

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DAI TRANG THI NGUYEN,
Plaintiff,
v.
CITY OF SAN JOSE, et al.,
Defendants.

Case No. [5:21-cv-00092-EJD](#)

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

Re: ECF No. 70

Before the Court is Defendants’ Motion to Dismiss the First Amended Complaint under Rule 12(b)(6) based on municipal liability under *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). ECF No. 70 (“MTD”). The Court heard oral arguments on March 9, 2023. Having considered the parties’ written submissions and arguments made at the hearing, the Court GRANTS the motion with leave to amend.

I. BACKGROUND

A. Factual Background

Plaintiff Dai Trang Thi Nguyen brings this action against Defendant the City of San Jose (the “City”) and individual Defendants William Gerry, Joseph Hatfield, Rachel Roberts, Edgardo Garcia, and Does 1-100’s (collectively, “Defendants”) for violation of her Fourteenth Amendment rights to due process and equal protection under 42 U.S.C. § 1983. *See generally*, ECF No. 60 (“FAC”).

1. The Code Enforcement Division

In 2007, the City hired Defendant Gerry as a Code Enforcement Inspector in its Code Enforcement Division. *Id.* ¶ 28. Defendants Hatfield and Roberts supervised the Code

1 Enforcement Division. *Id.* ¶¶ 20–21, 28. Hatfield and Robert’s duties included training,
2 supervising, auditing, investigating, and disciplining Gerry. *Id.* ¶ 20.

3 The purpose of the Code Enforcement Division was to correct municipal code violations,
4 which included inspection of massage establishments. *Id.* ¶ 29. Many of the massage
5 establishments were owned and/or employed by immigrant women born in Asia with low levels of
6 education. *Id.* ¶ 31. For this reason, enforcement officers were prohibited from entering a
7 massage business alone and unsupervised for many years. *Id.* ¶ 32. Starting around 2011 or
8 earlier, however, the City permitted Gerry and other male code enforcement officers to conduct
9 solo, unsupervised inspections of massage establishments.¹ *Id.* ¶ 5.

10 2. The Massage Ordinance

11 In December 2015, City Council approved Ordinance No. 29662 (the “Massage
12 Ordinance”) which amended Section 6.44 of the City Municipal Code. *Id.* ¶ 36. The City’s
13 Massage ordinance took effect on January 15, 2016. *Id.* The Massage Ordinance was passed, in
14 part, to increase oversight of massage establishments because they were particularly susceptible to
15 human trafficking and prostitution. *Id.* ¶ 36. The Massage Ordinance required massage
16 establishments, in relevant part, to: (1) maintain valid business permits issued by the Chief of
17 Police; (2) maintain valid ownership/management licenses also issued by the Chief; and (3) ensure
18 that individual masseuses be certified as massage therapists. *Id.* ¶ 37.

19 At the time that the Massage Ordinance passed, there were purportedly anywhere from 300
20 to 5,300 massage establishments and/or licensed establishments offering massage services—all of
21 which fell under the gambit of the new ordinance. *Id.* ¶ 38. Chief Garcia informed the City that
22 the SJDP lacked sufficient resources to enforce the new law. *Id.* As a result, the Code
23 Enforcement Division partnered with the San Jose Police Department (“SJPD”) to assist with the
24 enforcement of the Massage Ordinance. *Id.* ¶ 22. In 2017, Gerry was assigned to be the

25 _____
26 ¹ The FAC adds a footnote which suggests that unsupervised code inspections were common
27 starting as early as 2006: “City records show that from 2006 through 2016—the decade before the
28 effective date of the Massage Ordinance—124 of the 158 massage enforcement visits (78%) in the
City were conducted by solo male code inspectors.” FAC ¶ 7, n.1.

1 Division’s sole enforcement inspector of massage establishments. *Id.* ¶ 40. Defendant Chief
 2 Garcia oversaw training, supervision, auditing, investigation, and discipline of Gerry when he was
 3 supporting and partnering with the SJPD’s Vice Unit. *Id.* ¶ 22.

4 Gerry worked as the enforcement inspector of massage establishments for nearly nine
 5 years. During this time, he conducted over 700 Massage ordinance enforcement visits at massage
 6 establishments. *Id.* ¶ 41. City records indicate that Gerry was alone—meaning, he was not
 7 accompanied by another inspector or supervisor—on all but five of these inspections. *Id.*
 8 Defendant Hatfield, Gerry’s unit supervisor, attended only two of Gerry’s enforcement actions.
 9 *Id.* ¶ 41. Division records also show that Defendant Roberts, Gerry’s other immediate supervisor,
 10 never visited a massage business to monitor his work. *Id.*

11 The City Defendants instructed the SJPD’s Vice Unit to partner and coordinate with Gerry
 12 when its officers conducted criminal raids on massage businesses. *Id.* ¶ 42. Gerry received alerts
 13 of planned raids of massage establishments and, as a matter of routine, attended and participated in
 14 the raids. *Id.* Gerry was also tasked with notifying the SJPD of criminal conduct he observed
 15 while inspecting massage establishments for code violations. *Id.*

16 3. Complaints About Gerry’s Conduct

17 Shortly after Gerry began acting as the sole enforcement inspector of massage
 18 establishments, on October 25, 2018, Defendant Roberts in the Code Enforcement Division
 19 received an anonymous letter addressed to Gerry that included photos of Gerry in a close embrace
 20 with an Asian woman who was later identified as an employee of a massage establishment that
 21 Gerry had inspected. *Id.* ¶¶ 43, 44; *see* Ex. 4. The letter threatened to publicize the photos of
 22 Gerry and the fact that he was having intimate relationship with the woman pictured unless Gerry
 23 closed a competitor’s massage business. *Id.* Defendant Roberts gave the letter to the SJPD to
 24 conduct a criminal investigation to discover the anonymous letter’s author. *Id.* ¶ 46. Plaintiff
 25 alleges that the department did not investigate the allegations against Gerry. *Id.*

26 A couple months later, on December 16, 2018, the City’s “Whistleblower Hotline”
 27 received an anonymous email from a female owner of a massage establishment accusing Gerry of

1 preying on female Asian massage workers. *Id.* ¶ 47. According to the email, Gerry twice came to
 2 the author's business while she was attempting to obtain a permit and misused his authority to
 3 sexually assault her and to propose *quid pro quo* arrangements. *Id.* The arrangements involved
 4 exchanging sex and/or money for the issuance of massage permits. *Id.* The email also stated that
 5 Gerry accepted bribes in exchange for issuing permits to other massage businesses that engaged in
 6 the illicit sex trade. *Id.* The email states, in part, that:

7 William Gerry is doing Code Enforcement for Massage businesses.
 8 He is violating city code of ethics and taking advantage of the fear
 9 people in the Asian community have of the government and police.
 10 He crossed the line several times when speaking with me, and I've
 11 heard from other owners similar stories. Here is what happened to me
 12 -I submitted all paperwork for a massage permit -On two different
 13 occasions William came to my store. My first encounter he came in,
 14 said who he was, and grabbed my hands to hold them to speak with
 15 me. This made me feel very uncomfortable and not professional. He
 16 also touched me several times on the shoulder and back with a rubbing
 17 and squeezing motion He was there for an hour talking about personal
 18 things and very little business. He said it was ok for me to remain
 19 open during the permit process (later I found out this is not true and
 20 he should have told me to close during the process). The second time
 21 he came to the store he immediately started touching me again. He
 22 then asked to go to back room to talk. In the backroom he repeatedly
 23 asked for me to give him a massage even though I told him I don't do
 that. He said he would help me open as many stores as I want if I take
 care of him. He also told me a woman I had working for me was bad
 and I should fire her. He repeated that I could keep store open until I
 get permit. He again was there for about an hour. I felt very
 uncomfortable, afraid, and that he is not acting like professional city
 representative. I have photos and video (no audio unfortunately) of
 him touching me repeatedly. I have heard from other massage owners
 that he asked for free massages. I also heard from some owners that
 did get their permit (even though they are known for being the bad
 kind of massage store the city is trying to get rid of), that they gave
 him envelope of money. This is common in China to pay government
 officials for favors, I didn't think it was acceptable in the USA. I
 encourage you to do a thorough investigation of William Gerry. As a
 tax payer and USA citizen, it makes me sad that someone like him is
 taking advantage of immigrants through fear, unwanted sexual
 advances, and bribes. Thank you for listening.

