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KIARA ROBLES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KIARA ROBLES, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, BERKELEY, et al. Defendants.	Case No.: 4:17-cv-04864 **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT** Date: November 7, 2017 Time: 2:30 p.m. Crtrm: TBD

Plaintiff Kiara Robles ("Plaintiff"), through her counsel Mr. Larry Klayman ("Mr. Klayman") hereby submit the following in opposition to City of Berkeley's ("BPD") Motion to Dismiss.

MEMORANDUM OF LAW

I. INTRODUCTION

This Complaint is based on the Defendants' steadfast refusal to permit speech and other expression that they do not agree with. BPD, on orders from the Regents and others, have subjected UC Berkeley students and invitees who do not subscribe to the radical, left wing philosophies sanctioned by Defendants to severe violence and bodily harm for merely expressing a differing viewpoint and sexual preference, in clear contravention of their rights under the First Amendment to the U.S. Constitution. Plaintiff Kiara Robles ("Robles") just happened to be one of those individuals.

On February 1, 2017, Plaintiff Robles attended a planned speech by Milo Yiannopoulos ("Mr. Yiannopoulos"), a media personality and political commentator, hosted on the UC Berkeley campus. On the day of Mr. Yiannopoulos' speech, however, over 1,500 "protestors" gathered at UC Berkeley's Sproul Plaza and the "protestors" erupted into violence just fifteen minutes after Plaintiff's arrival onto the UC Berkeley campus. The violence was primarily orchestrated by ANTIFA and its members, in an effort to disrupt, if not kill, the event. Several people, including Plaintiff, were intentionally and violently attacked by both masked and unmasked defendant assailants, including Ian Dabney Miller and Raha Mirabdal, and the UC Berkeley campus incurred over $100,000 worth of damage. Plaintiff was attacked with extremely painful pepper spray and bear mace by masked assailants amongst the "protestors" because she chose to exercise her right to freedom of speech and show support for Mr. Yiannopoulos.

Shockingly, while Plaintiff and others were being violently attacked and assaulted by ANTIFA members, nearly 100 campus police and BPD members waited in the Student Union building, within eyesight of the violence happening outside on the alleged direction of the Defendants. They did nothing except watch the chaos and violence unfold outside.

In furtherance of this patent bias against those who do not proscribe to their own ultra-leftist, radical beliefs, the Regents now have directly caused the serious injuries suffered by Plaintiff and others at the Mr. Yiannopoulos event by directing and ordering the conscious withholding of police protection from BPD with the actual knowledge, if not intent, that they would

be severely injured by ANTIFA rioters. This behavior is not only unconstitutional, as it effectively cuts off First Amendment rights, but is also extremely dangerous. While fortunately no one was killed by ANTIFA rioters this time, it is only a matter of time before someone is, given that their assaults are carried out with deadly weapons, such as flagpoles. It is shocking to think that the Defendants, including BPD, who are entrusted with administering to the safety of UC Berkeley students and invitees, would think so little of those that happen to hold different beliefs that they would dare risk their lives. This callous, tortious, and discriminatory behavior must be put to an end, and those who have been injured, such as Plaintiff, must be given legal recourse.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To defeat a motion to dismiss under Rule 12(b)(6), a claim must contain "enough factual matter (taken as true) to suggest that an agreement was made," explaining that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading state; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The *Twombly* Court also explained, more generally, that ". . . a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," yet "must be enough to raise a right to relief above the speculative level" and give the defendant fair notice of what the claim is and the grounds upon which it rests. *Id*. at 555. In other words, Plaintiffs here need only allege "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] the[] claims[] across the line from conceivable to plausible." *Id*. at 570.

Subsequently, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the U.S. Supreme Court elaborated. There, the Court held that a pretrial detainee alleging various unconstitutional actions in connection with his confinement failed to plead sufficient facts to state a claim of unlawful discrimination. The Court stated that the claim for relief must be merely "plausible on its face," *i.e.*, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949. In this regard, determining

whether a complaint states a plausible claim for relief is necessarily "a context-specific task." *Id*. at 1950. Therefore, if a complaint alleges enough facts to state a claim for relief that is merely plausible on its face, such as here, a complaint may not be dismissed for failing to allege additional facts that the plaintiff would need to prevail at trial. *Twombly*, 550 U.S. at 570; *see also Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (plaintiff need not allege specific facts, the facts alleged must be accepted as true, and the facts need only give defendant "fair notice of what the *** claim is and the grounds upon which it rests" (quoting *Twombly*, 550 U.S. at 555). grounds upon which it rests" (quoting *Twombly*, 550 U.S. at 555).

Where the requirements of Rule 8(a) are satisfied, even "claims lacking merit may be dealt with through summary judgment." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). In this regard, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at. 556. Indeed, "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Cotrell, Ltd. V. Biotrol Int'l, Inc*., 191 F.3d 1248, 1251 (10th Cir. 1999).

III. THE LAW

a. § 1983 Claims

Defendant BPD erroneously contends that Plaintiff's first and second causes of action pursuant to 42 U.S.C § 1983 must be dismissed pursuant to *Monell v. Dept. of Social Servs. of City of New York*, 436 U.S. 658 (1978). The Court in *Monell* confirmed that municipalities, such as the City of Berkeley (and therefore BPD) are subject to suit under section 1983.

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. *Id*. at 694.

