

1 Plaintiffs also seek redress for multiple claims brought under
2 California state law. Presently before the Court is Defendants'
3 Motion to Dismiss (ECF No. 91) Plaintiffs' Third Amended
4 Complaint ("TAC") (ECF No. 90) for failure to state a claim upon
5 which relief can be granted, pursuant to Federal Rule of Civil
6 Procedure 12(b)(6).² Defendants filed their Motion on July 19,
7 2012, and Plaintiffs filed a timely opposition (ECF No. 92).

8 Plaintiffs' TAC asserts seven causes of action, with
9 Ludavico bringing the initial five causes of action and all three
10 Plaintiffs asserting the last two. The first two causes of
11 action are for excessive force in violation of the Fourth, Fifth,
12 and Eighth Amendments, brought pursuant to 42 U.S.C. § 1983. The
13 third cause of action is for negligent hiring, supervision,
14 training and retention, in violation of Fourteenth Amendment,
15 also brought pursuant to 42 U.S.C. § 1983. The fourth cause of
16 action alleges a state law claim for negligence; the fifth,
17 assault and battery; the sixth, negligent and intentional
18 infliction of emotional distress against all Defendants; and the
19 seventh, negligent and intentional infliction of emotional
20 distress against Defendants Sacramento County and McGinness.

21 Defendants seek complete and final dismissal of Plaintiffs'
22 second, third and seventh causes of action. (ECF Nos. 91 and
23 93.) Defendants ask that the Court dismiss the first cause of
24 action as to all defendants except Defendants Heller, Schanep
25 and Weightman. (ECF No. 93 at 1-3.)

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28 ² Unless otherwise noted, all further references to "Rule"
or "Rules" are to the Federal Rules of Civil Procedure.

1 Defendants seek final dismissal of the fourth, fifth, and sixth
2 causes of action, except as asserted against Defendants Schanep
3 and the County. (Id. at 7-10.) Defendants also seek to prevent
4 Plaintiffs from adding parties to the sixth cause of action.
5 (Id. at 9.) For the reasons set forth below, Defendants' Motion
6 to Dismiss is GRANTED.

7
8 **BACKGROUND**³
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10 On or about May 14, 2007, Plaintiff Ashley Ludavico found a
11 note left by Ludavico, her father, that possibly indicated his
12 intention to commit suicide. Plaintiff Ashley Ludavico then
13 requested that Defendant Sacramento County Sheriff's Department
14 perform a wellness check on her father. Defendants Sydow and
15 Daniel Zuniga were dispatched to Ludavico's home to perform the
16 check.

17 Before either Defendant deputy exited the patrol car,
18 Ludavico saw at least two additional patrol cars park in front of
19 his house. Ludavico then observed Defendants Powe and Adrian
20 Zuniga approach his home. Defendant Adrian Zuniga was crouching
21 with his weapon unholstered. At this point, Ludavico proceeded
22 to walk out his front door with his hands in the air. Ludavico
23 also raised his shirt while turning around to allow Defendants to
24 establish that he was unarmed.

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³ The factual assertions in this section are based on the
27 allegations in Plaintiffs' TAC, except where otherwise noted.
28 For the purposes of this Motion, the Court accepts Plaintiffs'
facts as true and makes all inferences in the light most
favorable to Plaintiffs.

1 Ludavico subsequently asked Defendant Adrian Zuniga to explain
2 why he was at Ludavico's residence. Instead of responding,
3 Defendant Adrian Zuniga ordered Ludavico to the ground.

4 Before Ludavico could comply with Defendant Adrian Zuniga's
5 command, and without Defendants suspecting Ludavico's involvement
6 in any criminal activity, Defendants Schannep and Heller struck
7 Ludavico from behind and forcibly brought him to the ground.

