

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SANDRA ANDRE-GOLLIHAR,

Plaintiff,

No. 2:09-cv-03313 MCE KJN PS

v.

COUNTY OF SAN JOAQUIN, et al.,

Defendants.

ORDER

Presently before the court<sup>1</sup> is a motion to dismiss plaintiff’s First Amended Complaint filed by defendant County of San Joaquin Sheriff’s Office (“Sheriff’s Office”).<sup>2</sup> (Dkt. No. 22.) The court heard this matter on its law and motion calendar on January 20, 2011. (Dkt. No. 33.) Attorney Jason R. Morrish appeared on behalf of the Sheriff’s Office. Plaintiff, who is currently proceeding without counsel, appeared on her own behalf.

<sup>1</sup> This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

<sup>2</sup> The following defendants have neither appeared nor filed a response to plaintiff’s First Amended Complaint: County of San Joaquin, “Mrs. Brascino,” “Mr. Carter,” and Robert Semillo. Although it appears from the docket and the Sheriff’s Office’s reply in support of its motion that the United States Marshal has effectuated service upon the County of San Joaquin and Robert Semillo, it does not appear that the United States Marshal has effectuated service on individuals identified in plaintiff’s service-related documents as defendants Marty Brascino and Jeffrey Carter.

1           The undersigned has considered the parties’ briefs, oral arguments, and the record  
2 in this case and, for the reasons stated below, grants defendant’s motion to dismiss without  
3 prejudice and provides plaintiff leave to file a second amended complaint within 60 days of the  
4 date of entry of this order. Notably, plaintiff has represented to the court that an attorney has  
5 agreed to represent plaintiff if plaintiff is granted leave to further amend her complaint.<sup>3</sup> As the  
6 undersigned stated at the hearing, irrespective of whether plaintiff successfully retains counsel,  
7 plaintiff will not be granted more than the allotted 60 days to file her second amended complaint,  
8 and this opportunity to file a second amended complaint is plaintiff’s *final opportunity* to amend.

9 I.       BACKGROUND

10        A.       Plaintiff’s First Amended Complaint

11           Plaintiff’s Amended Complaint & Claim, referred to herein as the “First Amended  
12 Complaint,” is the operative complaint in this case. (Dkt. No. 18.) Plaintiff alleges therein that  
13 defendants are liable for the death of her son, Casey Gollihar, who, on January 21, 2008, was  
14 allegedly shot and killed by defendant Robert Semillo, a Deputy Sheriff with the Sheriff’s Office.  
15 (See First Am. Compl. at 2-3.) In short, the First Amended Complaint alleges what can fairly be  
16 construed as claims for excessive force under 42 U.S.C. § 1983 and wrongful death under  
17 California state law.<sup>4</sup> (See *id.* at 2 (alleging that “Casey Gollihar was shot with excessive force  
18 and ended in wrongful death”).) Plaintiff seeks damages in the amount of “10 million American

---

19           <sup>3</sup> Both in her written opposition to the Sheriff’s Office’s motion to dismiss and at the  
20 hearing, plaintiff represented that an attorney, Francis Shehadah, who is not currently counsel of  
21 record, will represent plaintiff and three previously dismissed minor plaintiffs in this action if the  
22 court grants plaintiff leave to file a further amended complaint. (See Pl.’s Opp’n to Mot. to Dismiss  
23 (“Pl.’s Opp’n”) at 3, Dkt. No. 29; Andre-Gollihar Decl. ¶ 3, Dkt. No. 29 at 7.) Plaintiff’s declaration  
24 appended to her written opposition indicates that an attorney, presumably Mr. Shehadah, assisted  
25 plaintiff in drafting her written opposition “as a courtesy.” (Andre-Gollihar Decl. ¶ 3.) Plaintiff  
26 represented at the hearing that Mr. Shehadah could not appear at the hearing because of a conflicting  
appearance in another court.

<sup>4</sup> In her opposition to the motion to dismiss, plaintiff states: “The gravamen of the  
‘AMENDED COMPLAINT & CLAIM’, though inartfully pled, is really a 42 U.S.C. § 1983 claim  
against Defendant County of San Joaquin and the individual sheriff who killed decedent.” (Pl.’s  
Opp’n at 2.)

