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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CHRISTOPHER LEE DUNN, Plaintiff, v. BURBANK POLICE DEPARTMENT, CITY OF BURBANK, and DOES 1 Through 100, Inclusive, Defendants.	Case No. BC 417928 **DEFENDANT CITY OF BURBANK'S OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY OF PEACE OFFICER PERSONNEL RECORDS; DECLARATIONS OF KRISTIN A. PELLETIER, GERARDO MISQUEZ, AND THOR MERICH AND EXHIBITS THERETO** Date: August 20, 2010 Time: 8:30 a.m. Dept. 31

Defendant City of Burbank ("City") hereby submits its opposition to plaintiff Christopher Dunn's motion for discovery of peace officer personnel records.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY

Plaintiff Christopher Dunn ("Dunn") filed this lawsuit on July 16, 2009, alleging race-based harassment, discrimination and retaliation in his employment as a police officer with defendant the City of Burbank ("City"). Nearly a year later, Dunn filed a *Pitchess* Motion for disclosure of police personnel records ("Motion"), in his first attempt to initiate any discovery.

In the Motion, Dunn principally claims that he needs the confidential personnel records of Sgt. Dan Yadon and Lt. Eric Rosoff to show the requisite causal link in his retaliation claim between the City's allegedly retaliatory conduct (his termination) and purported earlier complaints he made about improper racial remarks by Sgt. Yadon. Dunn's counsel, Solomon Gresen, declares under oath that his client made such complaints. However, *Dunn's sworn deposition testimony directly contradicts Mr. Gresen* and establishes that Dunn never complained about or reported Sgt. Yadon--or any other officer--for making any race-based statements. In short, the Motion's entire rationale for seeking the records at issue is provably false. Therefore, the requested information cannot be used to support Dunn's retaliation claim as a matter of law.

Not only has Dunn failed to establish the supposed protected activity that is the lynchpin of his Motion (complaints about Sgt. Yadon), he has completely failed to link either Sgt. Yadon or Lt. Rosoff to the supposedly retaliatory action he suffered as a result of those (non-existent) complaints (his termination). No contention is made that Sgt. Yadon was involved in the termination at all. Moreover, while Mr. Gresen's declaration falsely suggests to the contrary, the actual evidence establishes that Lt. Rosoff's participation in Dunn's internal investigation was limited to a few activities at its inception, and that Lt. Rosoff did not play any part in the conclusions reached in that investigation. The Motion is nothing more that a transparent fishing expedition that asks the Court to violate statutory privacy rights in a search for information that might embarrass the City and its officers.

The Motion should be denied for each of the following reasons:

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First, Dunn's request for unfettered access to Sgt. Yadon's file should be denied because Dunn has admitted under oath that he made no complaints against Sgt. Yadon for race-based comments, which is the entire basis for his request for Sgt. Yadon's records, and because Sgt. Yadon had no involvement in Dunn's termination or the events leading up to that termination;

Second, Dunn's request for access to information about a supposed "burglary investigation" under a retaliation theory is not plausible because Dunn admittedly never complained about discrimination so as to trigger retaliatory acts, because there is no evidence that there ever was a burglary, because the purportedly missing documents are not exculpatory or material, and because Dunn has failed to show a connection between that supposed burglary and his claims in this case;

Third, the Court should not order disclosure of the document referred to in the Motion as the "Merich Memo" because Sgt. Merich's declaration makes clear that the Memo does not pertain to the internal investigation of Dunn (again, contrary to the sworn declaration of Mr. Gresen), because the conduct described in the Memo could not have been retaliatory for the reasons discussed above, because Dunn admits that this supposed conduct had no impact on him, and because Dunn's use of a document that he had no legal right to possess is improper and in violation this Court's Order; and

Fourth, there is no basis to grant unfettered access to Lt. Eric Rosoff's personnel file as the retaliation theory on which the request for access is based is fatally flawed, because Lt. Rosoff was not involved in Dunn's termination, because his purported friendship with Sgt. Yadon is not sufficient to disclose confidential files, and because a purported "kidnapping" allegation against Lt. Rosoff has no connection whatsoever to Dunn's case and is not sufficiently similar to the issues herein to be material.

II. STATEMENT OF FACTS

A. Dunn Tips His Informant to Culver City's Investigation of Her

Dunn is a former officer of the Burbank Police Department ("BPD"), who is allegedly half Japanese. [UF[1] 1.] In March 2007 Dunn was a detective in the Vice/Narcotics Unit at BPD,

[1] On May 12, 2010, the City filed a Motion for Summary Judgment or In The Alternative

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where he was the handler for an informant for the BPD, "GD." [UF 4-5.] On Sunday March 11, 2007, members of the Culver City Police Department ("CCPD") told Dunn that they had begun an investigation of GD and were preparing to conduct a "controlled buy" involving GD (*i.e.*, to have an informant of theirs purchase drugs from GD while they monitored the transaction). According to CCPD Det. Charles Koffman, he discussed some of the details of CCPD's operation with Dunn, including information about CCPD's own informant [UF 6-10.]

Just minutes after that discussion, Dunn called GD multiple times using multiple phones not registered to him. [UF 19, 22.] Dunn did not tell anyone at BPD or CCPD that he had spoken with GD or that GD was aware of CCPD's operation. [UF 24.] Later that day, CCPD's controlled buy with GD was unsuccessful as GD had been warned by Dunn. [UF 27-29.] Immediately after the failed buy attempt, GD called Dunn. [UF 33.] Dunn would later admit that GD told him that CCPD's informant had just called her, but Dunn did not advise anyone at BPD or CCPD of this call either. [UF 34.] GD then flushed her supply of narcotics [UF 35-36.]

B. <u>GD's Arrest</u>

On Friday, March 16, 2007, CCPD served a warrant at GD's residence, without warning Dunn. [UF 38.] According to CCPD, upon being detained, GD blurted out "I know it was [the CCPD informant] that gave me up…" [UF 39.] Following her arrest, GD told CCPD that Dunn called her on March 11 to warn her that another police agency was looking at her. [UF 42.][2]

Summary Adjudication ("MSJ"), various declarations and exhibits in support thereof, and a Statement of Undisputed Material Facts. The MSJ and Separate Statement contain a much more detailed description of the facts in the case. In order to avoid unnecessary duplication of evidence already on file, the City cites to its Separate Statement as "UF __", particularly as to the underlying facts of the case not immediately at issue in the *Pitchess* Motion.

[2] The Motion and Mr. Gresen's declaration make numerous provably false or misleading statements about the events of March 11 and GD's arrest and questioning by the CCPD. By way of example only, they claim or imply that: (1) GD did not tell CCPD that Dunn warned her that another police agency was looking at her (she said this throughout her various interviews with CCPD and BPD) [UF 42]; (2) GD sent a letter to CCPD the day after she was arrested recanting her story that Dunn tipped her (she sent a letter to BPD six months later in September 2007, and the letter is not as broad as Dunn claims); (3) GD was then re-arrested by CCPD (she was not); and (4) Dunn was instructed by Sgt. Duran to continue working with GD on March 11 (Sgt. Duran denied this and told Sheriff's investigators that he could conceive of no legitimate reason why Dunn would have contacted GD on March 11) [UF 23]. Mr. Gresen's characterizations are particularly misleading and unreliable on timing, and yet such mistakes always err on the side of suggesting an inaccurate proximity in time to try to foster a connection between otherwise unrelated events. Because these false representations are not directly pertinent to the Motion, the

C. The Criminal and Administrative Investigations of Dunn

On March 30, 2007, Dunn was transferred to another assignment while his possible misconduct was investigated by BPD internal affairs ("IA Investigation"). [UF 54.] After receiving independent corroboration that Dunn had warned GD of CCPD's operation, BPD asked the Los Angeles County Sheriff, on behalf of BPD and CCPD, to conduct a criminal investigation into Dunn's actions. [UF 62-63.] BPD's IA Investigation of Dunn was suspended pending the outcome of the criminal investigation. [UF 64.] The Sheriff's investigator concluded that there was probable cause to believe Dunn had illegally tipped-off GD, and presented the case to the District Attorney's Office ("DA") for filing consideration. [UF 65.] The DA felt that the case was strong and Dunn's conduct was egregious, but declined to prosecute Dunn because of the legal privileges applicable to GD and to CCPD's own informant. [UF 66.] Dunn was however placed on the DA's Brady list, based on the DA's conclusion that he had unlawfully tipped GD about CCPD's investigation, and in so doing, engaged in an act of moral turpitude. [UF 70-71.]

Shortly after the Sheriff's Department concluded its criminal investigation, BPD resumed its IA Investigation. [UF 67.] Multiple witnesses were interviewed and numerous documents reviewed. Contrary to Mr. Gresen's incorrect assertion, Sgt. Gerardo Misquez conducted the IA Investigation. Before the IA Investigation had been suspended pending the Sheriff's investigation, IA supervisor Lt. Eric Rosoff provided some assistance as to one interview and in gathering documents. [Declaration of Gerardo Misquez attached hereto ("Misquez Decl."), ¶ 5.] However, when it resumed, Lt. Rosoff had moved to a different assignment in a different division and did not further participate in the IA investigation. [Id.] The IA investigation was completed on March 6, 2008, with Sgt. Misquez concluding that, among other things, Dunn had tipped-off GD to CCPD's investigation in violation of California *Penal Code* § 148(a)(1). [UF 68-69.] Dunn was terminated from the BPD on July 17, 2008 based on Sgt. Misquez' findings. [UF 74-75.] At deposition, Dunn testified that he had no evidence that Sgt. Misquez' conclusions (or those of the three other law enforcement agencies who determined that he tipped GD) were

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City will not belabor them, but it points them out to show the continuing pattern of misrepresentations made in the Motion and supporting declaration.

motivated by any discriminatory, retaliatory, or unlawful animus. [Declaration of Kristin Pelletier attached hereto ("Pelletier Decl."), Ex. D, pp. 299:14- 300:9, 307:24- 308:19.]

D. The Lawsuit, The Restraining Order, And This Motion

As noted above, Dunn filed this lawsuit on July 16, 2009, claiming that he suffered harassment, discrimination, and retaliation in his employment as a police officer with the City. On July 21, 2009, the City moved *ex parte* for an order sealing the Complaint to protect an illegally obtained confidential police personnel record, identified in the Motion as the "Merich Memo," that was attached to the Complaint. Pursuant thereto, Dunn's counsel signed a stipulated order sealing the Complaint which twice referenced the statutory sections governing the confidentiality of police officer personnel records and the procedures to move for discovery thereof, *Penal Code* § 832.5 and *Evidence Code* §§ 1043 and 1045. [Pelletier Decl., ¶¶ 2-3, Ex. A.] On January 7, 2010, the Court heard the City's Motion for an order restraining Dunn's continued use of the Merich Memo. The Court ordered Dunn "and his attorneys including Solomon Gresen" be restrained and enjoined from "distributing, disclosing, [or] revealing" the Merich Memo. [Pelletier Decl., ¶ 4, Ex. B.] Despite this express prohibition, the Motion discussed, revealed and utilized the improperly obtained Memo. [Id.]

