



1 **BACKGROUND**

2 On October 14, 2011, Plaintiffs Thomas Ludavico, Sr., Thomas  
3 Ludavico, Jr., and Ashley Ludavico filed their Second Corrected  
4 Second Amended Complaint ("SCSAC") against Defendants Sacramento  
5 County, Sacramento County Sheriff's Department, Sheriff John  
6 McGinness, Sergeants Greg Hanks and Chris Mora, and Deputies  
7 Adrian Zuniga, Daniel Zuniga, Dexter Powe, Michael Heller, Brett  
8 Schannep and Chris Weightman. (ECF 68.) The one paragraph of  
9 the SCSAC that constitutes a statement of facts alleges:

10 On or about May 14, 2007, the above named defendants,  
11 and each of them, while in performance of their duties  
12 to investigate and to determine whether Plaintiff,  
13 Thomas Ludavico, Sr. presented a danger to himself  
14 and/or others, brutally used excessive and reckless  
15 force by striking and beating said Plaintiff's body and  
16 head with their fists, feet, and other objects, and  
17 electrifying and shocking the person and body of said  
18 Plaintiff using a Taser weapon, all such actions  
19 occurring after said Plaintiff was not resisting.  
20 These acts by the individual defendants are detailed in  
the defendants' own words in the Sacramento County  
Sheriff's Department Crime Report written by the  
individual defendants, a true and correct copy of said  
report is attached hereto as exhibit "A" and  
incorporated herein by references. All actions  
occurred in the presence of said Plaintiffs son and  
daughter, Plaintiffs Thomas Ludavico, Jr. and Ashley  
Ludavico.

21 (ECF No. 68 at 5, ¶ 21.) The Attached Exhibit "A" is a copy of a  
22 Government Tort Claim. (ECF No. 68, Ex. A.) Plaintiffs  
23 presumably are referring to Exhibit "B," which is fifty-two pages  
24 of what appears to be the Sheriff's Department file on Ludavico,  
25 Sr., and which contains various documents - including arrest  
26 reports, interview notes, property reports, statements given by  
27 various officers, and handwritten notes apparently written by  
28 Ludavico, Sr. (ECF No. 68, Ex. B.)

1 Plaintiffs' SCSAC states seven causes of action; the first  
2 six are brought solely by Ludavico, Sr., and are brought against  
3 all Defendants. (ECF No. 68 at 5-11.) The First Cause of Action  
4 is a 42 U.S.C. § 1983 claim alleging excessive force. (Id. at  
5 5-6.) Plaintiff's Second Cause of Action is another § 1983  
6 excessive force claim, making the same allegations but adding  
7 deliberate indifference and denial of medical care claims that  
8 appear to be related to his confinement in the Sacramento County  
9 Jail. (Id. at 7.) The Third Cause of Action alleges negligent  
10 hiring and training, supervision, and retention in violation of  
11 § 1983 and the Fourth Amendment. (Id. at 8.) The Fourth, Fifth  
12 and Sixth Causes of Action are state law claims for negligence,  
13 assault and battery, and negligent and intentional infliction of  
14 emotional distress. (Id. at 9-11.) The Seventh Cause of Action,  
15 brought only by Ludavico, Jr., and Ashley Ludavico, is a  
16 negligent and intentional infliction of emotional distress claim  
17 brought against Defendants McGinness, Sacramento County and the  
18 Sheriff's Department. (Id. at 11-12.)

19 On October 14, 2011, Defendants filed their Motion to  
20 Dismiss ("MTD"). (ECF No. 78.) Defendants' MTD contends that  
21 Plaintiffs' SCSAC is deficient both on the basis of the  
22 sufficiency of Plaintiffs' factual allegations, as well as on the  
23 sufficiency of Plaintiffs' legal contentions and should be  
24 dismissed without leave to amend.

