

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ESTATE OF ANGEL ANTONIO
MENDOZA-SARAVIA, by and
through his estate
administrator, JOSE MENDOZA-
SARAVIA, et al;

1:10-CV-00618-OWW-SMS

MEMORANDUM DECISION AND ORDER
RE: DEFENDANTS' MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, MOTION FOR A MORE
DEFINITE STATEMENT (Doc. 9)

Plaintiffs,

v.

FRESNO COUNTY SHERIFF'S
DEPARTMENT, et al,

Defendants.

I. INTRODUCTION

Defendants County of Fresno and City of Mendota now move, pursuant to Federal Rule of Civil Procedure Rule 12(b), to dismiss the complaint on grounds, among others, that Plaintiffs lack standing. In the alternative, Defendants move for a more definite statement under Rule 12(e).

Plaintiffs are the alleged successors-in-interest and surviving relatives of Jose Mendoza-Saravia, who allegedly died as a result of an encounter with Fresno County Sheriff Deputies on November 26, 2008. They oppose the merits of the motion. Alternatively, they request an opportunity to file an amended complaint.

1 II. FACTUAL BACKGROUND

2 This action involves the alleged violation of Jose
3 Mendoza-Saravia's civil rights and other injuries. The following
4 facts are derived from the complaint, filed on February 10, 2010.

5 On November 26, 2008, several deputies with the Fresno County
6 Sheriff's Department responded to a disturbance call at 325 Blanco
7 Street, Mendota, California, the then-residence of decedent Jose
8 Mendoza-Saravia. Plaintiffs allege that the deputies "confronted"
9 Mr. Mendoza-Saravia, leading to an altercation between the deputies
10 and Mr. Mendoza-Saravia. At an unknown point in time, Mr. Mendoza-
11 Saravia was shot at close range with a beanbag projectile in the
12 upper torso. Mr. Mendoza-Saravia was transported to the hospital,
13 where he was pronounced dead the same evening.

14
15 III. PROCEDURAL BACKGROUND

16 On February 10, 2010, Plaintiffs filed the instant action in
17 Fresno County Superior Court, alleging six causes of action: (1)
18 negligence against all defendants; (2) assault and battery against
19 all defendants; (3) violation of "California Civil Rights" and
20 "the Fourth, Fifth, and Fourteenth Amendments to the Constitution
21 of the United States" against all defendants; (4) products
22 liability against MK Ballistic Systems;¹ (5) strict liability in
23 tort against MK Ballistic Systems; and (6) breach of warranties
24 against MK Ballistic Systems.

25 Plaintiffs seek to recover compensatory and punitive damages

26 _____
27 ¹ MK Ballistic Systems was voluntarily dismissed on June 3,
28 2010. (Doc. 11.) West Coast Ammunition was added as a defendant
in this action on June 4, 2010. (Doc. 14.)

1 against Defendants Fresno County, the City of Mendota, Fresno
2 County Sheriff's Department, and West Coast Ammunition.²

3 On April 4, 2010, this case was removed on the basis of
4 federal question jurisdiction. The notice of removal asserts that
5 Plaintiffs' action is founded on claims arising under federal laws,
6 including the Fourth, Fifth, and Fourteenth Amendments to the
7 Constitution of the United States.

8 On June 23, 2009, Defendants filed a motion to dismiss.
9 Plaintiffs oppose the motion.

10
11 IV. LEGAL STANDARD

12 Under Federal Rule of Civil Procedure 12(b)(6), a motion to
13 dismiss can be made and granted when the complaint fails "to state
14 a claim upon which relief can be granted." Dismissal under Rule
15 12(b)(6) is appropriate where the complaint lacks a cognizable
16 legal theory or sufficient facts to support a cognizable legal
17 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
18 (9th Cir. 1990).

