges facility failed to carry workers' compensation insurance,
12 Plaintiff filed a claim for compensation with the State of California Uninsured Employers
13 Fund. (Trial Tr., Day 3, 147:18-23; 148:16-18; 218:2-5.)
- 14 224. Plaintiff thereafter returned for further medical treatment at Kaiser Permanente and Highland
15 Hospital. At Highland, he received a prescription for Prozac because he was experiencing
16 depression related to the incident and the pending criminal and civil investigations that
17 followed. (Trial Tr., Day 3, 149:13-24.)
- 18 225. When the pain in Plaintiff's wrist, neck and shoulders did not subside, he sought chiropractic
19 treatment from Russell S. Kun, D.C., at Kun Chiropractic. (Trial Tr., Day 3, 150:19-151:18;
20 Pl.'s Exs. 28.1 and 28.2, (Kun Chiropractic billing and medical records).)
- 21 226. Dr. Kun's treatment helped the pain resolve. At the time of the trial, Plaintiff was pain and
22 injury free. (Trial Tr., Day 3, 151:9-15)
- 23 227. Plaintiff settled his claim with the Uninsured Employer's Fund, which included a settlement
24 of the his medical liens with Dr. Kun and Kaiser Permanente. (Trial Tr., Day 3, 150:6-12.)
25 The settlement amount for Dr. Kun's claim was \$8,000.00. The settlement amount for Kaiser
26 Permanente was \$992.10. (Trial Tr., Day 3, 152:23-153:11; Pl.'s Ex. 50.)
- 27 228. The total cost for Plaintiff's two visits to Highland Hospital, one on August 18, 2004 and the
28 other on September 17, 2004, was \$663.10. (Trial Tr., Day 3, 154:11-25; Pl.'s Ex. 50; Pl.'s

1 Exs. 26.1 through 28.2.)

2 229. In total, Plaintiff's claimed medical expenses incurred as a result of the August 10, 2004
3 incident total \$9,655.20. (Trial Tr., Day 3, 151:16-155:3.)

4 **I. Claimed Lost Wages as a Result of the August 10, 2004 Incident**

5 230. Plaintiff also alleges wage loss damages as a result of Defendants' conduct.

6 231. At the time of the incident, Plaintiff was an hourly employee at Hodges, making \$8.50 per
7 hour. He normally worked a 40-hour week, but would work approximately 10 hours per
8 week of overtime. Between June 2004 and August 10, 2004, Plaintiff made a total of
9 \$5,136.88 at Hodges. (Trial Tr., Day 3, 155:4-156:8; Pl.'s Ex. 29 (2004 W-2 Wage and Tax
10 Statement from Hodges Residential Facility).) Plaintiff testified that he earned
11 approximately \$2,500 per month at Hodges. (Trial Tr., Day 3, 161:23-25.)

12 232. Plaintiff alleges that he was unable to return to work immediately due to the injuries he
13 sustained during the incident, and because he was fearful that he would not be able to find
14 gainful employment in his field because of the allegations made against him by the OPD and
15 DSS. (Trial Tr., Day 3, 156:9-157:6; 157:17-158:5.)

16 233. Plaintiff testified that Mr. Hodges fired him after he filed his compensation claim with the
17 State of California Uninsured Employer's Fund. (Trial Tr., Day 3, 149:25-150:5.)

18 234. In February 2005, Plaintiff obtained employment as a Recovery Counselor I at Thunder Road
19 Adolescent Treatment Center ("Thunder Road") in Oakland, California, and he began
20 working there on February 11, 2005. Plaintiff earned \$10.50 per hour. (Trial Tr., Day 3,
21 157:7-7-15; 158:2-159:8; 162:5-8; Defs.'s Ex. L.)

22 235. While employed at Thunder Road, Plaintiff learned of the allegation filed against him by the
23 California Department of Social Services, and he disclosed this fact to Thunder Road. (Trial
24 Tr., Day 3, 158:2-159:2; 162:18-20.)

25 236. Thunder Road terminated Plaintiff on March 18, 2005. On Plaintiff's Separation Notice,
26 Thunder Road listed "Difficulty working w/ staff" as the reason for his termination. (Defs.'
27 Ex. L.)

28 237. Plaintiff testified that after he was terminated from Thunder Road, he focused his energy on

239. Prior to working at Hodges, Plaintiff held jobs in the social service area as a counselor at R&R Educational Home, Greater New Beginnings, Mary's Help, Anova Behavior and Consultation, Baker Places, and the California Autism Foundation.⁵ (Trial Tr., Day 3, 116:7-121:11.)

A. Jurisdiction and Venue

2. Venue is proper because the events giving rise to Plaintiff's claims occurred in Alameda County, which is within the Northern District of California. 28 U.S.C. § 1391(b).

3. Plaintiff's first cause of action is for excessive force under § 1983 against Officer Cardoza, Officer Rojas, and Sgt. Kelly.

Every person who, under the color of any statute ... subjects ... any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

⁵Plaintiff testified that he was terminated from his employment at Baker Place for taking a nap on his lunch break. However, he grieved that termination and got his job back for two weeks, at which point he was discharged again for falsifying his time sheet. (Trial Tr., Day 3, 169:10-170:1.) He also testified that he was discharged from the California Autism Foundation after about a month because he did not meet his probation. (Trial Tr., Day 3, 170:2-8.)

1 provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*,
2 510 U.S. 266, 271 (1994).

3 5. To prevail on a claim under 42 U.S.C. § 1983, Plaintiff must show (1) that a right secured by
4 the Constitution or laws of the United States was violated, and (2) that the violation was
5 committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48
6 (1988).

7 6. Liability may be imposed on the individual defendants if Plaintiff can show that they
8 proximately caused the deprivation of a federally protected right. *Leer v. Murphy*, 844 F.2d
9 628, 634 (9th Cir. 1988); *Harris v. City of Roseburg*, 664 F.2d 1121, 1125 (9th Cir. 1981).
10 Under § 1983, a person deprives another of a constitutional right if he or she does an
11 affirmative act, participates in another's affirmative act, or omits to perform an act which he
12 is legally required to do, that causes the deprivation of which the plaintiff complains. *Leer*,
13 844 F.2d at 633. The inquiry into causation must be individualized and focus on the duties
14 and responsibilities of each individual defendant whose acts or omissions are alleged to have
15 caused a constitutional deprivation. *Id.*

16 7. Here, it is undisputed that all the defendants were acting under color of state law. Thus,
17 Plaintiff's § 1983 claim turns on whether his constitutional rights were violated.

18 8. A claim that law enforcement officials used excessive force in the course of making an
19 arrest, investigatory stop, or other "seizure" is properly analyzed under the Fourth
20 Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388
21 (1989). The Fourth Amendment guarantees that "[t]he right of the people to be secure in
22 their persons, houses, papers, and effects, against unreasonable searches and seizures, shall
23 not be violated" U.S. Const. amend. IV.

24 9. "Determining whether the force used to effect a particular seizure is reasonable under the
25 Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on
26 the individual's Fourth Amendment interests against the countervailing governmental interest
27 at stake." *Graham*, 490 U.S. at 396 (internal quotations omitted).

28 10. Because the reasonableness test is not capable of precise definition or mechanical

1 application, its proper application requires careful attention to the facts and circumstances of
2 each particular case, including the severity of the crime at issue, whether the suspect poses an
3 immediate threat to the safety of the officers or others, and whether he is actively resisting
4 arrest or attempting to evade arrest by flight. *Id.*

5 11. Reasonableness must be judged "from the perspective of a reasonable officer on the scene,
6 rather than with the 20/20 vision of hindsight" and allow "for the fact that [peace] officers are
7 often forced to make split-second judgments - in circumstances that are tense, uncertain, and
8 rapidly evolving - about the amount of force that is necessary in a particular situation." *Id.* at
9 396-97.

10 12. In this case, had events taken place as Officers Rojas and Cardoza testified, the level of
11 violence Plaintiff inflicted on Mr. Fowler would have certainly led a reasonable officer to
12 believe both that Mr. Fowler was the victim of a serious crime and that Plaintiff was
13 dangerous. However, the preponderance of the evidence, including the audio transcript of
14 the 911 call, Plaintiff's testimony, Sgt. Kelly's testimony, and the testimony of both parties'
15 experts, leads the Court to find that the officers' version of the events is not credible.

16 13. Although Officers Rojas and Cardoza testified that they witnessed Plaintiff punch Mr.
17 Fowler in his eye, slam him into a garage door, straddle Mr. Fowler after he fell to the
18 ground, and punch him in the face and body after he was on the ground, the Court finds that
19 none of these events took place.

20 14. The 911 audio transcript is convincing evidence for Plaintiff. Although there is a brief one-
21 to-two-second-long scuffle that can be heard, this correlates with Plaintiff's testimony that he
22 brought Mr. Fowler to the ground to prevent him from entering the roadway.

23 15. Sgt. Kelly confirmed Plaintiff's version of the events. He saw Plaintiff push Mr. Fowler out
24 of the street and toward the house, but he did not see Mr. Fowler hit the garage door, and he
25 never witnessed Plaintiff punching him, either before or after he was on the ground.

26 16. Based on the sounds heard on the 911 call, the Court finds it implausible that, within one to
27 two seconds, Plaintiff had time to punch Mr. Fowler in the eye, slam him against the garage,
28 straddle him, and punch him at least two more times while on the ground. Further, both

Plaintiff and Sgt. Kelly testified that Plaintiff waved at Sgt. Kelly immediately before the alleged assault, yet the officers provide no explanation as to why Plaintiff would get the attention of a police officer, only to then beat a mentally-disabled individual in his presence. And, given that Plaintiff was holding his cell phone and only had one hand free, Defendants' version of the incident is even more implausible. Instead, the Court finds that Officers Rojas and Cardoza fabricated their account to justify their use of excessive force.

1. Officer Cardoza

17. Given that Plaintiff was trying to prevent Mr. Fowler from entering the roadway, Officer Cardoza escalated the situation by jumping out of the undercover vehicle and yelling, "What the fuck are you doing?!" Although Officers Rojas and Cardoza testified that they both announced themselves as Oakland Police, neither one can be heard making such an announcement on the 911 recording; therefore, the Court finds that neither officer made such an announcement.
18. Officer Cardoza's statement was unprofessional, not what a reasonably trained officer would do, and not in accord with peace officer standards and training. As the defendants' expert testified, where officers approach a situation in an unmarked police car, the response of reasonable officers would be to first identify themselves as police officers. As Officers Rojas and Cardoza did not identify themselves, they acted unreasonably.
19. Officer Cardoza himself testified that before making his profane remark, even though he considered this to be a felony stop, he never asked Plaintiff to stop what he was doing, never asked him to step away from Mr. Fowler, never asked him to put his hands behind his back, and never ordered Plaintiff to get down on the ground.
20. Defendants' expert based his testimony on the assumption that the officers announced themselves as Oakland Police, yet he did not hear them announce themselves on the 911 recording. Accordingly, the Court finds that the defendants' expert's testimony regarding the officers' initial interaction with Plaintiff is based on a false assumption with no evidentiary support other than Officers Cardoza and Rojas' self-serving, fabricated testimony.
21. Despite this, the Court notes that neither officer knew that Plaintiff had placed a 911 call and

1 was awaiting police assistance. Thus, the officers' direct observation of Plaintiff pushing Mr.
2 Fowler to the ground to prevent him from running into the street would give them reasonable
3 cause to perceive that they were witnessing a battery. However, the Court still finds that the
4 use of force that followed was excessive and unreasonable.

5 22. When Plaintiff responded that he was doing his job, he got up off the ground and stood up.
6 Officer Cardoza told Plaintiff to put his hands behind his back, but Plaintiff instead raised his
7 hands above his head to show that he was holding a cell phone and not a weapon.
8 Defendants' own expert testified that his response is an indication of submission to authority,
9 and Officer Cardoza should not have used force to take control of him. Plaintiff's response
10 was reasonable.

11 23. Officer Cardoza testified that Plaintiff never tried to strike any of the officers, nor did he try
12 to harm Mr. Fowler while he was on the scene, yet Officer Cardoza's response to Plaintiff
13 raising his hands above his head was to attempt to grab Plaintiff's right arm from behind.
14 Once again, Officer Cardoza's actions escalated the situation.

15 24. Given that Plaintiff had shown his willing compliance by placing his hands above his head,
16 the Court finds Officer Cardoza's actions unreasonable under the circumstances. There is no
17 evidence that Plaintiff was trying to flee, evade arrest, or cause harm to the officers or Mr.
18 Fowler at the point he placed his hands above his head.

19 25. Although Plaintiff jerked his arm away when Officer Cardoza tried to grab it, Officer
20 Cardoza approached from behind and such a move would have been sudden and unexpected,
21 especially when considered with the fact that Plaintiff had willingly complied with the
22 officer's directive. Plaintiff's expert testified that Officer Cardoza's attempt to grab Plaintiff's
23 arm was inappropriate because, when grabbing in such circumstances, the expected response
24 would be a jerk or pulling from the sudden intercession.

25 26. Defendants' expert testified that if a suspect were to jerk his arm away in response to an
26 officer's attempt to gain physical control, it could be seen as a violent attempt at resistance.
27 However, he also testified that if Plaintiff had put his hands above his head, Officer Cardoza
28 should not have used force to take control of him. Thus, the Court finds that Plaintiff's

- 1 response was reasonable under the circumstances and Officer Cardoza's attempt to grab
2 Plaintiff's arm was unreasonable and unnecessary.
- 3 27. Officer Cardoza's subsequent attempt to place Plaintiff in a carotid hold was also excessive
4 and unreasonable. Pursuant to the OPD's Use of Force policy, the application of a carotid
5 hold should only be used when less forceful options, such as verbal persuasion, are not
6 available.
- 7 28. Under *Graham*, the force which is applied must be balanced against the need for that force: it
8 is the need for force which is at the heart of *Graham*. *Drummond ex rel. Drummond v. City*
9 *of Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003) (internal citation and quotation omitted).
10 As Plaintiff had placed his hands above his head in response to Officer Cardoza's order,
11 thereby showing his compliance, the Court finds that there was no need for Officer Cardoza
12 to attempt to grab his arm from behind, and the escalation to the use of a carotid hold was
13 unreasonable.
- 14 29. Once Plaintiff was on the ground as a result of the carotid hold, the Court finds that Officer
15 Cardoza's use of the bent wrist hold to bring Plaintiff to his feet was also unreasonable and
16 excessive under the circumstances.
- 17 30. The Court recognizes that standing someone up from a seated position is not easy to do
18 without the subject's help, and the bent wrist hold is designed to allow the officer to get a
19 person to their feet and still maintain control. However, Defendants presented no evidence
20 that Plaintiff had demonstrated an unwillingness to stand up. Thus, as Plaintiff's expert
21 testified, it would have been preferable to help Plaintiff get to his feet by reaching under his
22 armpits and lifting him.
- 23 31. Defendants' expert testified that the use of the bent wrist hold is excessive if force is applied
24 beyond what is necessary to overcome resistance or achieve compliance. Given that there is
25 no evidence that Plaintiff resisted, and that he had attempted to comply with Officer
26 Cardoza's previous request, the Court finds that Defendants' expert testimony also establishes
27 that the bent wrist hold was excessive under these circumstances.
- 28 32. Accordingly, the Court finds that the totality of the circumstances establish that this use of

1 force on Plaintiff was unreasonable, unnecessary, and excessive.