24 *Id.*; Ex. 5. The email was reviewed by a Senior Executive Analyst within the City's Office of
 25 Employee Relations and forwarded to the SJPD. *Id.* ¶ 48. Plaintiff alleges that Defendants
 26 Garcia, Roberts, and Hatfield had knowledge of the whistleblower's email. *Id.*

27 After receiving the whistleblower email, Defendants allegedly received two additional

1 complaints against Gerry for similar conduct. *Id.* ¶ 49.

2 **4. Gerry's Predatory Conduct Towards Plaintiff**

3 Plaintiff is a naturalized United States citizen of Vietnamese descent who speaks limited
4 English. *Id.* ¶ 57. Plaintiff was a licensed massage therapist who owned and operated "Soft
5 Touch Spa" (the "Spa") in San Jose during the time that Gerry was the sole inspector of massage
6 establishments. *Id.* ¶¶ 58, 59. The Spa was located on leased commercial property. *Id.* ¶ 59.

7 On December 20, 2018, Gerry issued a "Compliance Order" on Code Enforcement
8 Division letterhead to the owner of Soft Touch Spa. *Id.* ¶ 60. The order notified the owner that
9 the Spa was operating without the permit and license required by the Massage Ordinance. *Id.* It
10 instructed all massage operations at the Spa to cease immediately. *Id.* Plaintiff's landlord
11 discovered the order and notified Plaintiff. *Id.*

12 On January 8, 2019, Gerry visited the Spa for the first time. *Id.* ¶ 61. During this visit he
13 was on-duty, wearing a visible City identification badge clipped to his belt and driving a white
14 City of San Jose sport utility vehicle bearing San Jose municipal decals on its doors. *Id.* Gerry
15 told two female employees at that Spa that he had a massage permit application package for the
16 Spa's owner. *Id.* Gerry was informed that Plaintiff was not at the Spa. *Id.* Gerry proceeded to sit
17 in between the two female employees on the couch and massaged each woman's back under their
18 blouses before leaving. *Id.*

19 Gerry returned to the Spa the next morning. *Id.* ¶ 62. He again wore his badge and drove
20 the City of San Jose sport utility vehicle. *Id.* Based on his vehicle and badge, Plaintiff believed
21 Gerry to be an SJPD officer. *Id.* Gerry inspected the premises and identified what he described as
22 unpermitted construction in the Spa that was not shown on City building plans. *Id.* Gerry told
23 Plaintiff that cost of construction to bring the Spa into compliance would exceed \$50,000. *Id.*
24 After the inspection, Gerry asked to speak to Plaintiff privately. *Id.* Plaintiff believed that Gerry
25 wished to discuss the inspection and permit process further. *Id.* Instead, once in a private room,
26 Gerry asked to see the tattoo on Plaintiff's back that was partially exposed under her outer
27 garments. *Id.* Believing that Gerry was a police officer, Plaintiff complied and lifted her blouse,

1 revealing the tattoo. *Id.* Afterwards, Gerry gave Plaintiff a permit application packet. *Id.* Based
2 on other statements Gerry made during his visit, Plaintiff believed that if she did not cooperate
3 with Gerry then he would close her Spa. *Id.* Gerry then told Plaintiff that she could keep her Spa
4 open if she paid him an upfront fee of \$10,000 in cash, followed by monthly payments of \$2,000.
5 *Id.* Plaintiff believed that making these payments meant that she did not need to comply with City
6 code requirements. *Id.*

7 On January 10, 2019, Gerry returned to the Spa before it opened for business to collect his
8 first extortion payment of \$10,000. *Id.* ¶ 63. Gerry extorted \$10,000 from Plaintiff and forced her
9 to perform oral sex on him. *Id.* The next day, January 11, 2019, Gerry contacted Plaintiff and
10 warned her to keep her Spa closed on January 14, 2019 because the SJPD was scheduled to
11 conduct an inspection of her establishment. *Id.* ¶ 64. Gerry knew this information based on an
12 insider tip he received from the Vice Unit. *Id.*

13 Gerry returned to the Spa on three more occasions—February 1, February 20, and
14 February 27—to extort Plaintiff for \$2,000, \$20,000, and \$2,000, respectively, and force her to
15 perform oral sex on him. *Id.* ¶¶ 65, 67–68, 70. In total, Gerry extorted \$34,000 from Plaintiff. *Id.*
16 ¶ 88. Gerry had told Plaintiff that in exchange for \$20,000 in cash he would arrange for the Spa to
17 remain open for three years without being inspected. *Id.* ¶ 67. On February 26, 2019, after
18 Plaintiff paid the \$20,000, Gerry texted Plaintiff to warn her of a planned undercover SJPD “sting”
19 planned for later that day at her Spa. *Id.* ¶ 69.

20 On March 19, 2019, Gerry told Plaintiff that he would come to her Spa the next day to take
21 photographs for her massage permit. *Id.* ¶ 71. He falsely promised Plaintiff that he would get her
22 the permit by April 15, 2019, and also remove her business’s name from the list of City massage
23 establishments to be inspected. *Id.* On March 20, 2019, Gerry arrived to take pictures while one
24 of Plaintiff’s employees was present. *Id.* ¶ 72. He left but returned to the Spa later that day and
25 raped Plaintiff. *Id.* Plaintiff never saw or heard from Gerry after this final encounter. *Id.* ¶ 73.

26 Then, on June 2, 2019, the SJPD notified Plaintiff’s landlord that the Spa would have to
27 close because of her failure to obtain proper licenses and permits. *Id.* ¶ 80. On June 28, 2019,

1 Plaintiff and her counsel met with the SJPD's Vice Unit and informed the SJPD about Gerry's
2 extortions. *Id.* ¶ 81. On September 15, 2019, Plaintiff was forced to shut down her business. *Id.*

3 In July 2020, Plaintiff went to the Kaiser Permanente Hospital to receive treatment for her
4 mental distress caused by Gerry's extortion and sexual assault. *Id.* ¶ 83. She was transferred to
5 Valley Medical Center, Emergency Psychiatric Services ("EPS") for continued protective
6 monitoring. *Id.* ¶ 84. EPS informed the police that a patient at their facility had been the victim of
7 a sexual crime. *Id.* ¶ 83. The SJPD interviewed Plaintiff and began investigating Gerry. *Id.* ¶ 84.

8 **5. The Aftermath**

9 Unbeknownst to Plaintiff, shortly after Gerry's final encounter with Plaintiff, Gerry had
10 resigned from the City's employment in mid-2019 and moved to Texas. *Id.* ¶ 74.

11 Following the investigation, Gerry was arrested, and, on September 29, 2020, a criminal
12 complaint was filed against Gerry asserting fourteen felony counts, including the sexual and
13 economic crimes committed against Plaintiff. *Id.* ¶ 77. The SJPD's investigation also revealed
14 that Gerry committed sex and extortive crimes under the color of his authority against the owners
15 of two other massage businesses. *Id.* On May 22, 2022, Gerry was sentenced to thirty-five years
16 in state prison after pleading guilty to ten felony offenses stemming from his misconduct. *Id.* ¶ 85.