III. DUNN'S REQUEST FOR *PITCHESS* DISCOVERY LACKS MERIT

Documents from the personnel file of a police officer, and the information contained therein, is private, personal, and privileged. *See Penal Code* § 832.7(a); *City of Santa Cruz v. Mun. Ct.* (1989) 49 Cal.3d 74, 81-84. As a matter of law, the City also holds a privilege against production of the personnel records of its police officers. *Davis v. City of Sacramento* (1994) 24 Cal.App.4th at 401.

Evidence Code § 1043 is the exclusive method for obtaining both police officer personnel records and information contained therein. *Davis, supra,* 24 Cal.App.4th at 401, fn. 2. Because police personnel records are confidential, their disclosure requires adherence to the motion and hearing requirements of the *Evidence Code*. *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 426. The moving papers and affidavit(s) must establish good cause for the production of police personnel records, "setting forth the materiality thereof to the subject matter

involved to the pending litigation." *Evid. Code* § 1043(b)(3). The California Supreme Court has expressly prohibited "fishing expeditions" in this context. *City of Santa Cruz, supra,* 49 Cal.3d at 85 (*quoting Pitchess v. Superior Court* (1975) 11 Cal.3d 531, 538).

Numerous cases have interpreted the good cause requirement, including *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1147, which held that the party seeking such records must provide a "specific factual scenario" establishing a "plausible factual foundation" that relevant misconduct occurred. The Motion must have "some factual basis," and set forth a specific factual scenario that is plausible in light of the other pertinent evidence. *Fletcher v. Sup. Ct.* (2002) 100 Cal.App.4th 386, 395; *Eulloqui v. Sup. Ct.* (Feb. 4, 2010) 181 Cal.App. 4th 1055, 1064. A specific factual scenario is plausible if it is internally consistent and could have occurred. *Warrick v. Sup. Ct.* (2005) 35 Cal.4th 1011, 1026. Demonstrably false assertions obviously do not meet this standard.

A. <u>Dunn's Personnel File and IA Investigation</u>

The City notes for the record that Mr. Gresen's sworn assertion that "Defendants [sic] have refused to produce a full and complete copy of Plaintiff Dunn's personnel file" [Gresen Decl., ¶ 28] is patently false. Dunn has not yet made a discovery request for these documents. In fact, Dunn has not yet served <u>*any*</u> written discovery in this action. [Pelletier Decl., ¶ 2.]

The City has no objection to producing Dunn's own personnel file pursuant to a valid, timely discovery request, once Dunn signs a waiver form that allows both sides to use the records equally in the case. Alternatively, City requests that any disclosure order make clear that the City may use any and all disclosed records in this action. The City likewise has no objection to producing the IA Investigation that led to Dunn's termination, or to questioning regarding the persons involved and conclusions reached in that investigation. In fact, Dunn already has that investigation, as he was given it as part of the *Skelly* process, and has been using it in depositions in this case. While the City has no objection to producing/re-producing Dunn's personnel records and IA Investigation, it does object to producing the confidential personnel records of third party police officers that are immaterial to Dunn's claims in this action. As indicated above, Dunn seeks the records of two such officers, Sgt. Dan Yadon and Lt. Eric Rosoff.

B. Sgt. Yadon's Personnel File

While requested, Dunn has not even attempted to make a showing justifying the production of the entirety of Sgt. Yadon's personnel file. Instead, he merely attempts to show good cause to discover information about how BPD handled Dunn's purported complaints of alleged "racist remarks and statements" by Sgt. Yadon to support his retaliation cause of action. [Motion, at 7:28.] Therefore, at most, the Court could only consider reviewing *in camera* any documents in Sgt. Yadon's personnel file regarding such complaints and their resolution.

There is, however, one rather large problem. While Dunn's counsel, Mr. Gresen, is willing to swear under oath that Dunn made complaints about racial comments by Sgt. Yadon [Gresen Decl., ¶ 5], Dunn himself could not make these statements under oath. Dunn admitted in his sworn deposition testimony that he *never* made a complaint against *any* BPD officer, including specifically Sgt. Yadon, due to any alleged racial comments. [Pelletier Decl., Ex. D, pp. 194:11-14, 197:6- 198:4, 206:3-13.]

Specifically, Mr. Gresen states under oath that: "Over time, Plaintiff complained *several times* to his supervisors about Sgt. Yadon's use of race-based remarks and epithets towards him while on the job."[3] [Gresen Decl., ¶ 5, p. 14:22-23 (emphasis added).] In direct contradiction, Dunn testified that he never made any complaints about racial remarks, as follows:

> Q: Did you ever make a complaint against-- I'll just go through them by name—against Sergeant Yadon for the use of racial commentary?
> A: No.

[Pelletier Decl., Ex. D, pp. 194:11-14]

And:

> Q: I'm just trying to get what you communicated to [Sgt.] Duran, if anything, in terms of, "I have heard in the workplace inappropriate race-based comments"
> A: Nothing.

[3] Not only does Mr. Gresen manufacture Dunn's supposed complaints about racial comments, he also falsely tells the Court that Sgt. Yadon was "demoted" based on those non-existent complaints, when his own declaration and Dunn's deposition testimony establish that Yadon was a Seargent at the time of the allegedly relevant events, and still is a Sergeant. In addition, he makes numerous provably false representations as to the Merich Memo, Lt. Rosoff, and other alleged events. Again, these factual disputes are not critical to resolving the Motion, but they are noted as part of the systematic pattern of false statements.

[Id., Ex. D, pp. 198:1-4 (at end of testimony about discussing other issues about Sgt. Yadon he raised with Sgt. Duran).]

And:

> Q: Okay. And just so I'm clear, I think it's on the record, but given some of your prior commentary, did you ever go to anyone—I know you didn't do it in writing, but go to anyone and say, "I want to make a complaint against," any member of the Burbank Police Department for inappropriate racial comments?
>
> A: No.
>
> Q: Did you ever go to anyone and say, "I want to make a report against," any member of the Burbank Police Department for racial comments?
>
> A: No.

[Id, Ex. D, pp. 206:3-13.]

Thus, Dunn cannot meet his standard of establishing a "plausible factual foundation" for discovery (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1147) with a declaration from counsel that is, at best, a demonstrable fabrication. Mr. Gresen simply cannot expect that the statutory confidentiality afforded to police officer personnel files can be undone by a declaration in which he invents complaints that his client admits he never made.

Dunn's entire argument for access to Sgt. Yadon's personnel file is premised upon his need to establish the causal link between his (provably nonexistent) complaints and his termination in order to support his retaliation claim. To state a *prima facie* claim for retaliation under FEHA, Dunn must prove that: (1) he engaged in a protected activity; 2) he was subsequently subjected to an adverse employment action; and 3) there was a causal link between the two. *Flait v. North Am. Watch Corp.* (1992) 3 Cal.App.4th 467, 476. Protected activity under FEHA includes, as relevant here, complaining about conduct made illegal by that statute. *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 615. A causal link is demonstrated by showing a closeness in time and relationship between the protected complaint and the alleged retaliatory action. *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 156-157 (termination two days after complaint). The defendant must know of the complaint before the alleged retaliation takes place to show the causal link. *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1053; *Sada, supra*, 56 Cal.App.4th at 156-157.

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Here, Dunn had admitted that he did not engage in protected activity upon which he could predicate his FEHA retaliation claim. Dunn also has not, and cannot, show that Sgt. Yadon was involved in his termination. Therefore, as a matter of law, there can be no causal link to support a retaliation claim, and there is no plausible factual scenario making any part of Sgt. Yadon's personnel file material. The Motion should be denied in its entirety as to Sgt. Yadon.

C. The Alleged "Burglary Investigation"

Mr. Gresen tells this Court that he is informed and believes that Dunn's personal notes as well as "files of the department" (an apparent reference to the criminal case files involving GD) were "stolen" after he went on administrative leave. Dunn does not need to bring a *Pitchess* motion to seek discovery of his personal notes, if they exist, or of criminal case files (however, depending on the status of any particular criminal files, other privileges might apply). Nonetheless, he has done so, seeking records of any investigation into the purported "burglary" and to be able to inquire into the same. However, he attempts to justify disclosure of this investigation by primarily pointing to the content of the allegedly stolen documents, which is an argument for disclosure of the underlying documents, not the supposed investigation. Dunn has not made a sufficient showing to obtain disclosure of personnel records, if any, on this issue for several reasons.[4]

First, Dunn again premises the conduct as material to show retaliation for his purported race-based complaints against Sgt. Yadon. He even posits that Lt. Rosoff might have committed the burglary because he was, according to Dunn, Sgt. Yadon's "friend." [Motion, p. 10:14-16.] However, since, as discussed above, Dunn has admitted that he never made any such complaints against Sgt. Yadon, his good cause showing fails. It is simply not a plausible factual scenario that Lt. Rosoff retaliated against Dunn over non-existent complaints.

Second, even if the Court were to ignore that gaping hole in plausibility, the purported reason for the burglary is premised upon Dunn's description that the documents taken were

[4] Dunn briefly suggests that the investigation, if any, might not even be a personnel record. However, he also suggests that a BPD officer may have committed the supposed burglary. An internal investigation where a BPD officer is shown or suspected to have committed misconduct is considered a confidential police personnel record. *See e.g., City and County of San Francisco v. Sup. Ct.* (1993) 21 Cal.App.4th 1031, 1033 (city investigation of misconduct confidential.)

"crucial exculpatory documents." [Motion, p. 10:14.] However, a mere conclusory label of the documents as "exculpatory" does not plausibly make them so. *California Highway Patrol v. Sup. Ct.* (2000) 84 Cal.App.4th 1010, 1020 (recognizing conclusory statements like "voluntary consent was not in fact obtained" is insufficient to establish good cause). The missing files allegedly consist of 1) a few BPD criminal case files wherein Dunn's informant GD provided information, and, 2) some notes that Dunn supposedly made about the events concerning GD's arrest by CCPD. [Pelletier Decl., Ex. D, pp. 333:13- 339:12.] However, as the charges of misconduct against Dunn were not based upon (or in any way rely upon) any of the BPD criminal cases, but instead emanated out of the CCPD's criminal investigation of Dunn, the BPD case files would not be exculpatory. Moreover, Dunn's personal notes would have reflected Dunn's story, which he was free to re-tell as part of the investigation, but would not be independently exculpatory.

Third, Dunn has made no showing that there was any burglary to be investigated. While it is true that the criminal case files involving GD were misplaced for a short time, they were found misfiled in the Narcotics office and are in the City's possession today. [Misquez Decl., ¶ 4.] As to Dunn's notes, Dunn testified at deposition that he typed them on a BPD computer and gave them to his supervisor, Sgt. Duran, so that Sgt. Duran could include Dunn's input in an e-mail report to his supervisors. [Pelletier Decl., Ex. D, pp. 334:18- 335:16.] Sgt. Duran told internal affairs that Dunn gave this input verbally, not in writing. [Misquez Decl., ¶ 3.] BPD checked the computer used by Dunn to see if any such notes existed, but no such documents could be found thereon. [Id.] This apparently prompted Dunn to describe them as "missing" in his deposition. [Pelletier Decl., Ex. D, p. 335:10-16.] However, Dunn told BPD during the IA Investigation that he may have erased the notes from the computer. [Misquez Decl., ¶ 3.] In short, there is no evidence that any such notes were retained on BPD's computer, and even assuming that Dunn's assertion that he gave a copy of those notes to Sgt. Duran (whom he is not accusing of any improper conduct) is accurate, there is no allegation they were stolen from Sgt. Duran.[5]

[5] There are numerous other reasons why Dunn's "missing notes" claim makes no sense. Among them are why Dunn did not take a copy of the supposed notes with him when he was moved from Narcotics to the Juvenile division pending the investigation of him, and why he did not attempt to retrieve them while he was in Juvenile and still actively employed by BPD.