8 Once Ludavico was on the ground, Defendant Heller hit him in the
9 stomach and face and Defendant Schannep struck him in the back

10 and side of his head. Defendant Weightman then discharged a stun
11 gun on Ludavico at least twice. Due to the nature of the
12 incident, Ludavico is unable to provide the exact identities and
13 actions of everyone involved. The altercation occurred in the
14 presence of Ludavico's two minor children, Plaintiffs Ashley
15 Ludavico and Thomas Ludavico, Jr.

16 Although Ludavico made no threatening motions or comments to
17 Defendants, except for objecting to their conduct, the Deputies
18 took Ludavico into custody for battery on a police officer.

19 Ludavico received medical treatment when he first arrived at the
20 Sacramento County Jail. Although Defendants knew of Ludavico's
21 injuries, the medical care ceased once authorities booked him
22 into the jail. As a result of the incident at Ludavico's home
23 and his subsequent treatment at the jail, Ludavico states that he
24 suffered damage to various parts of his body. All Plaintiffs
25 seek compensation for pain and suffering and emotional distress.

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1 In compliance with California Government Code section 945.4,
2 Plaintiffs filed the requisite tort claim against Defendants
3 Sacramento County, Sacramento County Sheriff's Department, Jim
4 Rose, and Deputies Adrian Zuniga, Daniel Zuniga, Mueller, Powe,
5 and Schannep. (ECF No. 68, Ex. A.) Plaintiffs claim they adhered
6 to applicable government statutes by filing the 2007 tort claim
7 against all then known Defendants. (ECF No. 92 at 14-15.)

8
9 **LEGAL STANDARD UNDER 12 (b) (6)**

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11 On a motion to dismiss for failure to state a claim under
12 Rule 12(b)(6), all allegations of material fact must be accepted
13 as true and construed in the light most favorable to the
14 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,
15 337-38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and
16 plain statement of the claim showing that the pleader is entitled
17 to relief' in order to 'give the defendant fair notice of what
18 the . . . claim is and the grounds upon which it rests.'" *Bell*
19 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting
20 *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

21 While a complaint attacked by a Rule 12(b)(6) motion to
22 dismiss does not require detailed factual allegations, "a
23 plaintiff's obligation to provide the grounds of his entitlement
24 to relief requires more than labels and conclusions, and a
25 formulaic recitation of the elements of a cause of action will
26 not do." *Twombly*, 550 U.S. at 555 (internal citations omitted.)
27 "Factual allegations must be enough to raise a right to relief
28 above the speculative level." *Id.*

1 Furthermore, a court is not required to accept as true a "legal
2 conclusion couched as a factual allegation." *Ashcroft v. Iqbal*,
3 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555.)
4 "Rule 8(a)(2) . . . requires a 'showing,' rather than a blanket
5 assertion, of entitlement to relief." *Twombly*, 550 U.S. at 556
6 n.3 (internal citations omitted). "But where the well-pleaded
7 facts do not permit the court to infer more than the mere
8 possibility of misconduct, the complaint has alleged--but it has
9 not 'show[n] '--'that the pleader is entitled to relief.'" *Iqbal*,
10 556 U.S. at 679 (quoting Rule 8(a)(2)). "Without some factual
11 allegation in the complaint, it is hard to see how a claimant
12 could satisfy the requirements of providing not only 'fair
13 notice' of the nature of the claim, but also 'grounds' on which
14 the claim rests." *Twombly*, 550 U.S. 556 n.3 (internal citation
15 omitted). A pleading must contain "only enough facts to state a
16 claim to relief that is plausible on its face." *Id.* at 570. If
17 the "plaintiffs . . . have not nudged their claims across the
18 line from conceivable to plausible, their complaint must be
19 dismissed." *Id.* A court granting a motion to dismiss a
20 complaint must then decide whether to grant leave to amend. A
21 court should "freely give" leave to amend when there is no "undue
22 delay, bad faith[,] or dilatory motive on the part of the movant,
23 . . . undue prejudice to the opposing party by virtue of . . .
24 the amendment, [or] futility of amendment" *Foman v.*
25 *Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is
26 denied only when it is clear the deficiencies of the complaint
27 cannot be cured by amendment. *DeSoto v. Yellow Freight Sys.,*
28 *Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