2 33. Having carefully considered the facts and circumstances of this case, the Court finds that
3 Plaintiff has successfully established by a preponderance of the evidence that Officer
4 Cardoza used excessive force in the course of the August 10, 2004 incident, in violation of
5 the Fourth Amendment.

6 **2. Officer Rojas and Sgt. Kelly**

7 34. As to Officer Rojas and Sgt. Kelly, the Court finds that both officers are also liable for the
8 violation of Plaintiff's Fourth Amendment rights because they failed to intervene to stop
9 Officer Cardoza's use of force that occurred in their immediate presence.

10 35. Police officers have a duty to intercede when their fellow officers violate the constitutional
11 rights of a citizen. *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000) (internal
12 citations omitted). The passive defendant violates a constitutional right that "is analytically
13 the same as the right violated by the person who strikes the blows." *United States v. Koon*,
14 34 F.3d 1416, 1447 n. 25 (9th Cir. 1994), *rev'd on other grounds*, 518 U.S. 81 (1996). On
15 the other hand, if a violation happens so quickly that an officer had no "realistic opportunity"
16 to intercede, then the officer is not liable for failing to intercede. *Cunningham*, 229 F.3d at
17 1289-90.

18 36. Here, the evidence is undisputed that neither Officer Rojas nor Sgt. Kelly intervened to stop
19 Officer Cardoza's use of the carotid hold and wrist lock on Plaintiff, both of which occurred
20 in their immediate presence. Whether they had a realistic opportunity to intercede is
21 questionable.

22 37. As to the carotid hold, both Officer Rojas and Sgt. Kelly observed Officer Cardoza place
23 Plaintiff in the hold. However, given the short time period in which the incident took place,
24 and the lack of resistance from Plaintiff, the Court finds that it is possible that they did not
25 anticipate Officer Cardoza's use of the hold. Because the violation happened so quickly, the
26 Court finds that they did not have a realistic opportunity to intercede.

27 38. As to the bent wrist control, Officer Rojas and Sgt. Kelly both handcuffed Plaintiff
28 immediately before Officer Cardoza used the wrist lock to bring Plaintiff to his feet. Given

1 their proximity to Officer Cardoza, there is no evidence that anything prevented them from
2 stopping Officer Cardoza's unjustified use of the wrist lock. Further, as Sgt. Kelly and
3 Officer Rojas both witnessed Officer Cardoza's use of the carotid hold (despite Plaintiff's
4 compliance and lack of resistance), their failure to intercede is troubling.

5 39. Officer Cardoza continued to use the wrist lock as he walked Plaintiff to Sgt. Kelly's patrol
6 car. Thus, unlike the suddenness of the carotid hold, the use of the wrist lock occurred over a
7 relatively longer period of time. Further, Plaintiff complained that the wrist hold was hurting
8 him and, despite any evidence that Plaintiff physically resisted Officer Cardoza, neither
9 Officer Rojas nor Sgt. Kelly intervened.

10 40. As Sgt. Kelly was the senior supervisor at the scene, the Court also finds it troubling that,
11 although he was required to take control of the scene, he did not attempt to stop Officer
12 Cardoza from using the wrist lock. Sgt. Kelly knew from dispatch that there was a 5150 call
13 in the area. He also heard Plaintiff shouting that he was Mr. Fowler's counselor. And yet he
14 did nothing to intervene.

15 41. As a result, Officer Rojas and Sgt. Kelly are also liable under 42 U.S.C. § 1983 for their
16 failure to intervene.

17 **C. Malicious Prosecution**

18 42. Plaintiff's next cause of action is for malicious prosecution under 42 U.S.C. § 1983 against
19 Officer Cardoza, Officer Rojas, and Sgt. Kelly.

20 43. In order to prevail on a § 1983 claim for malicious prosecution, Plaintiff must establish that
21 the action was (1) commenced by or at the direction of the defendant and was pursued to a
22 legal termination in his favor, (2) brought without probable cause; and (3) initiated with
23 malice. *Sheldon Appel Co. v. Albert & Olier*, 47 Cal.3d 863, 871 (1989); *Marsh v. San*
24 *Diego County*, 432 F. Supp. 2d 1035, 1051 (S.D. Cal. 2006).

25 44. A malicious prosecution claim may arise from a violation of the First Amendment where the
26 plaintiff demonstrates that his protected speech was a motivating factor in the defendants'
27 wrongful conduct. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004). "[T]he
28 First Amendment protects a significant amount of verbal criticism and challenge directed at

police officers." *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). While police may resent the freedom of individuals to verbally oppose or challenge their action, "they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected." *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990).

45. To prevail on a First Amendment retaliation claim, a plaintiff must show: (1) that the plaintiff "was engaged in constitutionally protected activity"; (2) that the defendant's actions caused the plaintiff "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) that the "defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Mendocino Environment Center v. Mendocino County*, 192 F.3d 1283, 1300-01 (9th Cir. 1999). However, "[a] plaintiff may not recover merely on the basis of a speculative 'chill' due to generalized and legitimate law enforcement initiatives." *Mendocino Environment Center v. Mendocino County*, 14 F.3d 457, 464 (9th Cir. 1994).

46. "Ordinarily, the decision to file a criminal complaint is presumed to result from an independent determination on the part of the prosecutor, and thus, precludes liability for those who participated in the investigation or filed a report that resulted in the initiation of proceedings." *Awabdy*, 368 F.3d at 1067 (internal citation omitted). However, this presumption can be rebutted by showing that the investigating officers presented the prosecutor with information known by them to be false. *Blankenhorn v. City of Orange*, 485 F.3d 463, 482-83 (9th Cir. 2007) (holding that a district attorney's reliance on false statements are sufficient to state a § 1983 claim). Thus, "[a] police officer who maliciously or recklessly makes false reports to the prosecutor may be held liable for damages" *Id.* at 482.

47. In the instant case, Plaintiff has demonstrated by a preponderance of the evidence that the defendants violated his rights by making false reports and causing him to be maliciously prosecuted in both the criminal and DSS proceedings.

48. As discussed above, Officers Cardoza and Rojas fabricated their accounts, which were

1 approved and ratified by Sgt. Kelly, to justify Officer Cardoza's use of excessive force.

2 49. At the time they fabricated their accounts, they were on actual notice that Plaintiff had been
3 attempting to prevent Mr. Fowler from injuring himself and had no criminal intent to injure
4 him. Sgt. Kelly heard the earlier dispatch announcement regarding the 5150 call, admitted
5 that he pieced together at the scene that Plaintiff had been the one who made that call, and
6 decided (in the presence of Officers Cardoza and Rojas) that Plaintiff would not be arrested.

7 50. The individual defendants were also aware that Plaintiff intended to file a complaint about
8 the officers' conduct. Officer Cardoza testified that Plaintiff said he had subjected him to
9 excessive force by choking him, that he choked him because he was a black man, and that he
10 was going to retain John Burris as an attorney to sue him. Officer Rojas testified that, before
11 writing his report, he was aware that Plaintiff was threatening to sue them. Sgt. Kelly
12 testified that Plaintiff told him that he believed the officers used force on him because he was
13 black, and that he planned to make a complaint. Sgt. Kelly provided Plaintiff with a
14 complaint pamphlet and took his statement.

15 51. Officers Cardoza and Rojas knew that Plaintiff had not punched Mr. Fowler, nor slammed
16 him into the garage door. They also knew Plaintiff had no intent to injure Mr. Fowler, but
17 was in fact attempting to keep him from injuring himself. The Court finds that in response to
18 and in retaliation for Plaintiff's threat to file a complaint, Officers Cardoza and Rojas
19 fabricated their account of the night's events. Further, this information was instrumental in
20 causing Plaintiff to be prosecuted at both the DSS and criminal proceedings.

21 52. Although Sgt. Kelly knew that Plaintiff had no intent to injure Mr. Fowler, and that this was
22 not an ordinary crime scene, he failed to meet his responsibility as a sergeant supervisor at
23 the scene to keep Officers Cardoza and Rojas separate until all necessary statements were
24 gathered and written reports were completed. His failure permitted Officers Cardoza and
25 Rojas to return to the station and write their reports in the same room, thereby providing the
26 opportunity to fabricate their account.

27 53. Sgt. Kelly signed off on and approved the reports prepared by Officers Cardoza and Rojas.
28 He did not write a crime report of his own.

54. Despite reporting that Plaintiff committed a felony, none of the officers, either at the scene or at a later time, made any attempt to locate witnesses, take any statement from Mr. Fowler, or arrange to have photographs taken of any injuries to Mr. Fowler. Their lack of responsive actions do not match the level of violence they reported witnessing.

55. The officers' fabrications did not stop with their crime reports. As a result of the officers' reports, DSS brought an Accusation and Exclusion Action against Plaintiff. At the DSS hearing, Officers Cardoza and Rojas and Sgt. Kelly all testified against Plaintiff. However, the ALJ sided with Plaintiff and the exclusion action was dismissed.

56. Although the parties did not present specific evidence regarding the criminal proceedings, it is undisputed that they were also terminated in Plaintiff's favor.

57. Thus, based on the preponderance of the evidence, the Court finds that Officer Cardoza, Officer Rojas, and Sgt. Kelly are liable for malicious prosecution.

D. Qualified Immunity

58. Defendants argue that, even if the Court finds them liable under § 1983, they are entitled to qualified immunity because (1) they believed that they were witnessing a crime and acted reasonably under the circumstances, and (2) they did not falsify their reports.

59. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The privilege is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* (quoting *Mitchell*, 472 U.S. at 526)).

60. Here, Defendants failed to raise the issue of qualified immunity prior to trial, either in the form of a motion to dismiss under Rule 12(b)(6) or a summary judgment motion under Rule 56. Despite this failure on counsel's part, the Court shall now consider Defendants' immunity argument.

61. Pursuant to *Saucier*, the Court must undertake a two-step analysis when a defendant asserts qualified immunity. First, the Court must answer "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's

conduct violated a constitutional right?" *Id.* at 201. Second, if the evidence supports a finding that a constitutional right has been violated, the court then "ask[s] whether the right was clearly established" such that "it would be clear to a reasonable officer that [his] conduct was unlawful in the situation he confronted." *Id.* at 201-02.

62. "The question is what the officer reasonably understood his powers and responsibilities to be, when he acted under clearly established standards." *Id.* at 208. "If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Id.* at 205. However, this inquiry is wholly objective, and a defendant's subjective belief as to the lawfulness of his or her conduct is irrelevant. *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002) "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

1. Excessive Force

63. Turning to Plaintiff's excessive force claim, the qualified immunity analysis inquires "whether it would be objectively reasonable for the officer to believe that the amount of force employed was required by the situation he confronted. . . . That is, the first step in the analysis is an inquiry into the objective reasonableness of the officer's belief in the *necessity* of his actions, and there is no Fourth Amendment violation if the officer can satisfy this standard." *Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th Cir. 2003), *cert. denied*, 543 U.S. 811 (2004) (*italics in original*).

64. As discussed above, the Court finds that the officers' conduct in this case violated Plaintiff's Fourth Amendment rights. Accordingly, the first step of the *Saucier* analysis is answered in the affirmative, and the Court must now determine whether it would be clear to a reasonable officer in Officer Cardoza's position that his conduct was unlawful in the situation he confronted.

65. Officer Cardoza had an extremely hostile and unprofessional attitude toward Plaintiff the minute he stepped out of his police vehicle and uttered a profanity at him. The Court finds that Officer Cardoza could not have reasonably but mistakenly believed that he could fail to

1 announce himself as a police officer and instead swear at Plaintiff when jumping out of an
2 undercover vehicle.

3 66. The Court also finds that Officer Cardoza, in response to Plaintiff's compliance with his
4 orders, could not reasonably attempt to grab Plaintiff's arm from behind, place him in an
5 unnecessary carotid hold, and use a painful wrist lock to get Plaintiff to his feet and then
6 continue to apply the hold when there was no evidence that he was resisting.

7 67. Accordingly, the Court also finds that it is clearly established that a reasonable officer in
8 Officer Cardoza's position would know that his conduct was unlawful in this situation, and
9 Officer Cardoza is not entitled to immunity.

10 68. As Officer Rojas and Sgt. Kelly are liable under 42 U.S.C. § 1983 for their failure to
11 intervene, they are also not entitled to qualified immunity. *Koon*, 34 F.3d at 1447 n. 25, *rev'd*
12 *on other grounds*, 518 U.S. 81 (1996) (The passive defendant violates a constitutional right
13 that "is analytically the same as the right violated by the person who strikes the blows."). A
14 reasonable officer could not have reasonably but mistakenly believed that he had no duty to
15 intervene to stop another officer in their immediate presence from inflicting excessive force
16 on a subject when they could have prevented it.

17 **2. Malicious Prosecution**

18 69. Turning to the malicious prosecution claim, as discussed above, the Court finds that the
19 individual defendants violated Plaintiff's First Amendment rights by causing the criminal and
20 DSS proceedings against him. Officers Cardoza and Rojas fabricated their reports, Sgt.
21 Kelly reviewed and ratified them, and all three officers testified that these accounts were
22 true. The Court finds that reasonable officers could not have reasonably but mistakenly
23 believed that they could fabricate an account of an incident (and, in Sgt. Kelly's case, ratify
24 those fabrications), cause Plaintiff to potentially lose his livelihood, face felony charges, and
25 insulate themselves from civil liability for the excessive force employed by Officer Cardoza.
26 Accordingly, none of the individual defendants are entitled to qualified immunity under §
27 1983.

28 ///

E. Municipal Liability

70. Plaintiff second claim for relief alleges municipal liability under 42 U.S.C. § 1983 against Defendant City of Oakland.

71. Local governments are “persons” subject to liability under 42 U.S.C. § 1983 where official policy or custom causes a constitutional tort. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). However, a municipality may not be held vicariously liable for the unconstitutional acts of its employees under the theory of respondeat superior. *Id.* at 691; *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997).