D. The Merich Memo

The Motion next seeks disclosure of the "Merich Memo." Dunn misleads the Court in trying to suggest that the Merich Memo regarding Lt. Rosoff was part of, or related to, or "pertaining to" the internal BPD investigation of Dunn. [Motion, p. 6:20-21.] Dunn's good cause showing for production of the memo is that it documents an attempt by Lt. Rosoff to "manipulate" the testimony of Sgt. Merich during Dunn's IA Investigation, potentially compromising that investigation and its results (the sustained misconduct charges and his termination). However, Sgt. Merich's declaration establishes that he did not have any contact with Lt. Rosoff prior to his interview in the IA Investigation. [Declaration of Thor Merich ("Merich Decl."), attached hereto, ¶ 2.] Moreover, both Dunn and Sgt. Merich contend that Sgt. Merich provided truthful statements in the IA Investigation, further negating any claim that this investigation was compromised. [Pelletier Decl., Ex. D, p. 315:24-321:1, Merich Decl., ¶¶ 2-3.]

Even if Dunn's allegations of supposed witness tampering are construed very broadly, both he and Sgt. Merich agree that Lt. Rosoff had no impact whatsoever on the statements that Sgt. Merich gave to any investigator. [Merich Decl., ¶¶ 2-3; Pelletier Decl., Ex. D, pp. 315:24-321:1.] Dunn admitted at deposition that Lt. Rosoff had no impact on the Sheriff's investigation, and was entirely unconnected to the investigations of the two other public agencies (CCPD and the DA) that found that Dunn had unlawfully "tipped" his informant. [Pelletier Decl., Ex. D, pp. 315:24- 321:1.] In addition, the Motion offers no explanation for how Sgt. Merich could have undercut Dunn by feigning a lack of memory of details of the events at issue. Sgt. Merich was simply not a critical or material witness.[6]

Furthermore, Dunn again premises the conduct described in the Merich Memo as material to show retaliation for his purported race-based complaints against Sgt. Yadon.

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[6] While Sgt. Merich talked to CCPD and Dunn about CCPD's planned operation regarding Dunn's informant on the day that Dunn tipped that informant, he did not have any knowledge of whether or not Dunn tipped off the informant, and was not a significant or material witness in the investigations. [See *e.g.*, the Lewandowski Decl., Ex. A, pp. 9-10 (Merich interview summarized); and Ex. FF, p. 7 to the Misquez Decl. (Merich only briefly mentioned under heading "Why Detective Dunn Used Multiple Phones") filed with the City's MSJ.]

[Motion, p. 6:10-14, 7:8-13.] However, since, as discussed above, Dunn has admitted that he never made any such complaints, his good cause showing again fails.

Finally, Dunn obtained a copy of the Merich Memo through improper means. This Court (as well as Judge Chalfant) previously found the Memo to be a confidential police personnel document and ordered Dunn and his counsel to return all copies of it to the City. [Exs. B and C to the Pelletier Decl.] The Court further restrained and enjoined both Dunn and his attorneys from, *inter alia*, "distributing, disclosing, [or] revealing" that document. [Pelletier Decl., ¶ 5, Ex. B.] In support of the Motion, Dunn and his counsel disclose and reveal the existence and contents of the Merich Memo in contravention of the Court's Order. The Court need not and should not reward this violation by granting Dunn's improper request for the Memo.

E. <u>Lt. Rosoff's Personnel File</u>

Dunn has not made a showing justifying the production of the entirety of Lt. Rosoff's personnel file. Instead, he specifically attempts to show good cause for information about the purported documents discussed above, *i.e.,* the Merich Memo and a supposed burglary investigation. For the reasons discussed above, as to those documents, Dunn's request for such information, if any, from Lt. Rosoff's file should also be denied.

Moreover, Dunn's request for the entirety (or other portions) of Lt. Rosoff's personnel file is fatally flawed, and should be denied, for several additional reasons.

First, Dunn suggests that he should be given access to documents in Lt. Rosoff's personnel file because Lt. Rosoff was retaliating against him on behalf of Sgt. Yadon. [Motion, p. 9:7-15.] As noted previously, Lt. Rosoff's actions cannot be considered retaliatory as a matter of law because Lt. Rosoff could not have been aware of complaints which Dunn himself has admitted that he never made. [Pelletier Decl., Ex. D, pp. 194:11-14, 197:6-198:4, 206:3-13.] *Doe v. Capital Cities, supra,* 50 Cal.App.4th at 1053; *Sada, supra,* 56 Cal.App.4th at 156-157.

Second, Dunn cannot base his request for access to Lt. Rosoff's personnel records on his (Dunn's) termination (the purported act of retaliation) because Lt. Rosoff was not involved in the termination. *Evid. Code* § 1047; *Davis, supra,* 24 Cal.App.4th at 400 (*Evidence Code* § 1047 applies in civil case and limits disclosure of police personnel records to those officers directly

involved in the incident that is the subject of the litigation). Lt. Rosoff was only involved in a single interview and miscellaneous work on Dunn's IA investigation before it was suspended in its infancy in favor of the Sheriff's criminal investigation. When the IA investigation resumed, Lt. Rosoff was in a different position and was not involved in any further work. [Misquez Decl., ¶ 5.] Accordingly, Dunn agrees that Lt. Rosoff did not help formulate the investigation's (Sgt. Misquez's) conclusions. [Pelletier Decl., Ex. D, at 332:17-21.] As he is not alleged to be otherwise involved in Dunn's termination, Dunn cannot use the investigation or the termination as a basis to seek access to Lt. Rosoff's personnel records as a matter of law. *Evid. Code* § 1047.

Third, other than admittedly harmless alleged actions (the Merich Memo), and rank speculation (that Rosoff could have taken documents that were not actually stolen) previously discussed *infra*, Dunn's arguments for access to Lt. Rosoff's personnel file are based solely upon an alleged friendship between Lt. Rosoff and Sgt. Yadon. Courts will not infer that officers will commit misconduct simply to protect fellow officers. *See*, *California Highway Patrol v. Sup. Ct.*, *supra*, 84 Cal.App.4th at 1023-1025 (trial court abused its discretion in granting access to police officer personnel files based on such an assertion). Nor do courts grant access to confidential police officer personnel files when, as here, the moving party is merely fishing. *City of Santa Cruz, supra,* 49 Cal.3d at 85. A friendship between fellow officers is simply not a sufficient reason to grant access to confidential police personnel records.

Fourth, although mentioned nowhere else in the notice or the Motion, Dunn briefly suggests that he should be allowed to review Lt. Rosoff's personnel file because he alleges that Lt. Rosoff was accused of, but not disciplined for, "kidnapping."[7] Dunn argues, without any explanation, that this could be considered disparate treatment. Disparate treatment requires a showing that a protected category was a motivating factor for the adverse employment action. CACI 2500; see also BAJI 12.00 ("Disparate treatment means that the [employer]… treated some individuals less favorably than others because of race…"). However, to be relevant, comparative evidence must be directed at showing disparate treatment between employees that are "similarly situated" to the plaintiff in all relevant respects. *Guz v. Bechtel National, Inc.*

[7] This is yet another mischaracterization.

(2000) 24 Cal.4th 317, 354, 369 (plaintiff in discrimination case failed to show pretext through data on other employees that were not "similar or comparable"); *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 817 ("comparative evidence of pretext ... [is] evidence that [plaintiff] was treated differently from others who were similarly situated"). Similarly, the *Pitchess* decisions have strictly limited access to prior incidents of misconduct from an officer's personnel file to incidents similar to the misconduct alleged, *even in criminal cases where the defendant has a constitutional right to information that can be used in his or her defense. California Highway Patrol*, 84 Cal.App.4th 1010, at 1021. As such, the courts have, for example, held that an allegation of filing a false police report is not similar enough to personnel information about timecard irregularities so as to justify its disclosure. *Id.*, at 1023.

Here Dunn provides no specific, plausible factual scenario that would show how a purported "kidnapping" accusation against a Lieutenant could be material to a disparate treatment claim as to Dunn's discipline for illegally tipping his informant and obstructing the CCPD's investigation. In addition to the obvious dissimilarity in charges, there is no indication that, as was the case with Dunn, any agency, much less multiple outside agencies, found that Lt. Rosoff engaged in criminal conduct and/or placed him on a *Brady* list. It should be abundantly clear that Dunn is simply fishing for information that he thinks he may be able to use to embarrass Lt. Rosoff and/or the BPD. Dunn cites no case law entitling him to unrelated information from another officer's personnel file under a disparate treatment theory or given the circumstances here, and he should not be given broader access than a criminal defendant with Sixth Amendment rights would get. Lt. Rosoff's personnel records, if any, are so remote as to the facts at hand in this action "as to be of little or no practical benefit." *Evid. Code* § 1045(b)(3). Accordingly, they should not be ordered produced.

IV. *IN CAMERA* REVIEW IS REQUIRED PRIOR TO ANY DISCLOSURE, DURING WHICH THE COURT MUST BALANCE THE INTEREST IN DISCLOSURE WITH THE RIGHT TO PRIVACY AND CONFIDENTIALITY

Even if Dunn had made a showing of good cause, this is only the first hurdle to overcome to obtain discovery in a *Pitchess* motion. The second step would be for the Court to review documents *in camera* with the custodian of records, the affected officer(s), and their

representatives, to exclude from disclosure several enumerated categories of information, to protect other privacy interests, and to ensure the relevance of any disclosed documents. *Rosales, supra*, 82 Cal.App.4th at 425-426. This *in camera* review is mandatory. *Evid. Code* § 1045(b); *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70-71 (trial court "must" review the records *in camera*). Therefore, before ordering any actual disclosure, the Court must conduct the mandatory *in camera* review.

As part of this review, the moving party's interest in disclosure must be carefully balanced with the officers' privacy interests. *Becerrada v. Sup. Ct.* (2005) 131 Cal.App.4th 409, 413. In conducting this balancing, it is relevant that Dunn and his counsel, Solomon Gresen, have repeatedly utilized and publicly disclosed confidential police personnel record information in violation of the law and court orders. [Pelletier Decl., ¶ 6, Exs. B, C, and E.] They have shown such a lack of respect for officers' privacy rights that the City believes it is a virtual certainty that further public disclosures would occur regardless of any protective order the Court may issue. Given the (at best) marginal relevance of the documents sought in Dunn's Motion, and the fact that Dunn and his counsel have demonstrated that they are unable or unwilling to limit use of disclosed documents as required by law and court orders, the City submits that no such documents should actually be turned over to Dunn or his counsel.

V. CONCLUSION

For the reasons set forth above, the City respectfully requests that Dunn's Motion for Disclosure of Confidential Police Officer Personnel Records be denied.

