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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

**JACOB SALCIDO, a minor by and
through his guardian ad litem Jeanine
Salcido,**

Plaintiff,

v.

**THE COUNTY OF MADERA, DEPUTY
JEFFERY THOMAS #10321,
SERGEANT PATRICK MAJESKI
#8484, DEPUTY MATTHEW KUTZ
#11173, DEPUTY S. STRIZEL #8616,
DEPUTY MARK SCHAFER #9630,
DEPUTY BRIAN CUTLER #10846,
DEPUTY IAN WEAVER #11404, and
DOES 1-50,**

Defendants.

1:10-CV-195 AWI DLB

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS**

[Doc. #24]

BACKGROUND

This lawsuit arises from a confrontation between Plaintiff Jacob Salcido ("Salcido"), a minor, and members of the Madera County Sheriff's Department.¹ Salcido alleges violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3). Defendants move to dismiss Salcido's Amended Complaint ("Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, the motion will be granted in part and denied in part.

¹ Salcido filed this case without a guardian ad litem. The Court stayed the proceedings in order to give Salcido the opportunity to petition for the appointment of a guardian ad litem. The Court appointed Salcido's mother, Jeanine Salcido, to be guardian ad litem. The Court lifted the stay on October 6, 2010.

1 **LEGAL STANDARD**

2 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a claim may be dismissed
3 because of the plaintiff’s “failure to state a claim upon which relief can be granted.” Fed. R. Civ.
4 P. 12(b)(6). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal
5 theory or on the absence of sufficient facts alleged under a cognizable legal theory. Johnson v.
6 Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v. Block, 250 F.3d 729,
7 732 (9th Cir. 2001). In reviewing a complaint under Rule 12(b)(6), all of the complaint’s
8 material allegations of fact are taken as true, and the facts are construed in the light most
9 favorable to the non-moving party. Marceau v. Blackfeet Hous. Auth., 540 F.3d 916, 919 (9th
10 Cir. 2008); Vignolo v. Miller, 120 F.3d 1075, 1077 (9th Cir. 1999). The Court must also assume
11 that general allegations embrace the necessary, specific facts to support the claim. Smith v. Pac.
12 Prop. and Dev. Corp., 358 F.3d 1097, 1106 (9th Cir. 2004). However, the Court is not required
13 “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or
14 unreasonable inferences.” In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1056-57 (9th Cir. 2008);
15 Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Although they may
16 provide the framework of a complaint, legal conclusions are not accepted as true and
17 “[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements,
18 do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009); see also Warren v. Fox
19 Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). As the Supreme Court has
20 explained:

21 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
22 factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to
23 relief requires more than labels and conclusions, and a formulaic recitation of the
24 elements of a cause of action will not do. Factual allegations must be enough to raise a
right to relief above the speculative level, on the assumption that all the allegations in the
complaint are true (even if doubtful in fact).

25 Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007). Thus, a “complaint must contain
26 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
27 Iqbal, 129 S.Ct. at 1949.

28 The plausibility standard is not akin to a ‘probability requirement,’ but it asks more than a
sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts

1 that are ‘merely consistent with’ a defendant’s liability, it stops short of the line between
2 possibility and plausibility of ‘entitlement to relief.’

3 . . .

4 Determining whether a complaint states a plausible claim for relief will . . . be a context
5 specific task that requires the reviewing court to draw on its judicial experience and
6 common sense. But where the well-pleaded facts do not permit the court to infer more
7 than the mere possibility of misconduct, the complaint has alleged – but it has not shown
8 – that the pleader is entitled to relief.

9 Id. at 1949-50. “In sum, for a complaint to survive a motion to dismiss, the non-conclusory
10 ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a
11 claim entitling the plaintiff to relief.” Moss v. United States Secret Serv., 572 F.3d 962, 969 (9th
12 Cir. 2009).