72. To impose municipal liability under § 1983 for a violation of constitutional rights, Plaintiff must show that: (1) he possessed a constitutional right of which he was deprived; (2) the municipality had a policy; (3) the policy amounted to deliberate indifference to his constitutional rights; and (4) the policy was the moving force behind the constitutional violation. *Plumeau v. Sch. Dist. No. 40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

73. Here, the Court finds that Plaintiff has established the first element, but he presented no evidence regarding a policy of the City of Oakland, let alone whether any such policy amounted to deliberate indifference and was the moving force behind the constitutional violation.

74. Accordingly, Plaintiff has not established that he is entitled to judgment as to his municipal liability claim against Defendant City of Oakland.

F. Negligence

75. Plaintiff's third claim for relief alleges that the individual defendants' negligence caused his damages, and that the City of Oakland is liable as respondeat superior.

76. California Civil Code section 1714(a) provides that: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." To prevail on a claim for negligence, Plaintiff must establish: (1) a legal duty to use

1 due care; (2) a breach of that duty; and (3) injury that was proximately caused by the breach.
 2 *Ladd v. County of San Mateo*, 12 Cal.4th 913, 917 (1996).

3 **1. Individual Officers**

4 77. Here, the Court finds the individual officers liable for negligence. First, the Court notes that
 5 police officers have a duty not to use excessive force. *Munoz v. City of Union City*, 120 Cal.
 6 App. 4th 1077, 1101 (2004) (recognizing "a duty on the part of police officers to use
 7 reasonable care in deciding to use and in fact using deadly force"). As discussed above, the
 8 Court also finds that officers on the scene have a duty to intercede when their fellow officers
 9 violate the constitutional rights of a citizen. Thus, Officer Cardoza, Officer Rojas, and Sgt.
 10 Kelly all had a legal duty either to not use excessive force or to intercede in instances of the
 11 use of excessive force.

12 78. Second, the Court finds that the individual defendants breached their duty to Plaintiff.
 13 Determination whether an officer breached such duty is "analyzed under the reasonableness
 14 standard of the Fourth Amendment to the United Constitution." *David v. City of Fremont*,
 15 2006 WL 2168329, *21 (N.D. Cal. July 31, 2006) (citing *Munoz*, 120 Cal. App. 4th at 1102-
 16 06).

17 79. As discussed above, the Court finds that Officer Cardoza's use of the carotid hold and wrist
 18 lock were excessive and unnecessary. As Plaintiff's expert testified, the inappropriate use of
 19 a carotid hold "can result in stroke, heart attack, crushing of the trachea, and death." Given
 20 Plaintiff's lack of resistance and attempts to comply, the Court finds that Officer Cardoza did
 21 not use reasonable care in deciding to use such force, and therefore breached his duty to
 22 Plaintiff. And, given Officer Rojas and Sgt. Kelly's failure to intervene, the Court finds that
 23 they also breached the reasonableness standard under the Fourth Amendment.

24 80. Finally, the Court finds that Plaintiff's injuries, including the physical injuries and loss of
 25 employment he suffered as a result of the incident, were proximately caused by this breach.
 26 "Proximate cause is that cause which, in natural and continuous sequence, unbroken by any
 27 efficient intervening cause, produced the injury [or damage complained of] and without
 28 which such result would not have occurred." *Walt Rankin & Assoc. v. City of Murrieta*, 84

1 Cal. App. 4th 605, 626 (2000). As Plaintiff's injuries resulted from the August 10, 2004
2 incident, and the evidence establishes that this cause was unbroken by any intervening cause,
3 the Court finds that Plaintiff has established, by a preponderance of the evidence, that the
4 individual defendants are liable for negligence.

5 **2. Municipal Liability**

6 81. Defendant City of Oakland can also be held liable for the individual defendants' negligence.
7 Although § 1983 provides that a municipality may be held liable for a violation of federal
8 law only if it has adopted an illegal or unconstitutional policy or custom, California has
9 rejected the *Monell* rule and instead imposes liability on public entities for state law causes
10 of action under the doctrine of respondeat superior. Cal. Gov't. Code § 815.2(a); *Munoz*, 120
11 Cal. App. 4th at 1110; *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002)
12 (internal citations omitted).

13 82. "Since the enactment of the California Tort Claims Act in 1963 (§ 810 et seq.), a
14 governmental entity can be held vicariously liable when a police officer acting in the course
15 and scope of employment uses excessive force or engages in assaultive conduct." *Mary M. v.*
16 *City of Los Angeles*, 54 Cal.3d 202, 215 (1991). For the doctrine of respondeat superior to
17 apply, the plaintiff must prove the employee's tortious conduct was committed within the
18 scope of employment. *Id.* at 209.

19 83. In this case, there is no dispute that the officers' tortious conduct was committed within the
20 scope of employment. Accordingly, the Court finds that Defendant City of Oakland is also
21 liable for the individual defendants' negligence.

22 **G. False Arrest/Imprisonment**

23 84. Plaintiff's fourth claim for relief is that he was subjected to a false imprisonment by
24 Defendants when he was handcuffed by Officer Cardoza.

25 85. "False imprisonment is the unlawful violation of the personal liberty of another." Cal. Penal
26 Code § 236. "The elements of a tortious claim of false imprisonment are: (1) the
27 nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for
28 an appreciable period of time, however brief." *Lyons v. Fire Ins. Exch.*, 161 Cal. App. 4th

1 880, 888 (2008).⁶

2 86. In this case, Plaintiff has established that he was confined for a brief period of time when the
3 officers handcuffed him and placed him in the patrol car. Thus, the issue is whether he was
4 handcuffed without lawful privilege.

5 87. The Court finds that the preponderance of the evidence establishes that Plaintiff was
6 handcuffed only long enough for Sgt. Kelly to determine Plaintiff and Mr. Fowler's
7 relationship and the situation at hand. Once Sgt. Kelly talked to Mr. Fowler and pieced
8 together that Plaintiff had been the one talking to the OPD dispatch concerning the 5150 call
9 he heard earlier, he ordered that Plaintiff be taken out of the police vehicle and released from
10 the handcuffs.

11 88. Further, as discussed above, it was reasonable for Officers Cardoza and Rojas to assume that
12 they had witnessed a battery. Although the amount of force Officer Cardoza used was
13 excessive, Plaintiff has not shown that it is improper for officers to handcuff a battery
14 suspect. The use of handcuffs can typically be justified based on safety concerns. *United*
15 *States v. Bautista*, 684 F.2d 1286, 1289 (1982) (holding that police may take "adequate
16 protective measures" to guard their own safety). Plaintiff argues that the officers used the
17 handcuffs after they were aware that Plaintiff had acted lawfully to prevent Plaintiff from
18 injuring himself; the evidence, however, does not support this conclusion.

19 89. Accordingly, the Court finds that the officers, and therefore the City of Oakland, are not
20 liable for false imprisonment.

21 **H. Battery**

22 90. Plaintiff's fifth claim for relief alleges that the individual defendants, acting in concert with
23 one another, caused him to be subjected to a battery, and that the City of Oakland is therefore
24 liable under the theory of respondeat superior.

25 91. "A battery is any willful and unlawful use of force or violence upon the person of another."

26
27 ⁶The Court notes that police officers are not liable for false imprisonment arising out of any
28 arrest where the arrest was lawful or the officer had reasonable cause to believe it was lawful. Cal.
Penal Code § 847(b)(1); *Hamilton v. City of San Diego*, 217 Cal. App. 3d 838, 844 (1990). However,
there is no indication that Plaintiff was actually "under arrest" at any time, and the Court could not find
any cases applying this section to a detention.

Cal. Penal Code § 242. The elements of civil battery are: (1) defendant intentionally did an act which resulted in a harmful or offensive contact with the plaintiff's person; (2) plaintiff did not consent to the contact; and (3) the harmful or offensive contact caused injury, damage, loss, or harm to plaintiff. *Piedra v. Dugan*, 123 Cal. App. 4th 1483, 1495 (2004). "[T]o prevail on a claim of battery against a police officer, the plaintiff bears the burden of proving the officer used unreasonable force." *Munoz*, 120 Cal. App. 4th at 1102.

92. A California peace officer "may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance." *Id.* at 1102 (citing Cal. Penal Code § 835(a)). Determination whether an officer breached such duty is "analyzed under the reasonableness standard of the Fourth Amendment to the United Constitution." *Id.* at 1102 n.6. Thus, the question is whether a peace officer's actions were objectively reasonable based on the facts and circumstances confronting the peace officer. *Id.* at 1103.

93. As discussed above in connection with Plaintiff's Fourth Amendment excessive force claim, Officer Cardoza's actions were not objectively reasonable in this case. Despite Plaintiff's willing compliance, Officer Cardoza used excessive and unnecessary force by placing him in a carotid hold and utilizing the bent wrist lock. Plaintiff clearly did not consent to the contact, and the use of excessive force caused injury and damage to Plaintiff, including the physical injuries at the scene and any emotional injuries that resulted. Thus, Officer Cardoza is liable for Plaintiff's battery claim.

94. Plaintiff also contends that Officers Rojas and Sgt. Kelly are liable for his battery claim. "A party injured by an unjustified assault may recover damages not only from the actual assailant, but from any other person who aids, abets, counsels or encourages the assault." *Ayer v. Robinson*, 163 Cal. App. 2d 424, 428 (1958); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 926 (9th Cir. 2001). However, in the context of an excessive force claim against peace officers, the plaintiff must show that the officers directed or encouraged the use of excessive force. *Susag v. City of Lake Forest*, 94 Cal. App. 4th 1401, 1416 (2002) (finding that officers who had no physical contact with the plaintiff could not be held liable for a battery committed by a third party because there was no evidence that the officers

directed or encouraged the use of excessive force.).

95. Although the Court finds that Officers Rojas and Sgt. Kelly failed to prevent Officer Cardoza's use of unnecessary and excessive force, there is no evidence that they directed or encouraged it. Accordingly, Plaintiff has not established by a preponderance of the evidence that Officers Rojas and Sgt. Kelly are liable for battery.

96. As discussed in the Court's negligence analysis above, the Court finds that the City of Oakland is vicariously liable under the theory of respondeat superior because Officer Cardoza was acting in the course and scope of employment at the time of his tortious conduct. Cal. Gov't. Code § 815.2(a)

I. California Civil Code section 51.7

97. Plaintiff's sixth claim for relief is that the individual defendants and the City of Oakland are liable under California Civil Code section 51.7 for causing him to be subject to force or violence based on his race.

98. Section 51.7 provides that all persons within California have the right to be free from any violence, or intimidation by threat of violence, committed against the person on account of race. Cal. Civ. Code § 51.7(a).⁷ The elements of a claim brought under section 51.7 are: (1) the defendant threatened or committed violent acts against the plaintiff; (2) the defendant was motivated by his perception of plaintiff's race; (3) the plaintiff was harmed; and (4) the defendant's conduct was a substantial factor in causing the plaintiff's harm. *Austin B. v. Escondido Union Sch. Dist.*, 149 Cal. App. 4th 860, 880-81 (2007).

99. In this case, even assuming that Plaintiff has established the first, third, and fourth elements, there is insufficient evidence to establish that the officers acted with racial animus. Although Plaintiff is African-American, he points to no specific evidence showing that the officers' actions on the night of the incident were based on his race. While Plaintiff can speculate as to the motivation for their actions, speculation does not establish the officers' motivations by a preponderance of the evidence. Accordingly, the Court finds that Defendants are not liable

⁷ Section 51.7 also provides protection based on sex, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation

1 under section 51.7.

2 **J. California Civil Code section 52.1**

3 100. Plaintiff's seventh claim for relief is that the individual defendants and the City of Oakland
4 are liable for the violation of his constitutional rights under California Civil Code section
5 52.1.

6 101. Section 52.1 authorizes a claim for relief "against anyone who interferes, or tries to do so, by
7 threats, intimidation, or coercion, with an individual's exercise or enjoyment of rights secured
8 by federal or state law." *Jones v. Kmart Corp.*, 17 Cal.4th 329, 331 (1998). To obtain relief
9 under this statute, a plaintiff must prove that a defendant tried to, or did, prevent the plaintiff
10 from doing something that he had the right to do under the law, or to force plaintiff to do
11 something that he was not required to do under the law. *Austin B.*, 149 Cal. App. 4th at 883
12 (citing *Jones*, 17 Cal. 4th at 334).

13 102. The elements of a section 52.1 excessive force claim are essentially identical to those of a §
14 1983 excessive force claim. *Corser v. County of Merced*, No. 1:05-CV-00985, 2009 WL
15 174144 at *25 (E.D. Cal. Jan 26, 2009) (citing *Edson v. City of Anaheim*, 63 Cal. App. 4th
16 1269, 1273 (1998), and *City of Simi Valley v. Superior Court*, 111 Cal. App. 4th 1077, 1085
17 (2003)). Thus, where a plaintiff's claims under the federal and state constitutions are
18 co-extensive, the discussion of a plaintiff's federal constitutional claim resolves both the
19 federal and state constitutional claims. *Los Angeles County Bar Ass'n. v. Eu*, 979 F.2d 697,
20 705 (9th Cir. 1992) (citing *Payne v. Superior Court*, 17 Cal.3d 908, 914 n.3 (1976)).

21 103. Here, as discussed above, the Court finds that the defendants violated Plaintiff's Fourth
22 Amendment right to be free from unlawful search and seizure under the United States
23 Constitution. As the California Constitution contains a similar provision, and the United
24 States Constitution defines the minimum protection provided under the California
25 Constitution, the same analysis applies here. *Craft v. County of San Bernardino*, 468 F.
26 Supp. 2d 1172, 1180 (C.D. Cal. 2006); *Wood v. Emmerson*, 155 Cal. App. 4th 1506, 1514,
27 1526 (2007).

28 104. Defendants argue that they are entitled to immunity from Plaintiff's section 52.1 because,

under California Government Code section 820.2, their conduct was constitutional. Section 820.2 provides that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Cal. Gov't. Code § 820.2. However, section 820.2 "does not confer immunity on peace officers for discretionary acts involving unreasonable use of force." *Megargee v. Wittman*, 550 F. Supp. 2d 1190, 1208 (E.D. Cal. 2008) (citing *Scruggs v. Haynes*, 252 Cal. App. 2d 256, 266 (1967)).

105. As discussed above, the force used in the August 10, 2004 incident was unnecessary, unreasonable, and excessive. Accordingly, the individual defendants are not entitled to immunity under section 820.2, and are therefore liable under section 52.1.

106. The Court also finds that the City of Oakland is vicariously liable under the theory of respondeat superior because the officers were acting in the course and scope of employment at the time of their tortious conduct. Cal. Gov. Code § 815.2(a).