17 On May 23, 2022, Mayor Sam Liccardo gave a press conference where he addressed
18 Gerry's crimes and another officer's criminal conduct of a predatory nature, stating that it "was
19 particularly disconcerting . . . that in each case city employees continued to serve in public facing
20 roles [] after someone in the city became aware of the nature of this conduct." *Id.* ¶ 55. He further
21 recognized that "all that information was immediately available, in some cases anonymous
22 complaints and so forth" such that the City "at least had some information about the seriousness of
23 conduct and individuals continued to serve in public facing roles where members of the public
24 would be subjected to harm and risk of harm." *Id.*

25 **B. Procedural History**

26 This case was stayed pending resolution of the ongoing criminal case against Defendant
27 Gerry in the Superior Court for the County of Santa Clara. The stay was lifted on October 6,

1 2022. *See* ECF No. 61.

2 Defendants moved to dismiss the complaint before the stay was entered. While the stay
3 was in place, the Court granted Defendants’ motion with leave to amend. *See* ECF No. 52 (“First
4 Order”). The First Order found that Plaintiff failed to state a claim for *Monell* liability based on a
5 custom or practice of unsupervised solo code enforcement inspections. *Id.* at 17. The Court
6 expressed no opinions on whether the facts stated a claim for supervisory liability because
7 Plaintiff had not asserted claims against Gerry’s supervisors, Roberts and Hatfield, or any other
8 supervisor in their individual capacity for supervisory liability. *Id.*

9 Plaintiff filed the FAC on October 6, 2022, adding claims against Roberts, Hatfield, or
10 other supervisors in their individual capacity for supervisory liability. The FAC asserts two causes
11 of action: (1) deprivation of her Fourteenth Amendment substantive due process rights to bodily
12 integrity and property interest in her business and equal protection of the laws as an Asian female
13 massage business owner in violation of 42 U.S.C. § 1983, against all Defendants; and (2)
14 municipal liability for the foregoing civil rights violations against the City. *See generally*, FAC.

15 **II. LEGAL STANDARD**

16 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with enough
17 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which
18 it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotations omitted). A complaint
19 which falls short of the Rule 8(a) standard may therefore be dismissed if it fails to state a claim
20 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is
21 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support
22 a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th
23 Cir. 2008). When deciding whether to grant a motion to dismiss, the Court must accept as true all
24 “well pleaded factual allegations” and determine whether the allegations “plausibly give rise to an
25 entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The Court must also construe
26 the alleged facts in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242,
27 1245 (9th Cir. 1989). While a complaint need not contain detailed factual allegations, it “must

1 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
2 face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

3 A court generally may not consider any material beyond the pleadings when ruling on a
4 Rule 12(b)(6) motion. If matters outside the pleadings are considered, “the motion must be treated
5 as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d). However, documents
6 appended to the complaint, incorporated by reference in the complaint, or which properly are the
7 subject of judicial notice may be considered along with the complaint when deciding a Rule
8 12(b)(6) motion. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018); *see also Hal*
9 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).
10 Likewise, a court may consider matters that are “capable of accurate and ready determination by
11 resort to sources whose accuracy cannot reasonably be questioned.” *Roca v. Wells Fargo Bank,*
12 *N.A.*, No. 15-cv-02147-KAW, 2016 WL 368153, at *3 (N.D. Cal. Feb. 1, 2016) (quoting Fed. R.
13 Evid. 201(b)).

14 **III. DISCUSSION**

15 **A. Claims Against City of San Jose**

16 **1. Monell Municipal Liability**

17 Title 42 of the United States Code Section 1983 provides a cause of action against any
18 “person” who, under color of law, deprives any other person of rights, privileges, or immunities
19 secured by the Constitution of the United States. *Monell*, 436 U.S. at 694. Although a
20 municipality qualifies as a “person” under § 1983, a municipality cannot “be held liable under §
21 1983 on a *respondeat superior* theory.” *Id.* at 691. However, “liability may attach where the
22 municipality *itself* causes the constitutional violation through the execution of an official policy,
23 practice or custom.” *Fairley v. Luman*, 281 F.3d 913, 916 (9th Cir. 2002) (emphasis in original).
24 A *Monell* claim for § 1983 liability against a public entity may be stated in one of three
25 circumstances: 1) a municipal employee committed the alleged constitutional violation “pursuant
26 to a formal governmental policy or longstanding practice or custom which constitutes the standard
27 operating procedure of the local governmental entity;” 2) the individual who committed the

1 constitutional violation was an official with “final policy-making authority and that the challenged
2 action itself thus constituted an act of official government policy;” or 3) the plaintiff may
3 demonstrate that “an official with final policy-making authority ratified a subordinate’s
4 unconstitutional decision or action and the basis for it.” *Gillette v. Delmore*, 979 F.2d 1342, 1346
5 (9th Cir. 1992).

6 At issue in this case is the first prong. In the absence of an express official policy, a
7 plaintiff may allege municipal liability through a custom or practice. 42 U.S.C. § 1983; *City of St.*
8 *Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). A municipal’s policy may be one of
9 action or inaction: “A policy of action is one in which the government body itself violates
10 someone’s constitutional rights, or instructs its employees to do so; a policy of inaction is based on
11 a government body’s failure to implement procedural safeguards to prevent constitutional
12 violations.” *Jackson v. Barnes*, 749 F.3d 755, 763 (9th Cir. 2014) (quotations and citation
13 omitted). Thus, a municipal entity may be liable under § 1983 for inaction, namely, a policy or
14 custom of inadequate training, supervision, or discipline its employees. *City of Canton, Ohio v.*
15 *Harris*, 489 U.S. 378, 387 (1989); *see Davis v. City of Ellensburg*, 869 F.2d 1230, 1233 (9th Cir.
16 1989).

17 However, it is not enough for a plaintiff to identify a local government’s custom or policy
18 that caused his injury; plaintiff must also demonstrate “that the custom or policy was adhered to
19 with ‘deliberate indifference to the constitutional rights of [plaintiff].’” *Castro v. Cnty. of Los*
20 *Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016) (citing *Canton*, 489 U.S. at 392). Liability attaches
21 to a claim that arises under failure to supervise or train only where the failure to train or supervise
22 “amounts to a ‘deliberate’ or ‘conscious’ choice” by a government entity. *Flores v. Cnty. of Los*
23 *Angeles*, 758 F.3d 1158 (9th Cir. 2014). The inquiry is whether the training or supervision is
24 adequate, “and if it is not, the question becomes whether such inadequate training [or supervision]
25 can justifiably be said to represent city policy.” *Canton*, 489 U.S. 378 at 390; *see also Dougherty*
26 *v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (“[A] failure to supervise that is sufficiently
27 inadequate may amount to deliberate indifference.”) (quotations and citation omitted).

28 Case No.: [5:21-cv-00092-EJD](#)
ORDER GRANTING MOT. TO DISMISS W/ LEAVE TO AMEND

a. Custom or Practice of Unsupervised Solo Code Enforcement

Plaintiff alleges that the City had a custom or practice of unsupervised code enforcement by a solo male inspector. The First Order found that Plaintiff failed to state a claim for *Monell* liability based on a custom or practice of unsupervised solo code enforcement inspections because as pled the Undersigned could not plausibly infer a custom or practice from one employee's activities for two years. First Order at 13.

