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3 **UNITED STATES DISTRICT COURT**  
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

5 **ROSIO MOLAND, ET AL.,**

6 **Plaintiffs,**

7 **v.**

8 **CITY OF CERES ET AL.,**

9 **Defendants.**

**1:16-cv-01073-LJO-SKO**

**MEMORANDUM DECISION AND  
ORDER GRANTING DEEFENDANTS'  
MOTIONS TO DISMISS**

**(ECF Nos. 18, 19, 20.)**

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11  
12 **I. INTRODUCTION**

13 Plaintiffs Rosio Moland, Shon Moland, and Mya Moland file this action against Defendants  
14 Thomas Miller (“Miller”) and the City of Ceres (“City”). Rosio Moland sues on her own behalf, as  
15 Guardian ad Litem for Shon and Mya Moland, and as administratrix of the Jason Moland Estate. This  
16 action arises out of the fatal shooting of Jason Moland, Plaintiff Rosio Moland’s husband, by Miller, a  
17 police officer employed by the City of Ceres.

18 Plaintiffs bring a federal claim pursuant to 42 U.S.C. § 1983 (“§ 1983”), alleging violations of  
19 the Fourth and Fourteenth Amendments, and various state law claims. Now before the Court is  
20 Defendant City’s Motion to Dismiss the first amended complaint (“FAC”) under Federal Rule of Civil  
21 Procedure 12(b)(6). This matter is suitable for disposition without oral argument. *See* Local Rule 230(g).

22 **II. BACKGROUND**

23 **A. Procedural Background**

24 Plaintiffs filed the original complaint (“OC”) on May 6, 2016 in Stanislaus County Superior  
25 Court. On July 25, 2016, Defendant City filed a Notice of Removal pursuant to 28 U.S.C. § 1441 and  
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1 the case was removed to this Court. (ECF No. 1.) Federal question jurisdiction exists pursuant to 28  
2 U.S.C. § 1331 with respect to Plaintiffs' federal law claims, and this Court may exercise supplemental  
3 jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367. Venue is proper in this Court.

4 The FAC sets forth the same seven causes of action: (1) violation of the Fourth and Fourteenth  
5 Amendments pursuant to 42 U.S.C. § 1983 as to Defendants Miller and Does 1-10 (first cause of action)  
6 and as to City, Police, and Does 11-100 (second cause of action); (2) negligence pursuant to California  
7 Government Code §§ 820 and 815.2 (third cause of action); (3) negligent infliction of emotional distress  
8 (fourth cause of action); (4) intentional infliction of emotional distress (fifth cause of action); (5)  
9 survival action on behalf of the Estate of Jason Moland pursuant to California Code of Civil Procedure  
10 § 377.30 (sixth cause of action); and (6) wrongful death pursuant to California Code of Civil Procedure  
11 § 377.60 (seventh cause of action). Plaintiffs seek damages of not less than \$25,000.

12 On October 18, 2016, the Court dismissed the OC against Defendant City on the grounds that  
13 Plaintiffs did not adequately plead that Defendant Miller was acting under color of law when he shot  
14 Jason Moland and, alternatively, that Plaintiffs did not plead a *Monell* claim against Defendant City.  
15 (Order, ECF No. 12.) The Court granted Plaintiffs leave to amend the complaint. On November 7, 2016,  
16 Plaintiffs filed the first amended complaint ("FAC"). Defendants City and Miller moved to dismiss all  
17 causes of action stated against them. (ECF Nos. 19, 20.) Plaintiffs filed late oppositions to both motions.  
18 (ECF Nos. 27, 28).<sup>1</sup> Defendants each submitted a reply. (ECF Nos. 35, 36.) The matter is now ripe for  
19 review.

20 **B. Factual Allegations**

21 The factual allegations contained in the FAC are largely the same as those contained in the OC  
22 and recited in this Court's October 18 Order. (Order at 1-2.) The FAC contains one paragraph that  
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24 <sup>1</sup> Plaintiffs filed their oppositions six days late. This Court granted Plaintiffs an extension of time to file pursuant to Federal  
25 Rule of Civil Procedure 6(b). (ECF No. 33.) As the Court previously indicated, any future ignoring of the Rules will not be so  
26 easily forgiven.