K. Negligent Hiring, Training, and Discipline against Defendant City of Oakland

107. Plaintiff's final claim for relief is that Defendant City of Oakland is liable for negligent training, hiring, and discipline. However, Plaintiff has stipulated to dismiss this claim based on the principles set forth in *Munoz v. City of Union City*, 148 Cal. App. 4th 173 (2007). (Dkt. #49 at 13:9-12.) Accordingly, Plaintiff's eighth claim for relief against the City of Oakland is DISMISSED.

L. Compensatory Damages

108. Plaintiff seeks to recover compensatory damages as follows: (1) \$9,655.20 for medical bills; (2) \$50,204.00 in wage loss; (3) \$500.00 in bail expenses; and (4) \$175,000.00 in general damages for pain, suffering, and emotional distress.

109. A plaintiff who establishes liability under 42 U.S.C. § 1983 is entitled to recover for all compensatory damages suffered, including actual expenditures and economic harm, pain and suffering, and mental anguish and humiliation. *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1988). These same principles apply to Plaintiff's state law tort claims. *Id.*

///

1 **1. Medical Expenses**

2 110. As detailed above, Plaintiff has submitted evidence that he received medical bills from
3 Kaiser Permanente Medical Center, Alameda County Medical Center, and Kun Chiropractic
4 totaling \$9,655.20. As the reasonableness and necessity of this medical treatment was not
5 successfully challenged by the defense, the Court finds that Plaintiff incurred these expenses
6 as a result of the August 10, 2004 incident, and he is therefore entitled to an award of his full
7 medical expenses.

8 **2. Wage Loss**

9 111. Plaintiff claims that he is entitled to \$50,204.00 in wage losses. However, the submitted
10 evidence supports only a partial award.

11 112. At the time of the incident, Plaintiff was an hourly employee at Hodges, earning \$8.50 per
12 hour. Between June 2004 and August 10, 2004, Plaintiff made a total of \$5,136.88. This
13 indicates that Plaintiff earned at least \$2,500.00 per month at Hodges, and the defense
14 presented no evidence to dispute this.

15 113. As a result of the officers' fabricated reports, Plaintiff lost his job at Hodges and did not
16 obtain employment until February 11, 2005. Although it is unclear what efforts Plaintiff
17 undertook to find another job in the interim, he testified that he was unable to return to work
18 immediately due to the injuries he sustained during the incident, and because he was fearful
19 that he would not be able to find gainful employment in his field due to the allegations being
20 made against him by the OPD and DSS. As the defense never seriously challenged Plaintiff
21 on this issue, the Court finds that lost wages between August 10, 2004 and February 11, 2005
22 are appropriate.⁸

23 114. Assuming that Plaintiff would have either continued to work at Hodges if the incident had
24 not occurred, or that he would have found comparable employment elsewhere, Plaintiff
25 would have earned at least \$15,000 (\$2,500 per month x 6 months) for the six month period
26 from August 11, 2004 through February 11, 2005. Accordingly, the Court finds an award of
27

28 ⁸ Plaintiff claims he is entitled to overtime wages from February 12, 2005 through February 14, 2005. However, to the extent that Plaintiff would have received overtime at Hodges for those specific days, the Court finds that the submitted evidence does not support this claim.

1 \$15,000 appropriate for this time period.

2 115. Plaintiff also claims lost wages from the time he was terminated by Thunder Road, March
3 20, 2005, up until he received the favorable decision from DSS. Plaintiff does not state that
4 he was unable to find a new position; rather, he claims that his efforts would have been
5 fruitless because he needed to devote his time to defending himself before the Department of
6 Social Services and, in light of his experience with Thunder Road, it was unlikely that any
7 licensed facility would hire him before the DSS accusation was resolved in his favor.

8 116. The Court finds Plaintiff's reasoning unconvincing. First, the Court notes that Thunder Road
9 terminated Plaintiff because of "difficulty working with staff." Although Plaintiff claims that
10 he was terminated because he informed Thunder Road of the DSS proceedings, there is no
11 evidence to support his claim.

12 117. Second, Plaintiff contradicts himself in that he claims that he did not obtain employment
13 prior to Thunder Road because he was fearful about the allegations being made against him
14 by the OPD and DSS, yet he fails to reconcile this with the fact that he obtained employment
15 at Thunder Road. The Court recognizes that, but for the defendants' conduct, Plaintiff might
16 not have needed to seek employment, depending on his future experience at Hodges.
17 However, it would be inappropriate for the Court to reward Plaintiff for choosing not to work
18 after being terminated for difficulty working with staff.

19 118. Third, Plaintiff presents no evidence that the DSS proceeding took up all of his time, such
20 that he would be unable to seek and obtain employment. Accordingly, the Court finds that
21 Plaintiff is not entitled to lost wages for any period after he obtained employment at Thunder
22 Road.

23 119. Plaintiff also seeks an award of \$30,000 in future wage loss, arguing that such an award is
24 reasonable based on the negative effect the terminations of his employment at Hodges and
25 Thunder Road will have on his future employment prospects. However, the Court finds that
26 Plaintiff did not present evidence to support this claim; accordingly, the Court shall not
27 award future lost wages.

28 ///

3. Bail

120. Plaintiff presented evidence that he incurred damages in the amount of \$500.00 for bail as a result of Defendants' conduct. Specifically, Plaintiff testified that he received a warrant for his arrest from the City of Oakland in connection with the August 10, 2004 incident, and that he had to post bail in the amount of \$500.00. (Trial Tr., Day 3, 166:8-21.) As the defense presented no evidence to rebut this claim, the Court finds an award of \$500.00 appropriate.

4. General Damages

121. With respect to general pain and suffering, the Court finds that Plaintiff suffered mental anguish and humiliation as a result of the use of the excessive force and malicious prosecution described above. Accordingly, it awards Plaintiff \$100,000.00 to compensate him for this injury.

M. Statutory Damages

122. Pursuant to California Civil Code section 52, Plaintiff seeks an award of up to three times the amount of actual damages as a statutory penalty for the violation of his rights under Civil Code section 51.7. However, as discussed above, Defendants are not liable under section 51.7; therefore, the requested damages award is unavailable.

N. Punitive Damages

123. Plaintiff also seeks an award of punitive damages against Defendants Cardoza, Rojas, and Kelly under 42 U.S.C. § 1983. Punitive damages cannot be awarded against Defendant City of Oakland because as a municipality, it is immune from any such award. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

124. In § 1983 cases, punitive damages are recoverable "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993). Section 1983 punitive damages can also be awarded to address "malicious, wanton, or oppressive acts or omissions." *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005). Conduct is oppressive "if done in a manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or

1 severity as by misuse or abuse of authority or power, or by taking advantage of some
2 weakness or disability or the misfortunes of another person." *Id.* at 809.

3 125. Here, the Court finds that Plaintiff is entitled to an award of punitive damages against the
4 individual defendants because their conduct was done with reckless and callous disregard of
5 Plaintiff's rights.

6 **1. Officer Cardoza**

7 126. Specifically, as shown above, Officer Cardoza's hostility for Plaintiff was patent from the
8 moment he stepped out of the undercover SUV, addressed him with a profane statement, and
9 subjected him to an excessive and unnecessary carotid hold after Plaintiff had attempted to
10 comply and before giving him any reasonable opportunity to respond. This unprofessional
11 behavior alone might not have induced the Court to award punitive damages.

12 127. However, it was Officer Cardoza's subsequent collusion with his fellow officer to fabricate
13 an untruthful story that the Court finds most troubling. Not only did Officer Cardoza's
14 fabrication result in Plaintiff losing his job, but Officer Cardoza led a campaign to deprive
15 him of his liberty by attempting to have him criminally prosecuted and attempted to deprive
16 him permanently of his livelihood by repeating his fabrication in sworn testimony at the DSS
17 hearing. This dishonorable conduct cannot be tolerated. Accordingly, the Court finds an
18 award of \$30,000.00 in punitive damages appropriate against Officer Cardoza.

19 **2. Officer Rojas**

20 128. Even though Officer Rojas did not take the lead role in the campaign against Plaintiff, the
21 Court finds him equally at fault in his persecution. As discussed above, most of Officer
22 Rojas' testimony is not credible, and his version of the events does not match the
23 preponderance of the evidence. He was unable to recall significant details such as Officer
24 Cardoza's profane statement, yet he had a clear memory of something which did not occur -
25 both officers announcing themselves as police officers. His testimony was almost identical
26 to Officer Cardoza's, containing many of the fabrications the Court has determined could not
27 have occurred in the elapsed time documented by the 911 call.

28 129. Had Officer Cardoza not had the support of Officer Rojas' fabricated report and testimony,

Officer Cardoza's accusation would have been tested on its own merit and he may have been less emboldened to pursue his campaign against Plaintiff. Without Officer Rojas' support, Officer Cardoza's fabrication would have had less credibility and arguably done less harm. Officer Rojas supported a fabrication that cost a man his job, potential liberty and livelihood, and considerable emotional distress. Therefore, the Court finds that an award of \$20,000.00 in punitive damages is appropriate against Officer Rojas.

3. Sgt. Kelly

130. The evidence available to Sgt. Kelly clearly showed that the account of Officers Cardoza and Rojas could not be reconciled with his own admitted observations.

131. This is further evidenced by the fact that Officers Cardoza and Rojas claim that Plaintiff had just beaten a mentally-challenged person by punching him in the face and torso repeatedly, yet Sgt. Kelly released Plaintiff from the handcuffs and decided not to arrest him, he did not take a statement from Mr. Fowler, either at the scene or later, made no attempt to have photographs taken of him, and made no attempt to locate a single witness to the incident.

132. And yet, despite all the evidence exonerating Plaintiff, and knowing that Plaintiff intended to file a complaint, Sgt. Kelly approved the fabricated reports of Officers Cardoza and Rojas. The Court finds that Sgt. Kelly acted with callous indifference to the federally protected rights of Plaintiff and, therefore, the Court finds that an award of \$5,000.00 punitive damages is appropriate against Sgt. Kelly.

IV. CONCLUSION

For the reasons set forth above, the Court hereby finds as follows:

- 1) Plaintiff has prevailed against Defendants Officer Michael Cardoza, Officer Francisco Rojas, and Sergeant James Kelly with respect to his claim of excessive force and malicious prosecution under 42 U.S.C. § 1983.
- 2) Plaintiff has not prevailed against Defendant City of Oakland with respect to his claim for municipal liability under 42 U.S.C. § 1983.
- 3) Plaintiff has prevailed against Officer Cardoza, Officer Rojas, Sgt. Kelly, and the City of Oakland as to his negligence claim.

1 4) Plaintiff has not prevailed against any defendant as to his false imprisonment claim.

2 5) Plaintiff has prevailed against Officer Cardoza and the City of Oakland as to his
3 battery claim.

4 6) Plaintiff has not prevailed against Officer Rojas and Sgt. Kelly as to his battery claim.

5 7) Plaintiff has not prevailed against any defendant as to his claim under California Civil
6 Code section 51.7.

7 8) Plaintiff has prevailed against Officer Cardoza, Officer Rojas, Sgt. Kelly, and the
8 City of Oakland for violation of his constitutional rights under California Civil Code
9 section 52.1.

10 9) Pursuant to Plaintiff's stipulation, the claim against City of Oakland for negligent,
11 hiring, training, and discipline is DISMISSED.

12 Accordingly, judgment shall be entered accordingly in the following amounts:

13 Plaintiff shall have judgment in his favor against Defendants Michael Cardoza, Francisco
14 Rojas, James Kelly, and the City of Oakland, jointly and severally, in the amount of \$125,155.20.
15 This award covers Plaintiff's compensatory damages, including medical expenses, lost wages, bail
16 expenses, and general damages for mental anguish and humiliation.

17 Plaintiff shall have judgment in his favor on his punitive damages claim under 42 U.S.C. §
18 1983 in the amount of \$30,000 against Defendant Michael Cardoza, \$20,000 against Defendant
19 Francisco Rojas, and \$5,000 against Defendant James Kelly.

20 Finally, consistent with this Order, the Court finds that Plaintiff is entitled to an award of
21 reasonable attorney's fees and costs. Accordingly, counsel for both parties shall meet and confer in
22 person within 21 days to agree upon a reasonable attorney's fee award, if possible. If not, Plaintiff
23 may file a motion for fees within 60 days from the date of this Order.

24 **IT IS SO ORDERED.**

25
26 Dated: August 3, 2009



MARIA-ELENA JAMES
United States Magistrate Judge

EXHIBIT 3

UNITED STATES DISTRICT COURT
Northern District of California

KNAPPS,

Plaintiff(s),

No. C 05-02935 MEJ

v.

CITY OF OAKLAND ET AL,

Defendant(s).

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR NEW TRIAL AND/OR
TO ALTER/AMEND JUDGMENT**

DOCKET #93

I. INTRODUCTION

Pending before the Court is Defendants' Motion for New Trial, or Alternatively, to Alter or Amend Judgment. (Dkt. #93.) Pursuant to Civil Local Rule 7-1(b), the Court finds this matter suitable for determination without oral argument and hereby VACATES the September 24, 2009 hearing. After careful consideration of the parties' papers, the record as a whole, relevant legal authority, and good cause appearing, the Court hereby GRANTS IN PART and DENIES IN PART Defendants' motion for the reasons set forth below.

II. BACKGROUND

On August 3, 2009, the Court issued its Findings of Fact and Conclusions of Law ("FFCL") in this case, in which it found in favor of Plaintiff on his claims of excessive force, malicious prosecution, negligence, battery, and California Civil Code § 52.1. (Dkt. #90.) In addition to awarding Plaintiff compensatory damages in the amount of \$125,555.20, it awarded him punitive damages of \$30,000.00 against Officer Michael Cardoza, \$20,000.00 against Defendant Officer

1 Francisco Rojas, and \$5,000.00 against Defendant Sergeant James Kelly.¹

2 On August 13, 2009, Defendants filed the present motion for a new trial and/or to alter
3 judgment. Plaintiff filed an Opposition on August 26, 2009, (Dkt. #99), and Defendants filed their
4 Reply on September 3, 2009 (Dkt. #101).

5 III. DISCUSSION

6 In their motion, Defendants raise four arguments: (1) Michael Fowler's ambulance and
7 hospital records support the Defendants' version of the events that took place; (2) the evidence does
8 not support the award for wage loss; (3) the finding that Officer Cardoza used excessive force must
9 be amended to reflect consideration of Mr. Fowler's medical records; and (4) the contents of Mr.
10 Fowler's medical records undermine the conclusion that the officers acted with evil intent, requiring
11 reversal of the award of punitive damages. Based on these arguments, Defendants request that the
12 Court amend its judgment to prevent manifest injustice. The Court shall consider each argument in
13 turn.