13 **ALLEGED FACTS**

14 The Complaint alleges that on February 19, 2008, Defendants Deputy Jeffery Thomas
15 (“Thomas”) and Sergeant Patrick Majeski (“Majeski”) parked in front of Salcido’s home.
16 Complaint at ¶ 19. Thomas and Majeski entered the property without a warrant or the consent of
17 the homeowners, Salcido’s parents. Id. at ¶ 20. Thomas and Majeski “started questioning those
18 present if anyone had witnessed a fight that occurred earlier that day.” Id. at ¶ 21. Salcido, with
19 his parents present, said he saw what happened, but stated he was not involved nor a party to the
20 fight. Id. at ¶ 22. Salcido “voluntarily assisted” Thomas and Majeski by telling them what he
21 saw. Id. Salcido told the officers that “there was a fight in the middle of the road earlier that
22 day” and “[t]hat one individual was taken to the hospital and the other fled on foot.” Id. at ¶ 23.

23 The Complaint alleges that “Salcido’s father directed [him] to go inside the home since a
24 stranger was approaching the home.” Id. at ¶ 24. “Salcido listened to his father and proceeded to
25 enter the home.” Id. at ¶ 25. “Suddenly, without probable cause, deputy Thomas grabbed
26 [Salcido] around the neck and took him to the ground.” Id. at ¶ 26. While Thomas held Salcido
27 down on the ground, Majeski, without probable cause, tazed Salcido twice in the back. Id. at ¶
28 28. The Complaint alleges that Thomas and Majeski were both motivated by the fact that
29 Salcido was a person of color. Id. at ¶¶ 27, 30.

30 The Complaint alleges that Thomas and Majeski, “in order to cover up their unlawful
31 seizure and excessive use of force against [Salcido], charged [Salcido] with PC 148 resisting.”

1 Id. at ¶ 33. “The arrest was false” because “[a]t no time did [Salcido] resist the officers.” Id.
2 Subsequently, the “Madera District Attorney’s office dismissed the PC 148 case against [Salcido]
3 with prejudice.” Id. at ¶ 35. The Complaint alleges that in all of the above allegations, Thomas
4 and Majeski “were assisted” by Defendants Deputy Matthew Kutz (“Kutz”), Deputy S. Strizel
5 (“Strizel”), Deputy Mark Schafer (“Schafer”), Deputy Brian Cutler (“Cutler”) and Deputy Ian
6 Weaver (“Weaver”). Id. at ¶ 34.

7 DISCUSSION

8 A. Claims against Kutz, Strizel, Schafer, Cutler and Weaver

9 In the Complaint, Salcido alleges that Defendants Kutz, Strizel, Schafer, Cutler and
10 Weaver are employed by the County of Madera in the Sheriff’s Department. Complaint at ¶¶ 8-
11 12, 16. The only other specific factual allegation against these Defendants is that they “assisted”
12 Thomas and Majeski. Id. at ¶ 34. Defendants contend that Salcido “has failed to plead any
13 material details with respect to what actions” these Defendants have taken and that this failure is
14 “fatal to [Salcido’s] claim.” Motion at 4:16-19. In his opposition, Salcido has agreed to dismiss
15 Kutz, Strizel, Schafer, Cutler and Weaver from the Complaint. Opposition at 1:23-26.
16 Accordingly, Defendants’ Motion to Dismiss Salcido’s claims against Kutz, Strizel, Schafer,
17 Cutler and Weaver is GRANTED.

18 In the previous order dismissing Salcido’s original complaint, the Court noted that
19 Salcido’s complaint “appears to single out” Thomas and Majeski, “but then it proceeds to lump
20 all defendants together.” Order at 4:16-17. The Court warned Salcido that he “needs to
21 differentiate among the Defendants and explain what each Defendant did to deprive him of a
22 constitutional right.” Id. at 4:22-24. Since Salcido has failed again to specifically allege what
23 Kutz, Strizel, Schafer, Cutler and Weaver did wrong, it is apparent that Salcido cannot rectify the
24 deficiencies of these claims through additional allegations. See Gompper v. VISX, Inc., 298 F.3d
25 893, 898 (9th Cir. 2002) (stating that leave to amend need not be granted when amendment
26 would be futile). Therefore, dismissal is with prejudice and without leave to amend.