1 expands upon the factual allegations in the OC:

2 Plaintiff is informed and believes and thereon alleges, that as Jason  
3 Moland approached MILLER identified himself as a police officer of the  
4 City of Ceres and in accordance with that department policies fired at  
5 Jason Moland with the intent to kill him. Once the fatal shot or shots were  
6 fired MILLER took control of the scene using his position as a police  
7 officer to direct plaintiff and control the incident scene until other police  
8 officers from another agency arrived. Once other officers arrived MILLER  
9 continued to identify himself as a Ceres police officer with authority over  
10 the scene while plaintiff was separated from the subsequent health care of  
11 Jason Moland and the investigation. MILLER's actions from the point of  
12 identifying Jason Moland as a threat before shooting him, was in  
13 compliance with the City of Ceres police department procedures asserting  
14 authority of law over Jason Moland and plaintiff from that point until the  
15 inception of the investigation by the Modesto Police. MILLER'S actions  
16 during this time frame was in compliance with the standard Ceres Police  
17 procedures to assert the authority of the Ceres Police department when an  
18 individual officer is off duty in order to protect the officer and the public  
19 from injury or harm. MILLER's actions leading up to the shooting put him  
20 in the position of danger, and his actions in compliance with standard  
21 Ceres Police department policies identified above, which were  
22 subsequently ratified by the Ceres Police department, of acting as an  
23 officer and using deadly force while identifying himself as an officer and  
24 acting as such violated plaintiff and Jason Moland's constitutional rights.

25 (FAC ¶ 9.)

### 26 **III. STANDARD OF DECISION**

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is a challenge to the sufficiency of the allegations set forth in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In determining whether a complaint states a claim upon which relief may be granted, the Court accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

Under Rule 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and

1 the grounds upon which it rests.” A plaintiff is required to allege “enough facts to state a claim to relief  
2 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial  
3 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
4 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
5 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a  
6 sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556).

7 While Rule 8(a) does not require detailed factual allegations, “it demands more than an  
8 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A pleading is  
9 insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the elements of a  
10 cause of action.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the  
11 elements of a cause of action, supported by mere conclusory statements, do not suffice.”). Moreover, it  
12 is inappropriate to assume that the plaintiff “can prove facts that it has not alleged or that the defendants  
13 have violated the . . . laws in ways that have not been alleged[.]” *Associated Gen. Contractors of Cal.,*  
14 *Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). In practice, “a complaint . . . must  
15 contain either direct or inferential allegations respecting all the material elements necessary to sustain  
16 recovery under some viable legal theory.” *Twombly*, 550 U.S. at 562. In other words, the complaint must  
17 describe the alleged misconduct in enough detail to lay the foundation for an identified legal claim.  
18 “Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by  
19 amendment.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008). To the extent that the  
20 pleadings can be cured by the allegation of additional facts, the Court will afford the plaintiff leave to  
21 amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir.  
22 1990) (citations omitted).

#### 23 **IV. DISCUSSION**

##### 24 **A. Defendant Miller’s Motion to Dismiss**

25 Plaintiffs argue that Miller is precluded from moving to dismiss the FAC because Miller did not  
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1 move to dismiss the OC. (ECF No. 27 at 3.) According to Plaintiffs, by failing to oppose the FAC and  
2 by filing answers in state and federal court, Miller waived his right to contest the FAC for failure to state  
3 a claim. (*Id.*) Defendant Miller counters that Plaintiffs' waiver argument is not supported by case law  
4 and that the argument is made in bad faith because he was not served with the complaint until after the  
5 case was removed to federal court, and was not notified of the removal by Plaintiffs. (ECF No. 36 at 2-  
6 3.)

7 As a general rule, when a plaintiff files an amended complaint, the amended complaint  
8 supersedes the original, the latter being treated thereafter as non-existent. *Pac. Bell Tel. Co. v. Linkline*  
9 *Communications, Inc.*, 555 U.S. 438, 456 n.4 (2009) (citing 6 C Wright and A. Miller, Federal Practice  
10 & Procedure § 1476, pp. 556-57 (2d ed. 1990)). After the filing of the amended complaint, prior  
11 complaints no longer perform any function in the case. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.  
12 1992). Indeed, courts regularly deny as moot motions to dismiss an original complaint after an amended  
13 complaint has been filed. *See, e.g., Wensel v. Subia*, No. CIV S-07-0900JAMEFBP, 2009 WL 251132,  
14 at \*1 (E.D. Cal. Feb. 3, 2009)