14 A. Legal Standard

15 Pursuant to Federal Rule of Civil Procedure 59(a)(2), "After a nonjury trial, the court may,
16 on motion for a new trial, open the judgment if one has been entered, take additional testimony,
17 amend findings of fact and conclusions of law or make new ones, and direct the entry of judgment.
18 Fed. R. Civ. P. 59(a)(2). A court may grant a new trial or amend its judgment after a court-tried
19 action for three reasons: (1) manifest error of law; (2) manifest error of fact; and (3) newly-
20 discovered evidence. *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978).

21 B. Michael Fowler's Medical Records Do Not Support Defendants' Version of Events

22 Defendants first argue that the Court failed to include any reference to or discussion of the
23 medical examiners' notes and observations documenting Mr. Fowler's admission to Alameda
24 County Hospital on August 10, 2004, following the subject incident. However, the Court
25 considered, albeit not explicitly, Mr. Fowler's medical records in rendering its decision, and the
26

27 ¹ Because the Court set forth the factual background of this case in detail in its findings,
28 (Dkt. #90 at 2:2-29:10), it shall only discuss the facts as they are pertinent to the present motion.

1 records fail to establish that Plaintiff assaulted Mr. Fowler in the manner alleged by Officers
2 Cardoza and Rojas, and Defendants have failed to establish that the Court committed any manifest
3 error in rendering judgment in Plaintiff's favor.

4 First, the Court notes that Defendants chose not to call any of Mr. Fowler's medical
5 providers to testify at trial to confirm the source and content of the information contained in these
6 records or about the causation of any alleged pain or injuries to Mr. Fowler. Prior to commencement
7 of trial, the parties stipulated both to the records' authenticity and that they shall not constitute
8 hearsay. (Dkt. #64.) However, they did not stipulate as to the meaning, weight, relevancy and
9 importance of these records at trial.

10 Turning to the medical records themselves, the first page of Mr. Fowler's American Medical
11 Response ("AMR") ambulance records state the chief complaint and history as: 5150, Med
12 Clearance with "possible fight." (Rosen Decl., Ex. 2, AMR records, page 1). The second page of
13 the AMR records reflect that Mr. Fowler did not sign the Master Signature Statement, and it was
14 reported he was "developmentally challenged." (Rosen Decl, Ex. 2, page 2). The PreHospital Care
15 Report, which appears as page three of this record, is not entirely legible and Defendants failed to
16 call any witness to interpret the illegible portions of the record. (Rosen Decl., Ex. 2, p. 3).
17 Although the report makes a reference to Mr. Fowler being hit with a closed fist, the report does not
18 cite the source of this information. (*Id.*)

19 However, a reasonable inference that can be drawn from the evidence is that the AMR report
20 was based on Officer Rojas' fabricated account of the assault. This inference is supported by
21 Officer Rojas' testimony, in which he admitted that he told the paramedics that Mr. Fowler had been
22 assaulted and that he may have also told them that Mr. Fowler had been punched around the eye.
23 (FFCL, 12:18-21). Therefore, the Court reasonably concluded that Officer Rojas' fabricated account
24 of the assault was the source of the information contained in the AMR record and, therefore,
25 discounted the importance or materiality of this record in rendering judgment in Plaintiff's favor.

26 Mr. Fowler's Highland Hospital records similarly fail to establish that the Court committed
27 manifest error. As is the case with the AMR records, some of the entries on the Highland Hospital
28

1 records are not clearly legible, yet Defendants failed to call any of the Highland Hospital treating
2 staff to testify as to the source, content, or interpretation of the information contained in these
3 records. (Rosen Decl., Ex. 2).

4 While Defendants argue that these records support the credibility of the accounts of Officers
5 Cardoza and Rojas - that Plaintiff punched Mr. Fowler repeatedly with a closed fist in the face and
6 torso during the incident on the public sidewalk - the Highland Hospital records state in two separate
7 places that Mr. Fowler's alleged complaints of pain occurred as a result of an incident inside Mr.
8 Fowler's home, rather than outside on the public sidewalk. (Rosen Decl., Ex. 2, (Highland Hospital
9 Emergency Department Flow Sheet and Emergency Department Record)). Defendants failed to call
10 any of Mr. Fowler's medical providers at Highland to explain the source of this information, and it is
11 clearly not consistent with the evidence that the incident involving Plaintiff occurred outside, some
12 distance away from the Hodges residential home.

13 As Defendants note in their motion, the Emergency Department Flow Sheet also appears to
14 state that Mr. Fowler's head hit down when he was pushed backwards. (Def. Mot. for New Trial,
15 3:20-23). While Defendants claim that this record says it was an "employee" who pushed him
16 backwards, the report is not clearly legible, and it does not identify by name the person who
17 allegedly pushed him. Regardless, this record is consistent with Plaintiff's use of reasonable force in
18 taking Mr. Fowler to the ground to prevent his running into the street at the oncoming SUV.

19 The Highland Record also notes that the severity of Mr. Fowler's complaints was only 1 on a
20 10 point scale. (Rosen Decl., Ex. 2, Highland Hospital Triage Chart). Therefore, the Court
21 reasonably concluded that Mr. Fowler's alleged complaint of minor pain was more likely
22 attributable to Plaintiff's use of the take down to the sidewalk to prevent Mr. Fowler's running into
23 the street, rather than the result of the alleged repeated punches to Mr. Fowler's face and torso.

24 Additionally, Defendants ask the Court to take these records on face value without
25 considering the veracity of Mr. Fowler's own accounts about the incident. However, Mr. Fowler
26 was mentally impaired to such a degree he was placed on a 5150 hold, and it was noted he was
27 unable to sign off on the AMR records. Moreover, while the AMR record notes that Mr. Fowler
28

1 reported he had tried to commit suicide by walking into traffic (Rosen Decl., Ex. 2, PreHospital Care
2 Report), the Highland Hospital record states that Mr. Fowler gave an entirely inconsistent account
3 and denied suicidal ideation or that he intended to walk into traffic. (Rosen Decl., Ex., 2, Highland
4 Campus Emergency Department Record.).

5 Given these facts, the Court reasonably concluded that Mr. Fowler's account of the incident
6 is not credible, including with respect to any reports he gave to medical providers about the alleged
7 mechanism of injury. This is particularly true when he gave inconsistent accounts of his plan to
8 commit suicide to medical providers, and he possibly had a motive to retaliate against Plaintiff for
9 his belief that Plaintiff caused his involuntary psychiatric hold at Highland Hospital.²

10 Finally, while the Highland Hospital record mentions a complaint of orbital and right cheek
11 pain and a contusion that is not specific as to location, size or causation, Defendants failed to present
12 any evidence conclusively establishing that this alleged pain or unspecified contusion was caused by
13 the alleged assault claimed by Defendants, rather than as a result of Plaintiff's reasonable use of
14 force in taking Mr. Fowler to the ground.

15 Therefore, based on the totality of the evidence, Defendants have failed to establish that the
16 Court committed manifest error in determining that Plaintiff's account of the incident was more
17 credible than the accounts of Officers Cardoza and Rojas.

18 **B. The Evidence Supports the Award for Wage Loss**

19 The Court awarded Plaintiff \$15,000.00 in lost wages for the six month period from August
20 11, 2004 through February 11, 2005. Defendants argue that the Court committed manifest error in
21 awarding any damages at all to Plaintiff for his wage loss. The sole basis for Defendants' contention
22 in this regard is the inconsistent trial testimony of Plaintiff's former employer, Anthony Hodges.

23 The evidence at trial supported the reasonable inference that Plaintiff's wage loss was
24 proximately caused by the wrongful conduct of Defendants. This evidence included Officer
25

26 ² Mr. Fowler did not sign the voluntary admission form in the Highland Records. A staff
27 member, instead, reported that he was being detained under Welf. & Inst. Code 5150 as a danger to
28 himself. (Rosen Decl., Ex. 2, Highland Hospital, Close Observation Area, Psychiatric Emergency
Service, Patient Advisement).

1 Cardoza's admission that he told Mr. Hodges that Plaintiff struck Mr. Fowler in the face on the night
2 of the incident when, based on the totality of the evidence, this was not true. (FFCL, 12:1-13:21).

3 Although the Court found that Mr. Hodges did not observe any injuries to Mr. Fowler and
4 did not report to the Department of Social Services that he saw any injuries, Mr. Hodges told
5 Plaintiff that he would be removed from work until the allegations were resolved. The night of this
6 incident was the last time Plaintiff worked at the Hodges facility. (FFCL, 16:12-17:18; Trial Tr.
7 Day 3, 144:10-145:16).

8 When Mr. Hodges was called as a witness at trial, he claimed that he saw a bruise to the back
9 of Mr. Fowler's neck after he returned to the facility from Highland Hospital. However, no one else
10 involved in the case, including Hodges facility employee Jesse McDaniels (FFCL, 17:19-18:20),
11 ever reported seeing any injury to the back of Mr. Fowler's neck. Moreover, Mr. Hodges' claim was
12 belied by his own written report to the California Department of Social Services (which he admitted
13 signing on the night of the incident), in which he represented that Mr. Fowler had sustained no
14 injuries, including any bruises, cuts or lacerations. (Trial Tr., Day 3, 214:14-216:4, Ex. 42,
15 Vendor's Special Incident Report). Mr. Hodges also admitted that he never reported in that form
16 that Mr. Fowler had been punched during the incident or that Mr. Fowler ever told him that he had
17 been punched by Plaintiff. (*Id.*)

18 Mr. Hodges' testimony that he saw an injury on Mr. Fowler following the incident was also
19 belied by the tape recorded statement he gave to Sgt. Short of the Oakland Police Department on
20 November 16, 2004, in which Mr. Hodges admitted never seeing any injury on Mr. Fowler, never
21 mentioned that Mr. Fowler told him that Plaintiff allegedly assaulted him, and admitted that all of
22 the information he received came from the police officers at the scene. (*Id.* at 216:5-217:19, Ex. 39,
23 CD of Mr. Hodges' statement). Mr. Hodges also told Sgt. Short that Mr. Fowler had never
24 complained about Plaintiff prior to the incident. (Ex. 39, CD Rom of Mr. Hodges' statement; Trial
25 Tr., Day 3, 218:10-219:5).

26 Mr. Hodges' also gave inconsistent accounts about whether Plaintiff was allowed to
27 physically restrain Mr. Fowler at all to prevent his running into the street. (Trial Tr., Day 3, 219:20-
28

1 221:8). As the Court noted in its FFCL, Mr. Hodges' testimony on this issue varied on direct, cross-
2 examination and re-direct, in which he first claimed that Plaintiff was not allowed to use any force at
3 all on Mr. Fowler, even to prevent him from running into traffic to commit suicide, and then
4 admitted he could restrain him, but not take him to the ground.

5 Finally, the Court also notes that when Plaintiff sought medical treatment for the injuries he
6 suffered as a result of Officer Cardoza's use of force, he learned that Mr. Hodges illegally failed to
7 have worker's compensation insurance coverage. (FFCL 17:16-18; Trial Tr. Day 3, 145:17-150:5).
8 Therefore, by the time the trial in this case took place, it is apparent that Mr. Hodges had a motive to
9 lie and was biased against Plaintiff due to his exposing Mr. Hodges' lack of worker's compensation
10 insurance coverage for the injuries sustained by Plaintiff during this incident. (See, Trial Transcript
11 Day 3, 217:20-218:9; California Labor Code Section 3700.5).

12 In light of his inconsistent testimony, the Court reasonably determined that Mr. Hodges was
13 biased against Plaintiff and that his testimony was not credible. Therefore, Defendants failed to
14 show that the Court committed any manifest error in its award of wage loss to Plaintiff based on Mr.
15 Hodges' testimony.

16 **C. The Court Committed No Manifest Error in Determining that Officer Cardoza Used**
17 **Excessive Force**

18 Defendants next argue that the Court must amend its finding that Officer Cardoza used
19 excessive force. Determining whether Officer Cardoza subjected Plaintiff to the use of excessive
20 force in violation of the Fourth Amendment's prohibition against unreasonable seizures turned on
21 the question of whether the force was objectively reasonable based on the totality of the
22 circumstances he was confronted with at the time he employed the carotid hold and bent wrist lock.
23 *Graham v. Connor*, 490 U.S. 386, 388 (1989).

24 Relying exclusively on the medical records discussed above, Defendants argue that the Court
25 committed manifest error in determining that Officer Cardoza used excessive force on Plaintiff. As
26 shown above, however, the medical records fail to conclusively establish that Plaintiff subjected Mr.
27 Fowler to the violent assault claimed by Officers Cardoza and Rojas. Moreover, even if the Court
28

1 were to assume that the medical records corroborated Defendants' account, which they do not, the
2 totality of the evidence supported the reasonable inference that Officer Cardoza subjected Plaintiff to
3 an unnecessary and potentially lethal carotid hold *after* any alleged assault on Mr. Fowler had
4 already concluded, and when Plaintiff was indisputably not engaging in any life-threatening
5 behavior, much less any significant resistance to the officers' authority. (FFCL, 7:18-11:16).

6 Plaintiff's police practices expert, Roger Clark, testified that Officer Cardoza's use of the
7 carotid hold was unreasonable and excessive under the circumstances. (FFCL, 18:22-20:9).
8 Defendants' police practices expert, Scott Seaman, also conceded that based on Plaintiff's account
9 of the incident, in which Plaintiff testified he put his hands above his head after all contact with Mr.
10 Fowler had ceased, Officer Cardoza should not have used any significant degree of force to take
11 control of the Plaintiff and that the use of a carotid hold would be less appropriate. (FFCL, 22:28-
12 23:9).

13 In addition to the carotid hold, Officer Cardoza admitted that he placed Plaintiff in a bent
14 wrist lock simply to bring Plaintiff to his feet, in the absence of any evidence of resistive conduct on
15 the part of Plaintiff. (FFCL, 11:17-12:7). The testimony of both Plaintiff's and Defendants' police
16 practices experts supported the conclusion that the use of this force under these circumstances was
17 unreasonable and excessive. (FFCL, 20:10-14; 24:10-13).

18 Therefore, Defendants have failed to establish that the Court committed any manifest error in
19 rendering judgment in favor of Plaintiff as a result of Officer Cardoza's use of excessive force.

20 **D. Punitive Damages**

21 Finally, Defendants argue that the contents of Mr. Fowler's medical records undermine the
22 Court's conclusion that punitive damages should be awarded against the defendant officers.
23 However, the Court based its award of punitive damages on 1) Officer Cardoza's inappropriate use
24 of a carotid hold on a man whom he admitted was not actively engaged in assaultive conduct; 2) the
25 use of a bent wrist lock when it was unnecessary; and 3) Defendants' wrongful conduct and
26 malicious prosecution of Plaintiff. As discussed above, Mr. Fowler's medical records do not alter
27 this conclusion. Therefore, the Court finds Defendants' argument unpersuasive as to punitive
28

1 damages against Officers Cardoza and Rojas.