1 Graham v. Connor, 490 U.S. 386, 388 (1989). The "inquiry in an
2 excessive force case is an objective one: the question is whether
3 the officer's actions are 'objectively reasonable' in light of
4 the facts and circumstances." Id. at 397 (citing Scott v. United
5 States, 436 U.S. 128, 137-39 (1978); Terry v. Ohio, 392 U.S. 1
6 (1968)). This analysis "requires careful attention to the facts
7 and circumstances of each particular case." Id. at 396 (citing
8 Tennessee v. Garner, 471 U.S. 1 (1985)). Put another way,
9 resolving the Fourth Amendment allegation necessitates examining
10 "the factbound morass of 'reasonableness.'" Scott v. Harris,
11 550 U.S. 372, 383 (2007). Determination of reasonableness
12 requires the Court to balance "the nature and quality of the
13 intrusion of the individual's Fourth Amendment interests against
14 the countervailing governmental interests at stake." Graham,
15 490 U.S. at 396 (internal quotations omitted). The
16 reasonableness of the use of force is "judged from the
17 perspective of a reasonable officer on the scene," and not from
18 the perspective of the person seized or of a court reviewing the
19 situation "with the 20/20 vision of hindsight." Id. Because an
20 investigation into "objective reasonableness" is fact-driven, the
21 plaintiffs must, at a minimum, provide sufficient details to
22 satisfy the Twombly and Iqbal pleading requirements. See Smith-
23 Downs v. City of Stockton, No. 2:10-cv-02495-MCE-GGH, 2012 WL
24 671932, *6 (E.D. Cal. Feb. 29, 2012).

25 Plaintiffs aggregate the excessive force claim against
26 Defendants Hanks, Mora, Adrian Zuniga, Daniel Zuniga, Sydow and
27 Powe without providing adequate facts or information describing
28 the actual conduct of each individual defendant.

1 Even after the Court's warning in its prior order, Plaintiffs do
2 nothing more than allege that these Defendants were present and
3 used excessive force. In particular, Plaintiffs claim that
4 Defendants Sydow and Daniel Zuniga were dispatched to Plaintiffs'
5 home and that Defendants Hanks and Mora may have been at the
6 scene. (ECF No. 90 at 5; ECF No. 92 at 9.) However, these facts
7 are insufficient to state a claim for excessive force in
8 violation of the Fourth Amendment. For Defendant Powe,
9 Plaintiffs state merely that he was spotted leaving his patrol
10 car. (ECF No. 90 at 6.) This behavior hardly constitutes an
11 abuse of force. While the TAC asserts that Defendant Adrian
12 Zuniga drew his weapon, the facts pled simply fall short of
13 showing that Defendant Zuniga used excessive force. (ECF No. 90
14 at 6.)

15 Although given opportunities to correct their pleadings,
16 Plaintiffs fail to assert sufficient information. Rule 8 does
17 not require Plaintiffs to provide detailed facts, but Plaintiffs
18 must do more than simply accuse Defendants of causing harm.
19 Iqbal, 556 U.S. at 678. Consequently, the claims against
20 Defendants Hanks, Mora, Adrian Zuniga, Daniel Zuniga, Sydow and
21 Powe are dismissed without leave to amend.