Here, pursuant to *Monell*, it is evident that the injuries sustained by Plaintiff were not "inflicted solely" by the employees or agents of BPD. As set forth in the Complaint:

> **UCPD and BPD, at the direction of the Regents**, chose to withhold their aid to attendees of the Milo Yiannopolous event—in concert with each and every named Defendant, jointly and severally—including Plaintiff Robles, despite the fact that they could see attendees being viciously attacked by "protestors." During the Milo

> Yiannopoulos riots, UC Berkeley police and the Berkeley Police Department did not to intervene while pro-President Trump/pro- Milo Yiannopolous supporters were being violently attacked. Comp. ¶ 25 (emphasis added).

Thus, as alleged in the Complaint, the actions of BPD were not solely within the discretion of the individual officers, therefore properly subjecting it to liability under *Monell*. BPD's argument therefore turns on the "policy or custom" requirement set forth in *Monell*.

Importantly, in *Monell*, there is no requirement that the "policy or custom" giving rise to section 1983 liability be formally written or publicized. It may simply be set forth by "those whose edicts or acts may fairly be said to represent official policy." *Id*. As set forth in the Complaint, Defendants' animus against those who do not subscribe to their ultra-leftist, radical philosophies is widely known and implemented. *See* Comp. ¶¶ 27-42. The pattern and practice of committing these acts unquestionably reflects the "official policy" required to give rise to section 1983 liability under *Monell*. [1]

b. Exhaustion of Administrative Remedies Would be Futile

California's courts have held, generally, "[w]hile it is true that the rule requiring exhaustion of internal administrative remedies does not apply where an administrative remedy would be futile." *Williams v. Hous. Auth. of L.A.*, 121 Cal. App. 4th 708, 736-37 (2004). "The failure to pursue administrative remedies does not bar judicial relief where the administrative remedy is inadequate or unavailable, or where it would be futile to pursue the remedy. In order to invoke the futility exception, a plaintiff must show 'that the [agency] has declared what its ruling will be on a particular case.' A plaintiff need not pursue administrative remedies where the agency's decision is certain to be adverse." *Howard v. Cty. of San Diego*, 184 Cal. App. 4th 1422, 1430 (2010) (internal citations omitted).

As set forth in the Complaint, BPD, violating their oath as law enforcement, willfully stood down and watched while Plaintiff and others be violently assaulted by ANTIFA and other "protestors" while rendering no assistance, on the direction of the Regents of the University of

[1] In the event that this Court finds that Plaintiff has not pled with the requisite specificity, Plaintiff respectfully requests leave to amend to include further instances where BPD's "official policy" are reflected

California and others. A favorable decision would force BPD to admit that they willfully ignored their sworn duties and withheld their services based on political and other biases. Indeed, as BPD has chosen to respond substantively to Plaintiff's Complaint, such an admission is certainly not going to occur. As such, seeking administrative relief would serve no end other than to needlessly delay Plaintiff's claims and prevent her from obtaining relief for her significant physical injuries and the deprivation of her constitutional rights.[2]

c. Injunctive Relief

Injunctive relief is proper so long as there exists a cause of action upon which injunctive relief may be granted. *See Rockridge Tr. v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1167 (N.D. Cal. 2013). Defendant BPD does not contend that there does not exist a cause of action upon which injunctive relief may be granted as a remedy, only that injunctive relief as a separate claim is improper. It remains that injunctive relief here is viable based on the other causes of action alleged against BPD, and because Plaintiff prayed for injunctive relief in her Complaint.

IV. CONCLUSION

It is important to distinguish this matter from other cases involving failure to provide police protection. This is not a case where police officers simply made a tactical error by deploying officers to the wrong location or by not deploying enough officers to appropriately oversee an event. This is a case of willful refusal to provide police protection, even though they were on the scene, and where BPD and UCPD officers simply stood inside the Student Union building and watched Plaintiff and others get violently assaulted by ANTIFA rioters with deadly weapons. This is an enormous difference.

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[2] BPD also makes a brief argument that Govt. Code § 845 bars Plaintiff's claims. However, as set forth in Plaintiff's Opposition to the Regents' Motion to Dismiss, the Complaint sets clearly sets forth that the "failure to provide police services" involved here "do not involve the kind of 'budgetary and political decisions which are involved in hiring and deploying a police force." *Zuniga v. Hous. Auth.*, 41 Cal. App. 4th 82, 100 (1995) (internal quotations omitted). Indeed, as pled in the Complaint, the police officers were actually physically present at the scene, Comp. ¶¶ 53-54, but on order and direction from the Regents, stood there and simply watched individuals, including Plaintiff, get violently assaulted and did nothing. Thus, the fundamental purpose of Section 845, to "protect the budgetary and political decisions which are involved in hiring and deploying a police force" is simply not at play here. *Lopez v. S. Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 792 (1985).

To stand idly by while another individual is violently assaulted is bad enough. However, when the spectator happens to me a member of law enforcement, subject to a sworn duty to serve and protect, there must be some recourse. The animus against those who do not subscribe to Defendants' ultra-leftist, radical beliefs cannot be allowed to serve as a motivating factor to allow individuals who are simply exercising their First Amendment rights to be violently and brutally assaulted. It is therefore incumbent upon this Court to step in and protect the rights of the minority, who pursuant to the Constitution of the United States, still enjoy the same rights and protections as the majority. This case must now proceed to discovery, and in the unlikely event Defendants can support their non-meritorious arguments then, they can move for summary judgment later in this case. However, to now not even allow Plaintiff, Kiara Robles, a proud conservative gay woman, her day in Court with all attendant due process rights, would be a manifest injustice. Plaintiff is confident that this Court will not take this route based on her well-pled complaint and the integrity of the judicial process.

DATED: October 20, 2017

Respectfully submitted,

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