15 Because the FAC supersedes the OC in its entirety, Defendant did not waive his right to move to  
16 dismiss the FAC by failing to move to dismiss the OC. *Lowry v. Metro. Transit Bd. MTBS*, No.  
17 09CV882BTM WVG, 2010 WL 1571216, at \*1 (S.D. Cal. Apr. 16, 2010) (considering defendant's  
18 motion to dismiss the amended complaint on the merits although defendant did not move to dismiss the  
19 original complaint); *McCloud v. Pierce Cty. Sheriff Dep't*, No. 316CV05098BHSDWC, 2016 WL  
20 3675904, at \*6 (W.D. Wash. June 6, 2016), *report and recommendation adopted*, No. C16-5098 BHS-  
21 DWC, 2016 WL 3618082 (W.D. Wash. July 6, 2016) ("While [defendant] did not move to dismiss the  
22 claims alleged against him, if [plaintiff] files an amended complaint it will act as a complete substitute to  
23 the original Complaint and therefore [plaintiff] must include all claims against [defendant] in the

1 amended complaint.”). Miller is entitled to have his motion considered on the merits.<sup>2</sup>

2 **B. Violation of the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983**

3 To state a claim under § 1983, plaintiff must allege that: (1) the conduct complained of was  
4 committed by a person acting under color of state law; and (2) that the conduct deprived plaintiff of  
5 rights, privileges or immunities secured by the Constitution or laws of the United States. *Jensen v. City*  
6 *of Oxnard*, 145 F.3d 1078, 1082 (9th Cir. 1998).

7 **1. Color of Law Analysis**

8 The Supreme Court has interpreted the phrase “under ‘color’ of law” to mean “under ‘pretense’  
9 of law.” *Screws v. United States*, 325 U.S. 91, 111 (1945). “[A]cts committed by a police officer even  
10 while on duty and in uniform are not under color of state law unless they are in some way related to the  
11 performance of police duties.” *Gibson v. City of Chicago*, 910 F.2d 1510, 1516 n.10 (7th Cir. 1990)  
12 (internal citations omitted).

13 The color of law analysis has three components. First, the act constituting the deprivation of  
14 constitutional rights must have been “performed while the officer [was] acting, purporting, or pretending  
15 to act in the performance of his or her official duties.” *McDade v. West*, 223 F.3d 1135, 1140 (9th Cir.  
16 2000). Second, “the officer’s pretense of acting in the performance of his duties must have had the  
17 purpose and effect of influencing the behavior of others.” *Anderson v. Warner*, 451 F.3d 1063, 1068-69  
18 (9th Cir. 2006) (citing *Van Ort v. Estate of Sandwich*, 92 F.3d 831, 839-40 (9th Cir. 1996)). Third, the  
19 challenged conduct must be “related in some meaningful way either to the officer’s governmental status  
20 or to the performance of his duties.” *Martinez v. Colon*, 54 F.3d 980, 987 (1st Cir. 1995).

21 In its October 18 Order, the Court dismissed Plaintiffs’ § 1983 claim against Defendants City  
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23 <sup>2</sup> Because it is clear that Miller did not waive his right to file a motion to dismiss, the Court need not address Miller’s  
24 argument that Plaintiffs’ waiver argument was made in bad faith. However, the Court notes that the Proof of Service does  
25 indicate that Miller was not served with the complaint until September 12, 2016, almost two months after the case was  
26 removed to federal court and after the City of Ceres filed their motion to dismiss the OC in federal court. (ECF No. 36-1, Ex.  
A.) The September Proof of Service indicates that the case was filed in the Superior Court of California, County of  
Stanislaus, and does not indicate that the case was removed to federal court. (*Id.*)

1 and Miller on the grounds that Plaintiffs did not adequately plead that Miller was acting under color of  
2 law at the time that he committed the alleged constitutional violation. The Court reasoned:

3 In determining whether a police officer was acting under color of law, courts  
4 assess a variety of factors, such as whether the officer was on duty, in uniform, using  
5 police-issued equipment, and whether the individual represented that he was a law  
6 enforcement officer, among others. *See Huffman v. City of Los Angeles*, 147 F.3d 1054,  
1058 (9th Cir. 1998). The thrust of the inquiry, however, is whether the officer was  
7 cloaked in authority while performing the challenged conduct. *Pete v. Olsen*, No. CV-09-  
8 54-EFS, 2010 WL 996408, at \*3 (E.D. Wash. Mar. 15, 2010).