Plaintiff has addressed the Court's concerns in part by bolstering its allegations regarding the Code Enforcement Division's practice of using unsupervised code enforcement by a solo male inspector in the San Jose massage industry. For example, Plaintiff alleges that in the years prior to Gerry's assignment as sole code enforcer of all massage establishments—from 2006 to 2016—City records indicate that 124 out of 158 additional massage enforcement visits by other code enforcers besides Gerry were also conducted by solo male code inspectors. FAC ¶ 7 n.1. The FAC also alleges that Gerry conducted over 700 solo and unsupervised code inspections during the nine-year period that he worked for the Code Enforcement Division. *Id.* ¶ 41.

Identifying a custom or policy is only the first step, however; Plaintiff must also establish that the practice of using solo male code enforcement of the massage industry “was adhered to with deliberate indifference to the constitutional rights” of Plaintiff and other similarly situated women working in the massage industry as pled. Plaintiff asserts that the City's practice of using solo male code enforcement of the massage industry shows a reckless and callous indifference to Plaintiff's rights. FAC ¶¶ 40–41, 87–90. For the reasons discussed below, Plaintiff's theory fails at this inquiry.

i. Deliberate Indifference

A showing of deliberate indifference requires both notice and causation. First, a plaintiff to show that defendant “was on actual or constructive notice that its omission would likely result in a constitutional violation.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1145 (9th Cir. 2012). Second, a plaintiff must plead a sufficient causal connection between “the alleged deficiency in supervision and training actually caused the requisite indifference.” *Pergamensch v. Novato*

1 *Police Dep't*, No. 06-CV-6659-PJH, 2007 WL 2177678, at *6 (N.D. Cal. July 27, 2007) (citing
2 *Canton*, 489 U.S. at 391). This heightened inquiry is to avoid running afoul of *Monell*; otherwise,
3 “it could always be alleged that the municipality failed to enact a policy that would have prevented
4 the tort.” *Tsao*, 698 F.3d at 1143–44.

5 First, Plaintiff alleges that Defendants were on actual or constructive notice of the risk that
6 the City’s practice of using solo male code enforcement of the massage industry would result in
7 constitutional violations. Plaintiff alleges three “categories” of notice: 1) law enforcement experts
8 have cautioned against allowing code enforcement officers to inspect a massage establishment
9 alone because of the risk of exploitation of vulnerable women working in the industry, FAC ¶ 4;
10 and 2) the City enacted the Massage Ordinance imposing new licensing, permitting, and code
11 requirements on massage businesses in part to address and prevent sex work and human
12 trafficking within the massage industry, *id.* ¶ 6; and (3) anonymous complaints about Gerry’s
13 conduct. Opp’n at 19. The Court addresses each argument in turn.

14 The FAC contains only one allegation that law enforcement experts have instructed local
15 agencies to never allow code enforcement officers to visit a massage establishment alone. FAC ¶
16 4 (“[L]aw enforcement experts have for years instructed local agencies that an enforcement officer
17 must never be allowed to go into a massage business by himself, lest he exploit the vulnerable
18 women inside.”). Such a broad, unsupported allegation lacks sufficient detail for the Court to
19 plausibly infer that the practice of using solo male code enforcement of the massage industry is
20 widely discouraged by law enforcement and/or experts in the field because it could likely result in
21 constitutional violations.² Plaintiff cites one source in support, the 2017 Human Trafficking Task
22 Force Report, describing the presence and impact of human trafficking on the massage industry.

23
24 ² Plaintiff’s argument relies on *Vann*, which notes that “[d]eliberate indifference may also be
25 shown through expert testimony that a practice condoned by the defendant municipality was
26 ‘contrary to the practice of most police departments’ and was ‘particularly dangerous’ because it
27 presented an unusually high risk that constitutional rights would be violated.” *Vann v. City of New
28 York*, 72 F.3d 1040, 1049 (2d Cir. 1995). Although Plaintiff need not solicit expert testimony at
the pleading stage, in *Vann*’s own words, Plaintiff must still establish that “the need for more or
better supervision to protect against constitutional violations was *obvious*.” *Id.* (emphasis added).

1 *Id.* ¶ 31. Aside from the report, the FAC broadly alleges that Defendants knew that most people
 2 working in the massage industry were Asian immigrant women with low levels of education who
 3 were particularly vulnerable to exploitation, and that Defendants knew that human trafficking is
 4 widespread in the massage industry. FAC ¶ 31. According to Plaintiff, Defendants therefore
 5 knew or should have known that regulation of the massage industry “had to be done in a way so
 6 that no City employee could easily abuse his enforcement powers to exploit the vulnerable women
 7 working in this industry.” *Id.* ¶ 32. However, the fact that human trafficking is prevalent in the
 8 massage industry does not put Defendants on notice that unsupervised, solo male Code Inspectors
 9 are likely to extort and sexually assault massage business owners and masseuses.

10 For these same reasons, the passage of the Massage Ordinance also does not establish
 11 actual or constructive knowledge. Plaintiff alleges that the Massage Ordinance was passed “to
 12 combat prostitution and human trafficking within the City’s massage industry.” FAC ¶ 6. For the
 13 reasons already explained, the fact that the Massage Ordinance was passed for this purpose does
 14 not put Defendants on notice that Gerry would violate Plaintiff’s constitutional rights. The Court
 15 therefore cannot say that the City made a deliberate choice to “countenance the possibility of a
 16 constitutional violation.” *Tsao*, 698 F.3d at 1145.

17 As to the anonymous complaints about Gerry’s conduct, in the First Order the Court
 18 agreed that the whistleblower complaint clearly asserts that Gerry was demanding bribes and
 19 sexually assaulting business owners. *See* First Order at 19. However, even if Plaintiff shows that
 20 Defendants had actual or constructive knowledge, Plaintiff must also demonstrate that the lack of
 21 supervision “actually caused the constitutional harm or deprivation of rights.” *Flores*, 758 F.3d at
 22 1159. In this case, Plaintiff must allege facts to show that Defendants “disregarded the known or
 23 obvious consequence” that the practice of using solo male code enforcement of the massage
 24 industry “would cause [municipal] employees to violate citizens’ constitutional rights.” *Id.*
 25 (alteration in original).

26 Here, the causal connection is attenuated. Even if the City had known that workers in the
 27 massage industry are primarily Asian immigrant women who are vulnerable to human trafficking,

1 Plaintiff has not shown that this information would have alerted the City to the likelihood that
 2 Code Inspectors would extort and sexually abuse massage business owners and masseuses during
 3 solo code enforcement inspections and prevented the violation of Plaintiff’s rights. The
 4 unconstitutional consequences of the policy must be “so patently obvious that a city could be
 5 liable under 1983 without proof of a pre-existing pattern of violations.” *Flores*, 758 F.3d at 1159;
 6 *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995) (explaining that “the need for more
 7 or better supervision to protect against constitutional violations may be demonstrated through
 8 proof of repeated complaints of civil rights violations.”). The *Flores* court concluded that the
 9 unconstitutional consequences of failing to train police officers not to commit sexual assault are
 10 not “so patently obvious” that defendants “were deliberately indifferent.” *Flores*, 758 F.3d at
 11 1160. The same can be said for the City’s practice of using solo male code enforcement of the
 12 massage industry because “everyone is presumed to know the law” with respect to the “criminal
 13 prohibition on sexual assault.” *Id.*

14 Nor has Plaintiff shown a pattern or history of sexual abuse during solo male Code
 15 Inspector visits. *See id.* at 1159 (noting that plaintiff did not allege a pattern of sexual assaults
 16 perpetrated by sheriff’s deputies before her alleged assault); *Manda v. Albin*, No. 5:19-CV-01947-
 17 EJD, 2019 WL 6311380, at *8 (N.D. Cal. Nov. 25, 2019) (“a failure to supervise generally gives
 18 rise to § 1983 liability in situations where ‘there is a history of widespread abuse.’”) (quoting
 19 *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983)). Notably absent from the FAC is any
 20 allegation that other Code Inspectors engaged in similar kinds of illegal activities while on duty.
 21 The fact that other male Code Inspectors inspected massage businesses alone for years without
 22 engaging in similar conduct is at odds with Plaintiff’s argument that there was an obvious need for
 23 more supervision to protect against constitutional violations by solo male Code Inspectors. *See*
 24 *Tsao*, 698 F.3d at 1145. Plaintiff’s custom or practice argument is still based on Gerry’s acts, and
 25 “[a] single act or isolated incidents” are generally insufficient to establish a failure to supervise.
 26 *Wellington*, 717 F.2d at 936; *Monell*, 436 U.S. at 694 (“[A] local government may not be sued
 27 under § 1983 for an injury inflicted solely by its employees or agents it is when execution of

1 a government’s policy or custom . . . inflicts the injury that the government as an entity is
2 responsible under § 1983).