19 To sufficiently state a claim to relief and survive a 12(b)(6)
20 motion, a complaint "does not need detailed factual allegations"
21 but the "[f]actual allegations must be enough to raise a right to
22 relief above the speculative level." *Bell Atl. Corp. v. Twombly*,

23
24 ² "Fresno County Sheriff's Department" is not a legal entity.
25 *Maxwell v. Henry*, 815 F. Supp. 213, 215 (S.D. Tex. 1993). Nor is
26 the Fresno County Sheriff's Department a "person" for purposes of
27 § 1983 litigation. *Vance v. County of Santa Clara*, 928 F. Supp.
28 993 (N.D. Cal. 1996). Plaintiff has also sued "Fresno County"
which is the proper legal entity to be sued in this type of case.
Therefore, as a matter of law, the claims against Defendant Fresno
County Sheriff's Department are DISMISSED.

1 550 U.S. 544, 555 (2007). Mere "labels and conclusions" or a
2 "formulaic recitation of the elements of a cause of action will not
3 do." *Id.* Rather, there must be "enough facts to state a claim to
4 relief that is plausible on its face." *Id.* at 570. "To survive
5 a motion to dismiss, a complaint must contain sufficient factual
6 matter, accepted as true, to state a claim to relief that is
7 plausible on its face." *Ashcroft v. Iqbal*, --- U.S. ----, 129
8 S.Ct. 1937, 1949 (2009) (internal quotation marks omitted). "The
9 plausibility standard is not akin to a probability requirement, but
10 it asks for more than a sheer possibility that a defendant has
11 acted unlawfully. Where a complaint pleads facts that are merely
12 consistent with a defendant's liability, it stops short of the line
13 between possibility and plausibility of entitlement to relief."
14 *Id.* (internal citation and quotation marks omitted).

15 In deciding whether to grant a motion to dismiss, the court
16 must accept as true all "well-pleaded factual allegations." *Iqbal*,
17 129 S.Ct. at 1950. A court is not, however, "required to accept as
18 true allegations that are merely conclusory, unwarranted deductions
19 of fact, or unreasonable inferences." *Sprewell v. Golden State*
20 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see, e.g., Doe I v.*
21 *Wal-Mart Stores, Inc.*, --- F.3d ----, 2009 WL 1978730, at *3 (9th
22 Cir. July 10, 2009) ("Plaintiffs' general statement that Wal-Mart
23 exercised control over their day-to-day employment is a conclusion,
24 not a factual allegation stated with any specificity. We need not
25 accept Plaintiffs' unwarranted conclusion in reviewing a motion to
26 dismiss.").

27 The Ninth Circuit has summarized the governing standard, in
28 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to

1 survive a motion to dismiss, the non-conclusory factual content,
2 and reasonable inferences from that content, must be plausibly
3 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
4 *U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) (internal
5 quotation marks omitted).

6 7 V. DISCUSSION

8 Defendants now move, pursuant to Rule 12(b) of the Federal
9 Rules of Civil Procedure, to dismiss the following claims advanced
10 against them: (1) federal civil rights claims; (2) negligence; and
11 (3) assault and battery.

12 Defendants first argue that Plaintiffs lack standing to pursue
13 their survival and wrongful death actions because they do not
14 satisfy California Code of Civil Procedure §§ 377.11 and 377.60,
15 the applicable statutory frameworks. Whether a "particular party
16 has standing to pursue a claim naturally precedes the question of
17 whether that party has successfully stated a claim." *Moreland v.*
18 *City of Las Vegas*, 159 F.3d 365, 369 (9th Cir. 1998). Plaintiff
19 bears the burden of proving that standing exists. *Northwest Env'tl.*
20 *Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir.
21 1997). Defendants challenge whether Plaintiffs Jose Mendoza-
22 Saravia and Angie Melissa Castro have standing to sue.