9 By contrast, an officer who is “pursuing his own goals and [i]s not in any way  
10 subject to control by [his public employer],” *Van Ort*, 92 F.3d at 838 (internal quotation  
11 marks and citations omitted), does not act under color of law, unless he “purport[s] or  
12 pretend[s]” to do so, *id.* Officers who engage in confrontations for personal reasons  
13 unrelated to law enforcement, and do not “purport[ ] or pretend” to be officers during the  
14 confrontation, do not act under color of law. *Id.*; *see also Parrilla-Burgos v. Hernandez-*  
15 *Rivera*, 108 F.3d 445, 449-51 (1st Cir. 1997) (peace officer was not acting under pretense  
16 of authority when he shot plaintiff following barroom dispute); *Barna v. City of Perth*  
17 *Amboy*, 42 F.3d 809, 815-18 (3d Cir. 1994) (police officer who assaulted family member  
18 was not acting under color of law despite use of service revolver and police-issued  
19 nightstick); *Pitchell v. Callan*, 13 F.3d 545, 547-48 (2d Cir. 1994) (off-duty police officer  
20 acted “as a private citizen, not as a state actor” when he used his personal weapon to  
21 shoot a guest in his home).

22 . . .

23 The Complaint does not allege that Miller was on-duty or dressed in uniform on  
24 the evening of the alleged incident. (Compl. ¶ 6-8.) Furthermore, the Complaint does not  
25 allege that Jason Moland knew that Miller was a police officer when he approached him  
26 carrying a BB gun, nor that Miller identified himself as such to Jason Moland. (*Id.* ¶ 8.)  
*See Pete*, 2010 WL 996408, at \*3 (defendant who never identified himself as a police  
officer during altercation related to theft of his private vehicle was not acting under color  
of law). The Complaint does not allege that Miller used his position as a police officer to  
exert authority over Jason Moland during the incident. *Van Ort*, 92 F.3d at 839-40 (police  
officer who robbed citizens after knocking on their door did not act under color of law  
because victim did not open door for defendant based on his status as a police officer).  
On the contrary, the circumstances alleged in the Complaint suggest that Miller was  
acting in his personal capacity when the alleged incidents transpired. According to the  
Complaint, Miller was engaged in conduct of a personal nature with Rosio Moland.  
(Compl. ¶¶ 1, 6-8); *see also Sinks v. Cty. of Fresno*, No. CV-F-11-1990-LJO-SKO, 2012  
WL 174969, at \*5 (E.D. Cal. Jan. 20, 2012) (police officer involved in an altercation with  
restaurant staff while eating lunch with his wife was acting “in the ambit of his personal  
pursuits,” not under color of law (internal quotation marks and citations omitted)).

(Order at 5-8.)

23 In their amended pleading, Plaintiffs add allegations that prior to the shooting incident, “as Jason  
24 Moland approached MILLER identified himself as a police officer of the City of Ceres and in  
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1 accordance with that department [sic] policies fired at Jason Moland with the intent to kill him.” (FAC  
2 ¶ 9.) Plaintiffs also allege that Miller took certain actions after the shooting to control the scene and that  
3 he repeatedly identified himself as a police officer to responding law enforcement officers.