Dated: August 9, 2010

Burke, Williams & Sorensen, LLP
Kristin A. Pelletier
Robert J. Tyson

By: _____
Robert J. Tyson
Attorneys for Defendant City of Burbank

DECLARATION OF GERARDO MISQUEZ

I, Gerardo Misquez, hereby declare as follows:

1. I am a Sergeant with the Burbank Police Department ("BPD") and have been employed by that agency since 1995. From July 2006 to the present, I have been the Sergeant assigned to the Internal Affairs Division of the Burbank Police Department. Unless otherwise stated, I have personal knowledge of the matters stated herein and, if called as a witness, I could and would competently testify thereto.

2. I was the investigator assigned to investigate allegations of misconduct against Christopher Dunn. I interviewed Christopher Dunn twice during the investigation. Dunn claimed that he had written some notes about the events concerning the informant and Culver City police at the behest of his supervisor Sgt. Jose Duran. During both of his interviews with Internal Affairs, Dunn claimed that he printed the notes and gave them to Sgt. Duran. Duran told me in his second interview that he did not receive any notes from Dunn. Rather, he said that Dunn only orally reported to him as he put together an e-mail to report to his superiors. The e-mail, dated March 30, 2007 at 1223 hours still exists, and was turned over to Dunn as part of the *Skelly* process. I attempted to have Dunn's purported notes retrieved from the computer on which he says he typed them up. However, no such document could be located on it. In Dunn's second interview, he stated he might have deleted the document instead of saving it.

3. On or about June 23, 2010, I searched internal affairs records for any complaint by Christopher Dunn. I was specifically looking for any complaints by Dunn that any officer had made improper racial statements. I was not able to find any internal affairs complaint filed by Christopher Dunn on any topic. That same day I also inquired with the Management Services Department about any such complaints from Christopher Dunn. At my request, Management Services searched for any race related complaints filed by plaintiff Christopher Dunn. No complaints were found from Christopher Dunn.

4. I was made aware by counsel that Dunn has asserted that some department files with which he was associated were stolen from the Narcotics office after he was placed on administrative leave. I was further informed by counsel that, according to Dunn's deposition

testimony, one of these cases involved weapons charges against a William Bonnell. I am informed and believe that case files related to Dunn's informant, GD, were missing and later found, apparently misfiled, in the Narcotics office. In response to a request from counsel on this case, I sought to locate those files this week to determine if they were in fact stolen. I was able to locate the informant book kept by Narcotics detectives in 2007, and on June 23, 2010, I personally confirmed that it contained entries related to GD. On June 24, 2010, I also located and personally reviewed the case files of GD's arrest and the cases on which she provided information. One of these cases was against a defendant named William Bonnell, against whom weapons charges had been brought. To my knowledge, Dunn never complained about missing files during his internal affairs investigation.

5. Lt. Rosoff was my supervisor in Internal Affairs when the investigation began on or about March 30, 2007. He participated with me in the interview of the informant, GD, and in gathering documents in the early stages of the case. On or about April 18, 2007, after I interviewed Nancy Mercado, the Internal Affairs investigation was suspended while the matter was referred to the Los Angeles County Sheriff's Department for investigation of possible criminal conduct by Dunn. By the time the internal affairs investigation resumed in or about November 2007, Lt. Rosoff had moved to a different assignment in Patrol Division and no longer supervised IA investigations. He did not further participate in this investigation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 24th day of June, 2010, at Burbank, California.

Gerardo Misquez

DECLARATION OF THOR MERICH

I, Thor Merich, hereby declare as follows:

1. I am a Sergeant with the Burbank Police Department. As such, unless otherwise stated, the following statements are of my own personal knowledge, and if called to testify, I could and would testify competently thereto.

2. On June 13, 2007, I was interviewed by the Los Angeles County Sheriff's Department as part of a criminal investigation into Christopher Dunn. Nothing influenced me to be anything other than completely truthful during this interview and I was completely truthful during this interview.

3. On December 6, 2007, I was interviewed by Internal Affairs as part of the Burbank Police Department's internal investigation into Chris Dunn. Nothing influenced me to be anything other than completely truthful during this interview and I was completely truthful during this interview. I did not have any contact with Lt. Rosoff about my Internal Affairs interview, the subject of the interview, or the internal investigation into Christopher Dunn prior to this interview.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 24 day of June, 2010, at Glendale, California.

Thor Merich

DECLARATION OF KRISTIN A. PELLETIER

I, Kristin A. Pelletier, hereby declare as follows:

1. I am an attorney licensed to practice before this Court and a partner with the law firm of Burke, Williams & Sorensen, LLP, counsel of record for defendant City of Burbank ("City") in this action. As such, unless otherwise stated, the following statements are of my own personal knowledge, and it called upon to testify, I could and would testify competently thereto.

2. Christopher Dunn ("Dunn") filed this lawsuit on July 16, 2009, claiming that he suffered harassment, discrimination, and retaliation in his employment as a police officer with the City. Dunn as served no written discovery on this case, and has not requested his personnel file or records in discovery.

3. On July 21, 2009, the City moved *ex parte* for an order sealing the Complaint and for other relief to protect a confidential police personnel record that was attached to the Complaint. Attached hereto as Exhibit A is a true and correct copy of a stipulated order, signed by Dunn's counsel, to seal the Complaint. The stipulated order twice references the statutory sections governing the confidentiality and procedures to move for discovery of confidential police officer personnel records, *Penal Code* § 832.5 and *Evidence Code* §§ 1043 and 1045.

4. On October 13, 2009, Judge James Chalfant issued an order in LASC Case No. BC 414602 compelling the plaintiffs in that action and their counsel, Soloman Gresen, to return various documents to the City of Burbank that had been obtained improperly and were being used in violation of the court's prior protective order, including all copies of the document referred to as the "Merich Memo." A true and correct copy of Judge Chalfant's Order in that regard is attached hereto as Exhibit B.

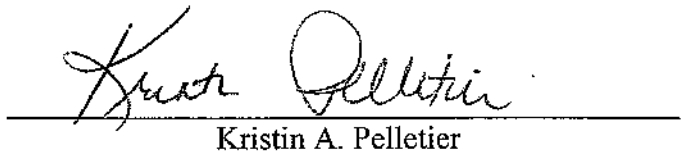
5. Despite Judge Chalfant's Order, the Merich Memo continued to be retained and used by Mr. Gresen and his clients. The City therefore brought, and on January 7, 2010, this Court heard, the City's Motion for an order restraining Dunn's continued use of the Merich Memo. The Court ordered Dunn "and his attorneys including Solomon Gresen" be restrained and enjoined from "distributing, disclosing, [or] revealing" that record. A true and correct copy of the Court's Minute Order to this effect is attached hereto as Exhibit C.

6. Attached hereto as Exhibit D are true and correct copies of cited excerpts of the second day of deposition of Dunn, which I took on March 22, 2010.

7. Attached hereto as Exhibit E is a true and correct copy of retired Judge Diane Wayne's findings and recommendation in LASC Case No. BC 414602, with respect to the plaintiffs and their counsel's failure to disclose relevant information during the discovery process in that case. In that document, Judge Wayne finds that Mr. Gresen's assertion that he did not possess the information in dispute (an illegally made tape recording) was not credible and was belied by the evidence. The City points this out because the lack of forthrightness, the making of illegal recordings, and the posting of such information on the internet, combined with previous violations of orders regarding confidential personnel records issued by this Court and others, all indicate that Dunn and his counsel cannot be relied upon to keep protected materials confidential, even in the face of protective orders. This is an additional reason why disclosure of the requested confidential police personnel records to Dunn is unwarranted.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 9th day of August, 2010, at Los Angeles, California.



Kristin A. Pelletier

LA #4826-6545-4854 v4

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Judge Chalfant's Order dated October 13, 2009 in
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Court's Minute Order re Motion of Defendant, City of Burbank for a
Preliminary Injunction, January 7, 2010 C

Excerpts from Christopher Lee Dunn's Deposition taken March 22, 2010 ..... D

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Amended

FILED
Superior Court of California
County of Los Angeles
OCT 13 2009
John A. Clarke, Executive Officer/Clerk
By A. Fajardo, Deputy
ANNETTE FAJARDO

Rodriguez, et al. v. Burbank Police Department
BC 414602

Tentative decision on motion commanding return of documents: granted

Defendant City of Burbank ("City") moves for an order requiring Plaintiffs Oliver Rodriguez ("Rodriguez") *et al.* to return documents in compliance with a previously issued preliminary injunction. The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

On May 28, 2009, Plaintiffs filed a Complaint against the City, it Police Department ("Department") and various individual Defendants alleging various forms of discrimination and harassment.

On August 6, 2009, Defendants applied *ex parte* for a temporary restraining order ("TRO") and order to show cause ("OSC") re: preliminary injunction restraining Plaintiffs from using any documents from the personnel files of third party police officers in Plaintiffs' possession, and ordering Plaintiffs to gather and return to the City all copies of such records. The court issued a protective order requiring that all Department personnel records in Plaintiffs' possession be collected and maintained in a separate location in Plaintiffs' counsel's office and that such records not be used directly or derivatively pending hearing on the OSC. The parties were directed to file supplemental briefs on the issue of whether the records were personnel records protected by privilege and must be returned to the Department.

On August 27, 2009, the court provided an analysis of what is and is not a protected police personnel record. Based on this framework, the court ordered the parties to meet and confer to evaluate what documents were protected, and ordered that Plaintiffs must return all documents that it agreed were protected and apply to the court for relief for any documents on which the parties disagreed. The court did not rescind its protective order that no documents were to be used pending outcome of the preliminary injunction.

The meet and confer took place, and Plaintiffs returned most of the documents at issue. The City applied *ex parte* on October 1, 2009 for an order of contempt with respect to two remaining documents. The court ordered briefing by opposition and reply.

B. Governing Law

Penal Code section 832.7 provides that peace officer personnel records, and information obtained from these records, are privileged and confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Evidence Code Section 1043. *See* Penal Code §832.7 ("peace officer personnel records. . . are confidential and shall not be disclosed in any criminal or civil proceeding, except by discovery pursuant to Section 1043 of the Evidence Code).

"Personnel records" are defined as any file maintained under an officer's name by his or her employing agency and containing records relating to any of the following: "(a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information. (b) Medical history. (c) Election of employee benefits. (d) Employee advancement, appraisal, or discipline. (e) Complaints, or investigations of complaints,

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concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties. (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy." Penal Code §832.8.

Section 832.7 protects peace officer personnel records against disclosure except pursuant to the Pitchess procedures of Evidence Code section 1043 and 1045. *See* City of Santa Cruz v. Superior Court, (1987) 190 Cal.App.3d 1669. It prohibits any disclosure of police personnel records and is not limited to those made in a legal proceeding. *See* Copley Press v. Superior Court, (2006) 39 Cal.4th 1272, 1284-86. "[T]he privilege against disclosure of official police records is held both by the individual officer involved and by the police department." Davis v. City of Sacramento, (1994) 24 Cal.App.4th 393, 401.