23 24 A. Standing

25 1. Plaintiff Jose Mendoza-Saravia

26 Citing California Code of Civil Procedure § 377.11, Defendants
27 assert that Plaintiff Jose Mendoza-Saravia lacks standing to sue,
28 as he is not the decedent's successor-in-interest, defined as the

1 beneficiary of decedent's estate.³ Defendants explain:

2 The first two causes of action in the complaint are state
3 law claims for negligence (first) and assault and battery
4 (second). Plaintiff Jose Mendoza-Saravia alleges that he
5 is the personal representative of Decedent's estate.
6 While the complaint is unclear, it appears that Mr.
7 Mendoza-Saravia is bringing a survival action under
8 California law, based on the torts allegedly committed
9 against Decedent. However, he has failed to properly
10 allege that he has standing to bring such an action.

11 (Doc. 9-1 at 2:23-28.)

12 Plaintiff Jose Mendoza-Saravia rejoins that he satisfies §
13 377.11's requirements because "he is the brother of Angel Mendoza-
14 Saravia and is his successor in interest and administrator of his
15 estate." He relies on two statements to support this assertion:
16 (1) the complaint's sixth paragraph, which states that Jose
17 Mendoza-Saravia "is [the] duly qualified and acting personal
18 representative of the estate of Angel Mendoza-Saravia"; and (2) his
19 declaration, which was filed on June 3, 2010 with the opposition.

20 California Code of Civil Procedure § 377.30 provides that "[a]
21 cause of action that survives the death of the person ... may be
22 commenced by the decedent's personal representative or, if none, by
23 the decedent's successor in interest." A "personal representative"
24 means an "executor, administrator, administrator with the will
25 annexed, special administrator, successor personal representative,

26 ³ Defendants' standing arguments apply with equal force to
27 Jose Mendoza-Saravia's "federal" claims, even though the complaint
28 does not mention § 1983. In order to maintain a § 1983 cause of
action, a plaintiff must have standing as a representative or
successor in interest under the California state survival statute.
See Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 369
(stating that in a Section 1983 action, the party bringing a
survival action must show that the particular state's law allows a
survival action and that plaintiff meets those requirements).

1 public administrator acting pursuant to Section 7660, or a person
2 who performs substantially the same function under the law of
3 another jurisdiction governing the person's status." Cal. Prob.
4 Code § 58(a); *Garcia v. Adams*, No. F. 04-5999 AWI SMS, 2006 WL
5 403838, at *11 (E.D. Cal. Feb.17, 2006). The "decedent's successor
6 in interest," which Jose Mendoza-Saravia claims to be, "means the
7 beneficiary of the decedent's estate or other successor in interest
8 who succeeds to a cause of action or to a particular item of the
9 property that is the subject of a cause of action." Cal. Civ.
10 Proc. Code § 377.11.

11 Although Jose Mendoza-Saravia states that he is the "successor
12 in interest to Angel Antonio's Mendoza-Saravia's [] estate" and
13 that "no proceeding is now pending in California for administration
14 of the decedent's estate," this does not establish standing to sue
15 under California's survival statute. In particular, he does not
16 satisfy § 377.32(a)(4), which provides in relevant part:

17 (a) The person who seeks to commence an action or
18 proceeding or to continue a pending action or proceeding
19 as the decedent's successor in interest under this
20 article, shall execute and file an affidavit or a
21 declaration under penalty of perjury under the laws of
22 this state stating all of the following [...]

(4) If the decedent's estate was administered, a
copy of the final order showing the distribution of
the decedent's cause of action to the successor in
interest.

23 *Id.*

24 Critically, his declaration provides that "[a] copy of the
25 final order showing distribution of the decedent's cause of action
26 to the successor in interest is attached hereto." (Doc. 12-1, ¶
27 5.) Mr. Mendoza-Saravia, however, fails to attach the "final order
28 showing the distribution of the decedent's cause of action."

1 Without such an order, he cannot satisfy § 377.32(a)(4).⁴

2 Providing a "final order showing the distribution of the
3 decedent's cause of action" is a prerequisite to filing a survival
4 action under § 377.10, *et seq.* As such, Mr. Mendoza-Saravia lacks
5 standing and the survivor claims are DISMISSED WITH LEAVE TO AMEND.