3 Thus, Plaintiff has failed to establish that she “suffered a constitutional injury *by the City*,”
4 and a constitutional deprivation suffered as a result of an official policy is “the touchstone of §
5 1983 liability.” *Fairley*, 281 F.3d at 917 (emphasis in original). Accordingly, as pled, Plaintiff
6 has not stated a claim for *Monell* liability based on a custom or practice of unsupervised solo code
7 enforcement inspections and/or failure to supervise.

8 2. Vicarious Liability

9 Plaintiff’s second cause of action asserts that the City is vicariously liable to plaintiff for
10 her injuries resulting from Gerry’s sexual assault pursuant to California Government Code Section
11 815.2. FAC ¶¶ 92–93.

12 Section 815.2(a) imposes vicarious liability on a public entity for the acts and omissions of
13 government employees acting in the course and scope of their employment unless the employee
14 successfully asserts statutory immunity as provided in § 815.2(b). Cal. Gov’t Code § 815.2. The
15 primary inquiry under § 815.2 is “whether the risk was one that may fairly be regarded as typical
16 of or broadly incidental to the enterprise undertaken by the employer,” in which case “the
17 employer’s liability extends beyond his actual or possible control of the employee to include risks
18 inherent in or created by the enterprise.” *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962,
19 964 (1986).

20 Plaintiff relies on the doctrine articulated in *Mary M. v. City of Los Angeles*, which carves
21 out a narrow exception to § 815.2 by recognizing that an on-duty law enforcement officers who
22 misuse official authority by committing a sexual assault may be acting within the scope of their
23 employment. Cal. 3d 202, 208 (1991). In *Mary M.*, California Supreme Court stated three
24 reasons for applying the doctrine of *respondeat superior* under these circumstances: “(1) to
25 prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the
26 victim; and (3) to ensure that the victim’s losses will be equitably borne by those who benefit from
27 the enterprise that gave rise to the injury.” *Mary M.*, 54 Cal. 3d 202, 209 (1991). In doing so, the

1 court held that a public entity may be vicariously liable for a sexual assault committed by a police
2 officer where the assault “arose from misuse of official authority,” which, in such cases, is a
3 question for the jury to determine. *Id.*

4 Plaintiff asserts that a Code Inspector is a peace officer “akin to a law enforcement officer”
5 because he had a badge, drove a marked, city-endorsed vehicle, often accompanied the Vice Unit
6 on raids, and was vested with the power of citation issuance and arrest in limited circumstances.
7 Opp’n at 21–22. Thus, Plaintiff contends that vicarious liability attached to Gerry’s sexual
8 misconduct committed during the scope of his employment as a Code Inspector. *Id.* at 21.

9 However, § 1983 does not authorize Plaintiff to impose vicarious liability on the City
10 under state law.³ See *Moor v. Cnty. of Alameda*, 411 U.S. 693 (1973). Plaintiff asserts a federal
11 cause of action against the City under § 1983 and that the City is vicariously liable under
12 California law for the acts of its Code Inspector, Gerry, which violated the Federal Civil Rights
13 Act; in effect, Plaintiff seeks to establish a federal cause of action against the City on the basis of
14 California law. But permitting vicarious liability under § 815.2 would “achieve a result which
15 could not be reached through section 1983 [and] the result would be inconsistent with the
16 laws of the United States.” *Moor v. Madigan*, 458 F.2d 1217, 1220 (9th Cir. 1972), *aff’d in part*,
17 *rev’d in part sub nom. Moor v. Cnty. of Alameda.*, 411 U.S. 693 (1973). The law is clear that “the
18 municipal liability created by California under section 815.2(a) did not expand the remedies

19 _____
20 ³ As the Second circuit has explained:

21 [T]he scope of municipal liability under the federal cause of action
22 created by § 1983 is a federal question. Just as states cannot
23 extinguish municipality liability under § 1983 via state law, they
24 cannot enlarge it either. As the Supreme Court discussed in *Monell*,
25 Congress chose not to impose a federal law of *respondeat superior* . .
26 . . . A state may not alter that choice. If Vermont wishes to confer a
27 cause of action against municipalities that is more generous to
28 plaintiffs than § 1983, it is free to do so, but it may not tinker with the
boundaries of the cause of action created by federal statute. As the
claim at issue on this appeal arises under § 1983, the district court
correctly held that the Town could not, consistent with *Monell*, be
held liable under § 1983 Accordingly, the claim against the Town
was properly dismissed.

Coon v. Town of Springfield, Vt., 404 F.3d 683, 687 (2d Cir. 2005) (citations omitted).

Case No.: [5:21-cv-00092-EJD](#)

ORDER GRANTING MOT. TO DISMISS W/ LEAVE TO AMEND

1 available under federal law.” *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1505 (9th Cir.
2 1992). As explained by the Ninth Circuit, “Congress did not intend to impose vicarious liability
3 on municipalities under section 1983 and that, although states are free to impose vicarious
4 liability, section 1983 cannot be used as the means to impose such liability.” *Id.* (citing *Moor*, 411
5 U.S. at 710).

6 Accordingly, vicarious liability under Cal. Gov’t Code § 815.2 is not a cognizable claim
7 and the claim is therefore DISMISSED. Because this claim “could not possibly be cured by
8 allegation of other facts,” leave to amend is denied. *Cook, Perkiss and Liehe, Inc. v. N. Cal.*
9 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

10 **B. Claims Against Individual Defendants**

11 Next, Defendants argue that Plaintiff’s supervisory liability claim against Defendants
12 Roberts, Hatfield, and Garcia is untimely, and that relation back, the “Discovery Rule,” and
13 “Emergency Rule 9,” are unavailable to save Plaintiff’s claim. The Court considers each
14 argument in turn.

15 **1. Statute of Limitations⁴**

16 **a. Relation Back**

17 Defendants contend that supervisory liability is barred by the statute of limitations
18 (“SOL”). Because § 1983 does not provide a SOL, “federal courts borrow the forum state’s
19 limitations period for personal injury torts.” *Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d
20 1044, 1048 (9th Cir. 2008). “California has a two-year statute of limitations for personal injury
21 actions.” *Klein v. City of Beverly Hills*, 865 F.3d 1276, 1278 (9th Cir. 2017) (citing Cal. Code
22 Civ. P. § 335.1). Under federal law, the claim accrues from the date on which the SOL begins to
23 run, or “when the plaintiff knows or has reason to know of the injury which is the basis of the
24 action,” *Lukovsky*, 535 F.3d at 1048 (quoting *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926
25

26 ⁴ Defendants also argue for dismissal of the supervisory claims against Defendants Roberts,
27 Hatfield, and Garcia because they are entitled to qualified immunity. The Court need not address
28 this argument because Plaintiff’s supervisory claims are not timely.

1 (9th Cir. 2004)), and “not when the plaintiff suspects the legal wrong,” *id.* at 1049.