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1 **2. Claims Against Defendants Sacramento County and**
2 **Sheriff McGinness**

3 Plaintiffs' first cause of action is also brought against
4 Defendant Sacramento County. Municipalities and local officials
5 cannot be vicariously liable for the conduct of their employees
6 under § 1983, but rather are only "responsible for their own
7 illegal acts." Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011)
8 (quoting Pembaur v. Cincinnati, 475 U.S. 469, 479 (1986)). In
9 other words, a municipality may only be liable where it
10 individually caused a constitutional violation via "execution of
11 a government's policy or custom, whether by its lawmakers or by
12 those whose edicts or acts may fairly be said to represent
13 official policy." Monell v. Dep't of Soc. Servs. of N.Y.,
14 436 U.S. 658, 694 (1978). A recent decision from this district
15 summarized the Ninth Circuit standard of municipal liability
16 under § 1983 in the following way:

17 Municipal liability may be premised on: (1) conduct
18 pursuant to an expressly adopted official policy; (2) a
19 longstanding practice or custom which constitutes the
20 "standard operating procedure" of the local government
21 entity; (3) a decision of a decision-making official
22 who was, as a matter of state law, a final policymaking
authority whose edicts or acts may fairly be said to
represent official policy in the area of decision; or
(4) an official with final policymaking authority
either delegating that authority to, or ratifying the
decision of, a subordinate.

23 Young v. City of Visalia, 687 F. Supp. 2d 1141, 1147 (E.D. Cal.
24 2009) (citing Price v. Sery, 513 F.3d 962, 966 (9th Cir. 2008);
25 Lytle v. Carl, 382 F.3d 978, 982 (9th Cir. 2004); Ulrich v. City
26 of S.F., 308 F.3d 968, 984-85 (9th Cir. 2002); Trevino v. Gates,
27 99 F.3d 911, 918 (9th Cir. 1996)).

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1 Besides demonstrating that one of the methods of
2 establishing municipal liability applies, a plaintiff must also
3 show that an official "policy or custom . . . inflicts the
4 injury." Monell, 436 U.S. at 694. That is to say, a plaintiff
5 bears the burden of demonstrating that the policy or custom was a
6 "moving force" of the constitutional deprivation and that the
7 alleged injury would have been avoided had the municipality had a
8 constitutionally proper policy. Gibson v. County of Washoe,
9 290 F.3d 1175, 1196 (9th Cir. 2002).

10 Additionally, a negligent municipality does not violate the
11 Constitution. Rather, a plaintiff must demonstrate that the need
12 for more or different action is "obvious, and the inadequacy [of
13 the current policy or procedure] is so likely to result in a
14 violation of constitutional rights, that the policymakers . . .
15 can reasonably be said to have been indifferent to the need."
16 City of Canton v. Harris, 489 U.S. 378, 389 (1989) (internal
17 citations omitted); Mortimer v. Baca, 594 F.3d 714, 722 (9th Cir.
18 2010).

19 Liability attaches to the County, according to Plaintiffs,
20 because it ratified the "policies, customs, and practices" that
21 the Defendant deputies followed when assaulting Ludavico. (ECF
22 No. 90 at 9.) Plaintiffs make only a conclusory allegation that
23 Defendants acted pursuant to a government policy or custom,
24 without ever identifying or describing the policy. Furthermore,
25 Plaintiffs fail to explain how any government practice caused a
26 constitutional violation. Such unsupported claims fail to "raise
27 a right to relief above the speculative level." Twombly,
28 550 U.S. at 555.

1 Plaintiffs also fall far short of showing deliberate
2 indifference, as required by City of Canton. 489 U.S. at 389.
3 As a result, Plaintiffs' claim against Defendant Sacramento
4 County is dismissed without leave to amend. Plaintiffs rely on a
5 supervisory liability theory to allege a claim against Defendant
6 Sheriff McGinness. However, "under § 1983, supervisory officials
7 are not liable for actions of subordinates on any theory of
8 vicarious liability." Hansen v. Black, 885 F.2d 642, 645-46 (9th
9 Cir. 1989) (citing Pembaur, 475 U.S. at 479). For allegations
10 against an individual in a supervisory position, a plaintiff must
11 establish the defendant's personal involvement in the incident or
12 that the defendant implemented a policy that was a moving force
13 behind the alleged wrongdoing. Id. 885 F.2d at 646.
14 "Supervisory liability exists even without overt personal
15 participation in the offensive act if supervisory officials
16 implement a policy so deficient that the policy 'itself is a
17 repudiation of constitutional rights' and is 'the moving force of
18 the constitutional violation.'" Id. (quoting Thompkins v. Belt,
19 828 F.2d 298, 304 (5th Cir. 1987)).