Police personnel records are customarily maintained in either a general personnel file or a separate file containing complaints and reports or findings relating to complaints maintained for five years. Penal Code §832.5. However, despite the literal language of section 832.8 in referring to a personnel "file," the content of the document, not its location, is determinative. Otherwise, a clearly public document such as a newspaper article could be deemed confidential if placed in an otherwise protected personnel file. Therefore, only the types of information enumerated in section 832.8 constitute protected peace officer personnel records. Commission on Peace Officer Standards & Training v. Superior Court, (2007) 42 Cal.4th 278, 290-91. The category of "personal data" in section 832.8 includes the type of information normally supplied by an employee to his or her employer, and does not include information, such as salary arising from the officer's employment with the police department. International Federation of Professional & Technical Engineers, (2007) 42 Cal.4th 319, 342-43.

B. Analysis

The City contends that Plaintiffs and their counsel remain in wrongful possession of two documents: OR 399, CG 399, PR 1031 and OR 1242 (different versions of the same document, a memo authored by Thor Merich (the "Merich memo") and CG 385 (detective rankings with the names of some 20 officers).

1. The Merich Memo

According to the Declaration of Chief of Police Tim Stehr ("Stehr"), the Merich memo concerns possible misconduct by a third party City police officer, which also makes reference to former City police officer Christopher Dunn ("Dunn"). The Merich memo was attached as Exhibit B to a complaint in a separate lawsuit filed by Dunn, who is represented by the same counsel as Rodriguez.

Plaintiffs argue that the Merich Memo is not a police personnel record because Penal Code section 832.8(e) requires that a document concerning a complaint, or investigation of a complaint, against a police officer must also pertain to the manner in which the officer performed his or her duties. The Merich Memo apparently concerns a complaint that the officer suborned perjury by encouraging a witness to lie. *See* Opp. at 3. Plaintiffs argue that it is not part of an officer's job to suborn perjury, and therefore the memo is outside the scope of section 832.8(e).

This argument is self-defeating. Obviously, suborning perjury is not part of a police

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officer's job. Just as obviously, an allegation that an officer suborned perjury relates to the performance of his or her duties.

Plaintiffs also argue that the Stehr declaration does not state that the Merich Memo concerns an event that involves the third party officer as a participant or witness. That may be true, but Plaintiffs admit that the document concerns an allegation against ~~Dunn~~ that he suborned perjury. This admission, coupled with the Stehr declaration, makes the Merich Memo a confidential personnel record ~~of Dunn~~. the third party

Plaintiffs argue that Dunn is entitled to the document as his own personnel record. That may or may not be true, but Dunn is not a party to this case. Whether he validly possessed the document to file it as an exhibit in his separate lawsuit is also not an issue in this case. This court's only concern is whether Plaintiffs must be ordered to return the Merich Memo because it is a confidential police personnel record. It is and must be returned.

This raises the issue of the scope of what must be returned. If Plaintiffs improperly provided the Merich Memo to Dunn, or their attorney improperly used the Memo in Dunn's case, in violation of this court's protective order that the documents at issue not be used for any purpose, the crime-fraud exception to the attorney-client privilege may well apply to permit discovery of that fact. The trial court (Judge O'Donnell) apparently has ruled that investigation of the source of the memo would violate the attorney-client privilege. (The word "apparently" is used because Plaintiffs failed to attach the Exhibit I which they contend is a notice of Judge O'Donnell's ruling.) The City argues that the crime-fraud exception applies. The court does not know whether the City presented evidence to Judge O'Donnell concerning the crime-fraud exception before her ruling was made.

In any event, the scope of discovery in this case is for Judge O'Donnell. This court is merely ordering that Plaintiffs must return the Merich Memo, including any copies of the Memo that were distributed or used in violation of the protective order.

2. <u>The Detective Ranking</u>

The other document (OR/CG 385) is a detective ranking involving 20 other officers. Penal Code section 832.8 expressly provides that personnel files include records relating to "employee advancement, appraisal or discipline." Penal Code §832.8(d). A detective ranking relates to employee advancement, and as such is a personnel record. It includes rankings, scores and promotion assessments of officers other than the Plaintiffs.

It is undisputed that this document is a police personnel record, and the court so indicated in its August 27, 2009 analysis.[1]

Plaintiffs argue that Rodriguez is entitled to a copy of the detective rankings under POBRA (Gov. Code §3300 *et seq.*) A police officer is entitled to inspect his or her personnel file, and by implication obtain a copy of its contents. *See* Gov. Code §3306.5.

The City argues that Plaintiffs wrongly stated that this document was given to Rodriguez by the City's then Chief of Police, and this has proven to be false. Therefore, the City concludes

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[1] Plaintiffs argue that the document is not maintained in any officer's file, but the court has previously ruled that the location of a document is not determinative of whether it is a police personnel record.

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that Plaintiffs must return it and Rodriguez may obtain a copy of it in a Pitchess motion.

The problem with the City's argument is that the court previously stated in its framework for analysis that Plaintiffs need not return records that are part of their own personnel file. It does not matter whether Rodriguez misappropriated the detective ranking because the City's application sought the return of confidential police personnel records, not records wrongly misappropriated though Plaintiffs had the right to possess them. Thus, the means by which Plaintiffs obtained the detective ranking is irrelevant *to this application.*

The detective ranking is part of Rodriguez's personnel file. However, Rodriguez would not be entitled to a copy of an unredacted detective ranking; he would only be entitled to a list with his name in a particular order and other names blacked out. Thus, the unredacted detective ranking is a document to which Rodriguez is not entitled.

The City's application for return of the Merich Memo and the detective ranking is granted. Plaintiffs are ordered to return both documents forthwith. Rodriguez may seek a copy of the redacted detective ranking pursuant to Gov. Code section §3306.5.

10/16/09

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FILED
LOS ANGELES SUPERIOR COURT
JUL 27 2009
JOHN A. CLARKE, CLERK
BY S. WONG, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CHRISTOPHER LEE DUNN Plaintiff, v. BURBANK POLICE DEPARTMENT; CITY OF BURBANK; AND DOES 1 THROUGH 100, INCLUSIVE. Defendant.	Case No.: BC417928 [redacted]ORDER SEALING COMPLAINT [Pursuant to Rule 2.550, California Rules of Court]

On July 21, 2009, the Custodian of Records for the Burbank Police Department applied ex parte to seal Exhibit B to the Complaint on the basis that it constituted a confidential peace officer personnel record protected by California Penal Code § 832.7 and California Evidence Code §§ 1043 and 1046. During a discussion in chambers regarding Exhibit A between the Court, counsel for the Custodian of Records for the Burbank Police Department, and counsel for plaintiffs, it was noted that Exhibit A to the Complaint included private and confidential information regarding unrelated third parties, including dates of birth. The Court recommended

and the parties stipulated thereto that the original Complaint would be sealed, an Amended Complaint would be refilled within ten days of July 21, 2009, Exhibit B would not be attached to the Amended Complaint and any reference to Exhibit B would be deleted from para. 17 of the Amended Complaint, and Exhibit A would be redacted to delete date of birth and other information of unrelated third parties that were deemed confidential.

Pursuant to Rule 2.550, California Rules of Court, the Court makes the following findings:

Exhibit B and the reference/quotation in para. 17 of the Complaint arguable constitutes confidential peace officer personnel information protected by California Penal Code § 832.7 and California Evidence Code §§ 1043 and 1046, and Exhibit A contains the date of birth of unrelated third parties. The privacy concerns raised thereby constitute an overriding interest that overcomes the right of public access to the record; this overriding interest in protecting these privacy issues supports sealing the record. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed. By allowing for an Amended Complaint that deletes Exhibit A and any reference thereto, and redacts Exhibit B, the sealing of the Complaint is narrowly tailored. No less restrictive means exist to achieve the overriding interest.

Therefore it is Ordered that the Complaint be sealed. Nothing in this Order should be construed, and the Court has made no finding, as to whether Exhibit A or Exhibit B or the information contained therein is relevant or material to the pending litigation.

Dated: 7-27-09

Alan S. Rosenfield
Los Angeles Superior Court Judge

Approved as to form and content.
Dated: 7/23/09

Carol Ann Humiston
Sr. Asst. City Attorney
Attorney for the Custodian of Records,
Burbank Police Department

Approved as to form and content.
Dated: 7/23/09

Solomon Gresen
Rheuban & Gresen
Attorney for Plaintiffs

1 THE WITNESS: Based on the outcome of this 15:28:43
2 investigation, it's my opinion that he was successful.
3 Q. BY MS. PELLETIER: Okay. Based on the outcome 15:28:49
4 of the sheriff's department investigation?
5 A. Based on the total -- the total incident, 15:28:57
6 beginning to end, where it ended in my termination.
7 Q. Okay. So let me just ask you this. 15:29:03
8 The -- so far as you know, Lieutenant Rosoff
9 only had contact with one Burbank employee who was 15:29:17
10 interviewed by the sheriff's department; correct?
11 Do you have any information about any other 15:29:23
12 contacts that Lieutenant Rosoff had with any other member
13 of the Burbank Police Department before they were 15:29:28
14 interviewed by the sheriff's department?
15 A. No. 15:29:32
16 Q. Okay. And if I understand you correctly,
17 there's only one person who Lieutenant Rosoff attempted 15:29:40
18 to influence in their testimony; is that correct?
19 MR. GRESEN: Foundation. Speculation. 15:29:45
20 You may answer.
21 THE WITNESS: That I know of. 15:29:46
22 Q. BY MS. PELLETIER: Okay. And what information
23 do you have that that one person -- let's call him TM -- 15:30:00
24 gave inaccurate information to the sheriff's department?
25 A. None. 15:30:06

1 Q. And, in fact, TM's position is that he was 15:30:12
2 completely honest with the sheriff's department; correct?
3 MR. GRESEN: Foundation. Speculation. Assumes facts 15:30:16
4 not in evidence.
5 You may answer. 15:30:17
6 Q. BY MS. PELLETIER: If -- if you know.
7 A. I don't know what his position was. 15:30:20
8 Q. Okay. Did you see anything in reviewing TM's
9 statement to the sheriff's department that was 15:30:26
10 inaccurate?
11 MR. GRESEN: Vague. Foundation. 15:30:29
12 What statement?
13 You may answer. 15:30:32
14 THE WITNESS: No.
15 Q. BY MS. PELLETIER: And, in fact, did -- in 15:30:34
16 reviewing TM's statement to the sheriff's department, did
17 it appear to be accurate? 15:30:38
18 A. Yes.
19 Q. And in -- TM was also interviewed by the Burbank 15:30:44
20 Police Department; correct?
21 A. Yes. 15:30:47
22 MR. GRESEN: Foundation.
23 Q. BY MS. PELLETIER: Do you have any evidence that 15:30:49
24 anyone attempted to influence TM's testimony or
25 statements during the internal affairs investigation 15:30:57