6 In their opposition brief, Plaintiffs submit that if the
7 motion is granted, it be granted with leave to amend to allow them
8 to "cure the defects in their complaint." Based upon the
9 submissions and arguments of the Plaintiffs in opposition to the
10 motion, leave to amend is not futile, sought in bad faith, nor
11 would it cause unnecessary delay. Plaintiffs' request is GRANTED.
12 See Fed. R. Civ. P. 15(a)(2) ("Leave to amend should be freely
13 given "when justice so requires.").

14 Any amended complaint shall include the "Final Order" and
15 conform with Rules 8 and 11 of the Federal Rules of Civil
16 Procedure.⁵

17

18 2. Angie Melissa Castro

19 Minor Plaintiff Angie Melissa Castro has advanced, through her
20 mother and guardian ad litem Blanca Estella Castro, a state law
21 wrongful death claim and a Fourteenth Amendment familial
22 association claim.⁶

23
24 ⁴ Plaintiff Jose Mendoza-Saravia's declaration is also
25 insufficient to satisfy § 377.32(a)(5).

26 ⁵ If permitted under § 377.10, *et seq.*, Plaintiff may include
27 the "Final Order" *in haec verba.*

28 ⁶ The complaint provides: "Angie Melissa Castro is the child
of the Decedent, and was dependent on decedent for support."

1 Standing to sue in a wrongful death action is governed by
2 California Code of Civil Procedure § 377.60, and the category of
3 persons eligible to bring a wrongful death action is strictly
4 construed. *Bouley v. Long Beach Memorial Medical Center*, 127
5 Cal.App.4th 601, 606 (2005); *Chavez v. Carpenter*, 91 Cal.App.4th
6 1433, 1438 (2001). Section 377.60 establishes a wrongful death
7 cause of action and delineates who may avail themselves of the
8 action. In relevant part, § 377.60 reads:

9 A cause of action for the death of a person caused by the
10 wrongful act or neglect of another may be asserted by any
11 of the following persons or by the decedent's personal
12 representative on their behalf:

13 (a) The decedent's surviving spouse, domestic partner,
14 children, and issue of deceased children, or, if there is
15 no surviving issue of the decedent, the persons,
16 including the surviving spouse or domestic partner, who
17 would be entitled to the property of the decedent by
18 intestate succession.

19 (b) Whether or not qualified under subdivision (a), if
20 they were dependent on the decedent, the putative spouse,
21 children of the putative spouse, stepchildren, or
22 parents. As used in this subdivision, "putative spouse"
23 means the surviving spouse of a void or voidable marriage
24 who is found by the court to have believed in good faith
25 that the marriage to the decedent was valid.

26 *Id.*

27 Defendants originally filed this motion under Rule 12(e) based
28 on an ambiguity in the complaint, which represented that Ms. Castro
was the "child of the decedent" and that she was "dependent on
decedent for his support." Defendants claimed these statements
were in conflict because "under the wrongful death statute, it is
not necessary for the surviving issue of a decedent to be dependent

1 on the decedent."⁷ Defendants moved for clarification of the issue
2 because "if the former is true [Ms. Castro is decedent's child],
3 there would be no need to conduct discovery on the issue of
4 dependence."

5 In their opposition, however, Plaintiffs clarified any
6 ambiguity over the statements:

7 Angie Melissa Castro was born on February 18, 2009 at
8 3:31 p.m. in El Salvador. Angie is the daughter of Angel
9 Antonion Mendoza-Saravia and Blanca Estella Castro,
10 therefore, as stated by Defendants in their Motion, there
11 is no need to conduct discovery on the issue of
12 dependence.

13 (Doc. 12 at 3:16-3:20.)

14 In further support, Plaintiffs attached the declaration of
15 Blanca Estella Castro to their opposition. The declaration
16 provides:

- 17 1. I was the girlfriend of Angel Antonio Mendoza-Saravia [...]
- 18 3. My daughter, Angie Melissa Castro, was born on
19 February 18, 2009.
- 20 4. Angel Antonio Mendoza-Saravia is the father of
21 Angie Melissa Castro.