4 As the court explained in its October 18 Order, in determining whether a defendant was acting  
5 under color of law, the court weighs and balances a number of factors, including “whether the officer  
6 was on duty, in uniform, using police-issued equipment, and whether the individual represented that he  
7 was a law enforcement officer, among others.” (Order at 5.) The context in which the events took place  
8 is important to weighing the factors. *Hudson v. Maxey*, 856 F. Supp. 1223, 1228 (E.D. Mich. 1994) (“the  
9 focus of analysis must be the nature of the defendant officer’s actions and the factual context out of  
10 which those actions arose” (emphasis added)); *Beck v. City of Portland, Or.*, No. CV-10-434-HU, 2010  
11 WL 4638892, at \*7 (D. Or. Nov. 5, 2010)) (“actions . . . made in the context of what appears to have  
12 been a personal dispute . . . does not cloak [defendant’s] actions with official authority”). However, the  
13 central inquiry remains whether the officer was, or was purporting to be, “cloaked in authority while  
14 performing the challenged conduct” or whether he was instead acting “in the ambit of his personal  
15 pursuits.” (Order at 5, 8); see also *Huffman v. City of Los Angeles*, 147 F.3d 1054, 1058 (9th Cir. 1998);  
16 *Pete v. Olsen*, No. CV-09-54-EFS, 2010 WL 996408, at \*3 (E.D. Wash. Mar. 15, 2010); *Hudson v.*  
17 *Maxey*, 856 F. Supp. 1223, 1228-29 (E.D. Mich. 1994).

18 As an initial matter, Defendant Miller’s activity in securing and controlling the scene after the  
19 shooting took place does not render the shooting an act committed under color of law. See *Corder v.*  
20 *Metro. Gov’t of Nashville & Davidson Cty., Tenn.*, 899 F.2d 14 (6th Cir. 1990) (acts taken after shooting  
21 incident were not relevant to analysis of whether officer was acting under color of law where officer was  
22 clearly acting in a personal capacity prior to the altercation). In *Myers v. Bowman*, a magistrate judge  
23 called the police to report the theft of his daughter’s dog by the plaintiff, leading to the plaintiff’s arrest.  
24 713 F.3d 1319, 1324-25 (11th Cir. 2013). After the arrest, the judge made threatening remarks to the  
25 plaintiff. *Id.* The plaintiff brought suit under § 1983, alleging that the judge and others had conspired to

1 have him falsely arrested. *Id.* at 1331. The Court held that the judge’s threats after the arrest did not  
2 create a reasonable inference that he acted under color of law when he reported the crime. *Id.* Rather, the  
3 facts indicated that he was acting in his personal capacity when the events leading up to the alleged  
4 constitutional deprivation occurred. *Id.* Likewise, Miller’s actions here in controlling the scene after the  
5 shooting do not indicate that he was acting under color of law when the shooting occurred.

6 The relevant fact added to the FAC for the purpose of establishing that Miller acted under color  
7 of law was that he identified himself as a police officer before he shot Jason Moland. This fact, coupled  
8 with the allegation that Miller used his service weapon in the shooting, are the only facts offered by  
9 Plaintiffs to establish that Miller acted under color of law. However, these facts do not indicate that  
10 Miller was “cloaked in authority” or that he used his authority over Jason Moland in depriving him of  
11 his constitutional rights. *See Van Ort v. Estate of Stanewich*, 92 F.3d 831, 839-40 (9th Cir. 1996)  
12 (holding that a police officer who committed armed robbery did not act under color of law because he  
13 “did not use his authority to gain entry to the home or to induce [victim] to open his front door” and did  
14 not “exert[] . . . meaningful, physical control over [the victim] on the basis of his status as a law  
15 enforcement officer.”)

16 Plaintiffs’ allegation that Miller identified himself as a police officer is also not sufficient to  
17 allege that he acted under color of law. *Id.* (“Merely because a police officer is recognized as an  
18 individual employed as a police officer does not alone transform private acts into acts under color of  
19 state law.”); *Cook v. Morrow*, No. C06–04337, 2007 WL 3022607, \*6–7 (N .D. Cal. Oct. 12,  
20 2007) (officer’s single comment that he was from the Oakland Police Department was not enough to  
21 show that the officer was “acting, purporting, or pretending to act in the performance of his official  
22 duties”). In *Sinks v. County of Fresno*, the court held that a police officer who allegedly assaulted  
23 restaurant staff while having lunch with his wife was not acting under color of law even though he  
24 repeatedly identified himself as a police officer. 2012 WL 174969, at \*5. Applying *Van Ort*, the court  
25 held that the defendant, who was unquestionably engaged in personal pursuits at the time of the incident,

1 “exerted no meaningful, physical control over [the victim] on the basis of his status as a law  
2 enforcement officer.” *Id.* The court noted that in spite of the fact that the defendant identified himself as  
3 a police officer, the restaurant staff still asked him to leave the premises, called 911 to summon the  
4 Fresno County Sherriff’s Department, and attempted to make a citizen’s arrest. These facts suggested  
5 that even if the defendant was “purporting to act in the performance of his official duties, his behavior  
6 did not influence the behavior of others.” *Id.* (citing *Van Ort*, 92 F.3d at 839-40).