2 Plaintiff alleges multiple instances of constitutional violations on various dates: January 9,
3 10; February 1, 20, and 27; and March 20, 2019. FAC ¶¶ 62–63, 65, 68, 70. Taking the most
4 recent of these dates, the final date for Plaintiff to file her claims against Defendants was Mach 20,
5 2021. *See Bird v. Dep’t of Human Servs.*, 935 F.3d 738, 746 (9th Cir. 2019). Plaintiff initiated the
6 instant action on January 6, 2021, but Defendants Roberts, Hatfield, and Garcia were named for
7 the first time in the FAC filed on October 6, 2022. *See* FAC.

8 Defendants argue that Plaintiffs’ individual claims against Roberts, Hatfield, and Garcia
9 are barred by the 2-year SOL because they were not named until October 6, 2022—approximately
10 a year and seven months after the SOL deadline. Mot. at 14. Plaintiff contends that Roberts,
11 Hatfield, and Garcia were identified as “Does” in the original complaint, which was filed within
12 the 2-year SOL period.⁵ The parties dispute whether the Doe amendment was permitted under the
13 “relation back” doctrine.

14 Because the limitations period derives from state law, Federal Rule of Civil Procedure
15 15(c)(1) mandates that the court consider both federal and state law “and employ whichever
16 affords the ‘more permissive’ relation back standard.” *Butler v. Nat’l Cmty. Renaissance of*
17 *California*, 766 F.3d 1191, 1201 (9th Cir. 2014). Pursuant to Rule 15(c)(1), the amended
18 complaint will relate back to the date the original complaint was filed if the newly named
19 defendant “(i) received such notice of the action that it will not be prejudiced in defending on the
20 merits; and (ii) knew or should have known that the action would have been brought against it, but
21 for a mistake concerning the proper party’s identity.” Fed. R. Civ. P. 15(c)(1)(C). In addition,
22 Rule 4(m) mandates that a defendant is served within 90 days after the original complaint is filed,
23 and Roberts, Hatfield, and Garcia were not served until more than a year after the initial complaint
24 was filed. Fed. R. Civ. P. 4(m); *see O’Neal v. Johnson*, No. 2:14-CV-2374-KJN-PST-EMP, 2016
25 WL 776924, at *3 (E.D. Cal. Feb. 29, 2016). Accordingly, the FAC does not relate back to the

26 _____
27 ⁵ Plaintiff’s original complaint listed “DOES 1-100” as defendants “legally responsible in some
28 manner for the events and happenings” alleged. Compl. ¶¶ 14–16.

1 original complaint under federal law.

2 Under California law, an amended complaint that adds new defendants does not relate back
3 to the date of original filing. *Woo v. Superior Ct.*, 75 Cal. App. 4th 169, 176 (Cal. Ct. App. 1999).
4 However, “where an amendment does not add a ‘new’ defendant, but simply corrects a misnomer
5 by which an ‘old’ defendant was sued, case law recognizes an exception to the general rule of no
6 relation back.”⁶ *Hawkins v. Pac. Coast Bldg. Prods., Inc.*, 124 Cal. App. 4th 1497, 1503 (Cal. Ct.
7 App. 2004) (citations omitted) (collecting cases). California Code of Civil Procedure Section 474
8 provides an exception, permitting relation back where the original complaint is stated against a
9 Doe defendant, and where plaintiff was “actually ignorant” of the true name of the doe defendant
10 at the time of filing. *Barrows v. Am. Motors Corp.*, 144 Cal. App. 3d 1, 7 (Cal. Ct. App. 1983);
11 *see Woo*, 75 Cal. App. 4th at 177 (describing the standard as “genuine ignorance”). “So long as
12 the amended pleading relates to the same general set of facts as the original complaint, a defendant
13 sued by fictitious name and later brought in by amendment substituting his true name is
14 considered a party to the action from its commencement for purposes of the statute of limitations.”
15 *Barrows*, 144 Cal. App. 3d at 7.

16 Defendants contend that this exception is not applicable here because Plaintiff knew about
17 Roberts, Hatfield, and Garcia at the time of initiating this action since she specifically identified
18 them in the original complaint and, therefore, she was not “actually ignorant” of their identities.
19 *See Compl.*, ECF No. 1 ¶¶ 22–23, 100–03. According to Plaintiff, while she was aware of
20 Defendants’ names, she was not aware of the facts giving rise to these individuals’ liability.
21 *Opp’n* at 14. For the reasons explained below, the Court is not persuaded by Plaintiff’s argument.

22 _____
23 ⁶ *Hawkins* provides additional clarity on this point:

24 Whether a plaintiff may amend the complaint to change a party’s
25 description or characterization after the statute of limitations has run
26 depends on whether the misdescription or mischaracterization is
27 merely a misnomer or defect in the description or characterization, or
28 whether it is a substitution or entire change of parties. In the former
case an amendment will be allowed; in the latter, it will not be
allowed.

27 *Hawkins*, 124 Cal. App. 4th at 1504 (quotations and citations omitted).

28 Case No.: [5:21-cv-00092-EJD](#)
ORDER GRANTING MOT. TO DISMISS W/ LEAVE TO AMEND

1 Plaintiff’s original complaint describes the Does as “unidentified officers, agents,
2 representatives, or employees of the City who either (a) had final policy-making authority
3 regarding . . . the hiring, training, and discipline of Code Enforcement Inspectors for the City, the
4 investigation of City employee misconduct and complaints regarding City employees, Compl. ¶
5 14, and whose “true names, capacities or involvement of the Defendants named herein as DOES 1
6 through 100, are unknown to Plaintiff,” *id.* ¶ 15. However, based on the allegations in the original
7 complaint, Plaintiff knew of Defendants’ names and their supervisory roles within the Code
8 Enforcement Division at the time of initiating the action.

9 The original complaint identifies Roberts, Hatfield, and Garcia as Gerry’s supervisors. It
10 specifically alleged that:

11 At all times relevant, Hatfield and Roberts had supervisory authority
12 and responsibility over Gerry, were actually aware of and/or
13 deliberately indifferent to Gerry’s pattern, custom, practice, and
14 policy of depriving civil rights afforded by the U.S. and California
15 Constitutions, and had the authority to discipline and terminate Gerry,
16 and to otherwise prevent Gerry from committing constitutional
17 violations against Plaintiff while acting under color of law.

18 Compl. ¶ 23. Plaintiff complains of: the lack of “supervisory quality control of Gerry’s outreach
19 visits,” noting that “Gerry’s unit supervisor, Joseph Hatfield, attended two of Gerry’s enforcement
20 actions;” “Supervisor Hatfield did not conduct a single follow-up outreach visit to a spa formerly
21 visited by Gerry to check on his employee’s conduct and professionalism in dealing with the
22 public;” and “Code Enforcement Division records show that Rachel Roberts, Gerry’s other
23 immediate supervisor, never visited a massage parlor in which Gerry conducted enforcement
24 operations during the same nine-year span to check on Gerry’s work.” Compl. ¶ 97. Based on
25 these allegations the Court cannot conclude that Plaintiff was “genuinely ignorant” of the facts
26 giving rise to the supervisory liability claims. *See, e.g., Hardesty v. Sacramento Metro. Air*
27 *Quality Mgmt. Dist.*, 935 F. Supp. 2d 968, 977, 981 (E.D. Cal. 2013) (declining to find relation
28 back where the allegations in the newly amended complaint show that plaintiffs were aware of
defendants and the inspection report that identified the alleged violations); *Ben-Dov v. Sragow*,
No. 17-CV-00122-DFM, 2017 WL 6883917, at *2 (C.D. Cal. Nov. 3, 2017) (finding that

1 “Plaintiff’s own allegations in her original complaint demonstrate that she was not ‘genuinely
2 ignorant’ of the identity of Defendants”), *aff’d*, 735 F. App’x 455 (9th Cir. 2018).

