

1 **BACKGROUND**¹

2 Anthony Arevalos served as a police officer for the San Diego Police
3 Department for nearly twenty years. On paper—in particular, his police personnel
4 file—he was a standout officer; in practice, he was nothing but. Indeed, Arevalos’
5 tenure with the SDPD included numerous complaints of sexual misconduct and
6 other deviant behavior. Yet, despite repeated instances of misconduct, Arevalos’
7 conduct went largely undocumented and was only minimally disciplined.

8 The City contends that Arevalos was a rogue officer who acted alone in his
9 base behavior, and that the SDPD could not have known that he would sexually
10 assault and batter a female arrestee. Plaintiff, however, paints a darker scene. She
11 contends that the SDPD engages in a custom of condoning sexual and other serious
12 misconduct by officers, and that a pervasive code of silence prevents officer
13 misconduct from being discovered, investigated, and appropriately resolved.
14 Accordingly, Plaintiff contends the City should be held liable for her injuries. The
15 Court will outline the factual predicate for Plaintiff’s claim and existing factual
16 disputes in the discussion that follows.

17 **EVIDENTIARY OBJECTIONS**

18 The City of San Diego contends that the vast majority of evidence Plaintiff
19 produces to support her opposition is inadmissible. The Court finds that many of the
20 City’s objections are well taken. In particular, Plaintiff has improperly supported
21 her statement of facts by citing to the factual statements set forth by her expert
22 witnesses in their reports rather than citing to facts in the record. This is improper:
23 “The law is clear . . . that an expert report cannot be used to prove the existence of
24 facts set forth therein.” *In re Citric Acid Litigation*, 191 F.3d 1090, 1102 (9th Cir.
25 1999). Thus, to the extent Plaintiff relies solely on the expert reports to support her
26
27

28 _____
¹ The facts of this case have been recounted at length in previous orders and will not be repeated here except as necessary to explain the Court’s ruling.

1 factual statement, the Court **SUSTAINS** Defendants’ objection.² Additionally, the
2 Court **SUSTAINS** Defendants’ objections to Plaintiff’s exhibits WW, YY, CCC,
3 DDD, HHH through RRR, UUU, AAAA, CCCC, DDDD, KKKK, TTTT, UUUU,
4 WWW, XXXX, YYYY, and the declaration of “DB,” attached to Linda
5 Workman’s supplemental declaration filed February 20, 2014. These exhibits either
6 contain inadmissible hearsay, were not properly authenticated, are irrelevant, or were
7 untimely filed.

8 All evidentiary objections not referenced herein are either overruled,³ or the
9 evidence in question was not material to the resolution of this motion, rendering the
10 objections moot.

11 **LEGAL STANDARD**

12 A motion for summary judgment should be granted if there is no genuine
13 issue of material fact and the moving party is entitled to judgment as a matter of law.
14 Fed. R. Civ. P. 56(a). The purpose of summary judgment “is to isolate and dispose
15 of factually unsupported claims or defenses.” *Celotex v. Catrett*, 477 U.S. 317,
16 323–24 (1986). The moving party bears the initial burden of informing the Court of
17 the basis for the motion, and identifying portions of the pleadings, depositions,
18 answers to interrogatories, admissions, or affidavits which demonstrate the absence
19 of a triable issue of material fact. *Id.* at 323. The evidence and all reasonable
20 inferences therefrom must be viewed in the light most favorable to the non-moving
21 party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630–31
22 (9th Cir. 1987).

23 If the moving party meets its initial burden, the burden then shifts to the

24
25 ² The Court notes, however, that the majority of the facts cited within the expert
26 reports are contained in admissible form elsewhere in the voluminous record before the
27 Court.

28 ³ For example, the Court overrules many of the City’s hearsay objections
pursuant to Federal Rule of Evidence 801(d)(2), which provides that an admission by
a party-opponent is not hearsay. An admission by a party-opponent includes “a
statement by the party’s agent or servant concerning a matter within the scope of the
agency or employment, made during the existence of the relationship.” Fed. R. Evid.
801(d)(2)(D).