7 The facts pled by Plaintiffs suggest that Miller was off-duty, not in uniform, and engaged in  
8 conversation of a personal and romantic nature with Rosio Moland at the time of the alleged incident.  
9 (FAC ¶¶ 6-8.) Unlike *Sinks*, where the facts pled affirmatively suggested that the police officer did not  
10 exercise control or authority, the facts pled here are silent on whether Miller’s self-identification as a  
11 police officer had the effect of exercising control and authority over Jason Moland. Plaintiffs have not  
12 pled facts to suggest that Miller exercised meaningful control or authority over Jason Moland in the  
13 events leading up to or during the incident, nor that Jason Moland interpreted Miller’s actions as being  
14 taken under color of law or by a police officer. *See Sinks*, 2012 WL 174969, at \*5. The Court therefore  
15 DISMISSES the first and second cause of action for failure to allege the underlying conduct complained  
16 of was committed by a person acting under color of state law. The Court GRANTS Plaintiffs one  
17 additional and final opportunity to amend their complaint to allege that Defendant Miller acted under  
18 color of law.

19 **2. Municipal (*Monell*) Liability.**

20 A municipality cannot be held liable under § 1983 for the actions of its employees under the  
21 theory of *respondeat superior*. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978). To state a  
22 claim against a public entity under *Monell*, a plaintiff must plead “(1) that the plaintiff possessed a  
23 constitutional right of which she was deprived; (2) that the municipality had a policy; (3) that this policy  
24 amounts to deliberate indifference to the plaintiff’s constitutional right; and, (4) that the policy is the  
25 moving force behind the constitutional violation.” *Dougherty v. City of Covina*, 654 F.3d 892, 900

1 (2011) (internal quotation marks and citations omitted). The policy must be the result of a decision of a  
2 person employed by the entity who has final decision or policy making authority. *Monell*, 436 U.S. at  
3 694.

4 Defendant City moves to dismiss on the ground that the FAC still fails to allege adequately a  
5 *Monell* claim. (ECF No. 5 at 3-5.) In the October 18 Order, the Court explained that Plaintiffs failed to  
6 plead a *Monnell* violation:

7 The FAC alleges four customs or policies: (1) using or tolerating the use of  
8 excessive force; (2) using or tolerating the use of unlawful deadly force; (3) covering up  
9 violations of constitutional rights by failing to investigate complaints of excessive force,  
10 ignoring or failing to properly investigate unconstitutional police activity, and using or  
11 tolerating improper procedures for investigating police misconduct; and (4) failing to  
12 implement procedural safeguards to prevent constitutional violations stemming from the  
13 use of excessive force, with notice that omitting these procedural safeguards was likely to  
14 result in constitutional violations. (Compl. ¶ 18.) The Complaint further alleges that the  
15 City failed to “properly hire, train, instruct, monitor, supervise, evaluate, investigate, and  
16 discipline Miller” with deliberate indifference to Rosio Moland and Jason Moland’s  
17 constitutional rights. (*Id.* ¶ 19.) It is further alleged that the City knew or “it should have  
18 been obvious to them” that the inadequate training program was likely to result in  
19 constitutional violations because of “a pattern of similar violations.” (*Id.*) These  
20 allegations are entirely conclusory. They are supported by no facts that would tend to  
21 plausibly suggest the City had any unconstitutional custom or policy, failed to train or  
22 supervise, or knew or should have known of a pattern or practice of similar violations. A  
23 conclusory allegation regarding the existence of a policy or custom unsupported by  
24 factual allegations is insufficient to state a *Monell* claim. For example, in *Via v. City of  
25 Fairfield*, 833 F. Supp. 2d 1189, 1196 (E.D. Cal. 2011), plaintiff alleged that:

[T]he acts ... alleged in the Complaint ... are indicative and representative  
of a repeated course of conduct by members of the CITY OF FAIRFIELD  
Police Department tantamount to a custom, policy or repeated practice of  
condoning and tacitly encouraging the abuse of police authority, and  
disregard for the constitutional rights of citizens ... [T]he damages  
sustained as alleged herein were the direct and proximate result of  
municipal customs and/or policies of deliberate indifference in the  
training, supervision and/or discipline of members of the ... FAIRFIELD  
Police Department.