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1 Plaintiffs' Opposition, if any, was due on or before  
2 November 17, 2011. However, Plaintiffs did not file their  
3 Opposition until November 28, 2011, the day before the scheduled  
4 hearing on the MTD. (ECF No. 81.)<sup>1</sup> Plaintiffs had not sought  
5 leave for an extension with the Court. Notably, Plaintiffs'  
6 counsel has repeatedly failed to file briefs in a timely manner.  
7 See: (1) (ECF Nos. 11 and 12) (regarding Plaintiffs' failure to  
8 file Opposition to an earlier motion to dismiss); (2) (ECF  
9 No. 40) (Order to Show Cause ("OSC") why Plaintiffs' counsel  
10 should not be sanctioned for failing to file an opposition or  
11 non-opposition to Defendants' Motion for Sanctions (ECF No. 37));  
12 (3) (ECF No. 48) (OSC why Plaintiffs' counsel should not be  
13 sanctioned for failing to timely file plaintiffs' Second Amended  
14 Complaint); and (ECF No. 51) (Order for sanctions for failing to  
15 timely file plaintiffs' Second Amended Complaint after Defendants  
16 counsel failed to respond to the Court's OSC and OSC why counsel  
17 should not be sanctioned for failing to respond (ECF No. 48)).

18 In their Reply, Defendants contend that the Court should not  
19 consider Plaintiffs' Opposition brief because it was untimely  
20 filed and should grant their MTD without leave to amend. (ECF  
21 No. 81 at 2.)

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27 <sup>1</sup> Plaintiffs' Counsel and co-counsel, William Bonham and  
28 Lyle Solomon, filed declarations in support of the Opposition  
which placed the blame on Mr. Solomon for failing to adhere to  
the Court's deadline. (ECF Nos. 82 and 83.)

1                   **LEGAL STANDARD UNDER FED. R. CIV. P. 12(B)(6)**<sup>2</sup>

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3           On a motion to dismiss for failure to state a claim under  
4 Rule 12(b)(6), all allegations of material fact must be accepted  
5 as true and construed in the light most favorable to the  
6 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,  
7 337-38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and  
8 plain statement of the claim showing that the pleader is entitled  
9 to relief,' in order to 'give the defendant a fair notice of what  
10 the . . . claim is and the grounds upon which it rests.'" Bell  
11 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting  
12 Conley v. Gibson, 355 U.S. 41, 47 (1957)). "Each allegation must  
13 be simple, concise, and direct." Rule 8(d)(1) (emphasis added).

14           A complaint attacked by a Rule 12(b)(6) motion to dismiss  
15 does not require detailed factual allegations. Twombly, 550 U.S.  
16 at 555. However, "a plaintiff's obligation to provide the  
17 grounds of his entitlement to relief requires more than labels  
18 and conclusions, and a formulaic recitation of the elements of a  
19 cause of action will not do." Id. (Internal citations omitted.)  
20 A court is not required to accept as true a "legal conclusion  
21 couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S.  
22 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). "Factual  
23 allegations must be enough to raise a right to relief above the  
24 speculative level." Twombly, 550 U.S. at 555.

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28           <sup>2</sup> All further references to "Rule" or "Rules" are to the  
Federal Rules of Civil Procedure unless otherwise noted.

1           Furthermore, "Rule 8(a)(2) . . . requires a 'showing,'  
2 rather than a blanket assertion, of entitlement to relief."  
3 Twombly, 550 U.S. at 556 n.3 (internal citations omitted). "But  
4 where the well-pleaded facts do not permit the court to infer  
5 more than the mere possibility of misconduct, the complaint has  
6 alleged—but it has not 'show[n]'-'that the pleader is entitled to  
7 relief.'" Iqbal, 556 U.S. at 679 (quoting Rule 8(a)(2)).  
8 "Without some factual allegation . . . , it is hard to see how a  
9 claimant could satisfy the requirements of providing not only  
10 'fair notice' of the nature of the claim, but also 'grounds' on  
11 which the claim rests." Twombly, 550 U.S. at 556 n.3 (citation  
12 omitted). A pleading must contain "only enough facts to state a  
13 claim to relief that is plausible on its face." (Id. at 570.)  
14 If the "plaintiffs . . . have not nudged their claims across the  
15 line from conceivable to plausible, their complaint must be  
16 dismissed." Id.