3 Kearney’s declaration filed in support of Plaintiff’s opposition admits that the original
4 complaint included information about Defendants’ supervision, the anonymous letter, and the
5 whistleblower complaint, but Kearney explains that counsel was “unaware of the extent” of
6 Defendants’ supervisory powers and investigatory failings with respect to Gerry. ECF No. 78, Ex.
7 1 (“Kearney Decl.”) ¶¶ 14–15. Based on Plaintiff’s knowledge of Defendants’ identities and the
8 allegations of their supervisory role contained in the original complaint, the Court is not convinced
9 of Plaintiff’s ignorance. Rather, Plaintiff asserted the supervisory liability claims only after the
10 Court brought it to Plaintiff’s attention. First Order at 17 (noting that Plaintiff “has not asserted a
11 claim against Roberts, Hatfield, or any other supervisor in their individual capacity for supervisory
12 liability.”). Many federal courts have recognized that “plaintiff’s deliberate choice not to sue a
13 party involved in the events at issue in the complaint is not a mistake.” *Hardesty*, 935 F. Supp. 2d
14 at 981 (collecting cases).

15 **b. “Discovery Rule” and “Emergency Rule 9”**

16 Plaintiff also argues that the “Discovery Rule” and “Emergency Rule 9” toll her claims
17 against the individual Defendants. First, the Discovery rule does not save Plaintiff’s claims. “The
18 discovery rule requires the plaintiff to be diligent in discovering the critical facts of the case.”
19 *Bibeau v. Pac. Nw. Research Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999). For the reasons
20 already explained, Plaintiff had sufficient information to assert the supervisory liability claims at
21 the time of filing the original complaint. Second, “Emergency Rule 9 does not extend the statute
22 of limitations on federal claims.” *Lansdown v. Bayview Loan Servicing, LLC*, No. 22-CV-00763-
23 TSH, 2022 WL 4227245, at *5 (N.D. Cal. Sept. 13, 2022) (collecting cases).

24 **c. Equitable Tolling Doctrine**

25 Finally, Plaintiff asks the Court to equitably toll her claims. Along with the SOL period, a
26 district court may borrow the state’s equitable tolling rules. *Daviton v. Columbia/HCA Healthcare*
27 *Corp.*, 241 F.3d 1131 (9th Cir. 2001) (en banc). Equitable tolling under California law essentially

28 Case No.: [5:21-cv-00092-EJD](#)

ORDER GRANTING MOT. TO DISMISS W/ LEAVE TO AMEND

1 “suspend[s] or extend[s] a statute of limitations as necessary to ensure fundamental practicality
2 and fairness.” *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir. 2004) (quotation and citation omitted).
3 The “three core elements” that must be shown to equitably toll a claim under California law are:
4 “(1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in
5 gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct
6 by the plaintiff in filing the second claim.” *Collier v. City of Pasadena*, 142 Cal.App.3d 917, 924
7 (1983).

8 The first prong of the test is satisfied. Timely notice “means that the first claim must have
9 been filed within the statutory period . . . [and] the filing of the first claim must alert the
10 defendant in the second claim of the need to begin investigating the facts which form the basis for
11 the second claim.” *Collier*, 142 Cal. App. 3d at 924. Plaintiff’s originally filed claim for *Monell*
12 municipal liability was timely, and it is similarly predicated on a failure to supervise theory with
13 respect to Roberts, Hatfield, and Garcia’s inaction resulting in Plaintiff’s constitutional injury.
14 Because the theory underlying the *Monell* liability claim is “based on essentially the same set of
15 facts” as Plaintiff’s untimely supervisory liability claim, the Court agrees that the *Monell* liability
16 claim was sufficient to alert Roberts, Hatfield, and Garcia of potential liability under supervisory
17 liability. *Collier*, 142 Cal. App. 3d at 925; *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d
18 1131, 1141 (9th Cir. 2001) (“[O]nce defendant is aware of the wrong, the purpose of the statute of
19 limitations has been served.”).

20 The second prong—prejudice—follows from the notice requirement and asks “whether
21 notice of the first claim affords the defendant an opportunity to identify the sources of evidence
22 which might be needed to defend against the second claim.” *Collier*, 142 Cal. App. 3d at 925.
23 Here, Defendants had sufficient notice and time to gather evidence in their defense. There is
24 substantial overlap between the evidence needed to defend the *Monell* liability theory for failure to
25 supervise and/or a practice of unsupervised solo code enforcement and the untimely supervisory
26 claim against Roberts, Hatfield, and Garcia for failure to supervise.

27 Third, Plaintiff exercised “good faith and reasonable conduct” in filing the second claim.

28 Case No.: [5:21-cv-00092-EJD](#)
ORDER GRANTING MOT. TO DISMISS W/ LEAVE TO AMEND

1 *Collier*, 142 Cal. App. 3d at 924. While “[t]he third prerequisite of good faith and reasonable
 2 conduct on the part of the plaintiff is less clearly defined in the cases,” there is nothing in the
 3 record to indicate that Plaintiff’s conduct was unreasonable or “deliberately misled” Defendants.
 4 *Id.* at 926. Plaintiff notes that this case was stayed seven months after it was initiated while
 5 Gerry’s criminal action was pending, which impacted Plaintiff’s ability to investigate the claims,
 6 and Plaintiff filed the FAC the same day that the Court lifted the stay. Opp’n at 11; *see* ECF Nos.
 7 45, 60, 61. The Court is also guided by the policies and the purpose underlining the doctrine
 8 which is to prevent “the harsh impact of technical rules which might otherwise prevent a good
 9 faith litigant from having a day in court.” *Davison*, 241 F.3d at 1137.

10 Accordingly, Plaintiff’s supervisory liability claims against Defendants Roberts, Hatfield,
 11 and Garcia are equitably tolled.

12 1. Supervisory Liability

13 Plaintiff’s first cause of action asserts that individual Defendants Roberts, Hatfield, and
 14 Garcia are liable to Plaintiff for her injuries based on a theory of supervisory liability. FAC ¶ 90.
 15 Defendants move to dismiss the supervisory claim against the individual Defendants as
 16 insufficient to state a claim against them and raise the defense of qualified immunity.

17 Although a supervisor may not be held liable on a theory of respondeat superior under §
 18 1983, a supervisor may be held individually liable “if there exists either (1) his or her personal
 19 involvement in the constitutional deprivation, or (2) a sufficient causal connection between the
 20 supervisor’s wrongful conduct and the constitutional deprivation.”⁷ *Keates v. Koile*, 883 F.3d
 21 1228, 1242–43 (9th Cir. 2018) (internal quotations and citation omitted). “The requisite causal
 22 connection can be established . . . by setting in motion a series of acts by others, or by knowingly
 23 refusing to terminate a series of acts by others, which the supervisor knew or reasonably should
 24 have known would cause others to inflict a constitutional injury.” *Starr v. Baca*, 652 F.3d 1202,
 25 1207–08 (9th Cir. 2011) (quotations and citations omitted) (cleaned up).