1 non-moving party to present specific facts showing that there is a genuine issue of
2 material fact for trial. *Celotex*, 477 U.S. at 324. The opposing party “must do more
3 than simply show that there is some metaphysical doubt as to the material facts.”
4 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 588 (1986). When a
5 party fails to properly address another party’s assertions of fact, a court may
6 consider these facts as undisputed. Fed. R. Civ. P. 56(e)(2). If the motion and
7 supporting materials, including facts considered undisputed, show the movant is
8 entitled to summary judgment, the Court may grant the motion. Fed. R. Civ. P.
9 56(e)(3). Summary judgment is not appropriate if the non-moving party presents
10 evidence from which a reasonable jury could resolve the disputed issue of material
11 fact in his or her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986);
12 *Barlow v. Ground*, 943 F.2d 1132, 1136 (9th Cir. 1991). However, “[w]here the
13 record taken as a whole could not lead a rational trier of fact to find for the
14 non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at
15 587.

16 DISCUSSION

17 The City moves for summary judgment on the ground that Plaintiff’s evidence
18 fails to raise a triable issue of fact that would allow a reasonable jury to find that
19 Plaintiff has proven her *Monell* claim.

20 I. *Monell* Claims Under 42 U.S.C. § 1983

21 Title 42 U.S.C. § 1983 “provides a cause of action for the ‘deprivation of any
22 rights, privileges, or immunities secured by the Constitution and laws’ of the United
23 States.” *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 (1990) (quoting 42
24 U.S.C. § 1983). Section 1983 is not itself a source of substantive rights, but merely
25 provides a method for vindicating federal rights elsewhere conferred. *Graham v.*
26 *Connor*, 490 U.S. 386, 393–94 (1989).

27 Municipalities cannot be held vicariously liable under section 1983 for the
28 actions of their employees. *Monell*, 436 U.S. at 691. “Instead, it is when execution

1 of a government’s policy or custom, whether made by its lawmakers or by those
2 whose edicts or acts may fairly be said to represent official policy, inflicts the injury
3 that the government as an entity is responsible under § 1983.” *Id.* at 694.

4 To impose liability on a government entity, a plaintiff must show that “the
5 municipality itself causes the constitutional violation through ‘execution of a
6 government’s policy or custom, whether made by its lawmakers or by those whose
7 edicts or acts may fairly be said to represent official policy.’” *Ulrich v. City &*
8 *County of San Francisco*, 308 F.3d 968, 984 (9th Cir. 2002) (quoting *Monell*, 436
9 U.S. at 694). The asserted policy or custom need not be unconstitutional per se; it
10 need only cause the constitutional violation. *Jackson v. Gates*, 975 F.2d 648, 654
11 (9th Cir. 1992).

12 The parties dispute whether Plaintiff also must show that the City was
13 “deliberately indifferent” to her constitutional rights. Deliberate indifference is a
14 “stringent standard of fault, requiring proof that a municipal actor disregarded a
15 known or obvious consequence of his action.” *Board of County Comm’rs of Bryan*
16 *County v. Brown*, 520 U.S. 397, 410 (1997). The Ninth Circuit applies a “deliberate
17 indifference” requirement in order to find liability in “single incident cases,” such as
18 where a municipal employee applies a facially permissible policy in an
19 unconstitutional manner. *Christie v. Iopa*, 176 F.3d 1231, 1240 (9th Cir. 1999)
20 (citations omitted). Moreover, the Ninth Circuit requires “deliberate indifference”
21 for *Monell* claims alleging liability based on a policy of failure to train. *See* 9th Cir.
22 Model Civ. Jury Instr. 9.7.

23 In contrast, where a plaintiff claims that a particular municipal action in itself
24 violates or directs employees to violate federal law, there is no “‘state-of-mind
25 requirement independent of that necessary to state a violation’ of the underlying
26 federal right.” *Brown*, 520 U.S. at 404–05 (quoting *Daniels v. Williams*, 474 U.S.
27 327, 330 (1986)). The stringent deliberate indifference standard is a response to the
28 “danger of permitting liability for . . . a facially valid policy.” *Christie*, 176 F.3d at

1 1241. As the Supreme Court explained,

2 Where a claim of municipal liability rests on a single decision, not itself
3 representing a violation of federal law and not directing such a violation,
4 the danger that a municipality will be held liable without fault is high.
5 Because the decision necessarily governs a single case, there can be no
6 notice to the municipal decisionmaker, based on previous violations of
7 federally protected rights, that his approach is inadequate. Nor will it be
8 readily apparent that the municipality's action caused the injury in
9 question, because the plaintiff can point to no other incident tending to
10 make it more likely that the plaintiff's own injury flows from the
11 municipality's action, rather than from some other intervening cause.