17           A court granting a motion to dismiss a complaint must then  
18 decide whether to grant a leave to amend. Leave to amend should  
19 be "freely given" where there is no "undue delay, bad faith or  
20 dilatory motive on the part of the movant, . . . undue prejudice  
21 to the opposing party by virtue of allowance of the amendment,  
22 [or] futility of the amendment . . . ." Foman v. Davis, 371 U.S.  
23 178, 182 (1962). Dismissal without leave to amend is proper only  
24 if it is clear that "the complaint could not be saved by any  
25 amendment." Intri-Plex Techs., Inc. v. Crest Group, Inc.,  
26 499 F.3d 1048, 1056 (9th Cir. 2007) (internal citations omitted).

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1 **ANALYSIS**

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3 Plaintiffs' SCSAC fails to state any cognizable claims  
4 against Defendants.

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6 **A. Factual Allegations**

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8 The one paragraph in the SCSAC devoted to facts (ECF No. 68  
9 at 5, ¶ 21) fails to satisfy the standards for pleading set forth  
10 in Iqbal and Twombly. Here, Plaintiffs allege that Defendants  
11 "while in the performance of their duties to investigate whether  
12 [Ludavico, Sr.] presented a danger to himself and/or others,  
13 brutally used excessive and reckless force" by striking and  
14 beating Ludavico, Sr., and using a Taser on him when he was not  
15 resisting arrest. (ECF No. 68 at 5, ¶ 21.)

16 As the Supreme Court noted in Iqbal, "the pleading standard  
17 Rule 8 announces does not require 'detailed factual allegations,'  
18 but it demands more than an unadorned, the-defendant-unlawfully-  
19 harmed-me accusation." Iqbal, 556 U.S. at 678. This, however,  
20 is exactly what Plaintiffs have done here. Specifically,  
21 Plaintiffs' description of what occurred to Ludavico, Sr., as  
22 well as who, exactly, was involved in each act, is unclear,  
23 undeveloped and conclusory. Plaintiffs do not explain why  
24 officers were investigating whether Ludavico, Sr., was "a danger  
25 to himself and/or others" or provide any details as to what may  
26 have occurred at the scene. (ECF No. 68 at 5, ¶ 21.)

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1 In addition, Plaintiffs do not state which of the individual  
2 Defendants were at the scene, or specify which Defendants were  
3 responsible for the acts at issue. See id.

4 Further, nothing in this paragraph suggests facts that would  
5 support Plaintiffs' Second Cause of Action claims that Ludavico,  
6 Sr., was subject to deliberate indifference and was denied access  
7 to medical care while he was incarcerated, or otherwise was  
8 harmed during his incarceration. To the extent that Ludavico is  
9 contending that his rights were violated during his  
10 incarceration, he does not specify which Defendants were  
11 responsible for those acts. (See ECF No. 68 at 7, ¶ 32.)

12 In sum, Plaintiffs' factual statement in the SCSAC  
13 constitutes a bare conclusory allegation that Defendants used  
14 excessive force against Ludavico, Sr. While conceivable, as  
15 pleaded, Plaintiffs "have not nudged their claims across the line  
16 from conceivable to plausible." Twombly, 550 U.S. at 570.

17 Plaintiffs' attempt to force the Court to assemble their  
18 factual allegations for them by directing the Court to Exhibit  
19 "B" is also misconceived. Although pursuant to Rule 10(c),  
20 exhibits are permissible if incorporated by reference, as they  
21 are here, they are unnecessary in the federal system of notice  
22 pleading, Rule 8(a). Plaintiffs may not attach an exhibit to  
23 their complaint - particularly not an exhibit like Exhibit "B,"  
24 which is over fifty pages of police reports, interview notes,  
25 witness statements, records of evidence, etc. - with the  
26 expectation that the Court will sift through the exhibit and  
27 extract factual information to identify cognizable claims on  
28 Plaintiffs' behalf.