22 (Doc. 12-2 ¶¶ 1, 3-4).

23 Defendants nonetheless argue that Plaintiff Angie Melissa
24 Castro lacks standing to advance a wrongful death cause of action
25 against them. Citing *Cheyanna D. V. A,C,. Nielsen, Co.*, 66 Cal.
26 App. 4th 855 (1998), Defendants argue that she is required to
27 "plead that clear and convincing evidence of paternity exists,"
28 which she cannot do:

⁷ However, a step-child must demonstrate "dependence" under §
377.60.

1 Ms. Castro has plainly failed to meet the [clear and
2 convincing] evidence] standard. While she represents
3 that she was Decedent's 'girlfriend,' and represents in
4 a conclusory fashion that Decedent 'is the father' of her
5 daughter, the attached birth certificate makes no
6 reference to Decedent as the father. Furthermore, in
7 contrast to the representation on the birth certification
8 that Angie was born at Fresno Community Regional Medical
9 Center, Ms. Castro represents in her declaration that her
10 daughter was born in El Salvador. Therefore it cannot
11 reasonably be concluded from the pleadings and motion
12 papers that the paternity of Decedent can be established
13 by 'clear and convincing' evidence. As such, Angie
14 Melissa Castro should be dismissed as a plaintiff.

15 (Doc. 17 at 5:25-6:4.)

16 Defendants' argument can be summarized as follows: Plaintiffs
17 cannot satisfy *Cheyanna's* "clear and convincing" evidence standard
18 because: (1) Angie's birth certificate does not list the decedent
19 as the father; and (2) there are inconsistent statements concerning
20 Angie's birthplace. According to Defendants, these two factors,
21 taken together, demonstrate that Plaintiff Angie Melissa Castro
22 lacks standing to pursue a wrongful death claim.

23 This argument was advanced for the first time in Defendants'
24 reply brief.⁸ As such, Plaintiffs have not had an opportunity to
25 respond, either via motion or at oral argument.⁹ Plaintiff is
26 requested to address the ambiguity and/or disparity in the amended
27 pleading. The motion is GRANTED WITH LEAVE TO AMEND.

28 ⁸ Arguments raised for the first time in a reply brief or at
the hearing on a motion are disregarded as a general rule. See
United States v. Bohn, 956 F.2d 208, 209 (9th Cir.1992); *United*
States v. Boyce, 148 F.Supp.2d 1069, 1085 (S.D.Cal.2001). However,
it appears that the ambiguity stems from Ms. Blanca Estrella
Castro's declaration, which was attached to Plaintiffs' opposition
to the present motion.

⁹ Counsel for Plaintiffs did not appear at oral argument on
August 2, 2010.

1 B. Merits of Plaintiffs' Complaint

2 1. Federal Civil Rights Claims (Claim III)

3 The complaint alleges that Defendants violated Jose
4 Mendoza-Saravia's constitutional rights. Specifically, the
5 complaint alleges that Defendants deprived Jose Mendoza-Saravia of
6 "liberty without due process of law" and "made an unreasonable
7 seizure." These are conclusions of law. The complaint contains no
8 allegations specific to the federal causes of action, nor does it
9 name as defendants any individual officers or deputies.

10 Title 42 U.S.C. § 1983 provides for liability against any
11 person acting under color of law who deprives another "of any
12 rights, privileges, or immunities secured by the Constitution and
13 laws of the United States." *S. Cal. Gas Co. v. City of Santa Ana*,
14 336 F.3d 885, 887 (9th Cir. 2003) (quoting 42 U.S.C. § 1983). "The
15 rights guaranteed by section 1983 are 'liberally and beneficently
16 construed.'" *Id.* (quoting *Dennis v. Higgins*, 498 U.S. 439, 443
17 (1991)).

