

1 recommended that the motion be **GRANTED**, and **that** Warden Pfeiffer and all claims against
2 him be dismissed without prejudice.

3 **LEGAL STANDARD**

4 Dismissal is proper under Rule 12(b)(6) if there is a lack of a cognizable legal theory, or
5 the absence of sufficient facts alleged under a cognizable legal theory. *Conservation Force v.*
6 *Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1762 (2012). To survive
7 a motion to dismiss, a complaint must contain sufficient factual allegations, accepted as true, to
8 state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937,
9 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65
10 (2007)); *Conservation Force*, 646 F.3d at 1242; *Moss v. U.S. Secret Service*, 572 F.3d 962, 969
11 (9th Cir. 2009). The Court must accept well-pled factual allegations as true and draw all
12 reasonable inferences in favor of the non-moving party. *Daniels-Hall v. National Educ. Ass'n*,
13 629 F.3d 992, 998 (9th Cir. 2010); *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007); *Huynh*
14 *v. Chase Manhattan Bank*, 465 F.3d 992, 1003-04 (9th Cir. 2006); *Morales v. City of Los*
15 *Angeles*, 214 F.3d 1151, 1153 (9th Cir. 2000).

16 Further, "[i]f there are two alternative explanations, one advanced by defendant and the
17 other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to
18 dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216-17. "Plaintiff's complaint may
19 be dismissed only when defendant's plausible alternative explanation is so convincing that
20 plaintiff's explanation is *implausible*. The standard at this stage of the litigation is not that
21 plaintiff's explanation must be true or even probable. The factual allegations of the complaint
22 need only 'plausibly suggest an entitlement to relief.'" *Id.* (emphasis in original). "Rule 8(a) '*does*
23 *not impose a probability requirement at the pleading stage*; it simply calls for enough fact to raise
24 a reasonable expectation that discovery will reveal evidence' to support the allegations." *Id.*,
25 quoting *Twombly*, 550 U.S. at 556 (emphasis added in *Starr*).

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1 **DISCUSSION**

2 **A. Defendants' Motion**

3 Defendants argue that Plaintiffs do not allege that Warden Pfeiffer personally participated
4 in the shooting death of Mr. Herrera. (Doc. 16, p. 2.) Plaintiffs instead assert that Mr. Herrera's
5 death was the result of (a) Warden Pfeiffer's policies or procedures, or the lack thereof; and/or (b)
6 the failure of Warden Pfeiffer to properly supervise or discipline the prison's employees. (*Id.*)
7 Defendants assert that the allegations in support of Plaintiffs' supervisory liability claim against
8 Warden Pfeiffer are insufficient and do not establish a "direct causal link" between any policy or
9 practice of Warden Pfeiffer and Mr. Herrera's death. (*Id.*)

10 **1. Plaintiff Fails to State a Cognizable Claim Against Warden Pfeiffer**

11 Plaintiffs assert two § 1983 survival claims against Warden Pfeiffer based on supervisory
12 liability. Plaintiffs allege that Mr. Herrera's death was the result of (a) "customs, practices or
13 policies, or the lack thereof" of Warden Pfeiffer; and/or (b) the failure of Warden Pfeiffer to
14 adequately supervise or discipline the employees at KVSP. (Doc. 13, FAC, ¶¶ 30-44.)
15 Defendants assert that the allegations in support of these claims are fairly general, with Plaintiffs
16 concluding that the shooting "was the result of the custom within the institution to deal with
17 minor events and confrontations with excessive and deadly force," and that "correctional officers
18 using this force knew there were no repercussions and were allowed to abandon training and
19 normal police policies in exchange for violations and unjustified use of force." (Doc. 16, 3:8-12,
20 citing Doc. 13, at ¶ 17.)

21 Under section 1983, liability may not be imposed on supervisory personnel for the actions
22 of their employees under a theory of *respondeat superior*. *Ashcroft v. Iqbal*, 556 U.S. 662, 677
23 (2009). Liability by a supervisor for "knowledge and acquiescence" in subordinates' wrongful
24 discriminatory acts is likewise not cognizable. *Id.* "In a § 1983 suit or a *Bivens* action - where
25 masters do not answer for the torts of their servants - the term 'supervisory liability' is a
26 misnomer." *Id.* Therefore, when a named defendant holds a supervisory position, the causal link
27 between him and the claimed constitutional violation must be specifically alleged. *See Fayle v.*
28 *Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir.