1 Although the Court will liberally construe Plaintiffs' complaint,  
2 the burden of presenting the facts in a "short and plain" manner  
3 is on Plaintiffs; the Court will not perform their work for them.  
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5 **B. Substantive Law**  
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7 Each of Plaintiffs' causes of action in the SCSAC is also  
8 deficient under the pleading standards set forth in Iqbal and  
9 Twombly. First, as stated above, Plaintiffs' statement of facts  
10 is so deficient that it cannot presently support any of  
11 Plaintiffs' causes of action. Second, each of Plaintiffs' claims  
12 essentially just states the elements of the cause of action and  
13 concludes that Defendants are liable.<sup>3</sup> This is insufficient to  
14 state a claim for relief under Rule 8(a). See Iqbal, 556 U.S. at  
15 678 ("the tenet that a court must accept as true all of the  
16 allegations contained in a complaint is inapplicable to legal  
17 conclusions. Threadbare recitals of the elements of a cause of  
18 action, supported by mere conclusory statements, do not  
19 suffice."); Twombly, 550 U.S. at 555 ("a plaintiff's obligation  
20 to provide the grounds of his entitlement to relief requires more  
21 than labels and conclusions, and a formulaic recitation of the  
22 elements of a cause of action will not do").

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26 <sup>3</sup> For six of Plaintiffs' causes of action, Plaintiffs allege  
27 that all Defendants are liable without providing any factual  
28 support for why "all" the Defendants would be liable (e.g., how  
would the arresting officers be responsible for Ludavico, Sr.'s  
denial of medical care claim?).

1           **C.    Discussion**

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3           Plaintiffs' SCSAC will be dismissed with final leave to  
4 amend.<sup>4</sup> To survive summary dismissal by this Court, Plaintiffs'  
5 amended complaint must (1) be submitted within thirty days of the  
6 filing of this Memorandum and Order; and (2) clearly state  
7 individually for each Defendant a) who that Defendant is; b) what  
8 that Defendant did; c) what right that particular Defendant  
9 violated; and d) how that Defendant's actions violated that  
10 right. Consistent with the pleading standards set forth in Rule  
11 8, as well as Iqbal and Twombly, Plaintiffs must detail the facts  
12 supporting their claims and tie those facts to each of their  
13 causes of action in a manner that would provide the Court "not  
14 only 'fair notice' of the nature of the claim, but also 'grounds'  
15 on which the claim rests." Twombly, 550 U.S. at 556 n.3 .

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23           <sup>4</sup> Defendants urge the Court to dismiss without leave to  
24 amend on the basis of (1) Plaintiffs' failure to timely file  
25 their Opposition; (2) the factual inadequacies of the SCSAC; and  
26 (3) the merits of each of Plaintiffs' causes of action. Although  
27 the Plaintiffs' pattern of untimely filings is of concern to the  
28 Court, it declines to dismiss the case on that basis without  
giving Plaintiffs clear direction that they have one last chance  
to timely file or face dismissal, as the Court does here.  
Further, the Court declines to dismiss without leave to amend  
until Plaintiffs have been given a final opportunity to cure the  
factual and legal deficiencies of the SCSAC.

1 At this point, the Court will not delve into a substantive  
2 discussion of each of Plaintiffs' causes of action because of the  
3 factual inadequacies of the SCSAC, but for constitutional  
4 violation claims, "[t]he inquiry into causation must be  
5 individualized and focus on the duties and responsibilities of  
6 each individual defendant whose acts or omissions are alleged to  
7 have caused a constitutional deprivation." Leer v. Murphy,  
8 844 F.2d 628, 633 (9th Cir. 1988). Therefore, Plaintiffs are on  
9 notice that alleging that "all" Defendants violated Ludavico's  
10 rights without providing any details about each Defendant, as  
11 they do in the SCSAC, is insufficient.

12  
13 **CONCLUSION**  
14

15 For the reasons set forth above, it is hereby ORDERED that:

16 1. Defendants' Motion to Dismiss (ECF No. 78) is GRANTED  
17 with final leave to amend;

18 2. Within thirty (30) days of service of this Memorandum  
19 and Order, Plaintiffs shall file an amended complaint;

20 3. Plaintiffs may not add any new claims to their  
21 complaint; and

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