27 B. Claim against the County of Madera

28 In the fourth cause of action, Salcido attempts to state a claim under 42 U.S.C. § 1983

1 against the County of Madera. Salcido alleges:

2 45. The County of Madera has, under color of law, violated [Salcido's] rights,
3 privileges and immunities secured by the United States Constitution in violation of
4 Section 1983 of Title 42 of the United States Code in that it has established an unwritten
5 policy, practice and custom of: (i) questioning persons of color pursuant to a "general
6 interest in crime control", (ii) effecting false arrests of persons of color who exhibited
7 "passive response" to questioning; (iii) tasing a person of color simply for "passive
8 conduct", and (iv) failing to adequately train, supervise, instruct, monitor, and discipline
9 Madera Deputies in responding to passive conduct.

10 46. The above described customs, practices and policies demonstrate a deliberate
11 indifference on the part of the Defendants . . . and were the cause of the violations of
12 [Salcido's] rights alleged herein.

13 47. During all relevant times, one or more of the Defendants, established, maintained
14 encouraged, allowed and/or ratified the above described custom, practice or policy[.]

15 Complaint at ¶¶ 45-47.

16 Municipalities are considered "persons" under 42 U.S.C. § 1983 and may be liable for
17 causing a constitutional deprivation. Monell v. Dep't of Soc. Servs. of the City of New York, 98
18 S.Ct. 2018 (1978). However, "a municipality cannot be held liable solely because it employs a
19 tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a respondeat
20 superior theory." Id. at 2036. Liability only attaches where the municipality itself causes the
21 constitutional violation through "execution of a government's policy or custom, whether made by
22 its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." Id.
23 at 2037-38. Thus, in order to state a municipal liability claim, a plaintiff needs to (1) identify the
24 challenged policy/custom; (2) explain how the policy/custom is deficient; (3) explain how the
25 policy/custom caused the plaintiff harm; and (4) reflect how the policy/custom amounted to
26 deliberate indifference, i.e. show how the deficiency involved was obvious and the constitutional
27 injury was likely to occur. Young v. City of Visalia, 687 F. Supp. 2d 1141, 1149 (E.D. Cal.
28 2009).

29 "A policy is a deliberate choice to follow a course of action ... made from among various
30 alternatives by the official or officials responsible for establishing final policy with respect to the
31 subject matter in question." Long v. Cnty. of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006)
32 (internal quotations marks and citations omitted). A "custom" is a widespread practice that is "so
33 permanent and well settled as to constitute a 'custom or usage' with the force of law." City of St.

1 Louis v. Prapotnik, 108 S.Ct. 915, 926 (1988). Municipal liability based on ratification occurs
2 when “authorized policymakers approved a subordinate’s decision and the basis for it[.]” Id.

3 A municipality’s failure to train its employees may also create § 1983 liability when the
4 “failure to train amounts to deliberate indifference to the rights of persons with whom the
5 [employees] come into contact.” City of Canton, Ohio v. Harris, 109 S.Ct. 1197, 1204 (1989).
6 “The issue is whether the training program is adequate and, if it is not, whether such inadequate
7 training can justifiably be said to represent municipal policy.” Long, 442 F.3d at 1186. A
8 plaintiff alleging a failure to train claim must show: (1) he was deprived of a constitutional right,
9 (2) the municipality had a training policy that “amounts to deliberate indifference to the
10 [constitutional] rights of the persons’ with whom [its police officers] are likely to come into
11 contact;” and (3) his constitutional injury would have been avoided had the municipality properly
12 trained those officers. Blankenhorn v. City of Orange, 485 F.3d 463, 484 (9th Cir. 2007).

13 In this case, Salcido has set forth only conclusory allegations against the County of
14 Madera. In order to state a claim for municipal liability under Monell, Salcido must allege facts
15 establishing that the County of Madera caused his constitutional violation through a custom,
16 policy, ratification, or a failure to train. It is not enough to simply conclude that there is a policy,
17 custom, ratification or failure to train. The Supreme Court has made clear that the “[t]hreadbare
18 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
19 suffice.” Iqbal, 129 S.Ct. at 1949. Therefore, Salcido has not stated a municipal liability claim
20 against the County of Madera. Accordingly, Defendants’ Motion to Dismiss Salcido’s municipal
21 liability claim against the County of Madera is GRANTED.