20 Plaintiffs assert that Defendant McGinness is responsible
21 because he is "the ultimate supervisor of all individual
22 defendants as well as the policymaker for defendant Sacramento
23 County Sheriff's Department." (ECF No. 92 at 10.) Plaintiffs'
24 pleadings do not claim that Defendant McGinness participated in
25 the actual assault and provide no facts showing that Defendant
26 McGinness knew of a constitutional violation and failed to remedy
27 it.

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1 Finally, Plaintiffs fail to identify the alleged policy Defendant
2 McGinness enacted, and prove unable or unwilling to offer even a
3 rudimentary description of a procedure that caused the Defendant
4 deputies to use excessive force. Simply stated, reiterating a
5 cause of action's elements, supported only by conclusory
6 statements and without adequate facts, does not satisfy the Rule
7 8 pleading requirements. Iqbal, 556 U.S. at 678. Thus, the
8 claim against Defendant McGinness is dismissed without leave to
9 amend.

10
11 **C. 42 U.S.C. § 1983: Eighth Amendment Inadequate Medical**
12 **Care Claim**

13 Plaintiffs' second cause of action alleges that all
14 Defendants violated Ludavico's Eighth Amendment rights by failing
15 to treat his medical needs. Denial of medical care claims
16 require facts demonstrating "deliberate indifference to serious
17 medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). "In
18 the Ninth Circuit, the test for deliberate indifference consists
19 of two parts." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
20 2006) (internal citations omitted). This two-part test forces a
21 plaintiff to establish both "that failure to treat a prisoner's
22 condition could result in further significant injury or
23 unnecessary and wanton infliction of pain" and "a purposeful act
24 or failure to respond to a prisoner's pain or possible medical
25 need." Id. As discussed above, a municipal entity is liable
26 when a government "policy or custom" caused the violation.
27 Monell, 436 U.S. 694.

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1 To bring a supervisory liability claim, a plaintiff must allege
2 that the defendant was actually involved in the wrongdoing or
3 that the defendant's policy caused the harm. Hansen, 885 F.2d at
4 646.

5 Plaintiffs allege that Ludavico received medical treatment
6 when he first arrived at the Sacramento County Jail, but
7 Defendants, although aware of Ludavico's medical need, allowed
8 the care to end once Ludavico was booked. (ECF No. 90 at 10.)
9 The TAC lacks any other factual statements regarding the
10 activities that occurred at the jail. In regard to the Defendant
11 officers, Plaintiffs do not assert even basic allegations as to
12 which Defendants were present at the jail, which Defendants
13 actually violated Ludavico's rights, or which Defendants had a
14 duty to administer care. Plaintiffs also provide insufficient
15 facts regarding Ludavico's medical condition. Due to Plaintiffs'
16 failure to plead this necessary information, Plaintiffs' claims
17 against the Defendant officers are dismissed without leave to
18 amend.

19 Plaintiffs also assert that Defendant Sacramento County is
20 liable for Eighth Amendment violations. Plaintiffs do not
21 mention or describe any government procedure that resulted in
22 withholding needed medical aid from Ludavico. Furthermore,
23 Plaintiffs fail to put forth any facts suggesting deliberate
24 indifference. Without the necessary facts, Plaintiffs
25 inadequately plead their allegations and fail to support their
26 claim. Twombly, 550 U.S. at 556 n.3. Thus, Plaintiffs' second
27 cause of action is dismissed without leave to amend as to
28 Defendant Sacramento County.