2 However, upon reconsideration of the evidence presented in this case, the Court finds that
3 punitive damages are not appropriate against Sgt. Kelly. Although Sgt. Kelly ratified the officers'
4 reports and testified in the DSS proceedings, Plaintiff did not establish that he knew the officers
5 fabricated their reports, and his testimony was based solely on what he witnessed. Given the
6 circumstances at the scene, it is unfortunate that Sgt. Kelly did not keep the officers separate until
7 their reports had been prepared, but it does not appear that this failure was malicious, or motivated
8 by evil motive or intent. Accordingly, the Court shall amend the August 3, 2009 Judgment to
9 remove the \$5,000.00 punitive damages award against St. Kelly.

10 IV. CONCLUSION

11 Based on the foregoing analysis, the Court finds that, with the exception of the \$5,000.00
12 punitive damages award against Sgt. Kelly, Defendants have failed to establish that it committed
13 manifest error of law or fact in rendering judgment in favor of Plaintiff. Accordingly, Defendants'
14 motion for new trial, or in the alternative, to alter or amend the judgment, is hereby GRANTED IN
15 PART as to punitive damages against Sgt. Kelly and DENIED IN PART as to the remainder of the
16 judgment. The August 3, 2009 Judgment is hereby AMENDED to remove the \$5,000.00 punitive
17 damages award against Sgt. Kelly.

18 **IT IS SO ORDERED.**

19
20 Dated: September 8, 2009

21 
22 Maria-Elena James
23 Chief United States Magistrate Judge
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25
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27
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EXHIBIT 4

Follow us on

Monday, Jan. 16, 2012 | 1:05 p.m.

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Posted: 10:12 p.m. Monday, Nov. 14, 2011

Oakland paying out extraordinary police abuse settlements



OAKLAND, Calif. — A two-month KTVU Channel 2 investigation has found Bay Area taxpayers have spent tens of millions of dollars in the last 10 years to pay for alleged victims of police abuse, with the managers of one local city in particular writing checks for especially extraordinary amounts.

Using the California Public Records Act, KTVU asked the 20 largest cities in the region how much they've paid out for claims, lawsuits and settlements involving alleged police misconduct in the last decade.

Although virtually every one of the Bay Area's 101 cities have paid out amounts often in the hundreds of thousands to low millions, the top payouts, not expectedly, came from the three largest cities. What was unexpected was the breathtaking amount the smallest of the top three paid.

San Jose, the region's largest city with more than 1 million residents, paid out \$8.6 million.

Number two was San Francisco, with 800,000 people. The lodestar city of the Bay Area paid nearly \$28 million during the same period.

However it was Oakland, with 400,000 residents, that won first place with more than \$57 million in payouts in just the last 10 years.

The single biggest payout was in 2004, when the city paid almost \$11 million for the notorious "Riders" case.

Oakland is shelling out all of that taxpayer money at a time when, ironically, it's running a \$58 million deficit, laying off police and asking voters to approve a property tax hike.

We asked Oakland Police Department brass, the Oakland city administrator and the city attorney to provide some perspective on the huge, cumulative payout, but all refused. Late Friday, City Attorney Barbara Parker provided a written statement saying things are getting better.

Rocky Lucia, a partner in a prominent Bay Area law firm that often represents accused police officers, says the problem is less with the police than with Oakland city politicians and their hand-picked administrators.

"The city of Oakland is the most dangerous city in the state of California," Lucia pointed out. "The city of Oakland settles many cases they don't have to settle and I believe there is an element of politics that come into play when these cases are settled.

"If politics were to stay out of it, most cops would be vindicated in a court of law."

Attorney John Burris argued most of the cases are legitimate – and hard to prove. "There's a not a lot of lawyers that do this kind of work because it's very difficult and it's risky," Burris remarked.

Barry Krisberg of U.C. Berkeley's Warren Institute on Law and Social Policy, has studied the issue nationally. He called it "an epidemic."

"We're talking about Oakland, San Francisco, East Palo Alto, Richmond, Santa Rosa, Vallejo -- there's almost no city in the Bay Area that hasn't been touched by this," Krisberg said.

The scholar said the main problem is training officers better and allowing police administrators to trump influential police unions and laws – which would not only advance justice but save taxpayers countless millions of dollars desperately needed elsewhere.

"If as a police chief, I can't even fire somebody," Krisberg added. "And it's very difficult to fire anybody. Increasingly, you're giving citizens no other choice but to go into the courtroom and that's an expensive, difficult way to go."

We Recommend

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- Psycho Woman Bites 2 Kids in Children's Section of Bookstore (The Stir By CafeMom)
- How to Track Blocked Call Phone Numbers (eHow)
- Terrence Howard's Nasty Divorce: 11 Disturbing Claims in the Court File (The Daily Beast)

[?]

EXHIBIT 5



MAYOR JEAN QUAN
CITY OF OAKLAND

January 19, 2011

Honorable Thelton E. Henderson
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

*Re: Delphine Allen v. City of Oakland, et al., C 00 4599 TEH, January 26, 2011 Case
Management Conference (CMC), Joint Statement from City Officials*

Honorable Judge Henderson:

Thank you for the opportunity to transmit this joint letter that demonstrates the governance alignment that we have implemented as three City of Oakland Officers. We heeded your direction and have established a stronger foundation anchored to our respective City Charter roles and responsibilities. Upon review of this letter, we believe that the Court will find that we have transitioned into an effective administrative partnership focused on achieving compliance with the Negotiated Settlement Agreement (NSA) and constitutional policing.

We acknowledge that the 8th Quarterly Report reflects a period of time (Audit Report Period July-September 2011) when Ms. Parker and Ms. Santana were transitioning into their new responsibilities. Additionally, we acknowledge that this reporting period occurred before the Mayor was identified as the lead client. Another development that bears upon the City's renewed commitment to efficiently achieve full NSA compliance is



that as of, October 13, 2011, Howard Jordan was appointed and now serves as Interim Chief of the Oakland Police Department.

As we acknowledged at the September 22, 2011 CMC, the recent appointments of City Attorney Parker and City Administrator Santana required time to meld, along with Mayor Quan, into an effective legal and administrative team and to adhere to our respective roles—while valuing our unique skill sets. We believe that we have created a focused team that demonstrates commitment to achieving NSA compliance and we expect to deliver improved compliance in the April 2012 Ninth Quarterly Report (Audit Report Period October-December 2011).

Under the leadership of Mayor Quan, the City has quickly addressed areas of transition that were noted during the September CMC. First, Mayor Quan and City Attorney Parker established clear procedures with respect to legal representation, roles, and communication that fully acknowledge Mayor Quan as the “lead client” for purposes of NSA compliance. In her absence, the City Administrator assumes the “lead client” role. Second, Mayor Quan and City Administrator Santana have established high management and accountability standards for OPD to achieve NSA compliance. These standards include, but are not limited to, regular meetings between Mayor Quan and City Attorney Parker and regular NSA compliance tracking meetings attended by Mayor Quan, City Administrator Santana, and Chief Howard Jordan.

The close tracking of legal, management, and operational issues demonstrates leadership and commitment on the part of Mayor Quan. Mayor Quan’s office will continue to explore and/or monitor the following compliance and cultural changes both during the NSA and after:

- Civil Lawsuits
- Community Policing Efforts
- Stop Data Analysis
- Early Intervention Risk Management System (PAS) to identify and correct at-risk behavior
- Use of Force
- Use of Force Boards
- Staffing Issues
- Intake of Internal Affairs
- Creation of an Independent Inspector General to oversee investigation of alleged inappropriate officer conduct
- Mutual Aid agreements and training
- Changing the Department’s organizational structure to further cultural change

To further establish NSA compliance as one of the City's highest priorities, City Attorney Parker assigned Chief Assistant City Attorney Randolph Hall as the lead attorney assigned to the NSA. Mr. Hall is supported by Mr. Gregory Fox, and Ms. Rocio Fierro, who also serves as Agency Counsel to the Oakland Police Department. With the City's legal team led at the highest level in the City Attorney's Office and supported by two attorneys thoroughly familiar with the NSA, the City anticipates that legal issues will be quickly addressed and all reasonable efforts will be made to resolve legal issues raised by plaintiffs' counsel.

Under the City Charter, the City Administrator is responsible for directing the Oakland Police Department to ensure that goals and policy directives are attained. The City is well guided by the City Administrator's professional experience in public administration and, particularly, overseeing public safety services for large municipalities. Immediately following the September 22, 2011 CMC, the City Administrator began mandatory NSA monitoring meetings twice weekly to: (1) establish clearer lines of management accountability and expectations; (2) quickly get up to speed on, and personally examine, areas where there is a lack of compliance; and, (3) identify areas where compliance can be achieved and vigorous work toward compliance within those areas. While these meetings demonstrate a high level of engagement and commitment by the City Administrator, Ms. Santana continues to take other actions to more intimately understand the workings of the Oakland Police Department, its workforce, and to assess what institutional change may be needed to facilitate NSA compliance. In accordance with the management principle that an organization's "culture is [reflected] in [its] conversation and operational transactions," the City Administrator has initiated several efforts to obtain first-hand, personal knowledge of the Department's norms as reflected by its members (Attachment A).

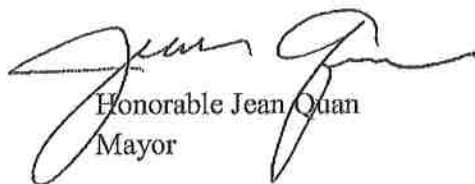
City Administrator Santana places the highest priority on achieving NSA compliance. She is particularly grateful to the collaborative guidance that Chief Warshaw has provided her to ensure that she gets up-to-speed quickly and focuses on the correct priorities for achieving compliance by OPD. When Chief Batts resigned on October 11, 2011, Ms. Santana immediately vested all police chief responsibilities and duties in Chief Howard Jordan. This immediate assignment of police chief responsibilities was initiated to ensure that no time was expended on further organizational transition and for the City to remain focused on achieving NSA compliance. This swift action allowed for Chief Jordan to immediately lead the Department and continue without delay to implement NSA compliance reforms. His previous role of and actions as Inspector General demonstrates that he is highly committed to NSA compliance and uniquely understands the organizational changes needed to achieve such. The various actions on the part of City Administrator Santana and Chief Jordan demonstrate a stronger organizational

partnership and management tone relative to mutual leadership priorities, performance expectations, and overall accountability to achieve compliance. The Chief is well positioned, and supported by the City Administrator, to drive the organizational and cultural changes needed to identify and resolve past barriers that resulted in stagnation or practices that do not advance the goals of the NSA or constitutional policing.

Since the last CMC, City Officials have remained focused on ensuring that the City is doing all it reasonably can to implement the NSA requirements. City Officials have established clear lines of communication, protocols, and expectations to facilitate NSA compliance. This structure ensures that respective City Charter roles and authorities are maintained and is matched by an articulated work plan and aggressive meeting schedule to continue this achieved momentum. The Court can feel assured that the needed executive and management structures for accountability are in place to further implement the long-term strategies to build a police department that has a more robust commitment to building trust and connections to the Oakland community, while adhering to compliant policing practices.

In closing, kindly accept this joint letter as a reflection of the efforts that we have made and will continue to make to achieve NSA compliance. We welcome the opportunity to continue to lead and report our achievements toward compliance in April 2012. Thank you for the opportunity to submit this letter.

Sincerely,



Honorable Jean Quan
Mayor



Deanna J. Santana
City Administrator



Barbara J. Parker
City Attorney

Attachment A

City Administrator initiated efforts to obtain first-hand, personal knowledge of the OPD:

- Attends numerous Line-Ups to personally introduce herself to the Department and establish in-person rapport with Department staff;
- Participates in "Ride-A-Longs" to become directly familiar with the field conditions that police officers face, procedures, work environment, and overall day-to-day operations;
- Maintains direct communication with the entire Oakland Police Department by emailing key messages from the City Administrator, which have been met with overwhelming positive response by many levels of the Police Department;
- In process of examining the Internal Affairs process with a particular focus of outcomes, potential bias, and/or process improvements that better serve all parties involved in the process;
- Listens to randomly selected Internal Affairs interviews of both complainants and police officers to determine whether preferential treatment, or bias, was granted to one party over the other and to assess overall Internal Affairs interview quality;
- Reviewed Internal Affairs cases to become familiar with quality of review and investigation methodology, followed by in-person meetings with the IA Commander to review issues and initiate Department training;
- Observed once, with more participation to follow, the Department's CompStat meeting to learn about how crime is discussed, data used, crime prevention efforts developed, and how crime patterns are determined;
- Personal involvement in the production of high profile research or data reports to ensure that the professional experience of the City Administrator is integrated into analysis;
- Worked side-by-side with the Police Department at the Emergency Operations Center (EOC), along with other City staff, during the recent Occupied Oakland incidents to better understand/observe emergency response, tactical planning, and overall approach to unordinary circumstances;
- Listens to the Radio communication during Ride-A-Longs and the Occupied Oakland incidents to obtain deeper knowledge of Department communication skills, transactions, instructions, and overall choice of words to describe situations/incidents;
- Initiated an independent investigation of incidents regarding Occupied Oakland (October 24-25) to receive input, which will be publically available, on an overall

assessment of the Department's performance with additional reviews to follow for the subsequent events (e.g., November 2 and December 12); and,

- Works closely with the Department to monitor staffing and budget to better determine resource availability and capacity to advance NSA compliance.

EXHIBIT 6

CITY OF OAKLAND



POLICE ADMINISTRATION BUILDING λ 455 – 7TH STREET λ OAKLAND, CALIFORNIA 94607-3985

Police Department
Office of Chief of Police

Office (510) 238-3076
Fax (510) 238-2321

Hon. Thelton E. Henderson
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

January 19, 2012

Re: Delphine Allen v. City of Oakland, et al., C 00 4599 TEH
January 26, 2012 Case Management Conference
Status Report from the Chief of Police

Dear Judge Henderson:

I respectfully submit this report to the Court.

Since the last CMC hearing and upon the resignation of Chief Batts, I have been appointed by City Administrator Deanna Santana as the Interim Chief of Police. While the title remains interim, I have not assumed the responsibility of Chief of Police with the mindset of a temporary appointee. I am making decisions with both short and long term perspective based on my goal of achieving NSA compliance as soon as possible. The urgency of our situation does not permit me to make only short term decisions, and the people of Oakland deserve to know their police department is being led by an individual committed to the long term success of the agency and the trust of the community.