12 *Brown*, 520 U.S. at 408.

13 Here, Plaintiff's theory of municipal liability rests on her assertion that the
14 SDPD followed a practice that itself was unconstitutional. For the reasons described
15 below, the existence of such a practice is a disputed issue of fact. If Plaintiff
16 succeeds in proving the existence of such a practice, then she need not prove that the
17 City acted with deliberate indifference to her constitutional rights.

18 **A. City Policy, Regulation, Custom, or Usage**

19 It is undisputed that Plaintiff suffered a constitutional deprivation. The
20 primary source of dispute is whether Plaintiff has produced sufficient evidence from
21 which a reasonable jury could conclude that the City is liable under section 1983 for
22 her deprivation. To meet her burden of establishing a policy, regulation, custom, or
23 usage that caused her constitutional deprivation, Plaintiff asserts that SDPD officers
24 participate in a "code of silence,"—amounting to a custom—whereby officers
25 protect each other from investigation and consequences of their wrongdoing.
26 According to Plaintiff, the SDPD's failures to report misconduct, appropriately
27 discipline misbehaving officers, and *de facto* policy where officers cover up,
28 interfere with, and impede misconduct investigations, created an environment where
officers like Arevalos could act with impunity, and where instances of sexual
misconduct against females were commonplace. "While aware of his sexually
deviant tendencies and long history of unbridled prior misconduct, the SDPD did
nothing to prevent Officer Arevalos from abusing his official authority." [Pl's Opp.

1 Brief at 2.]

2 A “custom” for purposes of municipal liability is a “widespread practice that,
3 although not authorized by written law or express municipal policy, is so permanent
4 and well-settled as to constitute a custom or usage with the force of law.” *City of St.*
5 *Louis v. Praprotnik*, 485 U.S. 112, 127 (1998). Proof of random acts or isolated
6 events is insufficient to establish custom. *Thompson v. City of Los Angeles*, 885
7 F.2d 1439, 1444 (9th Cir. 1989). But a plaintiff may prove “the existence of a
8 custom or informal policy with evidence of repeated constitutional violations for
9 which the errant municipal officials were not discharged or reprimanded.” *Gillette*
10 *v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). Once such a showing is made, a
11 municipality may be liable for its custom “irrespective of whether official
12 policy-makers had actual knowledge of the practice at issue.” *Thompson*, 885 F.2d
13 at 1444.

14 While the City implicitly acknowledges that a “code of silence” may qualify
15 as a type of custom able to invoke *Monell* liability, the City contends that Plaintiff
16 has not sufficiently demonstrated that the SDPD abides by one. Instead, the City
17 contends that Plaintiff’s claim is “premised solely on conclusions and assumptions
18 using 20/20 hindsight.” [Mot. at 1, Doc. No. 201-1.] The City argues that Arevalos
19 was a rogue officer who acted alone, and that the SDPD had no evidence to suggest
20 that Arevalos would sexually assault Plaintiff. [*Id.*] According to the City,
21 “Plaintiff’s theories are cobbled together by use of isolated incidents, conclusory
22 opinions and opinions based upon non-existent or inadmissible facts. Plaintiff
23 point[s] to events which have no relationship to one another and clearly fail to prove
24 a City custom or policy that amounts to a widespread and longstanding practice.”
25 [*Id.* at 7–8.]

26 In considering whether triable issues of fact remain, the Court disagrees.
27 Plaintiff has presented sufficient evidence of a code of silence that exists within the
28 SDPD, and which could constitute the moving force behind her constitutional

1 injuries. Specifically, Plaintiff presents: (1) evidence of Arevalos' tenure with the
2 SDPD, during which numerous bad acts went undocumented and largely
3 undisciplined; (2) testimony from former police officers acknowledging the code of
4 silence; (3) expert testimony opining as to the existence and scope of a code of
5 silence. In light of this evidence, the Court finds that there are genuine issues of fact
6 material to the resolution of Plaintiff's claim.