1 Plaintiffs also claim that Defendant McGinness is
2 responsible for the alleged Eighth Amendment violations because
3 he holds a supervisory position. However, Plaintiffs do not
4 allege that Defendant McGinness came into contact with Ludavico
5 at his home or the jail, and Plaintiffs fail to identify or
6 describe a procedure that Defendant McGinness ratified that
7 caused Ludavico's injuries. Without additional facts, Plaintiffs
8 simply state a general claim that Defendant McGinness harmed
9 Ludavico. See Iqbal, 556 U.S. at 678. As a result, Plaintiffs
10 fail to state a claim against Defendant McGinness. Accordingly,
11 the claim is dismissed without leave to amend.

12
13 **D. 42 U.S.C. § 1983: Negligent Hiring, Training,**
14 **Supervision, and Retention**

15 Plaintiffs' third cause of action alleges that Defendants
16 Sacramento County, McGinness, Hanks and Mora are responsible for
17 engaging in negligent hiring, training, supervision and retention
18 practices. While "it is now well settled that the mere
19 negligence of a state official does not violate the due process
20 clause of the [F]ourteenth [A]mendment, a constitutional
21 violation may arise from training or supervision where the
22 training or supervision is sufficiently inadequate as to
23 constitutes deliberate indifference to the rights of persons with
24 whom the police came into contact." Davis v. City of Ellensburg,
25 869 F.2d 1230, 1235 (9th Cir. 1989) (internal citations omitted).
26 However, as set forth above, municipalities are liable under
27 § 1983 "only where the municipality itself causes the
28 constitutional violation at issue.

1 Respondeat superior or vicarious liability will not attach under
2 § 1983." City of Canton, 489 U.S. at 385 (citing Monell, 436
3 U.S. 694-95). "Municipalities cannot be held liable simply
4 because they employ a tortfeasor." Davis, 869 F.2d at 1234.
5 Thus, a municipality is only liable "where its policies are the
6 moving force [behind] the constitutional violation." City of
7 Canton, 489 U.S. at 389. Thus, the "first inquiry in any case
8 alleging municipal liability under § 1983 is the question whether
9 there is a direct causal link between a municipal policy or
10 custom and the alleged constitutional deprivation." Id.

11 Plaintiffs claim that Defendant Sacramento County is at
12 fault under a Monell-liability theory. That is, Plaintiffs
13 contend that an official practice, enacted by Defendant
14 Sacramento County, caused Ludavico's harm. However, Plaintiffs'
15 TAC fails to allege any specific policy or procedure that
16 Defendant Sacramento County enacted that was "the moving force
17 [behind] the constitutional violation." City of Canton, 489 U.S.
18 at 389. Plaintiffs merely provide conclusory allegations without
19 identifying any practices, policies, or customs which are
20 directly and causally linked to the alleged constitutional
21 deprivation. Due to Plaintiffs' repeated failures to adequately
22 plead this cause of action, the claim against the County is
23 dismissed without leave to amend.

24 Plaintiffs rely on theories of general negligence,
25 supervisory liability, and Monell-liability to bring this cause
26 of action against Defendants McGinness, Hanks and Mora.

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1 As for Plaintiffs' general negligence theory, it is "well settled
2 that mere negligence of a state official does not violate the due
3 process clause of the fourteenth amendment" Davis,
4 869 F.2d at 1235. Plaintiffs have not alleged facts sufficient
5 to demonstrate that Defendants McGinness, Hanks and Mora
6 inadequately supervised, hired, or trained police officers to the
7 point that their conduct "constitute[s] deliberate indifference to
8 the rights of persons with whom the police come into contact."
9 Id. (internal citations omitted).