In close consultation with Chief Robert Warshaw, I am implementing a strategy and Action Plan designed to bring this agency into full compliance with the NSA. Consistent with the goals of the NSA, I am fully committed to protecting public safety while safeguarding the constitutional rights of all persons living in our community.

One of my goals as Chief is to further cultural change within the organization. This goes to the heart of reform and good Constitutional policing. I plan on assessing the organizational structure to identify problems that are standing in the way of compliance, culture change, and sustainability. This includes understanding the psychology of the police department,

Continued – Page 2

our hiring process, training, and policies. From this analysis my goal is to develop a roadmap towards cultural change and bringing the police department into compliance and consistent with the best police practices of the 21st Century. This will be a collaborative effort and in addition to working with the Monitor, the Mayor, and City Administrator, I will reach out to the community, the Plaintiff's Attorneys, and all the members of the police department to make this goal a reality.

I have made additional appointments since I became the Chief of Police. I appointed Anthony Toribio as the Interim Deputy Chief of Police over the Bureau of Risk Management, which includes Internal Affairs, the Office of Inspector General (OIG), and the Training Section. He has continued the work I was doing as the Inspector General prior to my appointment and his highest priority as ordered by me is compliance with the NSA.

I have also assigned a captain to oversee the Training Section of the Department. Training is a critical function not just for culture change but for risk management issues, and the assignment of a captain to that position is designed to demonstrate the importance of training under the NSA while improving accountability and to improve accountability in our instructors.

I have endeavored to foster a culture of accountability by holding individuals responsible for their failures to lead by example or comply with reforms. Under my direction, high ranking personnel have been demoted or reassigned pending investigations. I will not tolerate any personnel, particularly management, that is not supportive of the changes I am making in the organization. It is my intention that individuals will embrace the cultural change we are seeking. Those persons that do not voluntarily assume those responsibilities and our cause will be personally held accountable by me.

I fully understand your frustration with the lack of significant progress in achieving compliance with the NSA. The time for promises of better performance is over; my actions will speak louder than my words. Now each member, regardless of rank, must show by action they understand the reforms are our highest priority. This level of accountability underscores the high emphasis I place on professionalism and good constitutional policing.

The Monitor released the 8th quarterly report and it did not show sufficient progress toward compliance. However, it is my belief that many of the corrections that were put into place during that review period will be more evident in the subsequent review periods and that compliance will see significant improvement in a very short time. I believe that my appointment as the Interim Chief has given a renewed energy to our compliance effort.

The OIG has continued to audit Department functions and has demonstrated the ability to point out our mistakes where applicable. The OIG has also commended officers when they perform professionally and in compliance with the reforms. The Department has published its review of vehicle pursuits and of Level Four uses of force (pointing of firearms).

Continued – Page 3

The Pursuit Review found significant problems with how our pursuits are managed and tracked; measures have been implemented to correct the deficiencies. Pursuit boards are being held on a regular basis to assess whether or not pursuits are within policy.

The Level Four Use of Force Review found that improvement is needed in how officers justify using force and how those incidents are reviewed. The Department has provided training on the importance of articulating the reason force was used and the legal standards for using force.

The Training Section has begun modifying training to focus on enhancing scene management, tactics, de-escalation of force, and supervisory and command accountability when reviewing the use of force. These are areas of concern identified by the Monitor and which we are striving to address by the actions noted above and in close consultation with the Monitoring Team. For example, scenario training (hypothetical critical incidents that require officers to respond to by using force options) now also includes situations where officers are not required to point firearms or use any other force.

Additionally, the Department has met with the OPOA to discuss aligning our efforts at coming into compliance with Level Four uses of force. One of my goals is to improve communication and collaboration with the OPOA to further promote compliance with the NSA. Developing a strategy with the OPOA to promote a “buy in” attitude with all OPOA members will help further the desired culture change.

The Department also lowered the threshold for the number of Level Four uses of force an officer can have in a 60 day period before an automatic risk management review is triggered. The review is intended to identify in a timelier manner if there are any at-risk patterns or trends in officer performance so that appropriate intervention strategies may be implemented to correct the behavior.

Another significant issue I have dealt with as Chief of Police has been the nationwide Occupy movement. Under my leadership the Department has consistently facilitated the peaceful exercise of free speech rights by hundreds and thousands of protesters on a frequent basis while maintaining the safety of all citizens and businesses in the City of Oakland.

The Occupy Oakland encampment put considerable strain on the City of Oakland and ultimately had to be disbanded due to health and safety concerns. The Department is committed to balancing the free speech rights of individual protestors with the rights of non-protesting citizens and the safety of all those involved. Ultimately the Department twice participated in operations to end the encampment, as well as an operation accommodating the General Strike that was held on November 2nd.

These operations generated significant international media attention. With some exceptions, the Department was overall very successful in dismantling the camps while protecting the peoples’ right to protest. On those rare occasions when violence occurred,

Continued – Page 4

the Department engaged in crowd control and dispersal and the arrest of persons in accordance with our Crowd Control Policy and the Fourth Amendment. There were isolated situations when a limited number of people were injured during dispersal operations and I have ordered full investigations into those relatively few instances. Since those events, we continue to facilitate non-violent free speech while maintaining the public safety.

With regard to those investigations into individual uses of force and into the command and control of those crowd control operations (particularly the night of October 25th and November 2nd), I am committed to accountability of our officers for their actions. Where policies or laws were violated by our members, I will hold those individuals accountable regardless of their rank.

The Department remains committed to transparency in the investigative process of these crowd control incidents. To that end, the Department has begun posting individual officers' portable camera videos on our website. We have also posted all of the police radio traffic from those incidents. The Department has even posted a significant number of our policies on our website, including our Use of Force and Crowd Control Policies.

In 2005, I was a police captain and assigned as the commander of the Internal Affairs Division. Since that time I have risen to the rank of Chief of Police and I remain as committed now as I was then to achieving compliance with the NSA. That commitment and achievement of full compliance with the NSA will be one that leaves the Oakland Police Department as an organization that embraces good constitutional law enforcement and best risk management practices.

Mayor Quan, City Administrator Santana, and I all look forward to continuing our collaborative working group with the Monitor and the Plaintiffs' Attorneys. I recognize the Department has made many promises over the life of the NSA and that we have not met all of those commitments. Today, I only promise that my top priority is the successful completion of this agreement and my individual record shows that I am willing to make the hard decisions necessary to obtain that success.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Howard A. Jordan", with a stylized, cursive script.

Howard A. Jordan
Chief of Police

EXHIBIT 7

OAKLAND POLICE DEPARTMENT Organizational Chart

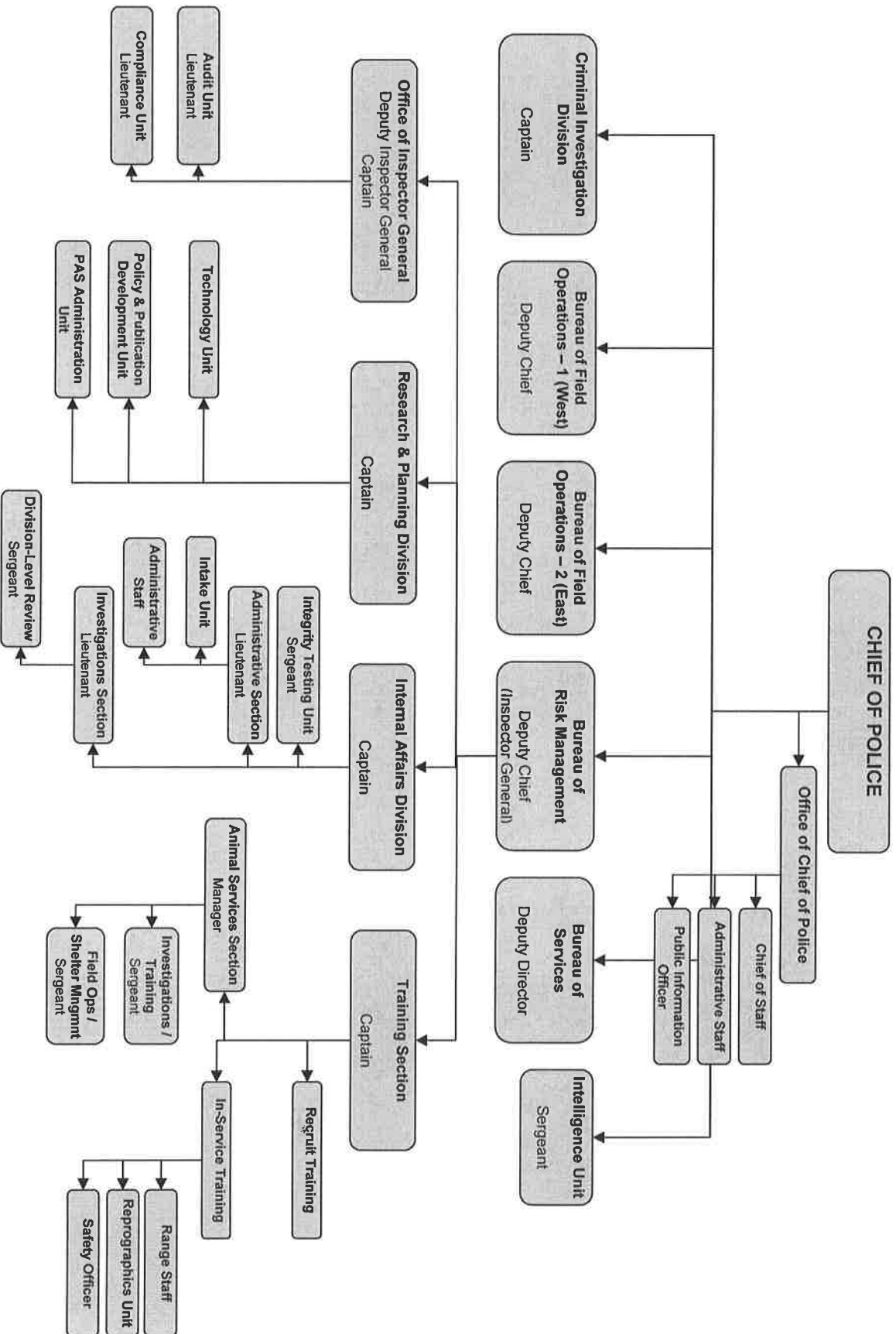


EXHIBIT 8

OPD - Action Plan Tracking Working Draft

15 Jan 12

Task 3 – OPD to conduct integrity tests of subjects of repeated allegations of misconduct

Action Step	Responsible	Due Date	Status
Increase staffing of ITU	Capt. Figueroa	N/A	Completed
New ITU policy for units outside IAD on conducting integrity tests	Capt. Figueroa	N/A	Completed
Bureau level integrity tests	Bureau Chiefs	N/A	On-going
Focus on repeat offenders as integrity testing subjects	Capt. Figueroa	N/A	On-going
Focus on “in-moment” misconduct	Capt. Figueroa	N/A	On-going
Consult with Monitor during integrity test process to ensure compliance	Capt. Figueroa	N/A	On-going
Since 07 Apr, ITU has conducted seven field tests and one selective test on members of repeated allegations of misconduct and four planned tests. BFO has conducted two tests and BOI has met with ITU and will begin to conduct integrity tests.	Capt. Figueroa	N/A	On-going as of 26 May 11.
ACOP endorsed confirmation letters to 65 officers who passed IT tests.	COP Jordan	N/A	Completed 15 Jun 11.

Since 26 May, ITU has conducted four planned tests and four field tests. All have been on subjects of repeated complaints.	Capt. Whent	N/A	On going as of 16 Jun 11.
Completed three integrity tests involving surveillance of members identified through repeated allegations. Two of the tests failed and investigations have been initiated.	Capt. Figueroa	N/A	Tests completed as of 30 Jun 11. Investigations on failed tests are on-going as of 5 Jul 11.
Transfer of personnel: replaced officer with one with more experience with surveillance operations to enhance efficiency and quality of tests.	Capt. Whent	N/A	Completed 09 Jul 11.
Changed language to letter to officers who have passed integrity tests.	DC Toribio	N/A	Completed 08 Jul 11.
Monitor's 6 th Quarterly Report found task in compliance			02 Aug. 11. In-compliance.
Integrity Tests to also focus on PAS Top 30 UOF and Complaints; tests relevant to allegations on Top 30.	Capt. Figueroa	N/A	On-going
Conduct tests on possible abuse of sick/injury leave.	Capt. Figueroa	N/A	Pending follow up with City Attorney's Office. Completed: ITU conducting tests in this area. Testing on-going.

Task 5.5 – Commander is notified when complaint is made

Action Step	Responsible	Due Date	Status
Provide refresher training to Communication's personnel reinforcing the importance of completing the DIL properly	Act. Lieut. Gonzalez	N/A	Completed
Weekly/Monthly compliance reviews by designated compliance auditors/assessors	OIG/IAD/Comm Section	N/A	On-going
The ACOP and OIG met with Bureau of Services Commander and the Communications Center Acting Lieutenant to discuss daily auditing process and what is being done to ensure the DIL is completed thoroughly. Recent OIG audit discovered a DIL missing box indicating the name of the commander notified. ACOP advised this failure was unacceptable and disciplinary action would be taken if this happened again. An action plan was developed to prevent future occurrences. SNF entries made for the commanders and supervisors involved.	COP Jordan	N/A	Completed 21 Apr 11.
IAD Intake Section Commander issued directive to Intake Staff to audit the DIL on a daily basis. Per IAD Commander, an annuitant is conducting a weekly	Capt. Figueroa	N/A	Completed 21 Apr 11. Daily and weekly reviews on-going.

audit on this subtask.			
DIL revised to include field for 2 nd reviewer at the Communications Center.	BOS	N/A	Completed 11 May 11.
Met with BOS and Communications Center Commanders to discuss deficient DIL from 11 May 11. BOS Commander was issued a Written Reprimand.	COP Jordan	N/A	Completed 27 May 11.
Monitor's 6 th Quarterly Report found task in compliance.			02 Aug 11. In-compliance.
Monitor's 7 th Quarterly Report found task in compliance.			20 Oct 11. In-compliance.