7 **1. Arevalos' Tenure with the SDPD**

8 The Court has previously outlined Arevalos' tumultuous history as a police
9 officer within the SDPD. The history shows that Arevalos survived for over 15
10 years within the department, despite numerous complaints of sexual misconduct and
11 other deviant behavior. Despite the repeated instances of misconduct, Arevalos'
12 behavior was only minimally disciplined and documented. Ultimately, Arevalos
13 was criminally convicted for his on-duty elicit behavior towards four women in
14 addition to Jane Doe.⁴ Several other allegations of sexual misconduct were reported
15 but did not become part of the criminal trial. The following is a brief overview of
16 the past incidents involving Arevalos which Plaintiff contends serve as proof of the
17 code of silence.⁵

18 1. 5150 Detainee – In the late 1990's, SDPD Officer Francisco Torres
19 reported that Officer Arevalos had sexually assaulted and photographed a nude 5150
20 detainee with Arevalos' baton in her vagina. Officer Torres reported the incident to
21 Arevalos' supervisors, who gave Arevalos a "verbal reprimand" for his actions, but
22 did not otherwise document the incident. Later, Arevalos allegedly confronted
23 Officer Torres for reporting the incident, stating "what happens in the field stays in
24 the field."

25 ⁴ Jeannie E., Melissa W., Melissa M., and Melissa R.

26 ⁵ Plaintiff attempts to also invoke incidents involving Melissa R. and Marjan M.
27 However, the only evidence of these incidents comes in the form of testimony from
28 Arevalos' criminal trial. This evidence is inadmissible hearsay, and, thus, the Court
does not rely on these incidents in its analysis of whether a code of silence exists.

1 2. Susy S. – Ms. S. alleges that in 2001, upon pulling her over in his
2 police car, Officer Arevalos grabbed her and forcefully pushed her against her
3 vehicle. Ms. S. contends that she could feel Officer Arevalos push his groin area
4 into her, and that he grabbed her breast. Ms. S. states she called the police
5 department the next day to report Arevalos, and that she later met with Police Chief
6 David Bejarano, who told her that everything was taken care of. Arevalos was
7 apparently never disciplined or investigated for this incident.

8 3. MP – In July 2007, sixteen-year-old MP, wearing a bathing suit
9 covered by a top, was pulled over by Officer Arevalos. Arevalos told her that her
10 license plate tags were about to expire, and required her to exit the vehicle to look at
11 the tags. Once behind the vehicle, Officer Arevalos told MP to “bend over” to look
12 at the tags. Officer Arevalos was standing behind MP as she did so, and MP states
13 that Arevalos was “really weird and uncomfortable.”⁶ The incident was reported
14 directly to Arevalos’ supervisors. However, Officer Arevalos was not disciplined
15 for this incident.

16 4. Jane Roe – In February 2010, Jane Roe reported that Officer Arevalos
17 inserted a gloved hand inside her vagina while en route to Las Colinas Women’s
18 Detention Center. Arevalos was investigated, but was ultimately cleared and
19 returned to patrol. The City claims that Roe’s complaint was properly handled.
20 Plaintiff, however, contends that the investigation was flawed from the outset. For
21 instance, Plaintiff produces evidence which tends to demonstrate that Roe’s rape
22 examination was improperly delayed, rendering the exam inconclusive. [*See, e.g.*,
23 Daniel Cerar Dep. at 70–71, Doc. No. 217-3.] Moreover, while the investigation
24 turned up several incriminating facts—including that the automatic vehicle locator
25

26 ⁶ As discussed in the Court’s Order Granting the Supervisor Defendants’ motion
27 for summary judgment [Doc. No. 330], this incident cannot truly be seen as egregious
28 sexual misconduct. Nonetheless, the City’s response to the incident, including whether
it documented the incident, remains relevant to the question of whether a code of silence
exists.

1 (“AVL”) system on Arevalos’ patrol car showed he parked his car for one minute
2 and twenty-nine seconds while transporting Roe, and that blue latex gloves, similar
3 to gloves issued to SDPD officers, were found at the location where the AVL
4 indicated he had stopped—neither the investigation unit nor Arevalos’ supervisor
5 confronted him with these facts.