10 As to Plaintiffs' supervisory liability theory, Plaintiffs
11 must establish Defendants' personal involvement in the incident
12 or that Defendants implemented a policy that was a moving force
13 behind the alleged wrongdoing. Hansen, 885 F.2d at 646. As to
14 Defendants McGinness, Hanks and Mora, Plaintiffs offer too few
15 details to state a claim. Plaintiffs fail to personally connect
16 these three Defendants to the deputies involved in the incident
17 at Ludavico's house and do not plead facts sufficient to
18 demonstrate that these Defendants were actually charged with
19 hiring, training, supervision and retention. Moreover,
20 Plaintiffs fail to plead facts that clarify what policy or
21 procedure was the moving force behind the wrongdoing, much less
22 show that Defendants implemented such a policy. Instead,
23 Plaintiffs submit only the general allegation that these
24 Defendants are in management positions and should have prevented
25 the wrongdoing. To sustain a claim, Plaintiffs must present more
26 than bare conclusions and a recitation of the cause of action's
27 requirements. Twombly, 550 U.S. at 555.

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1 As a result, the claim against Defendants McGinness, Hanks and
2 Mora are dismissed without leave to amend.

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4 **D. Tort Claims Brought Pursuant to State Law**

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6 Plaintiffs' fourth, fifth, sixth, and seventh causes of
7 action allege state law claims for various torts committed by
8 Defendants.

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10 **1. Duplicative Actions**

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12 Plaintiffs' sixth cause of action, claiming negligent and
13 intentional infliction of emotional distress, names all
14 Defendants. The seventh cause of action, also for negligent and
15 intentional infliction of emotional distress, only applies to
16 Defendants Sacramento County and McGinness. Because the seventh
17 cause of action is duplicative, it is dismissed without leave to
18 amend.

19
20 **2. Additional Plaintiffs**

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22 In granting Defendants' previous motion to dismiss, the
23 Court concluded that "Plaintiffs may not add any new claims to
24 their complaint." (ECF No. 88 at 11.) In Plaintiffs' Second
25 Corrected Second Amended Complaint, only Ludavico pled the sixth
26 cause of action. (ECF No. 68 at 10.) Plaintiffs then proceeded
27 to add Plaintiffs Ashley Ludavico and Thomas Ludavico, Jr. to the
28 TAC's sixth cause of action.

1 Adding parties to a cause of action constitutes alleging new
2 claims and thus violates the Court's previous order. As a
3 result, only Ludavico can bring Plaintiffs' sixth cause of
4 action.

6 3. **The GCA**

8 Before bringing a suit against a public entity, the
9 California Tort Claims Act ("the GCA") requires "the timely
10 presentation of a written claim and the rejection of the claim in
11 whole or in part." Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d
12 1470, 1477 (9th Cir. 1995). Claims must also be presented prior
13 to bringing suit against a public employee who is alleged to have
14 caused injury while acting within the scope of his or her
15 employment. Briggs v. Lawrence, 230 Cal. App. 3d 605, 612-13
16 (1991). "[T]he claims-presentation requirements serve two basic
17 purposes: First, they give the governmental entity an opportunity
18 to settle just claims before suit is brought. Second, they
19 permit the entity to make an early investigation of the facts on
20 which a claim is based, thus enabling it to defend itself against
21 unjust claims and to correct the conditions or practices which
22 gave rise to the claim." Lozada v. City of S.F.,
23 145 Cal. App. 4th 1139, 1151 (2006).

24 A plaintiff must allege facts demonstrating either
25 compliance with the GCA requirement or an excuse for
26 noncompliance as an essential element of the cause of action.
27 State v. Sup. Ct. (Bodde), 32 Cal. 4th 1234, 1243-44 (2004).

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1 Failure to allege compliance or an excuse for noncompliance
2 constitutes a failure to state a cause of action and results in
3 dismissal of such claims. Id. Consequently, if the requisite
4 tort claim is not filed because certain defendants' identities
5 are unknown, the plaintiff must plead and prove the reasons that
6 the public employees' identities were not known. Williams v.
7 Braslow, 179 Cal. App. 3d 762, 772-74 (1986).