Tasks 5.15, 5.16, and 5.18 – Quality of IAD investigations

Action Step	Responsible	Status
Creation of quality control team to review all IAD cases before finalization	DC Toribio	Completed 18 Apr 11. Reviewing all DLI and IAD investigations.
Change review process to require Captains to review investigations	COP Jordan	Completed 09 Jul 11.
Executive Staff to hold investigators and Reviewers accountable for failing to complete quality investigations	COP Jordan	On-going
Additional training for IAD investigators and Department commanders/managers on conducting quality investigations	COP Jordan	Training started 03 May 11. Completed 27 May 11. Seventeen sessions total. 14 Jun 11: Added additional training classes through 28 Jun 11. Assigned remaining supervisors to a training session with completion by the end of July.
Implement recommendations by	Capt. Figueroa	On-going

outside auditor regarding qualitative assessment of IAD investigations				
Weekly compliance reviews and audits by designated compliance assessors (OIG and IAD)	Capt. Whent	N/A	On-going	
IAD providing bimonthly training to staff re. investigations. OIG to participate.	Capt. Figueroa	N/A	Started 12 May 11. On-going.	
Checklists of policy requirements for investigators and reviewers revised and created to enhance quality of investigations.	Capt. Figueroa	N/A	Completed 22 Apr 11.	
COP to be briefed weekly on deficiencies in IAD cases: significant problems and repeat offenders.	Capt. Figueroa	N/A	On-going	
Standardized investigative template sent to all commanders and supervisors including Summary Finding.	Capt. Whent	N/A	Completed 09 Jun 11.	
Revised investigative template to enhance credibility assessment examples.	Capt. Figueroa		Completed 03 Aug 11.	
Issued Information Bulletin regarding Internal Investigation Reminders including credibility assessments, witness identification for on-scene complaints, and TASER discharges.	Capt. Figueroa	N/A	Completed 18 Aug 11.	
IAD 2-day investigator's course for supervisors and commanders, civilian managers, and newly	Capt. Figueroa	N/A	Completed 9-10 Jan 12	

promoted supervisory/command staff.			
Command review to listen to recorded statements before approving investigations where complainant is deemed not credible.	Bureau Chiefs		Started 10 Jan 12. On-going.

Task 6 (Refusal to Accept or Refer Citizen Complaints)

Action Step	Responsible	Due Date	Status
Allegations to remain as MOR violations and not training issues.	COP Jordan	N/A	Completed 03 Aug 11.
IAD utilized ICR for MOR related to this task.	DC Toribio	N/A	No longer will ICR allegations of misconduct related to this task. Completed 13 Oct 11.
Revision to MOR 314.48 (Reporting Violations of Rules or Orders)	Capt. Figueroa	N/A	Completed 06 Dec 11. Does not allow Class II violations of 398.76 (Refusal to Accept or Refer Complaint) to be addressed via non-disciplinary corrective action by supervisors/commanders. Requires initiation of internal investigation.

Task 20.2 – Consistency of supervision

Phase One

Action Step	Responsible	Due Date	Status
Reduce Sergeant and Lieutenant leave time (Vacation and Training)	DC Breshears	N/A	Completed
Reduce use of patrol sergeants as instructors	COP Jordan	N/A	On-going
Identify sergeant positions outside of patrol that can be replaced by officers. Replace at a rate	COP Jordan	N/A	On-going

commensurate with overall staffing levels				
Replace sergeants assigned to Homicide Unit as investigators with officers. Two in 2011 and at least two 2012.	COP Jordan	N/A		CID reorganization completed.
Identify sergeant positions outside of patrol that can be replaced by other staff or eliminated, if work can be parsed to other staff. Move sergeants within one year.	COP Jordan	Jan 2012		On-going Pending IAD use of annuitants and civilianization of IAD.
Fill long-term lieutenant patrol vacancies to reduce need for acting lieutenants	COP Jordan	N/A		On-going. Promotions held 10 Jun 11.
Promote vacant sergeant, lieutenant and captain ranks to reduce backfill by lower ranks	COP Jordan	N/A		On-going Five sergeants promoted to lieutenant of police. Four assigned to patrol. Completed 10 Jun 11. Eight sergeants promoted on 08 Jul 11; five assigned to Patrol. Two captains, two lieutenants, and four sergeants promoted on 09 Dec 11.
Amend 85% compliance standard: - Sick/injury time and FML does not count towards compliance - Back filling by a relief sergeant within the team counts towards compliance				

Phase Two

Action Step	Responsible	Due Date	Status
Reorganize Patrol for team supervision: • 12 admin/relief/training sergeants • Patrol has 1 relief sgt per same 4 patrol squads and PSO Unit has 1 relief sgt per Area • Flex schedule for Admin sgt assigned to Patrol (OPOA negotiations pending)	COP Jordan	N/A	Reorganization completed 09 Jul 11. 2012 Patrol Shift Plan developed and expected to enhance consistency of supervision. To be implemented 04 Feb 12.
Reassignment of squads to increase sergeants in patrol: • Eliminate Traffic Squad	DC Breshears	N/A	Elimination of Abandoned Auto Unit rescinded. Completed 09 Jul 11.
Civilianization of IAD: • Reduce sgt from 13 to 3 by replacing with civilian staff	COP Jordan	N/A	Pending

Task 24 (UOF Reporting Policy)

Action Step	Responsible	Due Date	Status
Front end review to identify and address problems.	Capt. Whent	N/A	On-going as of 06 Jun 11.
OIG UOF Audit	Capt. Whent	Pending	To include subtasks of Tasks 24.
Identify modifications to training and/or policy re. pointing of firearm.	DC Toribio	Pending	In-progress • Information Bulletin (IB) re. articulation and legal standards for using force. Completed 13

			Sep 11. • Power Point issued for lineup training re. IB. Completed 17 Sep 11. • Review of MILO Training (simulation training) completed 10 Oct 11. Include situation where no display or use of force needed during annual officer training (CPT). To begin 24 Jan 12. • Modify training scenario in 10 hour range course to include multiple officer scenario and situation where no display or use of force used. Includes TASER and Less than Lethal Bean Bag recertification. To begin 30 Jan 12. • Modification of PAS threshold to identify outliers for Level 4 UOF. Completed. • Add normative comparison for arrests and Level 4 UOF. Pending Feb 12. • Review of OPD UOF training and tactics: Training Needs Assessment. Meeting held 02 Nov 11. Revision of SO 8977 and training plan pending. • Working in collaboration with OPOA. Meeting held 10 Nov 11, 07 Dec 11, 10 Jan 12. • Review of Patrol Rifle Policy & Deployment. In-Progress. • Pointing of firearm perception issue added to academy training on cultural diversity. Completed 07 Dec 11. • Developing Cultural Competency course for academy and CPT.
Timely supervisory notification when UOF or allegation of excessive force	DC Breshears	N/A	• BFO Admin conducting daily audits. • Report modification to include supervisory notification time completed May 11.

			Lineup Training Power Point reminder of requirement.
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Task 25 (UOF Investigations and Report Responsibilities)

Action Step	Responsible	Due Date	Status
Front end review to identify and address problems.	Capt. Whent	N/A	On-going as of 06 Jun 11.
Reminder to Commanders regarding deadlines: Division Commander authorization; reason for extension; who approved, new date; document in chronological log; BFO Admin to advise of new due date. DC Breshears reviewing all UOF extensions. Capt. Allison revising chronological log to calculate due dates.	DC Breshears	N/A	Email sent 18 Apr 11.
Level One timelines: review to reduce need for extensions, improve expediency.	Capt. Figueroa/ DC Toribio	N/A	Completed 16 May 11. Per Capt. Figueroa all Level One UOF to receive high priority. Assigned investigator to have other cases reassigned to help ensure Level One case is completed in a timelier manner. OIG researching other agencies to identify ways to improve Level One timeliness. 25 Jul 11: The following has been implemented to complete Level One UOF in a timelier manner: - Annuitant assigned to assist investigators on Level One UOF. A second annuitant started on 10 Aug 11 specifically for this purpose. 30 day review with ACOP, OIG, Homicide, and

				City Attorney to identify work needing completion, areas of concern, additional resources. 3. Reduced status report case review and deadlines from ten to five work days.
Information Bulletin on boilerplate language in crime reports to be issued.	DC Toribio	N/A		Completed 08 Jun 11.
Issued Level Four common mistakes report for BFO commanders and supervisors handout.	DC Breshears	N/A		Completed 17 Jun 11.
OIG UOF Audit.	Capt. Whent	31 Oct 11		To include subtasks of Tasks 24 and 25.
Identify periodic refresher training to underscore to supervisors importance of conducting timely, thorough, complete, and impartial UOF investigations.	Capt. Whent	N/A		Completed 13 Sep 11. Additional training to be provided by OIG Information Bulletin by 31 Oct 11.
Monitor's 6 th Quarterly Report found task in compliance.				02 Aug 11. In compliance.
Monitor's 7 th Quarterly Report found task out of compliance.				20 Oct 11. In-compliance.
Level 4 UOF review process	DC Toribio			See Task 24 action points.

Task 30 (EFRB)

Action Step	Responsible	Due Date	Status – Due Date
Ensure subject officer's commander attends EFRB.	DC Breshears	N/A	Completed 11 Aug 11. Force Board Coordinator to ensure commander is invited. For excused absence a commander in subject officer's chain-of-command must attend.

Schedule EFRB during site visit for proper assessment.	DC Breshears	N/A	Completed 11 Aug 11. Timelines may require coordination with Monitoring team or alternative arrangements be made.
7 th Quarterly Report critical of EFRB quality of review of an OIS	DC Toribio	N/A	Technical Assistance by Monitoring Team. Discussion held during November Site Visit (14-18 Nov 11). Completed.

Tasks 33.1 and 33.2 – Reporting Misconduct

Action Step	Responsible	Due Date	Status – Due Date
Revise investigator template to include a section for analysis by investigator, on sustained cases, for any member/employee who knew of misconduct, but failed to report it	Capt. Figueroa	N/A	Completed 18 Jan 11.
Monitor's 5 th Quarterly Report found subtasks in compliance.			22 Apr 11. In compliance.

Task 34 – Stop Data

Action Step	Responsible	Due Date	Status
Conduct audits of FI reports to determine if identifiable basis and/or authority for stop have been documented	DC Israel	N/A	On-going
Re-train members on how to 1) properly complete a FI report and 2) how to properly articulate the reason and legitimacy of the stops and pat-searches. Provide refresher training on stops based on	DC Israel	N/A	Completed

reasonable suspicion or probable cause.			
Merge the FI report and stop data report in FBR so the documented reasons and/or legitimacy of stops for each stop data form are easily accessible	DC Israel	N/A	Completed 13 May 11.
Conduct analysis of stop data and issue report	Capt. Rachal	N/A	Information Bulletin issued 30 Dec 12. Draft final pending review from COP.
Secondary review of data to ensure accuracy for Monitoring audit.	Capt. Toribio	N/A	Completed.

Task 40/41 – Personnel Assessment System

Action Step	Responsible	Due Date	Status
OPD providing training to supervisors and commanders on PAS reviews	DC Israel	N/A	Completed
All PAS reviews inspected for quality, completeness, analysis, and documentation	DC Israel	N/A	On-going
OPD to increase PAS Unit staffing	DC Israel	N/A	Added one additional staff member on 19 Mar 11 & 08 Oct 11. Pending additional staff member in Feb 12.
Development of a more reliable and sustainable PAS system, including sufficient IT support	City	June 2012	In-progress
Custodian of records program provides weekly report identifying status of data entry for their particular database, identification of problems and	DC Israel	N/A	On-going

data entry delays				
Daily audits for data accuracy	DC Israel			On-going
Outside audit to review PAS data and quality of PAS and provide recommendations for improvement	Capt. Whent	N/A		Audit complete. Recommendation implementation in-progress.
Updated PAS so identification of outliers is automated in the system. Undergoing beta testing for use in threshold reports. The reports calculate outliers using a three standard deviation from the mean formula for an 18 month period from date report is generated.	DC Israel	In-Progress		Pending. Beta testing as of 04 May 11. DIT unable to correct all problems with this automated process. DIT needs to rehire outside consultant to make corrections.
Case Evaluations and Report Review Notice data separated in IPAS.	DC Israel	N/A		Completed 28 Mar 11.
Monitor's 5 th Quarterly Report found Task 40 In Compliance				22 Apr 11.
PAS Training for officers: purpose and responsibilities	DC Israel	15 Mar 12		On-going. Began 31 May 11 at Continued Professional Training (CPT) for officers.
Sergeants required to review all field interview cards	DC Israel	N/A		Completed 13 May 11.
Task 41 Audit	Capt. Whent	N/A		14 Jul: Preliminary audit results indicate follow up meetings are being conducted late—not within five calendar day timeline for follow up meetings. OIG met with ACOP and Research and Planning Division Commander to discuss corrective measures. R & P Commander to issue biweekly status reports to Deputy Chiefs and Captains. Commanders who miss timelines shall report to ACOP for corrective action.

Revision of D-17 (PAS)	DC Toribio	16 Dec 12	Completed 23 Nov 11. Increase supervisory monitoring period from 3 to 6 months. Increase frequency of follow up meetings for both monitoring and intervention. Reduce threshold review period from 30 to 18 months. Lower Level 4 thresholds for PAS Review. Pending completion 17 Jan 12.
Add normative comparison of arrest vs. Level 4 UOF	DC Toribio	15 Feb 12	Pending 15 Feb 12. See Task 24 action points.

Task 43 Academy and In-Service Training

Action Step	Responsible	Due Date	Status
Training Needs Assessment	DC Toribio	On-going	Training Section has completed Training Needs Assessment for Youth and Family Services Section (18 Feb 11), Training Section (29 Apr 11), and Animal Services Section (15 Jul 11). Special Operations Section assessment completed 16 Sep 11; Evidence Technician Unit due 30 Sep, 11, Communications Section due Mar 12.
Evidence Technician Training	DC Toribio	N/A	Training needs assessment to be completed by Evidence Technician Unit, Crime Lab to coordinate with Training Section to set up training session for technicians, schedule technicians into relevant CPT courses. PETs assigned to CPT and training with Drug Lab training pending Feb 2012.
Communications Center Training Needs Assessment Completed	DC Toribio	N/A	Completed 11 Aug 11.

Task 45.1 – Central system for documenting and tracking discipline and corrective action

Action Step	Responsible	Due Date	Status
Date added upon Chief making disciplinary finding	Capt. Whent	N/A	On-going
Weekly/Monthly compliance reviews by designated compliance auditors/assessors	OIG	N/A	On-going
Modified database to add “Discipline Pending” and “Skelly Pending.” to cover period between sustained finding and disciplinary finding. Policy dictates a 30 day period for discipline to be imposed after sustained finding.	Capt. Figueroa	N/A	Completed 26 Apr 11.
Database modification to include “No Discipline Imposed” Field.	Capt. Figueroa	10 Aug 11	Completed.
Modified data entry process: dates to be entered upon completion of task.	Capt. Figueroa	N/A	Completed 23 Sep 11.
Added additional drop downs in the discipline field (resigned and released from probation)	Capt. Figueroa		Completed 07 Dec 11.