1 conducted by the Burbank Police Department? 15:31:00

2 MR. GRESEN: Rifkin objections.

3 You may answer. 15:31:01

4 THE WITNESS: Repeat the question. I thought you

5 already asked me that. 15:31:06

6 Q. BY MS. PELLETIER: Do you have any information

7 that anybody tried to influence TM in the statements that 15:31:15

8 he made to internal affairs? In other words, that

9 somebody contacted TM before he was interviewed by 15:31:23

10 internal affairs and -- and tried to influence what he

11 said to internal affairs. 15:31:27

12 MR. GRESEN: Same objections.

13 THE WITNESS: Yes. I had already said Lieutenant 15:31:29

14 Rosoff.

15 Q. BY MS. PELLETIER: I'm talking about he went 15:31:33

16 to -- I'm talking about in conjunction with his internal

17 affairs interview, not a sheriff's department interview. 15:31:41

18 MR. GRESEN: Asked and answered.

19 You may answer again. 15:31:43

20 Same Rifkin objections.

21 THE WITNESS: Oh, the internal affairs. I'm sorry. 15:31:46

22 That's where I got it wrong.

23 No. 15:31:46

24 Q. BY MS. PELLETIER: Okay. And did you review

25 TM's statements to internal affairs? 15:31:51

1 A. Yes. 15:31:51

2 Q. Did they appear to be accurate?

3 MR. GRESEN: Foundation. Speculation. Assumes facts 15:31:55

4 not in evidence. And speculation as to how many

5 statements he gave. 15:32:03

6 You may answer.

7 THE WITNESS: Yes. 15:32:04

8 Q. BY MS. PELLETIER: And I'm sorry. I lost that

9 with everything -- 15:32:06

10 MR. GRESEN: Sorry.

11 Q. BY MS. PELLETIER: -- that's -- that's gone on. 15:32:08

12 You've -- you've -- I just want to make sure.

13 Based upon your review and what you know, TM's 15:32:14

14 statements during the internal affairs investigation

15 interview appear to be accurate? 15:32:19

16 MR. GRESEN: Same objections.

17 THE WITNESS: Yes. 15:32:21

18 Q. BY MS. PELLETIER: So it's fair to say that you

19 don't have any information that TM gave any inaccurate 15:32:27

20 information to either the sheriff's department or to the

21 Burbank Police Department when he was interviewed by 15:32:32

22 those agencies; is that correct?

23 A. That's -- 15:32:35

24 MR. GRESEN: Same -- same objections and add form.

25 You may answer. 15:32:38

1 THE WITNESS: That is correct. 15:32:40

2 Q. BY MS. PELLETIER: And the internal affairs

3 investigation report that -- that reaches the conclusion 15:32:54

4 that you tipped the informant, who prepared that report?

5 A. I believe it was Sergeant Misquez -- Jerry 15:33:06

6 Misquez.

7 Q. And do you have any information that Jerry 15:33:12

8 Misquez was biased against you based on your race?

9 A. No. 15:33:17

10 Q. By the way, what's Jerry Misquez's race, if you

11 know? 15:33:22

12 A. I don't know.

13 Q. Okay. Do you have any information that Jerry 15:33:29

14 Misquez prepared the report reaching the conclusion that

15 you tipped the informant based upon a desire to retaliate 15:33:38

16 against you?

17 MR. GRESEN: Rifkin objections. 15:33:41

18 You may answer.

19 THE WITNESS: No. 15:33:42

20 Q. BY MS. PELLETIER: Did you have any problems

21 with Jerry Misquez prior to this investigation? 15:33:49

22 A. No.

23 Can I add something to that? You asked me 15:33:55

24 everyone who prepared. I believe Armen Dermenjian

25 prepared portions of this investigation. 15:34:02

1 to go into unless you want me to. 15:49:39

2 MR. GRESEN: Keep going.

3 THE WITNESS: Well, I'm -- it's getting to that point 15:49:42

4 where I'm getting redundant. And maybe a question would

5 help me -- 15:49:47

6 MS. PELLETIER: Okay.

7 THE WITNESS: -- for more information. 15:49:48

8 Q. BY MS. PELLETIER: So let me ask you this.

9 What evidence or information do you have that, 15:49:53

10 in your opinion, Misquez just did a bad job because he

11 did a bad job as opposed to it being motivated by your 15:50:02

12 race?

13 MR. GRESEN: Foundation. Argumentative. 15:50:05

14 You may answer.

15 THE WITNESS: There's no indication that he did a bad 15:50:10

16 job motivated by race.

17 Q. BY MS. PELLETIER: Okay. Do you have any 15:50:41

18 information that Lieutenant Rosoff played any part in

19 drafting the conclusions set forth in Sergeant Misquez's 15:50:53

20 investigation report?

21 A. No. 15:51:20

22 Q. You indicated that there were illegal actions by

23 the BPOA as the second item when I was numbering them in 15:51:28

24 terms of the things that led you to believe that the

25 investigation was -- was flawed. 15:51:35

1 MR. GRESEN: I believe that misstates his testimony. 15:51:37

2 You may answer.

3 THE WITNESS: That misstates it. 15:51:40

4 It was Burbank personnel, not the BPOA.

5 Q. BY MS. PELLETIER: Okay. And who engaged in 15:51:47

6 the --

7 Is that a reference to what you've been telling 15:51:50

8 us about Lieutenant Rosoff?

9 A. No. 15:51:54

10 Q. Who is that a reference to?

11 A. That's a -- that's a reference to unknown 15:51:59

12 officers.

13 Q. And what illegal actions are you talking about? 15:52:04

14 A. I'm referring to a burglary that occurred in my

15 office, specifically to my desk and the files regarding 15:52:11

16 GD and this case --

17 Q. When did -- 15:52:13

18 A. -- and the removal of possible evidence that

19 could have been substantial in -- in determining the 15:52:17

20 outcome of this case.

21 Q. When did those files go missing? 15:52:22

22 A. Sometime in June of 2007, I believe.

23 Q. Let me ask you this. 15:52:29

24 You're -- you're moved from detectives to

25 juvenile in April of 2007; right? 15:52:42

1 A. Yes. 15:52:43

2 Q. Okay. And you left your files in your desk?

3 A. Yes. 15:52:48

4 Q. And who took over your desk?

5 A. Nobody, as far as I know. 15:52:56

6 Q. And how do you know that those --

7 Those weren't your files; right? Those were 15:53:03

8 Burbank files?

9 A. It's a combination of the two. 15:53:07

10 Q. Okay. Why didn't you take --

11 What -- what portion of the files were your 15:53:11

12 files?

13 A. You'd have to be more specific about "files." 15:53:13

14 If you're referring to the burgled files, there's a

15 number of items that were missing, stolen from the 15:53:21

16 office -- the narcotics office and my desk. Two separate

17 locations. 15:53:26

18 Q. Okay. Let's talk about, what of your personal

19 items were stolen? 15:53:36

20 A. It's hard to determine because I was never

21 allowed to go back and find out what was missing. 15:53:43

22 One thing specifically that I know was missing

23 based on what Sergeant Misquez indicated in the internal 15:53:50

24 affairs interview was a set of notes that I prepared

25 shortly after this incident, if not the day -- the second 15:53:58

1 day that I was notified that -- from Nancy Mercado that I 15:54:03
2 was under investigation possibly.
3 Q. Uh-huh. 15:54:05
4 A. And those notes were a very good recollection of
5 what occurred in real time. Being only two weeks old, 15:54:14
6 I believe they provided an accurate depiction of -- of my
7 side of the story. Those notes were provided to Sergeant 15:54:22
8 Duran in which he prepared a memo, which is in the
9 investigation, to Sergeant -- or Captain Taylor. 15:54:30
10 And when I acknowledged the existence of those
11 notes to Sergeant Misquez, I believe he actually went and 15:54:36
12 tried to look for them, and apparently the computer had
13 been erased, and the notes were missing. I don't know if 15:54:42
14 he made a correlation between the burglary at that time
15 or even knew about it because, again, he didn't report 15:54:49
16 that in the investigation.
17 Q. So you printed out a hard copy of your notes and 15:54:55
18 gave them to Sergeant Duran?
19 A. Yes. 15:54:57
20 Q. And did you ask Sergeant Duran for those notes?
21 A. No. 15:55:03
22 Q. Have you seen Sergeant Duran deny that that
23 occurred? 15:55:07
24 A. Yes.
25 Q. Did you print out a hard copy of those notes for 15:55:10

1 yourself? 15:55:11

2 A. Yes.

3 Q. And you prepared them and left the only copy on 15:55:16

4 a Burbank computer?

5 A. I had no chance -- when they place you on 15:55:19

6 administrative leave, they take your key. And this is a

7 controlled area, the narcotics office. 15:55:22

8 When I was escorted out, I was not allowed to

9 return there unescorted, and I did not access my desk nor 15:55:28

10 the computer at that time.

11 Q. Did you ask Sergeant Duran -- 15:55:32

12 Because Sergeant Duran is still in charge of the

13 narcotics unit; right? 15:55:36

14 A. Yes.

15 Q. Did you ask Sergeant Duran if you could have a 15:55:38

16 copy of the notes that you prepared that you gave him?

17 A. As I stated before, I've had no contact with 15:55:44

18 Sergeant Duran for almost three years now since I've been

19 on -- this incident. 15:55:48

20 Q. So you -- you didn't ask him for your notes

21 back? 15:55:51

22 A. No.

23 Q. Did you ask anybody if you could get the notes 15:55:54

24 that you prepared shortly after the incident off of the

25 computer? 15:56:02

1 A. No. 15:56:03

2 Q. And was your computer subsequently assigned to

3 somebody else, if you know? 15:56:08

4 A. According to the investigation, I believe when

5 Mis- -- Sergeant Misquez went and checked the computer, 15:56:17

6 Sergeant Duran had indicated that that computer has since

7 been reassigned and therefore my files were no longer 15:56:23

8 available.

9 Q. And you consider that to be a burglary? 15:56:26

10 A. No.

11 Q. Okay. What of your personal property was 15:56:31

12 stolen?

13 A. Like I said before, there's no way to know 15:56:38

14 exactly what was missing. I received nothing from my

15 desk. 15:56:45

16 When Sergeant Irving and Mike Parrinello brought

17 property to my house, I had numerous informant files, 15:56:52

18 case files, photographs, work-related materials, notes,

19 some of which involved GD -- or GD and -- and a lot of 15:57:01

20 which didn't.