8 Plaintiffs did not file tort claims against Defendants
9 Heller, Weightman, McGinness, Hanks and Mora. However,
10 Plaintiffs contend that they satisfied the GCA by timely filing
11 tort claims against all then known Defendants. (ECF No. 92 at
12 114-15.) Plaintiffs' pleadings offer no explanation for their
13 failure to identify these defendants. See Williams, 179 Cal.
14 App. 3d at 772-74. Furthermore, Plaintiffs had access to police
15 reports and other documents with the information needed to
16 appropriately file tort claims against these Defendants.
17 Accordingly, it appears that Plaintiffs cannot show that they
18 "did not know or have reason to know the identities of the public
19 employees" when they filed their tort claims. Id. at 773. As a
20 result of Plaintiffs' failure to comply with the GCA, Plaintiffs'
21 fourth, fifth and sixth causes of action against Defendants
22 Heller, Weightman, McGinness, Hanks and Mora are dismissed
23 without leave to amend.

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1 **4. Claims Against Defendants Adrian Zuniga, Daniel**
2 **Zuniga, Sydow, and Powe**

3 Plaintiffs' fourth cause of action alleges negligence; the
4 fifth, assault and battery; and the sixth, negligently and
5 intentional infliction of emotional distress. As to Defendants
6 Adrian Zuniga, Daniel Zuniga, Sydow and Powe, Plaintiffs simply
7 offer blanket assertions of liability. Plaintiffs offer no
8 factual details showing that each individual Defendant was
9 negligent, assaulted and battered Ludavico, or caused, either
10 intentionally or negligently, Plaintiffs to suffer emotional
11 distress. Plaintiffs plead only that Defendant Adrian Zuniga
12 wielded a shotgun in a potentially menacing manner, and,
13 according to Plaintiffs' TAC, the other Defendants might have
14 been at the scene. (ECF No. 90 at 5-6; ECF No. 92 at 5-9.) In
15 short, Plaintiffs merely accuse Defendants of wrongdoing without
16 pleading facts sufficient to demonstrate that arriving at the
17 scene or holding a weapon constitutes tortious conduct of any
18 sort. Taken as true, the factual details in Plaintiffs' FAC fail
19 to support the causes of action and are insufficient to
20 demonstrate that Defendants are liable under state law. Thus,
21 Plaintiffs' fourth, fifth and sixth causes of action against
22 Defendants Adrian Zuniga, Daniel Zuniga, Sydow and Powe are
23 dismissed without leave to amend.

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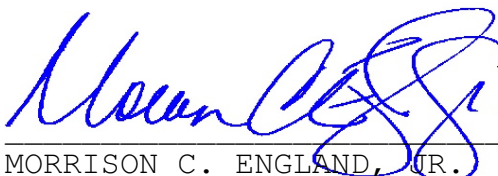
1 **CONCLUSION**

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3 For the reasons set forth above, Plaintiffs' second, third,
4 and seventh causes of action are DISMISSED WITHOUT LEAVE TO
5 AMEND; Plaintiffs' first cause of action is DISMISSED WITHOUT
6 LEAVE TO AMEND as to all Defendants EXCEPT Defendants Heller,
7 Schanep and Weightman; Plaintiffs' fourth, fifth and sixth
8 causes of action are DISMISSED WITHOUT LEAVE TO AMEND for all
9 Defendants EXCEPT Defendants Schanep and Sacramento County; and
10 Plaintiffs' sixth cause of action is DISMISSED WITHOUT LEAVE TO
11 AMEND to the extent that it is brought by Plaintiffs Ashley and
12 Thomas Ludavico.

13 IT IS SO ORDERED.

14 Dated: November 6, 2012

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17 MORRISON C. ENGLAND, JR.
18 UNITED STATES DISTRICT JUDGE
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