26 _____
 27 ⁷ Plaintiff does not allege that Hatfield, Roberts, or Garcia “participated in or directed the
 28 violations.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

1 A supervisor need not be physically present when the constitutional violation occurs.
2 *Starr*, 652 F.3d at 1205. “Rather, the supervisor’s participation could include his ‘own culpable
3 action or inaction in the training, supervision, or control of his subordinates,’ ‘his acquiescence in
4 the constitutional deprivations of which the complaint is made,’ or ‘conduct that showed a reckless
5 or callous indifference to the rights of others.’” *Id.* at 1205–06 (quoting *Larez v. City of Los*
6 *Angeles*, 946 F.2d 630 (9th Cir. 1991). After *Iqbal*, liability premised on supervisors’ “mere
7 knowledge and acquiescence” in a subordinates’ misconduct is not enough. *Ashcroft v. Iqbal*, 556
8 U.S. 662, 677 (2009). A plaintiff may state a claim against a supervisor based upon a supervisor’s
9 “acquiescence or culpable indifference” only where deliberate indifference is shown. *Starr*, 652
10 F.3d at 1207.

11 The FAC sufficiently alleges that Defendants Hatfield, Roberts, and Garcia exercised
12 supervisory authority over Gerry. For example, Hatfield and Roberts supervisory responsibilities
13 included:

14 [T]he power to assign him to a specific team or task, define his job
15 responsibilities, establish his workplace standards and rules of
16 conduct, supervise his field work, review and verify his work, audit
17 his performance, investigate any concerns or complaints about him,
18 assign him to desk duty, discipline him, suspend him and terminate
19 him for cause.

20 *Id.* ¶ 28. Garcia, who was the Chief of the SJPD during the time that Gerry assisted with the SJPD
21 Vice Unit’s enforcement of the Massage Ordinance, “ensur[ed] proper training, supervision,
22 auditing, investigation, and discipline of Gerry when he was supporting and partnering with the
23 SJPD’s Vice Unit.” *Id.* ¶ 22.

24 Plaintiff’s theory of liability is that Hatfield, Roberts, and Garcia acted with “deliberate
25 indifference based upon . . . [their] knowledge of and acquiescence in unconstitutional conduct by
26 his or her subordinates” by failing to act, *i.e.*, failing to supervise or investigate.⁸ *Starr*, 652 F.3d
27 at 1207. The FAC alleges that Defendants had received credible complaints that Gerry was

28 ⁸ To the extent that Plaintiff asserts that Defendants failed to investigate by not conducting a
background check on Gerry, Plaintiff’s allegations are substantially the same as those addressed in
the First Order and therefore fail for the same reasons. *See* First Order at 14–15.

1 engaging in sexual misconduct during his enforcement visits but failed to properly investigate or
 2 act on this information by removing Gerry from the field and assigning him to “desk duty” until
 3 investigations were complete. Opp’n at 15; FAC ¶¶ 44–48. For example, Plaintiff alleges that
 4 Roberts received the anonymous email which contained a photo of Gerry in an intimate embrace
 5 with an Asian woman who was letter identified as an employee of a massage business that Gerry
 6 had visited for code enforcement. FAC ¶¶ 43, 44. The letter accused Gerry of having a sexual
 7 relationship with the woman pictured. *Id.* ¶ 43. Plaintiff also alleges that based on “information
 8 and belief” Roberts, Hatfield, and Garcia were aware of the whistleblower email received by the
 9 Code Enforcement Division accusing Gerry bribing and sexually harassing and/or assaulting
 10 massage business owners—and specifically “people in the Asian community.” *Id.* ¶ 47–48. This
 11 complaint was allegedly not investigated. *Id.* ¶ 48.

12 Defendant challenges whether the anonymous letter would have informed Roberts that
 13 Gerry was violating Plaintiff’s constitutional rights because the letter only alludes to an improper
 14 intimate relationship with a massage establishment owner. Mot. at 23. Whether the letter
 15 suggests that Gerry would sexually assault and bribe massage business owners or not—which the
 16 Court found that it does not in the previous Order—because Roberts gave the letter to the SJPD to
 17 conduct a criminal investigation,⁹ FAC ¶ 46, the Court cannot say that Roberts’s actions show
 18 “acquiescence or culpable indifference” to Plaintiff’s constitutional rights. *See* First Order at 19.
 19 Plaintiff suggests that, after turning over the letter to the SJPD, Roberts failed to take immediate
 20 steps to ensure that Gerry was not abusing his authority, such as conducting an internal
 21 investigation, pulling Gerry from the field, accompanying Gerry on subsequent enforcement visits,
 22 or following up with massage establishments that Gerry had visited, despite Roberts’s knowledge
 23 of the “nexus between human trafficking and the massage industry.” FAC ¶¶ 44–46. FAC ¶¶ 45–
 24

25 ⁹ Plaintiff alleges that Roberts turned over the letter to the SJPD for an investigation into the
 26 anonymous author, not Gerry, and that the SJPD “took no steps to investigate the allegations
 27 against Gerry.” FAC ¶ 46. Roberts is not responsible for the subsequent actions of the SJPD, and
 it was reasonable for Roberts to believe that the police conducted a proper investigation into Gerry
 after she provided the letter.

1 46. Even if Roberts acted carelessly in allowing Gerry to continue code enforcement visits,
2 “negligence does not suffice for due process liability.” *OSU Student All. v. Ray*, 699 F.3d 1053,
3 1078 (9th Cir. 2012); *see Daniels v. Williams*, 474 U.S. 327, 328 (1986) (“The Due Process
4 Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or
5 injury to life, liberty, or property.”).

6 Plaintiff’s allegations with respect to Hatfield, Roberts, and Garcia’s knowledge of the
7 whistleblower complaint and failure to act on it are also insufficiently pled. Plaintiff alleges that
8 “on information and belief” Roberts, Hatfield, and Garcia were aware of the whistleblower
9 complaint and “took no steps to prevent Gerry from harming other women working in the massage
10 industry” but Plaintiff does not provide a factual basis for this belief. FAC ¶¶ 48, 53. For
11 example, the FAC alleges that the whistleblower complaint was submitted to the Office of
12 Employee Relations, *id.* ¶ 48, but Plaintiff does not explain whether supervisors in the Code
13 Enforcement Division received notice of the whistleblower complaint, or whether the SJPD was
14 informed of the complaint such that Chief Garcia would be aware of the accusations against Gerry.
15 As pled, Plaintiffs do not indicate why Roberts, Hatfield, and Garcia would have known about the
16 whistleblower complaint and thus whether they acquiesced or acted with culpable indifference.
17 *See Starr*, 652 F.3d at 1208.

18 Accordingly, Plaintiff has not sufficiently alleged supervisory liability against Defendants
19 Hatfield, Roberts, and Garcia.¹⁰

20 C. Leave to Amend

21 Plaintiff requests leave to amend any pleading deficiencies. “Requests for leave to amend
22 should be granted with ‘extreme liberality.’” *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567,
23 574 (9th Cir. 2020). A court should not grant leave to amend if “it determines that the pleading
24 could not possibly be cured by allegation of other facts.” *Cook, Perkiss and Liehe*, 911 F.2d at
25 247. For the reasons already explained, the Court finds that amendment of the vicarious liability

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27 ¹⁰ In light of this conclusion, the Court does not reach Defendants’ qualified immunity argument.

United States District Court
Northern District of California

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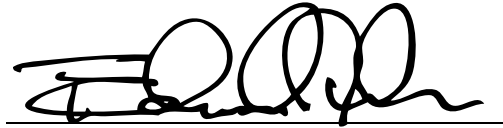
claim would be futile. However, the Court cannot say that Plaintiff is unable to allege facts establishing the existence of *Monell* or supervisory liability at this time, and therefore Plaintiff is permitted leave to file a second amended complaint.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the motion to dismiss with limited leave to amend as explained in this Order. Should Plaintiffs choose to file an amended complaint, they must do so by **December 21, 2023**. Plaintiffs may not add new claims or parties without leave of the Court or stipulation by the parties pursuant to Federal Rule of Civil Procedure 15.

IT IS SO ORDERED.

Dated: November 30, 2023



EDWARD J. DAVILA
United States District Judge