6 In addition to the actual claims of misconduct, Officer Arevalos had built a
7 reputation on the police force for his suspect behavior towards female arrestees. He
8 was known as the “Las Colinas Transport Unit” because of the number of runs he
9 would take to Las Colinas Women’s Detention Facility. He consistently bragged
10 about stopping “beautiful girls.” In the words of one police officer, Arevalos
11 “appeared to be a profiler of hot women.” [Henry Castro Statement, Ex. B-1 at
12 632.]⁷ “At the end of the shift, [Arevalos] would show other officers the driver’s
13 license photo[s] of women he arrested. It pumped him up.” [*Id.* at 633.]
14 “[Arevalos] is the only guy in Traffic Division that had a nude magazine in his
15 locker.” [*Id.*] “[Arevalos] would come in and tell stores about women and what
16 they would do. . . . Tony had more stories than anybody.” [Brian Keaton Statement,
17 Ex. B-1 at 634.] “I think he enjoyed having a reputation.” [*Id.*] One officer told
18 Arevalos he was “playing with fire” and that if he was purposefully seeking to arrest
19 good looking females he should “knock it off.” [Bob Wells Statement, Ex. B-1 at
20 635.]⁸ Arevalos referred to himself as the “Teflon Don” because no allegations

21
22 ⁷ The Court notes that Exhibit B-1 and other exhibits cited herein are currently
23 filed under seal pursuant to the protective order entered in this case. Thus, the Court
24 refrains from citing the confidential portions of these documents, and otherwise strives
25 to maintain inviolate their confidential nature.

26 ⁸ The City objects to the admissibility of Exhibits B-1 through B-14. Each of
27 these documents was developed by the SDPD during the investigation of Arevalos, and
28 contain the statements of San Diego Police Officers or statements of Arevalos himself.
Under Federal Rule of Evidence 801(d)(2), an admission by a party-opponent is not
hearsay. An admission by a party-opponent includes “a statement by the party’s agent
or servant concerning a matter within the scope of the agency or employment, made
during the existence of the relationship.” Fed. R. Evid. 801(d)(2)(D). Thus, the City’s
objections to these exhibits are **OVERRULED**.

1 could ever stick to him. [Torres Dep. at 79, Ex. XX.]

2 Despite all of Arevalos’ problematic behavior, his personnel file contains only
3 documentation of inappropriate computer use, and no other documentation of
4 misconduct. [See Arevalos Personnel File, Ex. LLLL.] According to Plaintiff’s
5 expert Jeffrey Noble, “[a]nyone who reviewed Officer Arevalos’ personnel file
6 would be of the opinion that Officer Arevalos was a hard-working, competent,
7 veteran San Diego police officer and with the exception of two minor disciplinary
8 actions that Officer Arevalos was among SDPD’s best and brightest.” [Noble
9 Report ¶ 149.]

10 2. The “Code of Silence” Acknowledged by SDPD Officers

11 Plaintiff also provides testimonial evidence from former SDPD police officers
12 regarding the existence of a “code of silence” within the SDPD.

13 Former SDPD Officer Arthur Perea testified to observing a code of silence
14 within the SDPD. He stated that “a lot of misconduct” is “kept within the
15 department, and many times swept under the rug, depending on who you are and
16 what your position is on the police department.” [Perea Dep. at 28–29, Ex. BB.]

17 Officer Arevalos testified that he had seen the code of silence “with [his] own
18 eyes.” [Arevalos Dep. at 240, Ex. R.] He testified that he saw “captains get stopped
19 for DUIs,” only to be “driven home” for fear of retaliation. [*Id.*]

20 Former SDPD Officer Francisco Torres noted the unwritten rule that “what
21 happens in the field stays in the field, and it’s never brought up or – you know, you
22 don’t bring charges up against a fellow officer.” [Torres Dep. at 151, Ex. XX.]

23 3. Expert Testimony

24 Plaintiff also offers expert testimony to support her claim regarding the “code
25 of silence” within the SPPD. Jeffrey Noble’s⁹ expert testimony includes the
26 following opinions:

27
28 ⁹ Mr. Noble was a police officer for 28 years before retiring in July 2012 as the Deputy Chief of Police with the Irvine Police Department. The City does not seek to exclude Mr. Noble’s testimony under Federal Rule of Evidence 702.