22 Salcido’s opposition contains numerous facts that should have been included in the
23 Complaint, but were omitted. The additional facts indicate that amendment of Salcido’s
24 municipal liability claim would not be futile. See Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th
25 Cir. 2003) (facts raised in opposition papers may not defeat a motion to dismiss, but may be
26 considered by the court to determine whether dismissal should be with or without prejudice).
27 Therefore, the Court will dismiss Salcido’s municipal liability claim against the County of
28 Madera without prejudice and with leave to amend.

1 **C. Claims against Thomas and Majeski**

2 **1. Excessive Force**

3 In his first cause of action, Salcido alleges that one or more of the Defendants violated his
4 right to be free from excessive force under the Fourth Amendment. Complaint at ¶ 39. To state
5 a cause of action under § 1983, a plaintiff must “plead that (1) the defendants acted under color
6 of state law and (2) deprived plaintiff of rights secured by the Constitution or federal statutes.”
7 WMX Techs., Inc. v. Miller, 197 F.3d 367, 372 (9th Cir. 1999).

8 All claims that law enforcement officers used excessive force, either deadly or
9 non-deadly, in the course of an arrest, investigatory stop, or other seizure of a citizen are to be
10 analyzed under the Fourth Amendment. Graham v. Connor, 109 S.Ct. 1865, 1871 (1989). The
11 key inquiry in a Fourth Amendment excessive force case is whether “the officers’ actions are
12 ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard
13 to their underlying intent or motivation.” Id. at 1872 (citations omitted). The analysis of whether
14 a specific use of force was objectively reasonable “requires a careful balancing of the nature and
15 quality of the intrusion on the individual’s Fourth Amendment interests against the
16 countervailing government interests at stake.” Id. at 1871.

17 Salcido has stated a plausible excessive force claim against Thomas and Majeski under §
18 1983. In the Complaint, Salcido alleges that Thomas, without probable cause, grabbed him by
19 the neck and took him to the ground. Complaint at ¶ 26. While Thomas held Salcido on the
20 ground, Salcido alleges that Majeski tazed him twice in the back without probable cause. Id. at ¶
21 29. Accordingly, Defendants’ Motion to Dismiss Salcido’s excessive force claim against
22 Thomas and Majeski is DENIED.

23 **2. Unlawful Arrest**

24 In the second cause of action, Salcido alleges that one or more Defendants violated his
25 right to be free from arrest without probable cause in violation of the Fourth Amendment.
26 Complaint at ¶ 41. “A claim for unlawful arrest is cognizable under § 1983 as a violation of the
27 Fourth Amendment, provided the arrest was without probable cause or other justification.”
28 Dubner v. City and Cnty. of San Francisco, 266 F.3d 959, 964 (9th Cir. 2001) (citation omitted).

1 Here, Salcido alleges that Thomas and Majeski arrested him for “PC 148 resisting.”
2 Complaint at ¶ 33. Salcido alleges that “[t]he arrest was false” because “[a]t no time did
3 [Salcido] resist the officers.” Id. Salcido has clearly stated a plausible claim for unlawful arrest
4 under § 1983. Accordingly, Defendants’ Motion to Dismiss Salcido’s unlawful arrest claim
5 against Thomas and Majeski is DENIED.

6 3. Equal Protection

7 In the third cause of action, Salcido alleges that one or more Defendants violated his right
8 to equal protection of the laws under the Fourteenth Amendment. Complaint at ¶ 43. Salcido
9 alleges that Defendants targeted him, arrested him and tasered him because of his race. Id. “The
10 Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to
11 any person within its jurisdiction the equal protection of the laws,’ which is essentially a
12 direction that all persons similarly situated should be treated alike.” Serrano v. Francis, 345 F.3d
13 1071, 1081 (9th Cir. 2003) (citation omitted). “Denials [of the equal protection of the laws] by
14 any person acting under color of state law are actionable under § 1983.” Dyess ex Rel. v.
15 Tehachapi Unified School Dist., No. 1:10-CV-00166-AWI-JLT, 2010 WL 3154013, at *6 (E.D.
16 Cal. Aug. 6, 2010). In order to state a § 1983 equal protection claim, the plaintiff must “plead
17 intentional unlawful discrimination or allege facts that are at least susceptible of an inference of
18 discriminatory intent.” Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1026 (9th Cir.
19 1998).