18 To establish liability under § 1983, a plaintiff must show (1)
19 that he was deprived of a right secured by the United States
20 Constitution or a federal law and (2) that the deprivation was
21 effected "under color of state law." *Broom v. Bogan*, 320 F.3d
22 1023, 1028 (9th Cir. 2003).

23 Defendants argue that Plaintiff fails to allege sufficient
24 facts to support either an excessive force or due process claim.
25 According to Defendants, it "certainly cannot be surmised from the
26 complaint that any deputy sheriff acted with 'deliberate
27 indifference' to Plaintiffs' rights." In opposition, Plaintiffs
28 assert that the complaint's allegations are sufficient to state a

1 claim and that discovery is necessary to "properly analyze the []
2 cases cited by Defendants."

3 Although Plaintiff did not specifically enumerate a cause of
4 action under § 1983, the complaint asserts that Defendants
5 "violated his constitutional rights." The opposition, however,
6 makes clear that Plaintiffs advance several independent causes of
7 action pursuant to the § 1983 framework. The relevant paragraph of
8 the complaint provides:

9 Said Defendants, while acting within their capacities as
10 deputies in the City of Mendota, County of Fresno, State
11 of California, deprived decedent of his liberty without
12 due process of law, made an unreasonable seizure of the
13 decedent thereby depriving decedent of his rights,
privileges, and immunities as guaranteed by Article I, §
14 13 of the California Constitution; and the Fourth, Fifth,
and Fourteenth Amendments to the Constitution of the
15 United States [...]

16 As a proximate result of the Constitutional violations by
17 the defendants, and each of them, the decedent died on
18 November 26, 2008.

19 (Compl. ¶¶ 18, 20.)

20 Other than a general reference to the three-sentence "factual
21 summary," which is itself devoid of any factual detail, the
22 complaint does not identify what constitutional deprivations (i.e.,
23 "facts") support the federal claims. Plaintiffs confound the
24 pleading posture by inserting "new" facts in their opposition,
25 i.e., facts that were not included in their complaint. For
26 instance, the opposition states that "upon arriving at Jose's home,
27 the officers chased Angel Antonio Mendoza-Saravia into a bedroom
28 where he was unarmed and alone, unable to harm the officers or
anyone else." The opposition further provides: "While barricaded
in the bedroom alone, Angel opened the door and was immediately

1 shot in the chest by an officer with a bean-bag shotgun." The
2 opposition also submits that Jose was "placed in handcuffs by the
3 officers and taken to the Community Regional Medical Center," and
4 that he "was pronounced dead as a result of the severe impact [] to
5 the chest." None of these facts were included in the boilerplate
6 pleading filed on February 10, 2010.

7 Where plaintiff has identified a federal constitutional right,
8 such as the Fourth and Fourteenth Amendments, plaintiff must allege
9 who violated those rights, and how. For example, under the § 1983
10 claim, the complaint alleges Defendants "made unreasonable search
11 and seizure" and deprived him of due process of law, conclusions of
12 law. Plaintiff must, without providing elaborate detail, allege
13 who denied him of these rights, and how.

14 To survive dismissal a complaint must plead "enough facts to
15 state a claim to relief that is plausible on its face." *Bell Atl.*
16 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility
17 standard "asks for more than a sheer possibility that a defendant
18 has acted unlawfully," demanding instead sufficient factual
19 allegations to allow "the court to draw the reasonable inference
20 that the defendant is liable for the misconduct alleged." *Ashcroft*
21 *v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d
22 868 (2009). "Threadbare recitals of the elements of a cause of
23 action, supported by mere conclusory statements, do not suffice."
24 *Iqbal*, 129 S.Ct. at 1949. *Iqbal* has made clear that conclusory,
25 "threadbare" allegations that merely recite the elements of a cause
26 of action will not withstand a motion to dismiss. If Plaintiff
27 seeks to pursue this action, he must amend the § 1983 claim to
28 identify the Defendants who violated his constitutional rights and

1 how those rights were allegedly violated.