- 1 ● In any police agency, there may be anecdotal evidence of a code of silence
2 among individual officers that does not amount to an unwritten policy,
3 practice, or custom within the agency itself. However, in this case there
4 is significant evidence of a strong, active and pervasive code of silence
5 that is designed and practiced to prevent officer misconduct from being
6 discovered, investigated and appropriately resolved.
- 7 ● There is evidence of a pervasive, widespread, policy, custom and practice
8 within the SDPD of engaging in the code of silence to protect fellow
9 officers from investigations and consequences of their wrongdoing,
10 allowing officers to reasonably believe that they can violate the
11 constitutional rights of others with impunity.
- 12 ● While it is possible in any police agency for an individual unprincipled
13 police officer to engage in a code of silence to protect another police
14 officer, the evidence in this matter is that the code of silence within the
15 SDPD is pervasive, widespread, pattern and practice where police officers
16 are taught the code early in their career and they live by the code
17 throughout their careers. Unquestionably, absent the code of silence, the
18 predatory nature of Officer Arevalos to prey on vulnerable members of the
19 San Diego community would have reported, investigated, and resolved
20 long before Officer Arevalos had the opportunity to victimize Ms. Doe.
21 Moreover, the evidence of the code of silence is so strong within the
22 SDPD that a reasonable police officer would believe that they could
23 violate the constitutional rights of others with impunity.
- 24 ● In a four year period, the SDPD reported that only four Category I
25 allegations based on community member complaints were sustained. The
26 fact that only four allegations of misconduct were sustained over four
27 years for a department with 1,200 officers is concerning. Such a low
28 number of sustained complaints could mean that the officers of the SDPD
are extraordinarily well behaved and they are performing their duties
appropriately, or that the SDPD has systemic issues in their complaint and
investigatory processes that makes it nearly impossible for an officer to be
held accountable for their misconduct.
- The complaint acceptance procedure of the SDPD is unreasonable as it
does not mandate the acceptance and documentation of all complaints[.]
[It] does not address complaints made by third parties, juveniles,
intoxicated individuals, or due to civil lawsuits, and most importantly
because it allows field supervisors unfettered discretion to dissuade, ignore
or refuse to accept allegations of officer misconduct without any
investigation or documentation.

[Noble Report, ¶¶ 155–57, 163, 185.]

Another expert retained by Plaintiff, Dr. Robert Taylor,¹⁰ opines:

- The [SDPD] promotes patterns and practices that rise to the force of policy
that serve to mask and/or cover-up allegations of sexual misconduct.

¹⁰ Dr. Taylor is currently a Professor of Criminology at the University of Texas at Dallas. He formerly chaired the Department of Criminal Justice at the University of North Texas. The City does not seek to exclude his testimony under Federal Rule of Evidence 702.

1 These patterns and practices include both the inappropriate categorization
2 of sexual misconduct complaints and the case of Anthony Arevalos' 2008
3 reprimand that stemmed from the inappropriate use of his city-issued work
4 computer to access a pornographic website.

- 5 ● The specific cases enumerated early in this report collectively describe the
6 promotion of a code of silence and inaction on the part of the San Diego
7 Police Department middle managers, administrators and executives
8 confronted with complaints of sexual misconduct.
- 9 ● The case not only makes clear that the victims were not “mistaken,” but
10 that Officer Arevalos should not have been a police officer—most
11 assuredly by the time that Jane Doe was stopped. Arevalos counted on the
12 protection provided by his superiors and the administration of the SDPD
13 that allowed him to repeatedly stalk, harass, and/or sexually assault female
14 drivers for almost two decades.

15 [Taylor Report, ¶¶ 59, 73, 92.]

16 **4. SDPD Policies Regarding Reporting Officer Misconduct**

17 Plaintiff's expert Jeffrey Noble reviewed the SDPD's written policies and
18 procedures regarding the reporting of officer misconduct. He opines that “the San
19 Diego Police Department has generally enacted reasonable policies and procedures
20 designed to establish consistent work standards and to regulate the behavior of their
21 employees.” [Noble Report ¶ 158.] However, Mr. Noble states that while the
22 “codes of conduct that are covered within the SDPD's policy manual generally
23 conform with reasonable practices, the SDPD does not have a mandatory reporting
24 policy, nor does it have a retaliation policy protecting those who report misconduct.”