1 1978), cert. denied, 442 U.S. 941 (1979).

2 To state such a claim, a plaintiff must allege facts that show supervisory defendants either
3 personally participated in the alleged deprivation of constitutional rights; knew of the violations
4 and failed to act to prevent them; or promulgated or "implemented a policy so deficient that the
5 policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional
6 violation.'" *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations omitted);
7 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). An unconstitutional policy cannot be proved
8 by a single incident "unless proof of the incident includes proof that it was caused by an existing,
9 unconstitutional policy." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S.Ct. 2427
10 (1985). In this instance, a single incident establishes a "policy" only when the decision-maker has
11 "final authority" to establish the policy in question. *Collins v. City of San Diego*, 841 F.2d 337,
12 341 (9th Cir. 1988), citing *Pembauer v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986).

13 Defendants contend that Plaintiffs only generally allege that Mr. Herrera's death was the
14 result of Warden Pfeiffer's customs, practices, and policies, or the lack thereof; and/or the failure
15 of Warden Pfeiffer to properly supervise or discipline the staff at KVSP. (Doc. 16-1, p. 5.)
16 Defendants correctly contend that Plaintiffs do not identify any specific policy of Warden Pfeiffer
17 that directly resulted in Mr. Herrera's death and that the FAC is devoid of facts establishing that
18 any policy promulgated by Warden Pfeiffer was a "repudiation" of Mr. Herrera's constitutional
19 rights or "the moving force" behind the alleged violation of Mr. Herrera's rights. (*Id.*) Plaintiffs'
20 allegations are conclusory and assert that unspecified policies of Pfeiffer permit correctional
21 officers to use excessive force. Such vague and non-specific allegations, however, are
22 insufficient to establish that any particular policy was the "moving force" behind the alleged
23 unjustified shooting of Mr. Herrera by Officer Atkinson.

24 Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a
25 cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556
26 U.S. 662, 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
27 Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is
28 plausible on its face.'" *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 555. Factual

1 allegations are accepted as true, but legal conclusions are not. *Iqbal*. at 678; *see also Moss v. U.S.*
2 *Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009); *Twombly*, 550 U.S. at 556-557. Courts are not
3 required to indulge unsupported inferences. *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681
4 (9th Cir. 2009) (internal quotation marks and citation omitted). The “sheer possibility that a
5 defendant has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a
6 defendant’s liability” fall short of satisfying the plausibility standard. *Iqbal*, 556 U.S. at 678, 129
7 S. Ct. at 1949; *Moss*, 572 F.3d at 969.

8 The FAC, as Defendants’ correctly assert, does not allege facts sufficient to state a claim
9 that Warden Pfeiffer either personally participated in the alleged deprivation of Mr. Herrera’s
10 constitutional rights, or promulgated or implemented a policy so deficient that the policy itself is
11 a repudiation of Mr. Herrera’s constitutional rights and was the moving force behind his death.
12 Plaintiffs concede as much via their statement of non-opposition. It is, therefore, recommended
13 that Warden Pfeiffer and all claims against him be dismissed without prejudice.³

14 **RECOMMENDATION**

15 Based on the foregoing, the Court **HEREBY RECOMMENDS** that Defendants’ motion
16 to dismiss, filed on December 21, 2016 (Doc. 19), be **GRANTED** and that Warden Christian
17 Pfeiffer and all claims against him be **DISMISSED without prejudice**.

18 These Findings and Recommendations will be submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
20 **twenty-one days** after being served with these Findings and Recommendations, the parties may
21 file written objections with the Court. The document should be captioned “Objections to
22 Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file
23 objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v.*

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27 ³ Defendants’ request for qualified immunity on Plaintiff’s claims against Warden Pfeiffer need not be addressed at
28 this time in light of the recommendation that their motion to dismiss for failure to state a claim be granted. Nothing
in this order should be construed to preclude Defendants from raising qualified immunity on any and all claims later
in this action.

1 *Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th
2 Cir. 1991)).

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4 IT IS SO ORDERED.

5 Dated: January 11, 2017

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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