20 As a preliminary matter, Defendants argue that Salcido’s equal protection claim is fatally
21 defective because Salcido is attempting to “double up” on his constitutional claims. Opposition
22 at 6:8-10. Specifically, Defendants contend that Salcido’s Fourteenth Amendment claim is
23 duplicative of his Fourth Amendment claim. Id. at 6:21-22.

24 “[C]ertain wrongs affect more than a single right and, accordingly, can implicate more
25 than one of the Constitution’s commands.” Armendariz v. Penman, 75 F.3d 1311, 1320 (9th Cir.
26 1996). Thus, in a § 1983 case, the first inquiry is to “isolate the precise constitutional violation
27 which [the defendant] is charged.” Baker v. McCollan, 99 S.Ct. 2689, 2692 (1979). A plaintiff
28 may not “double up” on constitutional claims, meaning “[w]here a claim can be analyzed under

1 'an explicit textual source' of rights in the Constitution, a court may not also assess the claim
2 under another, 'more generalized,' source." Ramirez v. Butte-Silver Bow Cnty., 298 F.3d 1022,
3 1029 (9th Cir. 2002).

4 In this case, Salcido's Fourth and Fourteenth Amendment claims are not duplicative.
5 Although the alleged constitutional violations involve the same underlying facts, Salcido is
6 alleging distinct constitutional violations. In Salcido's Fourth Amendment claims, he is alleging
7 that Thomas and Majeski conducted an unlawful arrest and used excessive force against him; in
8 Salcido's Fourteenth Amendment claim, he is alleging that there was intentional unlawful
9 discrimination by Thomas and Majeski.

10 Despite there being no "double up" of constitutional violations, Salcido has not stated an
11 equal protection claim. In the Complaint, Salcido makes the conclusory allegation that Thomas
12 and Majeski targeted, arrested and tasered him because of his race. Complaint at ¶ 43. Salcido's
13 conclusion is not supported by any factual allegations suggesting an improper racial motive on
14 the part of Thomas or Majeski. Therefore, Salcido has not stated an equal protection claim.

15 Accordingly, Defendants' Motion to Dismiss Salcido's equal protection claim against
16 Thomas and Majeski is GRANTED. Since this is the first time Salcido has brought an equal
17 protection claim, dismissal is without prejudice and with leave to amend.

18 **4. Conspiracy**

19 In his opposition, Salcido states that he will withdraw his conspiracy claim under 42
20 U.S.C. § 1985(3). Accordingly, Defendants' Motion to Dismiss Salcido's 42 U.S.C. § 1985(3)
21 claim is GRANTED. Dismissal is without prejudice and with leave to amend.

22 **CONCLUSION**

23 Accordingly, IT IS HEREBY ORDERED that:

- 24 1. Defendants' Motion to Dismiss Salcido's claims against Kutz, Strizel, Schafer,
25 Cutler and Weaver is GRANTED with prejudice and without leave to amend;
- 26 2. Defendants' Motion to Dismiss Salcido's municipal liability claim against the
27 County of Madera is GRANTED without prejudice and with leave to amend;
- 28 3. Defendants' Motion to Dismiss Salcido's excessive force claim against Thomas

and Majeski is DENIED;

1 4. Defendants' Motion to Dismiss Salcido's unlawful arrest claim against Thomas
2 and Majeski is DENIED;

3 5. Defendants' Motion to Dismiss Salcido's equal protection claim against Thomas
4 and Majeski is GRANTED without prejudice and with leave to amend;

5 6. Defendants' Motion to Dismiss Salcido's 42 U.S.C. § 1985(3) claim against
6 Thomas and Majeski is GRANTED without prejudice and with leave to amend;

7 7. Salcido has thirty (30) days to file a Second Amended Complaint
8 consistent with this order.
9

10 IT IS SO ORDERED.

11 Dated: February 28, 2011


12 CHIEF UNITED STATES DISTRICT JUDGE
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