21 When we talk about "files," I think it's 15:57:04

22 important to clarify that I'm not just talking about

23 personal files when I say "burglary." The crime that was 15:57:12

24 constituted of the burglary involves more important

25 files. All the official record files regarding GD -- GD 15:57:19

1 and the informant -- her informant information provided 15:57:21
2 and the arrest -- subsequent arrest from that
3 information. On top of that, other items were removed 15:57:27
4 from the -- the vice/narcotics office, and this was
5 reported. 15:57:33
6 Q. Who reported it?
7 A. I believe Sergeant Duran did. 15:57:37
8 Q. Who did he report it to?
9 MR. GRESEN: Foundation. 15:57:40
10 THE WITNESS: That, I don't know.
11 Q. BY MS. PELLETIER: Did you report it to him? 15:57:43
12 A. No. Again, I had no contact with these
13 individuals -- actually, let me correct that. 15:57:50
14 I did have contact in an official capacity with
15 Sergeant Duran. One time we went to court. I forgot 15:57:56
16 about that.
17 Q. Who told you that there was a burglary of files 15:58:04
18 that you were maintaining while you were in narcotics?
19 A. I don't recall who told me about files that I 15:58:13
20 was maintaining. The files that I'm talking about are
21 the official police files. That became an issue and I 15:58:26
22 became aware of that when there was a court case
23 involving GD, a case that she had informed on. 15:58:32
24 An individual by the name of William Bonel, a
25 parolee, had bought firearms from an undercover. I 15:58:41

1 responded to that -- according to the subpoena, I 15:58:44
2 responded to court. During this time, I was on
3 administrative leave. 15:58:47
4 That case was lost because the -- when the
5 officers that were responding from the station, which was 15:58:52
6 Mike Reyes and Chris Canales, went to look for the actual
7 hard file that's maintained in a locked case -- locked 15:59:00
8 confidential files, only accessible by narcotics officers
9 and supervision, they discovered that that file, amongst 15:59:09
10 others, were missing.
11 And that's how I became aware that a burglary 15:59:15
12 had occurred.
13 Q. So Mike Reyes told you? 15:59:18
14 A. I believe Mike Reyes gave me information along
15 with a -- Chris Canales. I believe Duran had mentioned 15:59:24
16 it. And there might have been someone else. But this
17 was all -- all around the time of that case. 15:59:32
18 Q. And as I understand you, this is property of the
19 Burbank Police Department? 15:59:38
20 A. Property of the Burbank Police Department and
21 then property of myself. 15:59:41
22 Q. Well, what -- that's what I'm trying to get at.
23 What property of yours personally was taken? 15:59:50
24 MR. GRESEN: Asked and answered.
25 MS. PELLETIER: I know I've asked it. I don't think 15:59:52

1 STATE OF CALIFORNIA)

) ss. 16:01:54

2 COUNTY OF LOS ANGELES)

3

4 I, Susan C. Campana, a certified shorthand
5 reporter in and for the state of California do hereby
6 certify:
7 That the foregoing proceedings were taken before
8 me at the time and place therein set forth, at which time
9 the witness was put under oath by me;
10 That the deposition was recorded
11 stenographically by me and was thereafter transcribed
12 into typewriting under my direction and supervision and
13 contains a true and correct transcript of my shorthand
14 notes so taken.
15 I further certify that I am not related to any
16 party to said action, nor in any way interested in the
17 outcome thereof.
18
19 IN WITNESS WHEREOF, I have hereunto subscribed
20 my name this 6th day of April, 2010.
21
22
23
24 Susan C Campana
SUSAN C. CAMPANA, CSR NO. 9573
25

Veritext National Deposition & Litigation Services
866 299-5127

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
CENTRAL DISTRICT

OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ; STEVE KARAGIOSIAN; ELFEGO RODRIGUEZ; AND JAMAL CHILDS,	§	CASE NO.: BC 414 602 Assigned to: Hon. Joanne B. O'Donnell
Plaintiffs,	§	
v.	§	JAMS Reference No. 1220040470 Hon. Diane Wayne (Ret.), Discovery Referee
BURBANK POLICE DEPARTMENT; CITY OF BURBANK,	§	**5th Report of the Discovery Referee**
Defendants.	§	

5th Report of the Discovery Referee

I. Procedural History

A hearing was held on July 13, 2010 at JAMS in Los Angeles. Plaintiffs Omar Rodriquez, Cindy Guilen-Gomez and Steve Karagiosian were represented by LAW OFFICES OF RHEUBAN & GRESEN and Solomon E. Gresen and Steven V. Rheuban. Respondents Burbank Police Department and the City of Burbank were represented by MITCHELL SILBERBERG & KNUPP LLP and Lawrence A. Michaels.

II. Legal History

Plaintiffs, three current police officers of the Burbank Police Department, filed a Complaint on May 28, 2009 alleging that over a period of years they were discriminated against, variously, based on their race, sex, pregnancy and/or ethnicity that they were retaliated against for opposing such alleged discrimination and harassment. They assert that they suffered adverse

employment decisions including imposition of discipline, demotion and failures to obtain promotions and specific work assignments.

The Defendants deny all allegations.

On October 2, 2009 in Department 37 the Honorable Judge Joanne B. O'Donnell, Judge of the Superior Court appointed Diane Wayne, Judge (Ret.) as the Discovery Referee pursuant to *Civil Code of Procedure §§ 639(a)(5), 640 and 645.1.* All discovery disputes have been assigned to the Discovery Referee.

III. Recommendation:

At the hearing, the following Motions were considered:

A. Defendants Request to Compel Plaintiff Steve Karagiosian to Further Respond to Burbank's Demand for Documents, Set Two, Request No. 10 and for Sanctions: Grant.

During his deposition Karagiosian testified that he made recordings of conversations during his employment. Request No. 10 sought recordings of any communications with any City of Burbank employee. He served a Response, but did not produce any documents or recordings, instead claiming that he has no such recordings in his possession, custody or control. He did not assert that none existed.

Code of Civil Procedure Section 2031.230 specifically requires that any representation of inability to comply with the demand "shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed . . ."

No such representation was made in the response. Instead, Karagiosian argues in his Reply that neither he nor his attorneys ever had the information. This position is belied by the facts.

During the June 7, 2010 deposition of Detective Mike Parrinello, attended by the Discovery Referee, Counsel for the Plaintiffs asked a series of questions that directly tracked

portions of a tape recording subsequently available on an Internet site, http://semichorus.wordpress.com.

Additionally, the day following the deposition; Counsel for Parrinello received an edited version of the tape recording of the April 15, 2009 conversation between Burbank police officers Parrinello, Neil Gunn Sr. and Plaintiff Omar Rodriquez. The recording was sent to Parrinello's attorney, who received it from another attorney representing the City of Burbank. Declarations of Michael Stone and Kristin Pelletier. The recording had been forwarded by Gregory Smith who represents another former police officer in a separate action

Clearly counsel for the Plaintiffs had the tape recording and/ or a transcript at the time of the deposition. This fact was not disclosed. Compliance with the discovery request was not adequate.

Compliance is ordered within 10 days.

The failure to adequately respond was misleading the Court and the Defendants. Sanctions in the amount of $1,890.00 are awarded pursuant to California Code of Civil Procedure Section 2031.310(h). There is no justification let alone "substantial justification" for this conduct.

Date: July 22, 2010

Diane Wayne, Discovery Referee

All matters set forth in the above report of Referee having been considered; the Court hereby approves and adopts said Report as the decision of the court, including the findings and recommendations therein.

Date: _____

Hon. Joanne B. O'Donnell

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Rodriguez, Omar, et al. vs. Burbank Police Department, et al.
Reference No. 1220040470

I, Michelle McPherson, not a party to the within action, hereby declare that on July 23, 2010 I served the attached 5th REPORT OF THE DISCOVERY REFEREE on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Los Angeles, CA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CA on July 23, 2010.

Michelle McPherson
mmcpherson@jamsadr.com

PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 444 South Flower Street, Suite 2400, Los Angeles, California 90071-2953. On August 9, 2010, I deposited with Federal Express, a true and correct copy of the within documents:

DEFENDANT CITY OF BURBANK'S OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY OF PEACE OFFICER PERSONNEL RECORDS; DECLARATIONS OF KRISTIN A. P[ELLETIER, GERARDO MISQUEZ, AND THOR MERICH AND EXHIBITS THERETO

in a sealed envelope, addressed as follows:

Solomon E. Gresen, Esq.
Law Offices of Rheuban & Gresen
15910 Ventura Boulevard, Suite 1610
Encino, CA 91436
Telephone: (818) 815-2727
Fax: (818) 815-2737

Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 9, 2010, at Los Angeles, California.

JULIE D. ANDERSON

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/07/10			DEPT. 31
HONORABLE ALAN S. ROSENFIELD	JUDGE	S. WONG	DEPUTY CLERK
HONORABLE #14	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
T. TENNYSON, CA	Deputy Sheriff	K. SMITH-MYLER CSR#12500	Reporter

8:30 am	BC417928	Plaintiff Counsel	SOLOMON E GRESEN (X)
	CHRISTOPHER LEE DUNN VS BURBANK POLICE DEPARTMENT ET AL	Defendant Counsel	CAROL A HUMISTON (X)
	NOT RELATED TO BC418792		

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT, CITY OF BURBANK FOR A PRELIMINARY INJUNCTION;

Matter is called for hearing and argued.

The Court denies the request for injunction and grants in part and issues an order restraining and enjoining Plaintiff and his attorneys from (1) distributing, disclosing, revealing, destroying, or otherwise disposing the Merich Memo; (2) assisting, aiding, or abeting any other person or entity in engaging in such activity; and (3) ordering Plaintiff and his attorneys to return to Sr. Asst. City Attorney Carol Ann Humiston all copies of the Merich Memo in their possession, custody, or control within five (5) days.

Counsel for defendant to give notice.

MINUTES ENTERED
01/07/10
COUNTY CLERK

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3

4 CHRISTOPHER LEE DUNN,	)	CERTIFIED TRANSCRIPT
	)	
5 Plaintiff,	)	
	)	
6 vs.	)	No. BC417928
	)	VOLUME II
7 BURBANK POLICE DEPARTMENT;	)	
CITY OF BURBANK; AND DOES 1	)	
8 THROUGH 100, INCLUSIVE,	)	
	)	
9 Defendants.	)	
	)	

10
11
12
13 Continued Videotaped Deposition of
14 CHRISTOPHER LEE DUNN, taken at
15 444 South Flower Street, Suite 2400,
16 Los Angeles, California, commencing at
17 10:34 a.m., Monday, March 22, 2010,
18 before Susan C. Campana, CSR No. 9573,
19 RPR.
20
21
22
23
24
25 PAGES 174 - 344

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866 299-5127

1 APPEARANCES OF COUNSEL:

2

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7 15910 Ventura Boulevard

8 Encino, California 91436

9 818/815-2727

10

11 FOR THE DEFENDANTS:

12 BURKE, WILLIAMS & SORENSEN, LLP

13 BY: KRISTIN A. PELLETIER, ATTORNEY-AT-LAW

14 Suite 2400

15 444 South Flower Street

16 Los Angeles, California 90071-2953

17 213/236-0600

18

19 THE VIDEOGRAPHER:

20 TIM BARKER

21 ALSO PRESENT:

22 TIM STEHR

23

24

25

1 Q. And I'm not asking you to repeat what you told 10:54:48
2 me the first time around. I'm -- what I'm doing is
3 you've now had some time to reflect -- 10:54:53
4 A. Right.
5 Q. -- and I want to see if other than these four -- 10:54:56
6 and that was my question.
7 Is there anybody specific who comes to mind who 10:55:01
8 you can say, you know, so and so made a racial comment --
9 you can identify them by name and what they said? 10:55:10
10 A. No.
11 Q. Did you ever make a complaint against -- I'll 10:55:20
12 just go through them by name -- against Sergeant Yadon
13 for the use of racial commentary? 10:55:31
14 A. No.
15 Q. Did you ever make a complaint against Officer 10:55:36
16 Anderson for the use of racial commentary?
17 A. No. 10:55:40
18 Q. Did you ever make a complaint against -- I guess
19 he would have been Detective Losacco at the time for the 10:55:46
20 use of racial commentary?
21 A. Can you define "complaint"? Official? 10:55:56
22 Unofficial? Conversation with supervisor?
23 Q. Well, let's start with "complaint," which is you 10:56:01
24 go and you say to somebody who's -- who's of a higher
25 rank than you, "I am here to complain about inappropriate 10:56:12