21 The district court granted defendants’ motion to dismiss plaintiff’s *Monell* claim based on  
22 its determination that the above allegation was conclusory and lacked factual content  
23 regarding the City’s alleged policy. *Id.*; see also *Save CCSF Coal v. Lim*, No. 14-CV-  
24 05286-SI, 2015 WL 3409260, at \*13 (N.D. Cal. May 27, 2015) (unspecific allegation  
25 regarding municipal defendant’s use of force policy insufficient to identify a relevant  
policy or custom under *Monell*); *Telles v. City of Waterford*, No. 1:10-cv-00982, 2010  
WL 5314360, at \*4 (E.D. Cal. Dec. 20, 2010) (to sufficiently state a claim under *Monell*,  
plaintiff must allege facts establishing a policy, it is not enough simply to state that there  
is a policy); *Jenkins v. Humboldt County*, No. C 09-5899, 2010 WL 1267113, at \*3 (N.D.

1 Cal. Mar. 29, 2010) (same); *Smith v. Stanislaus*, No. 1:11-CV-01655-LJO, 2012 WL  
2 253241, at \*3-4 (E.D. Cal. Jan. 26, 2012) (same). The allegations in the Complaint are as  
conclusory as those in *Via* and the other cases cited.

3 (Order at 9-10.)

4 Plaintiffs have not included any additional facts in the FAC regarding Defendant City's policies,  
5 customs, or practices that would remedy this deficiency. Instead, they cite to a portion of the FAC that  
6 was not altered from the OC (FAC ¶20), and dispute the Court's dismissal of the OC, noting that "this is  
7 simply the pleading stage of the litigation." (ECF No. 28 at 3 (citing *Klebanow v. Funston*, 35 F.R.D.  
8 518 (S.D.N.Y. 1964).) However, as Plaintiffs acknowledge in their brief, the Supreme Court's more  
9 recent decisions in *Twombly* and *Iqbal* require plaintiffs to plead more than conclusory and threadbare  
10 allegations. *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported  
11 by mere conclusory statements, do not suffice.") Plaintiffs have again failed to do so here. The FAC  
12 does not plausibly suggest the City had any unconstitutional custom or policy, failed to train or  
13 supervise, or knew or should have known of a pattern or practice of similar violations. Defendant City's  
14 motion to dismiss the second cause of action for failure to allege a *Monell* claim is therefore GRANTED  
15 with leave to amend.

16 **C. Causes of Action under State Law**

17 Defendant City removed this action to this Court from Stanislaus County Superior Court because  
18 the complaint contained claims brought under a federal statute, 42 U.S.C. § 1983, for violations of the  
19 United States Constitution. (ECF No. 1.) Where all federal claims are dismissed in an action containing  
20 both federal and state law claims, a federal court may decline to exercise supplemental jurisdiction over  
21 the remaining state law claims. 28 U.S.C. § 1367(c)(3); *Notrica v. Bd. of Supervisors of Cty. of San*  
22 *Diego*, 925 F.2d 1211, 1213-14 (9th Cir. 1991). As discussed above, this Court dismisses the first and  
23 second causes of action, the only federal claims in this lawsuit. Accordingly, this Court DECLINES to  
24 exercise supplemental jurisdiction over the third through seventh causes of action alleged against  
25 Defendant City and will not address them at this time.

1 **V. CONCLUSION AND ORDER**

2 For the reasons stated above:

3 1) Defendants' motions to dismiss the FAC causes of action brought pursuant to 42 U.S.C.  
4 § 1983 (ECF Nos. 18, 19, 20) are GRANTED WITH LEAVE TO AMEND.

5 2) The Court DECLINES to exercise supplemental jurisdiction over Plaintiffs' state law claims.  
6 Plaintiffs shall have twenty (20) days from electronic service of this Order to file an amended  
7 complaint or give notice that she will stand on the current pleading.

8  
9 IT IS SO ORDERED.

10 Dated: January 18, 2017

/s/ Lawrence J. O'Neill  
UNITED STATES CHIEF DISTRICT JUDGE