2 Plaintiffs suggest that "discovery is necessary" to meet the
3 applicable pleading standards, including *Iqbal*. Rule 8, however,
4 "does not unlock the doors of discovery for a plaintiff armed with
5 nothing more than conclusions." *Iqbal*, 129 S.Ct. at 1950. To
6 allow Plaintiff to conduct discovery before he has stated valid
7 claims to relief "would subvert the purpose of the pleading
8 requirements." *Salazar v. Lehman Brothers Bank*, 2010 WL 1996374 at
9 2 (E.D. Cal. May 14, 2010) (citing *Carpa v. Smith*, 1998 WL 723153
10 at 4 (D. Ariz. July 20, 1998)). The motion is GRANTED.

11 In their opposition, Plaintiffs request the opportunity to
12 amend their pleadings. Plaintiffs' request to amend is GRANTED.

13 14 2. State Law Claims

15 Plaintiffs sue Defendants County of Fresno and City of Mendota
16 for negligence and assault and battery.

17 18 a. Negligence (Claim I)

19 Plaintiff's complaint alleges Defendants were negligent.
20 Defendants contend that the first cause of action for negligence
21 should be dismissed because as public entities, they are immune
22 from liability for common law negligence. Defendants point to
23 California Government Code § 815(a), which provides: "[a] public
24 entity is not liable for an injury, whether such injury arises out
25 of an act or omission of the public entity or a public employee or
26 any other person."

27 Plaintiffs, however, correctly note that California Government
28 Code § 815.2(a) provides a statutory basis for liability: "A

1 public entity is liable for injury proximately caused by an act or
2 omission of an employee of the public entity within the scope of
3 his employment if the act or omission would, apart from this
4 section, have given rise to a cause of action against that employee
5 or his personal representative." *Id.* § 815.2(a); see also *Eastburn*
6 *v. Regional Fire Protection Auth'y*, 31 Cal.4th 1175 (2003) (
7 Section 815.2(a) "makes a public entity vicariously liable for its
8 employee's negligent acts or omissions within the scope of
9 employment").

10 Defendants do not dispute that "they can be held vicariously
11 liable for the torts of an employee" pursuant to § 815.2(a).
12 However, in their reply, they clarify that the motion only relates
13 to their *direct* liability:

14 As for their state law claims, it appears from
15 Plaintiffs' Opposition that they are confused about the
16 instant motion in relation to the Moving Defendants. To
17 be clear, Moving Defendants only contended that under the
18 Government Code, and pertinent case authority, they
19 cannot be liable for their own allegedly negligence
20 conduct, such as conduct in relation to training and
21 supervision. Moving Defendants fully recognize that they
22 can be vicariously liable for the torts of an employee.
23 However, this does not warrant a denial of the motion.
24 California law clearly makes a legal distinction between
25 direct and vicarious liability, Factually, there is a
26 considerable difference between direct and vicarious
27 liability, especially when it comes to discovery,
28 dispositive motions, and the presentation of evidence at
trial. As such, the motion should be granted as to the
direct (as opposed to vicarious) liability of Moving
Defendants.

(Doc. 17 at 6:6-6:17.)

There is no common law tort liability for public entities in
California; instead, such liability must be based on statute. See
Miklosy v. Regents of Univ. of Cal., 44 Cal.4th 876, 899 (2008)
("section 815 abolishes common law tort liability for public

1 entities"). Critically, California law does not provide a basis to
2 hold a municipality directly liable for its alleged "negligence in
3 the selection, training, retention, supervision, and discipline of
4 police officers." *Munoz v. City of Union City*, 120 Cal. App. 4th
5 1077, 1112 (2004).¹⁰ As such, to the extent Plaintiffs advance
6 direct tort claims against Defendants, the claims are DISMISSED.