25 [*Id.* ¶ 159.] Noble opines that:

26 Mandatory reporting policies are one method to address the code of
27 silence. These policies make clear that the control of serious misconduct
28 by employees is not just the responsibility of supervisors and managers,
rather, it is a shared responsibility among all officers, supervisors, and
managers. A reasonable policy would clearly state that an officer has an
affirmative duty to report serious wrongdoing and that officers who fail to
report serious acts of misconduct may themselves be subject to
disciplinary or other corrective action. By developing a policy of this
manner, it removes the stigma from reporting misconduct by making it an
affirmative obligation of all employees.

[*Id.* ¶ 159(b).]

In his deposition, former Chief William Lansdowne agreed that a mandatory
reporting policy is important because it creates an atmosphere where officers feel

1 comfortable reporting other officer misconduct, and it is necessary for maintaining a
2 professional and honest police department. [Lansdowne Dep., Ex. AA at 25.]
3 Lansdowne was previously chief of police in San Jose and Richmond, California.
4 Both of those police departments had mandatory reporting and no-retaliation
5 policies. Lansdowne “thinks” that the SDPD has similar policies, but he has never
6 personally read it. [*Id.* at 63.] According to Mr. Noble, however, there is no
7 evidence that the SDPD has mandatory reporting and anti-retaliation policies.
8 [Noble Report ¶¶ 159(b), (d).]

9 Mr. Noble also opines that the SDPD’s policies and procedures for accepting
10 and investigating citizen complaints are suspect. He states that “[t]he complaint
11 acceptance procedure of the SDPD is unreasonable as it does not mandate the
12 acceptance and documentation of all complaints, . . . and most importantly because it
13 allows field supervisors unfettered discretion to dissuade, ignore or refuse to accept
14 allegations of officer misconduct without any investigation or documentation.” [*Id.*
15 ¶ 163.] “This type of policy allows for legitimate complaints to be sheltered from
16 upper management, avoids investigations and protects officers from allegations of
17 misconduct.” [*Id.* ¶ 162(a).]

18 Mr. Noble’s opinion that the SDPD has deficient complaint policies and
19 procedures is relevant to the determination of whether there is a custom within the
20 SDPD of covering up officer misconduct. If mandatory reporting/anti-retaliation
21 policies were in place, this would tend to demonstrate that the SDPD does not
22 tolerate a widespread code of silence. However, the apparent fact that the SDPD
23 does not have mandatory reporting or anti-retaliation policies provides further
24 evidentiary support to Plaintiff’s *Monell* claim.

25 Based on the evidence cited, the Court finds that genuine issues of material
26 fact remain with respect to whether a code of silence exists within the SDPD.
27 Arevalos’ history with the department serves as primary evidence of the custom. His
28 police record was virtually impeccable, even though he sexually abused a number of

1 women, had a reputation for seeking out and pulling over females, and called
2 himself the “Teflon Don.” Moreover, Plaintiff’s experts, after reviewing the facts of
3 the case, conclude that the code of silence is strictly adhered to within the SDPD.
4 Moreover, Plaintiff’s expert, Jeffrey Noble opines on the SDPD’s deficient
5 complaint acceptance and investigatory procedures, which, together, make it “nearly
6 impossible” for an officer to be held accountable for their misconduct. All of these
7 facts demonstrate that there remain genuine disputes as to material facts with respect
8 to whether a code of silence exists. *See, e.g., Obrycka v. City of Chicago*, 2012 WL
9 601810, at *7 (N.D. Ill. Feb. 23, 2013) (summary judgment denied where plaintiff
10 offered testimony of two experts, one opining on the existence of a code of silence
11 and deficient administrative investigations and disciplinary procedures within the
12 Chicago Police Department and that the CPD’s sustained rates for force-related
13 complaints were statistically significantly lower than the national average over the
14 eight years prior to 2007, and record evidence that officers helped protect the
15 defendant during their investigation of the plaintiff’s complaint).

16 The City attempts to mitigate Plaintiff’s evidence, arguing that the SDPD was
17 not officially aware of several of the sexual assault cases until after Arevalos was
18 arrested following the Jane Doe incident. Moreover, the City asserts that Plaintiff
19 has “cobbled together” unrelated facts from an 18-year period to establish her claim.
20 However, the City fails to address the opinions rendered by Plaintiff’s experts,
21 which contain admissible evidence of the SDPD’s inadequate reporting policies and
22 pervasive nature of the code of silence. The expert opinions, combined with
23 Arevalos’ unfortunate history with the SDPD and the other facts cited previously,
24 create genuine issues of material fact which the Court may not resolve.

25 **B. Causation**

26 Plaintiff must also produce sufficient evidence to create a question of fact
27 regarding whether there is a “direct causal link” between the code of silence and the
28 deprivation of Plaintiff’s constitutional rights. *Wallis v. Spencer*, 202 F.3d 1126,

1 1143 (9th Cir. 1999). City policy “causes” an injury where it is the “moving force”
2 behind the constitutional violation. *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir.
3 1994).

4 Construing the facts and all reasonable inferences in Plaintiff’s favor, she has
5 presented evidence raising a genuine issue as to the material fact that the code of
6 silence caused her constitutional injury. Based on the voluminous record of
7 misconduct engaged in by Officer Arevalos, a reasonable jury could conclude that
8 Arevalos acted towards Jane Doe in a manner in which he thought he was
9 impervious to the consequences of his misconduct. Arevalos called himself the
10 “Teflon Don,” flaunting the fact that no allegations could stick to him. In addition, a
11 reasonable jury could find that Arevalos himself would have been removed entirely
12 from the police force had the code of silence not been in place. Dr. Taylor opines,
13 “[t]he case not only makes clear that the victims were not ‘mistaken,’ but that
14 Officer Arevalos should not have been a police officer—most assuredly by the time
15 that Jane Doe was stopped. Arevalos counted on the protection provided by his
16 superiors and the administration of the SDPD that allowed him to repeatedly stalk,
17 harass, and/or sexually assault female drivers for almost two decades.” [Taylor
18 Report ¶ 92 (emphasis in original).]

19 The City contends that Plaintiff cannot fulfill the causation requirement. It
20 points to a discovery order issued by Magistrate Judge David H. Bartick, in which
21 Judge Bartick concluded that “there is no evidence that any of the offending officers
22 engaged in the misconduct due to an actual or perceived culture within the SDPD
23 that encouraged officers to violate the law or the constitutional rights of others under
24 the belief their actions would remain immune from punishment.” [Reply Brief at 4
25 (citing Dec. 13, 2013 Order, Doc. No. 231).] The City contends that Judge Bartick’s
26 ruling is now the “law of the case,” precluding reconsideration of whether there
27 exists a culture within the SDPD such that officers could violate the law and remain
28 immune from punishment.


1 The City's argument is not persuasive. Judge Bartick's *discovery* order
2 considered whether the personnel files of three police officers should be produced in
3 discovery based on allegations that these officers engaged in sexual misconduct.
4 Judge Bartick found that the personnel files were irrelevant because they did not
5 contain evidence suggesting that the incidents were not properly investigated or that
6 the misconduct was condoned by the police department. The order did not
7 adjudicate the issue of whether there exists a code of silence which was the moving
8 force behind Plaintiff's constitutional injury. Moreover, the discovery order issued
9 by Judge Bartick cannot become the "law of the case" on the issue of *Monell*
10 liability. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) ("Under
11 the law of the case doctrine, a court will generally refuse to reconsider an issue that
12 has already been decided by the *same court or a higher court* in the same case.")
13 (emphasis added).

14 CONCLUSION

15 The role of the Court in deciding a motion for summary judgment is to
16 determine whether genuine issues of fact exist. The resolution of any factual issue is
17 a privilege reserved for the jury. Based on the record before it, the Court finds that
18 the City has not met its burden of demonstrating an absence of any genuine issues of
19 fact as to its liability under *Monell*. This is not to say that Plaintiff will prevail on
20 her *Monell* claim at trial, only that she has adduced evidence such that a jury could
21 return a verdict in her favor. Thus, for the reasons set forth above, the Court
22 **DENIES** the City's motion for summary judgment.

23 **IT IS SO ORDERED.**

24 DATED: April 1, 2014

25 

26 Hon. Michael M. Anello
27 United States District Judge
28