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1 but Yadon at the same time, like these individuals that 10:59:08
2 were part of narcotics. And those names were mentioned.
3 So if -- if you want, you know -- I guess you 10:59:17
4 could say that they were included, but they weren't
5 specifically about Claudio Losacco. 10:59:23
6 Q. Okay. And what did you tell Sergeant Duran
7 these individuals, meaning Yadon and Losacco, what -- 10:59:34
8 because I -- what I want to focus in on is what you said
9 to Sergeant Duran about racial comments in the workplace. 10:59:41
10 I understand there's a bigger --
11 A. Correct. 10:59:44
12 Q. -- conversation going on. But I want to know
13 what you recall of -- of indicating to him in terms of 10:59:50
14 racial commentary in the workplace.
15 A. I don't recall that I said anything specific 10:59:56
16 about the exact comments that we're -- we're discussing.
17 Q. Did you say inappropriate racial comments were 11:00:04
18 made?
19 A. It was my understanding at the time that he 11:00:07
20 understood that that's what we were discussing.
21 Q. But I -- what I'm trying to get at is -- because 11:00:13
22 you can't really testify about what's in -- in Duran's
23 head -- 11:00:17
24 A. Right.
25 Q. -- unless he told you. 11:00:19

1 I'm just trying to get what you communicated to 11:00:22
2 Duran, if anything, in terms of, "I have heard in the
3 workplace inappropriate race-based comments." 11:00:30
4 A. Nothing.
5 Q. Okay. What did you tell Sergeant Duran about 11:00:54
6 why you thought Claudio Losacco didn't like you?
7 A. I don't believe that I told him anything about 11:01:07
8 why he didn't like me.
9 Q. You indicated that -- that there was animosity, 11:01:13
10 and you -- you generally expressed some of the reasons
11 why you thought that existed. 11:01:18
12 A. No. I -- then let me clarify if that's what I
13 said. 11:01:24
14 I believe there's animosity, one-sided. I had
15 never had any animosity towards these individuals -- any 11:01:32
16 of the individuals that I'm -- I'm speaking about. I
17 have not -- I wasn't friendly with Claudio Losacco. I 11:01:39
18 didn't know Claudio Losacco very well. I had never
19 worked with Claudio Losacco prior to narcotics. 11:01:44
20 And it was more of asking why this is happening
21 and what's going to be done about it than me specifically 11:01:51
22 explaining details as to what's occurring.
23 Q. So if I understand you correctly, you never told 11:02:03
24 Sergeant Duran, "Here's why I think Claudio Losacco has
25 animosity towards me"? 11:02:09

1 Chris Racina's comment? 11:13:56

2 A. Not his -- not his comment, no.

3 Q. Okay. And just so I'm clear, I think it's on 11:14:08

4 the record, but given some of your prior commentary, did

5 you ever go to anyone -- I know you didn't do it in 11:14:16

6 writing, but go to anyone and say, "I want to make a

7 complaint against," any member of the Burbank Police 11:14:25

8 Department for inappropriate racial comments?

9 A. No. 11:14:28

10 Q. Did you ever go to anyone and say, "I want to

11 make a report against," any member of the Burbank Police 11:14:38

12 Department for racial comments?

13 A. No. 11:14:42

14 MS. PELLETIER: I'm going to give you back your

15 deposition, which has exhibits. I'm also going to -- I'm 11:15:17

16 not going to mark this, but I'm going to hand you a

17 Culver City interoffice memorandum that is 13-pages long 11:15:28

18 dated March 30, 2007.

19 MR. GRESEN: Thank you. 11:15:40

20 Are you going to ask him questions about this

21 document? 11:15:43

22 MS. PELLETIER: I am.

23 MR. GRESEN: Okay. It is -- I just want to note for 11:15:47

24 the record that it's 13 pages, single spaced.

25 You may want to take ten minutes and read it. 11:15:55

1 is to investigate and find that -- if there's enough 15:05:53
2 evidence that rises to a level that they forward to the
3 D.A. for review. He felt that this case rose to the 15:06:01
4 level of being forwarded. He didn't give an opinion, I
5 didn't think, or any substantive -- you know, substantive 15:06:09
6 evidence and make that claim that I tipped her off.
7 Q. BY MS. PELLETIER: He basically said that the 15:06:15
8 facts indicated that there was probable cause to believe
9 that a crime was committed and that the crime was 15:06:21
10 committed by you and that the crime was Section 148(a)(1)
11 of the Penal Code? 15:06:27
12 A. Yes.
13 MR. GRESEN: Foundation. Speculation. 15:06:29
14 Q. BY MS. PELLETIER: And I think you told me this
15 previously, but to be thorough, you don't have any 15:06:39
16 evidence that Culver City was biased against you based on
17 your race; is that correct? 15:06:46
18 MR. GRESEN: Foundation. Speculation. Rifkin
19 objections. 15:06:50
20 You may answer.
21 THE WITNESS: That is correct. 15:06:52
22 Q. BY MS. PELLETIER: And you don't have any
23 evidence that the L.A. County Sheriff's Department, or 15:06:58
24 any of its members, were biased against you based on your
25 race? 15:07:04

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1 MR. GRESEN: Kristin, my objection has to do with 15:07:04
2 "evidence" because it's defined by Section 250.
3 Can you ask it without using "evidence"? 15:07:04
4 Q. BY MS. PELLETIER: Do you have any --
5 MR. GRESEN: Then I don't have to interrupt you. 15:07:06
6 Q. BY MS. PELLETIER: Do you have any information
7 that the L.A. County Sheriff's Department was biased in 15:07:13
8 its investigation of you because of your race?
9 A. No. 15:07:18
10 Q. Do you have any evidence that the L.A. Sheriff's
11 Department -- L.A. County Sheriff's Department formed any 15:07:31
12 of its conclusions in order to retaliate against you for
13 any of your actions? 15:07:38
14 MR. GRESEN: Rifkin objections.
15 You may answer. 15:07:42
16 THE WITNESS: No.
17 Q. BY MS. PELLETIER: Then the case goes to the 15:07:47
18 D.A.; right?
19 A. I don't know. I -- I assume. 15:07:53
20 Q. Okay. Well, you -- you got a Brady letter from
21 the D.A.; correct? 15:07:58
22 A. Correct.
23 Q. And did you read the statement of the Deputy 15:08:04
24 District Attorney Baker in the internal affairs binder?
25 A. Yes. 15:08:09

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1 to -- since -- since we all know I have to teach today, 15:15:55
2 rather than trying to do that today, I will, if this is
3 okay with -- with the court reporter, keep Exhibit 209 15:16:03
4 and then mail in a redacted version of it.
5 MR. GRESEN: That's fine. 15:16:05
6 So it will be marked as 209 but not attached
7 until later. 15:16:10
8 MS. PELLETIER: Correct.
9 And what I will do is I will endeavor to have a 15:16:13
10 redacted version of this made up. And -- and I can
11 probably -- I'm sure I can probably do it by tomorrow and 15:16:22
12 give it to everybody.
13 MR. GRESEN: Terrific. 15:16:22
14 We'll use it for now.
15 MS. PELLETIER: I actually think I'm done with it for 15:16:27
16 now.
17 MR. GRESEN: Okay. 15:16:27
18 Just so we're clear, the only two exhibits that
19 we attached today were the Brady letter and the response; 15:16:33
20 correct?
21 MS. PELLETIER: That is correct. 15:16:34
22 We've looked at other things, but that's all
23 we've attached. 15:16:39
24 Q. Do you have any information that D.D.A. Baker
25 was biased against you in the conclusions he reached 15:16:48

1 because of your race? 15:16:51

2 A. No.

3 Q. Do you have any information or evidence that 15:16:55

4 D.D.A. Baker was retaliating against you in any way?

5 MR. GRESEN: Rifkin objections. 15:17:01

6 You may answer.

7 THE WITNESS: No. 15:17:04

8 Q. BY MS. PELLETIER: The letter from the Brady

9 compliance unit that puts you on the Brady list or tells 15:17:13

10 Chief Stehr that you're being put on the Brady list came

11 from a Lael Rubin. L-a-e-l, R-u-b-i-n. 15:17:21

12 Do you have any evidence that Ms. Rubin formed

13 any of the conclusions set forth in the letter to you 15:17:29

14 that we attached as Exhibit 208 based on your race?

15 MR. GRESEN: Mischaracterizes Exhibit 208. The 15:17:37

16 signature line bears the name Steve Cooley. It was

17 signed by Lael Rubin. 15:17:44

18 You may answer.

19 THE WITNESS: No. 15:17:45

20 Q. BY MS. PELLETIER: I take it you have no

21 information that Steve Cooley was biased against you 15:17:51

22 based on your race?

23 A. No. 15:17:52

24 Q. Do you have any evidence or information that

25 Lael Rubin formed any of the conclusions set forth in 15:18:01

1 A. Yes. According to City documents. 15:25:36

2 Q. Okay. What information do you have that the

3 Burbank Police Department played any role in Detective or 15:25:49

4 Deputy, whatever his title is -- let me just get it

5 right -- Sergeant -- 15:25:56

6 A. Lewandowski.

7 Q. -- Lewandowski's conclusion that probable cause 15:26:01

8 existed to believe that you committed a crime?

9 MR. GRESEN: Same objections. 15:26:06

10 THE WITNESS: That, I don't know.

11 Q. BY MS. PELLETIER: Okay. So let's get to -- 15:26:21

12 well, is your contention that --

13 Are you making a contention or is it your 15:26:30

14 opinion that somehow Burbank did something to influence

15 the investigation or the fact gathering that we see from 15:26:42

16 the Culver City Police Department?

17 MR. GRESEN: Rifkin objections. 15:26:45

18 You may answer.

19 Q. BY MS. PELLETIER: In other words, do you -- did 15:26:48

20 Burbank do something to unduly influence Culver City when

21 they reached the collusion that you tipped the informant? 15:26:57

22 MR. GRESEN: Same objections.

23 THE WITNESS: No. 15:26:59

24 Q. BY MS. PELLETIER: Okay. Did Burbank -- well,

25 let me strike that. 15:27:07

1 Paragraph -- do you have any information or 15:27:25
2 evidence that any of the information that Burbank Police
3 Department employees provided to the L.A. County 15:27:34
4 Sheriff's Department was inaccurate?
5 A. Yes. 15:27:40
6 Q. And what was that?
7 A. Based on what I had previously testified to, 15:27:47
8 that there's indication that one of the individuals, if
9 not the main individual, who provided documents, 15:27:54
10 statements, evidentiary material to the sheriffs to
11 assist with their investigation was Lieutenant Eric 15:28:01
12 Rosoff.
13 Q. Okay. 15:28:03
14 A. At some point during -- I believe it was after
15 this investigation -- and I think we had covered this in 15:28:08
16 our -- in my first deposition. I became aware that
17 Lieutenant Rosoff had illegally attempted to influence 15:28:17
18 the testimony of a potential witness in my case, an
19 ongoing criminal investigation by the L.A. County 15:28:23
20 Sheriff's Office.
21 Q. And what did -- was Lieutenant Rosoff successful 15:28:27
22 in interfering in the statements that the witness you're
23 referring to made to the sheriff's department? 15:28:37
24 MR. GRESEN: Foundation. Speculation.
25 You may answer. 15:28:41