7 Defendants argued in their original motion that Plaintiffs
8 failed to allege facts sufficient to show that the cause of action
9 lies outside the breadth of public entity immunity. For the
10 reasons discussed in §§ V(B)(1)), *supra*, the motion is GRANTED.
11 See *Lopez v. So. Cal. Rapid Transit Dist.*, 40 Cal.3d 780, 795
12 (1985) ("because under the Tort Claims Act all governmental tort
13 liability is based on statute, the general rule that statutory
14 causes of action must be pleaded with particularity is
15 applicable"). In their opposition, Plaintiffs request an
16 opportunity to file an amended pleading. The request to amend is
17 GRANTED.

18
19 ¹⁰ *Hoener v. County of Sonoma*, 2004 WL 1811156 at 7 (N.D. Cal.
20 Aug. 5, 2004) stated: "With respect to plaintiff's state
21 negligence claims against the City and County for [Monell conduct],
22 the City and County are entitled to immunity from plaintiff's state
23 law claim. The City and County are public entities. The Ninth
24 Circuit has held that California law does not support a cause of
25 action against a public entity for negligent hiring or supervision.
26 See *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 840-41 (9th
27 Cir.1996); see also *Universal By-Products, Inc. v. City of Modesto*,
28 43 Cal.App.3d 145, 153, 117 Cal.Rptr. 525 (1974) (stating there is
"no common law liability of a public entity; liability is wholly
statutory"). This is consistent with sections of the California
Government Code providing that a state governmental entity can be
sued in tort only pursuant to an authorizing statute or enactment.
See Cal. Gov't Code § 815 et seq.; *Lopez v. Southern Cal. Rapid
Transit Dist.*, 40 Cal.3d 780, 221 Cal.Rptr. 840, 710 P.2d 907
(1985)."

1 b. Assault and Battery (Claim II)

2 Plaintiffs assert their second claim of assault and battery
3 against all defendants, including moving parties City of Mendota
4 and County of Fresno.

5 In order to establish a common law battery claim against a
6 peace officer, Plaintiffs must establish each element of the tort:¹¹
7 (1) an unprivileged touching, that (2) caused damages. Plaintiffs
8 also have the burden of proving that the use of force was (3)
9 unreasonable.

10 Here, Defendants' motion to dismiss the second claim for
11 assault and battery is granted for two reasons. First, the state
12 law tort of assault and battery is inextricably intertwined with
13 the analysis of the § 1983 claim. See *Edson v. City of Anaheim*, 63
14 Cal. App. 4th 1269, 1272 (1998). As explained above, Plaintiffs
15 have failed to state facts sufficient to state a claim under §
16 1983.¹² The same analysis defeats the assault and battery cause of
17 action. Second, as explained in §§ V(A)(1)-(2), *supra*, it is
18 entirely unclear if the Plaintiffs have the requisite standing to
19 assert a claim for assault and battery.

20 Defendants' motion to dismiss the second claim for assault and
21

22 ¹¹ "Battery includes assault; in fact, battery is a consummated
23 assault. Assault is, therefore, necessarily included in battery."
24 See *Torres v. California*, No. 10-CV-0670-LJO-GSA, 2010 WL 2383698
at 10 (E.D. Cal. June 10, 2010) (citing *People v. Heise*, 217 Cal.
671, 673 (1933)).

25 ¹² While Rule 8 does not demand detailed factual allegations,
26 "it demands more than an unadorned, the
27 defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*,
129 S.Ct. at 1949. "Threadbare recitals of the elements of a cause
28 of action, supported by mere conclusory statements, do not
suffice." *Id.*

1 battery is GRANTED WITH LEAVE TO AMEND.
2

3 VI. CONCLUSION

4 For the reasons stated:

5
6 1. The Complaint is DISMISSED WITH LEAVE TO AMEND.
7

8 2. Any amended complaint shall be filed by September 1, 2010
9 and conform with Rules 8 and 11 of the Federal Rules of Civil
10 Procedure.
11

12 3. Responses to the amended complaint shall be filed within
13 twenty days thereto.
14

15
16 IT IS SO ORDERED.

17 Dated: August 2, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE