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OFFICER D. McCLAIN, OFFICER A. SAVAGE,
7 OFFICER D. SACCO, and OFFICER
C. HERNANDEZ
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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 SHANNON ROBINSON, DANTE HARRELL,) Case No. 11cv0876 AJB (WVG)
12 Plaintiffs,)
13 v.) **DEFENDANTS’ MOTION IN LIMINE**
14 CITY OF SAN DIEGO, WILLIAM) **TO EXCLUDE ANY REFERENCE TO**
15 LANSDOWNE, ARIEL SAVAGE, an) **INTERNAL AFFAIRS**
16 individual, DANIEL MCLAIN,) **INVESTIGATIONS**
17 an individual, DANIEL SACCO, an) [2 OF 5]
18 individual, CARLOS HERNANDEZ, an) Judge: Hon. Anthony J. Battaglia
19 individual, MATTHEW DOBBS, an) Courtroom: 3B (Schwartz)
20 individual, DORINDA DODD, an individual,) Trial: September 16, 2013
21 and DOES 1-50, inclusive.)
22 Defendants.)
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23 Defendants CITY OF SAN DIEGO and SAN DIEGO POLICE OFFICERS SAVAGE,
24 McCLAIN, SACCO, and HERNANDEZ move the Court for an order excluding any reference,
25 testimony, evidence or argument regarding investigation files of the San Diego Police
26 Department’s Internal Affairs (“IA”) investigation involving any of the Defendant police officers.

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1 The incident underlying the instant matter occurred on March 30, 2010. On February 28,
2 2013, the Court ordered Defendants to produce redacted pages of the IA file generated as a result
3 of the incident. (Doc. No. 65.) As discussed further below, those documents contain
4 inadmissible hearsay statements. Furthermore, Plaintiffs will be able to elicit testimony from the
5 Plaintiffs and the officers regarding the events of the incident. As such, the IA files are neither
6 admissible nor necessary for the Plaintiffs' case.

7 With respect to other IA files, one prior matter involved two of the defendants (SAVAGE
8 and McCLAIN) four years prior to the incident (2006) where the complainant alleged the officers
9 arrested him without cause when the complainant had made criminal threats. The complainant
10 also alleged that the officers had no right to take his 12 firearms. The subsequent IA investigation
11 files related thereto are not relevant to the instant matter.

12 One prior matter involved a different defendant (HERNANDEZ) a month before the
13 incident where the complainant alleged that the officer's body came in contact with the
14 complainant's and that the complainant's wrist was twisted. The subsequent IA files related
15 thereto are not relevant to the instant matter.

16 All other IA matters for the officers took place *after* the incident in question in the instant
17 case, as follows:

- 18 • McClain – June 29, 2011 (complainant alleged handcuffs were too tight)
- 19 • Savage – June 23, 2011 (complainant alleged unlawful arrest and further alleged
20 that while transporting the complainant to the sobering center, the officer
21 accelerated and braked abruptly and used inappropriate language)

22 Included with the investigative reports are irrelevant interviews, conclusions, and opinions
23 of police officers, as well as civilian witnesses. Defendant expects that Plaintiff will attempt to
24 refer to the Internal Affairs investigation files and reports including findings, conclusions, and
25 interviews of witnesses pertaining to the matters outlined above. Defendant objects to the
26 introduction of this evidence pursuant to Rules 401, 402, 403, 801 and 802 of the Federal Rules
27 of Evidence.

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1 During the course of this litigation, the only IA file provided to Plaintiffs, pursuant to
2 Court Order (Doc No. 44) was the file generated as a result of the underlying incident in the
3 above-captioned matter. In that Order, the Court indicated that “Defendants shall redact all
4 conclusions and impressions, and personal and confidential information from the documents.”
5 Doc. No. 44. Subsequently, following a motion by Plaintiffs, the Court subsequently ordered
6 some of the redacted documents to be produced. Doc. No. 65.

7 **I**

8 **IRRELEVANT EVIDENCE IS INADMISSIBLE**

9 Federal Rules of Evidence, Rule 401, provides as follows:

10 “Relevant evidence” means evidence having any tendency to make
11 the existence of any fact that is of consequence to the determination
12 of the action more probable or less probable than it would be
13 without the evidence.

14 Evidence need not prove anything but only must have tendency to prove fact in issue. *U.S.*
15 *v. Boulware*, 384 F.3d 794, 805 (9th Cir. 2004). A relevant matter is “any matter that bears on, or
16 that reasonably could lead to other matters that could bear on, any issue that is or may be in the
17 case.” *Soto v. City of Concord*, 162 F.R.D. 603, 617 (N.D. Cal. 1995) (quoting *Oppenheimer*
18 *Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).)

19 Federal Rules of Evidence Rule 402 provides, in relevant part, that “[E]vidence which is
20 not relevant is not admissible.” Fed. R. Evid. 402.

21 At trial, Plaintiffs will assert claims for unlawful detention, retaliation, excessive force,
22 arrest without probable cause, false imprisonment, assault, battery, intentional infliction of
23 emotional distress, negligence, violation of California Civil Code section 52.1, and permanent
24 injunctive relief against defendants. A 2006 arrest where the complainant made criminal threats
25 and had 12 firearms, and a 2010 event where a complainant complained about the officer’s body
26 coming in contact with the complainant are not relevant to the instant matter. Moreover, events
27 that occurred *after* the event in question have no bearing on Plaintiff’s claims in the matter at
28 hand. Thus, any referenced to these matters and IA investigation files should not be admissible in
the instant case.

II**THE INTERNAL AFFAIRS INVESTIGATION FILES ARE INADMISSIBLE HEARSAY**

An out-of-court statement is hearsay and inadmissible when the inference the proponent wants the trier of fact to draw from the statement depends on its truth. *Mahone v. Lehman*, 347 F.3d 1170, 1173 (9th Cir. 2003). Witness statements contained in the report are not admissible unless the witness had a duty to report accurately any information relevant to such report. *U.S. v. Bortnovsky*, 879 F.2d 30, 34 (2nd Cir. 1989). It is well established that entries in a police report which result from the officer's own observations and knowledge may be admitted but that statements made by third persons under no business duty to report may not. *U.S. v. Pazsint*, 703 F.3d 420, 424 (9th Cir. 1983); *United States v. Sims*, 617 F.2d 1371, 1377 (9th Cir. 1980); *United States v. Smith*, 521 F.2d 957, 964 (D.C.Cir. 1975); *Colvin v. United States*, 479 F.2d 998, 1003 (9th Cir. 1973); *Vanderpool v. A-P-A Transport Corp.*, 1992 WL 158418 (Ed. PA). The Court has discretion to exclude evidence that is cumulative of evidence already in the record. See *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996) (overruled on other grounds in *United States v. W.R. Grace*, 526 F.3d 499, 503 (9th Cir. 2008)) – exclusion of expert testimony on inadequacy of eyewitness identification was not an abuse of discretion where same information was conveyed through cross-examination and jury instruction.

Defendants object to the use of the statements pursuant to Rules 801 and 802 of the Federal Rules of Evidence. With limited exceptions, a hearsay statement is not admissible evidence. Fed. R. Evid. 802. Rule 801(c) of the Federal Rules of Evidence defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. In the absence of a procedural rule or statute, hearsay is inadmissible unless it is defined as non-hearsay or falls within a hearsay exception. *Orr v. Bank of America*, 285 F.3d 764, 778 (9th Cir. 2002).

The statements made to the Internal Affairs unit during its investigation of the incidents set out above are clearly out-of-court statements precluded from introduction into evidence by Rule 801 of the Federal Rules of Evidence. The findings, conclusions, thought processes of, factual inferences and deductions drawn by the investigating officers concerning such matters as

1 the credibility of witnesses or the significance, strength, or lack of evidence are not relevant and
2 should not be admissible at trial.

3 **III**

4 **INTERNAL AFFAIRS INVESTIGATION FILES ARE NOT RELEVANT**
5 **AND ALLOWING ANY REFERENCE TO SUCH INVESTIGATION FILES**
6 **WOULD BE UNDULY PREJUDICIAL TO DEFENDANT**

7 In order for evidence to be admissible, evidence must be relevant, and its probative value
8 must be substantially outweighed by the danger of unfair prejudice or confusing the jury. Fed. R.
9 Evid. 402, 403; *Duran v. City of Maywood*, 221 F.3d 1127, 1133 (9th Cir. 2000). “Once the
10 probative value of a piece of evidence is found to be substantially outweighed by the danger of
11 unfair prejudice, there is no other evidentiary rule that can operate to make that same evidence
12 admissible.” *U.S. v. Benavidez-Benavidez*, 217 F.3d 720, 725 (9th Cir. 2000).

13 Allowing Plaintiff to make any reference to the Internal Affairs investigation files outlined
14 above would be unduly prejudicial. With the exception of the IA Investigation conducted as a
15 result of the underlying incident, the investigations are completely irrelevant to the case at hand
16 and the sole purpose of introducing any testimony or evidence of same would be to unduly
17 prejudice Defendants and confuse the jury. As to the IA Investigation conducted as a result of the
18 underlying incident, the investigations are inadmissible hearsay without an exception and
19 Plaintiffs can elicit testimony from the witnesses regarding the incident. Again, then, the only
20 purpose of introducing the IA Investigation would be to unduly prejudice the Defendants and
21 confuse the jury. The evidence that Plaintiffs seek to elicit can be done through other sources.

22 **IV**

23 **CONCLUSION**

24 Based on the foregoing, it is respectfully requested that this Court grant the relief
25 requested and order Plaintiff and his counsel to refrain from making reference to, or introducing
26 any testimony, evidence, or argument regarding investigations, files and/or reports of the San
27 Diego Police Department’s Internal Affairs investigation involving Defendants, as outlined
28 above.

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Dated: August 23, 2013

JAN I. GOLDSMITH, City Attorney

By /s/Jennifer K. Gilman
JENNIFER K. GILMAN
Deputy City Attorney

Attorneys for Defendants
City of San Diego and Officers Savage,
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