1 Dollars.”<sup>5</sup> (Id. at 3.)

2 More specifically, plaintiff alleges that Casey Gollihar (“Mr. Gollihar”) was  
3 released on parole from Avenal state prison in the year 2007, and that defendant Jeffrey Carter  
4 was Mr. Gollihar’s parole agent. (First Am. Compl. at 2.) It is alleged that Carter would visit  
5 plaintiff’s home each month to interview and drug test Mr. Gollihar. (Id.) Plaintiff further  
6 alleges that “[a]fter approximately one year,” Carter informed plaintiff and Mr. Gollihar that: (1)  
7 Mr. Gollihar’s parole would end effective August 1, 2007; (2) Mr. Gollihar would no longer be  
8 required to report for monthly visits or drug tests after that date; and (3) it would take 60 to 90  
9 days from August 1, 2007, for the “formal parole papers” to come in the mail. (Id.)

10 Plaintiff alleges that all was well until the middle part of December 2007. (First  
11 Am. Compl. at 2.) She alleges that in mid-December, Marty Brascino, who is alleged to be a  
12 supervisor in the parole department, contacted plaintiff and reported that Mr. Gollihar “had not  
13 been reporting once monthly to Mr. Carter, and that Casey Gollihar . . . was running from the  
14 law.” (Id.) Plaintiff alleges that this statement was made despite the fact that Mr. Gollihar had  
15 been off of parole since approximately August 2007. (Id.) Plaintiff further alleges that she  
16 immediately called Mr. Gollihar and told him to come to her home. (Id.) Plaintiff alleges that  
17 Mr. Gollihar arrived at plaintiff’s home and that, while both plaintiff and Mr. Gollihar were on  
18 the telephone, Brascino informed plaintiff and Mr. Gollihar that she was placing Mr. Gollihar  
19 back on parole and issuing a warrant for Mr. Gollihar’s arrest, listing Mr. Gollihar as “armed and  
20 dangerous.” (Id. at 2-3.) Plaintiff alleges that “[i]t was discussed that as far as he, Casey  
21 Gollihar, knew Mr. Carter had been his Parole Officer since he had gotten out of Avenal Prison  
22 and was not notified any differently to that date.” (Id. at 2.) In response, Brascino allegedly  
23 stated, in a raised voice, that “she was putting Casey Gollihar back on Parole because she wanted  
24 to and it didn’t matter what anyone else said.” (Id.) When plaintiff asked Brascino whether

---

25 \_\_\_\_\_  
26 <sup>5</sup> Elsewhere in her First Amended Complaint, plaintiff alleges that the amount of damages  
sought is “unlimited.” (See First. Am. Compl. at 4.)

1 Brascino had been in touch with Carter, Brascino allegedly informed plaintiff that Carter was on  
2 vacation in Hawaii and was unreachable. (Id. at 2-3.)

3 Plaintiff alleges that, thereafter, Mr. Gollihar “saw Mrs. Brascino in person,” and  
4 that plaintiff and Mr. Gollihar tried to reach Carter several times via telephone, but without  
5 success. (First Am. Compl. at 3.) Plaintiff further alleges that around Christmas time of 2007,  
6 Brascino acted “outside the scope of her duties, and issued an arrest warrant [for Mr. Gollihar] as  
7 armed and dangerous and there was a reward.” (Id. at 3, 4.)

8 With respect to the shooting, plaintiff alleges that on January 21, 2008, Mr.  
9 Gollihar was installing a clutch in a vehicle “with the help of John Berna, and Whitney,  
10 described as his wife.” (First Am. Compl. at 3.) Plaintiff alleges that Mr. Gollihar “was shot  
11 with excessive force, several times, per the Corner’s [*sic*] Report, after being handcuffed,” and  
12 that “[t]here were other witnesses.” (Id.) Although not expressly alleged, the First Amended  
13 Complaint may be fairly construed as alleging that defendant Semillo is the officer who  
14 unjustifiably shot and killed Mr. Gollihar. (See id. (“Complainants are informed and believe that  
15 the shooting of Decedent was unjustified and constituted the use Of [*sic*] excessive force and or  
16 [*sic*] was otherwise tortuous [*sic*] conduct by Robert Semillo . . . .”))

17 B. Procedural History

18 On November 30, 2009, plaintiff initiated this action by filing a “Complaint &  
19 Claim” (“complaint”), which named as defendants the County of San Joaquin (“County”), the  
20 Sheriff’s Office, the State of California (“State”), and the California Department of Corrections  
21 and Rehabilitation (“CDCR”). (Dkt. No. 1.) Along with her complaint, plaintiff filed motions  
22 for leave to proceed in forma pauperis and to appoint counsel, the latter of which requested that  
23 plaintiff be permitted to add Casey Gollihar’s minor children—Catherine Belle Gollihar,  
24 Anthony Joseph Gollihar, and Casey Gollihar—as pro se plaintiffs. (Dkt. Nos. 2, 3.)

25 The court granted plaintiff’s application to proceed in forma pauperis. (Order and  
26 Findings & Recommendations at 2, Apr. 7, 2010, Dkt. No. 6.) It also screened plaintiff’s

1 complaint pursuant to 28 U.S.C. § 1915(e) and recommended that the State and CDCR be  
2 dismissed from this action as immune from suit. (Id. at 3-6.) The court ordered the United  
3 States Marshal (“Marshal”) to serve the complaint on the County and the Sheriff’s Office. (Id. at  
4 3.) However, the court denied, without prejudice, plaintiff’s motion to appoint counsel. (Id. at  
5 8.) It further denied, without prejudice, plaintiff’s request to add Casey Gollihar’s minor children  
6 as plaintiffs in this action because the minors are not represented by counsel. (See id. at 6-8.)  
7 The district judge assigned to this action, United States District Judge Morrison C. England, Jr.,  
8 adopted the proposed findings and recommendations and dismissed the State and CDCR from  
9 this action with prejudice. (Order, May 12, 2010, Dkt. No. 9.)

10           On August 6, 2010, the Sheriff’s Office filed a motion to dismiss plaintiff’s  
11 complaint. (Dkt. No. 14.) On September 28, 2010, plaintiff filed her First Amended Complaint,  
12 which the court, for good cause appearing, deemed timely filed as a matter of course. (Order  
13 Oct. 5, 2010, Dkt. No. 20.) The First Amended Complaint added defendants Brascino, Carter,  
14 and Semillo.

15           The court screened the First Amended Complaint pursuant to 28 U.S.C.  
16 § 1915(e). (Order, Oct. 5, 2010.) The court ordered the Marshal to serve the First Amended  
17 Complaint on the County and defendants Brascino, Carter, and Semillo, none of whom had yet  
18 appeared in the action.<sup>6</sup> (Id. at 5-6.) Despite the court’s prior order, the First Amended  
19 Complaint names Casey Gollihar’s minor children as plaintiffs. (First Am. Compl. at 1.)  
20 Accordingly, the court struck all references to the minor children from the First Amended  
21 Complaint. (Order, Oct. 5, 2010, at 4.) Moreover, despite the court’s order dismissing the State  
22 and CDCR from this case with prejudice, the First Amended Complaint again names those  
23 parties as defendants. (First Am. Compl. at 1.) Accordingly, the court did not order service of  
24 the First Amended Complaint on the State or CDCR. (Order, Oct. 5, 2010, at 4.)

---

25  
26           <sup>6</sup> The court did not order service on the Sheriff’s Office because that defendant had already  
appeared in the action. (Order, Oct. 5, 2010, at 5-6 & n.4.)

1 On October 22, 2010, the Sheriff's Office filed the pending motion to dismiss  
2 plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).  
3 Plaintiff initially failed to file a timely written opposition or statement of non-opposition to the  
4 Sheriff's Office's motion and, accordingly, the court continued the hearing and provided plaintiff  
5 with a final opportunity to file a written opposition or statement of non-opposition. (Order, Dec.  
6 6, 2010, Dkt. No. 27.)

7 Plaintiff filed a timely written opposition. (Dkt. No. 29.) In part, and as indicated  
8 above, plaintiff's opposition states that "Plaintiff has been unable to retain counsel; however, she  
9 recently contacted an attorney who may represent her if this Court grants leave to amend." (Pl.'s  
10 Opp'n to Mot. to Dismiss at 3.) At the January 20, 2011 hearing, plaintiff identified this attorney  
11 as Francis Shehadah. Indeed, it appears that although not retained, this attorney assisted plaintiff  
12 in the drafting of plaintiff's opposition brief "as a courtesy." (Andre-Gollihar Decl. ¶ 3.)

13 In terms of service of the remaining defendants, the court's docket reveals that the  
14 Marshal personally served the County on December 13, 2010. (Dkt. No. 30.) The court's docket  
15 further reveals that Marshal has not yet filed documentation reflecting service of the First  
16 Amended Complaint on defendants Brascino, Carter, and Semillo. However, the Sheriff's  
17 Office's reply brief suggests that the County and Semillo returned waivers of service forms  
18 during the week of January 3, 2011.<sup>7</sup> (Reply Br. at 3 n.2, Dkt. No. 32.)

19 Notably, it appears that Mr. Gollihar's wife filed a separate lawsuit related to her  
20 husband's death, with the caption of Maria-Gollihar v. County of San Joaquin et al., 2:10-cv-  
21 00135 MCE KJM PS (E.D. Cal.).<sup>8</sup> United States Magistrate Judge Kimberly J. Mueller, who  
22 was recently appointed and confirmed as a United States District Judge, dismissed the complaint

---

23  
24 <sup>7</sup> At the January 20, 2011 hearing, counsel for the Sheriff's Office again indicated that he  
25 had executed and returned waivers of service to the Marshal in regards to the County and Semillo.  
The court's docket does not yet reflect the filing of those waivers by the Marshal.

26 <sup>8</sup> These cases were never related, likely because plaintiff never filed a notice of related cases  
as required by the Court's Local Rules. See E. Dist. Local Rule 123.

1 without prejudice pursuant to the screening authority provided in 28 U.S.C. § 1915(e), and an  
2 amended complaint was filed that named only Anthony Joseph Gollihar, a minor, as a plaintiff.  
3 Judge Mueller screened the amended complaint and ordered plaintiff to file a second amended  
4 complaint, which plaintiff failed to do. Ultimately, the United States District Judge assigned to  
5 that matter dismissed the case for failure to file a second amended complaint.<sup>9</sup>

## 6 II. LEGAL STANDARDS

7 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)  
8 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase  
9 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard  
10 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and  
11 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see  
12 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “A complaint may survive a  
13 motion to dismiss if, taking all well-pleaded factual allegations as true, it contains ‘enough facts  
14 to state a claim to relief that is plausible on its face.’” Coto Settlement v. Eisenberg, 593 F.3d  
15 1031, 1034 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). “‘A claim  
16 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
17 reasonable inference that the defendant is liable for the misconduct alleged.’” Caviness v.  
18 Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Iqbal, 129 S. Ct. at  
19 1949). The court accepts all of the facts alleged in the complaint as true and construes them in  
20 the light most favorable to the plaintiff. Corrie v. Caterpillar, 503 F.3d 974, 977 (9th Cir. 2007).  
21 The court is “not, however, required to accept as true conclusory allegations that are contradicted  
22 by documents referred to in the complaint, and [the court does] not necessarily assume the truth  
23

---

24 <sup>9</sup> A district court may take judicial notice of proceedings within the federal judicial system  
25 where those proceedings have a direct relation to the matters at issue. See, e.g., Bias v. Moynihan,  
26 508 F.3d 1212, 1225 (9th Cir. 2007); Reyn’s Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746  
n.6 (9th Cir. 2006); Cactus Corner, LLC v. U.S. Dep’t of Agric., 346 F. Supp. 2d 1075, 1092 (E.D.  
Cal. 2004).

1 of legal conclusions merely because they are cast in the form of factual allegations.” Paulsen,  
2 559 F.3d at 1071 (citations and quotation marks omitted).

3           The court must construe a pro se pleading liberally to determine if it states a claim  
4 and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an  
5 opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See  
6 Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); see also Balistreri v. Pacifica  
7 Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990) (stating that “pro se pleadings are liberally  
8 construed, particularly where civil rights claims are involved”). In ruling on a motion to dismiss  
9 pursuant to Rule 12(b), the court “may generally consider only allegations contained in the  
10 pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.”  
11 Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and  
12 quotation marks omitted).

### 13 III. DISCUSSION

14           At the outset, the undersigned notes three aspects of the parties’ respective  
15 moving and opposition papers that impact the review of the pending motion to dismiss. First, it  
16 appears that the Sheriff’s Office interprets plaintiff’s First Amended Complaint as only alleging a  
17 claim for wrongful death under California state law and does not address plaintiff’s potential  
18 claim for relief premised on an alleged violation of 42 U.S.C. § 1983, however inartfully pled.

19           Second, plaintiff’s written opposition acknowledges the pleading deficiencies in  
20 the First Amended Complaint, at least insofar as plaintiff’s intended Section 1983 claim is  
21 concerned, and seeks leave to amend to more clearly plead a Section 1983 claim. (Pl.’s Opp’n at  
22 2, 4.) The opposition repeatedly states that the pleading deficiencies can be cured through  
23 amendment.

24           Third, plaintiff’s written opposition suggests that if given leave to amend, plaintiff  
25 may wish to abandon: (1) all claims separately alleged against the Sheriff’s Office; and (2) her  
26 state law wrongful death claim in its entirety. For example, plaintiff’s opposition states: “The



1 sheriff's department should more accurately be identified in the complaint as Defendant County  
2 of San Joaquin, d.b.a. County of San Joaquin Sheriff's Department. This can simply be  
3 corrected." (See Pl.'s Opp'n at 6.) Moreover, plaintiffs opposition does not respond to most of  
4 the Sheriff's Office's arguments seeking to dismiss the state law wrongful death claim; instead,  
5 plaintiff focuses on the standards applicable to Section 1983 litigation.

6 A. Subject Matter Jurisdiction

7 Apparently because the Sheriff's Office interprets plaintiff's First Amended  
8 Complaint as only stating a single claim under California law, the Sheriff's Office's  
9 memorandum of points and authorities repeatedly asserts that this court lacks subject matter  
10 jurisdiction over this case. (Sheriff's Office's Memo. of P. & A. in Supp. of Mot. to Dismiss  
11 ("Sheriff's Memo.") at 2:2 (stating that "[t]here is no stated basis for jurisdiction"), 2:8 (stating  
12 that "there is no cognizable basis for jurisdiction".) Although the Sheriff's Office is correct that  
13 plaintiff failed to allege a basis for subject matter jurisdiction in her First Amended Complaint, it  
14 is apparent that plaintiff intends to state a claim pursuant to 42 U.S.C. § 1983. The court noted  
15 as much in its screening order. (Order, Apr. 7, 2010, at 3.) Indeed, plaintiff's written opposition  
16 explicitly states as much and seeks leave to amend to more clearly plead a Section 1983 claim.  
17 (Pl.'s Opp'n at 2, 4.) Assuming that plaintiff intends to allege a claim under Section 1983, the  
18 court would have subject matter jurisdiction premised on a federal question. See 28 U.S.C. §  
19 1331. The court would also have supplemental jurisdiction over plaintiff's state law claim. See  
20 28 U.S.C. § 1367(a).

21 As noted in this order, the undersigned grants plaintiff leave to amend her First  
22 Amended Complaint to assert a claim pursuant to 42 U.S.C. § 1983. Accordingly, plaintiff  
23 should address the basis for this court's subject matter jurisdiction in her second amended  
24 complaint.

25 ///

26 ///

1           B.     Plaintiff's Section 1983 Claim

2           As noted above, it is apparent that plaintiff intends to allege a claim pursuant to  
3 42 U.S.C. § 1983. The Sheriff's Office moving papers do not address plaintiff's Section 1983  
4 claim and, accordingly, do not seek dismissal of this claim.<sup>10</sup> Nevertheless, plaintiff's Section  
5 1983 claim fails to adequately state a claim on which relief can be granted, and plaintiff  
6 acknowledges as much in her written opposition. Thus, in light of plaintiff's strong desire to  
7 amend her complaint and the court's power to dismiss the Section 1983 claim *sua sponte* under  
8 Federal Rule of Civil Procedure 12(b)(6), *see e.g., Lee v. City of L.A.*, 250 F.3d 668, 683 n.7 (9th  
9 Cir. 2001), the undersigned dismisses plaintiff's Section 1983 claim as to all defendants without  
10 prejudice for the following reasons.

11           Generally, with respect to individual defendants, "Section 1983 imposes civil  
12 liability upon an individual who under color of state law subjects or causes any citizen of the  
13 United States to the deprivation of any rights, privileges or immunities secured by the  
14 Constitution and laws." *Franklin v. Fox*, 312 F.3d 423, 444 (9th Cir. 2002) (citing 42 U.S.C. §  
15 1983). "To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a  
16 right secured by the Constitution or laws of the United States was violated, and (2) that the  
17 alleged violation was committed by a person acting under the color of State law." *Long v.*  
18 *County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006) (citing *West v. Atkins*, 487 U.S. 42,  
19 48 (1988)).

20           Here, none of the individual defendants has appeared in the action yet, so the  
21 undersigned need not address plaintiff's Section 1983 claim in great detail. It is enough to say  
22 that plaintiff has not expressly alleged that any right secured by the Constitution or laws of the  
23 United States was violated or that the alleged violation was committed by a person acting under

---

24  
25           <sup>10</sup> As plaintiff points out in her opposition, the Sheriff's Office briefly argues in a footnote  
26 that plaintiff's First Amended Complaint does not state claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). (Sheriff's Memo. at 3 n.3.) Thus, it appears that the Sheriff's Office at least tacitly acknowledges that plaintiff attempts to allege a claim under 42 U.S.C. § 1983.

1 the color of State law. Accordingly, the undersigned dismisses plaintiff’s Section 1983 claim  
2 alleged against the individual defendants.

3           Municipalities may also be liable for civil rights violations pursuant to 42 U.S.C.  
4 § 1983. The standards governing the liability of a municipality differ from those that govern the  
5 liability of individuals who acted under color of state law. Relevant here, in Monell the Supreme  
6 Court limited municipal liability and held that “a municipality cannot be held liable *solely*  
7 because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under  
8 § 1983 on a *respondeat superior* theory.” 436 U.S. at 691. Instead, “[l]ocal governing bodies  
9 . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the  
10 action that is alleged to be unconstitutional implements or executes a policy statement,  
11 ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”  
12 Id. at 690 (footnote omitted). The Court further stated that “it is when execution of a [local]  
13 government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts  
14 may fairly be said to represent official policy, inflicts the injury that the government as an entity  
15 is responsible under § 1983.” Id. at 693; see also Bd. of County Comm’rs of Bryan County,  
16 Okla. v. Brown, 520 U.S. 397, 403 (1997) (“[W]e have required a plaintiff seeking to impose  
17 liability on a municipality under § 1983 to identify a municipal ‘policy’ or ‘custom’ that caused  
18 the plaintiff’s injury.”); Levine v. City of Alameda, 525 F.3d 903, 907 (9th Cir. 2008) (“A city  
19 can be sued for monetary damages under 42 U.S.C. § 1983 if the constitutional violation was a  
20 product of a policy, practice, or custom adopted and promulgated by the city’s officials.”).

21           The Ninth Circuit Court of Appeals has held that in order to establish municipal  
22 liability, “the plaintiff must establish: (1) that he [or she] possessed a constitutional right of  
23 which he [or 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  
25 was the moving force behind the constitutional violation.” Miranda v. City of Cornelius, 429  
26 F.3d 858, 868 (9th Cir. 2005) (citation and quotation marks omitted, modification in original);

1 see also Levine, 525 F.3d at 907 (“To establish [municipal] liability, a plaintiff must establish  
2 that he was deprived of a constitutional right and that the city had a policy, practice, or custom  
3 which amounted to ‘deliberate indifference’ to the constitutional right and was the ‘moving  
4 force’ behind the constitutional violation.”) (citing Van Ort v. Estate of Stanewich, 92 F.3d 831,  
5 835 (9th Cir. 1996)). With respect to the last element, “[t]here must be a direct causal link  
6 between a municipal policy or custom and the alleged constitutional deprivation.” Villegas v.  
7 Gilroy Garlic Festival Ass’n, 541 F.3d 950, 957 (9th Cir. 2008) (en banc) (citation and quotation  
8 marks omitted).<sup>11</sup>

9 Here, plaintiff’s allegations in the First Amended Complaint in no way satisfy the  
10 pleading requirements under Monell insofar as the County or the Sheriff’s Office is concerned.  
11 Accordingly, plaintiff’s Section 1983 claim is dismissed as to those defendants. The undersigned  
12 notes that it appears that plaintiff may intend to abandon her Section 1983 claim against the  
13 Sheriff’s Office. Plaintiff’s written opposition states that if given leave to amend, she would  
14 allege her Section 1983 claim against “Defendant County of San Joaquin, d.b.a. County of San  
15 Joaquin Sheriff’s Department.” (Pl.’s Opp’n at 6.) Thus, it appears that plaintiff intends to  
16 abandon her separate claim against the Sheriff’s Office and proceed only against the County,  
17 doing business as the Sheriff’s Office.

18 C. Plaintiff’s Wrongful Death Claim Under State Law

19 In apparent reference to plaintiff’s wrongful death claim under California law, the  
20 Sheriff’s Office offers several arguments in favor of dismissal of that claim. As noted above,

---

21  
22 <sup>11</sup> There exist various formulations of the types of policies that may support a claim of  
23 municipal liability. However, the Ninth Circuit Court of Appeals has stated that in addition to  
24 showing that a constitutional violation resulted from an express municipal policy or custom, “[a]  
25 plaintiff may also establish municipal liability by demonstrating that (1) the constitutional tort was  
26 the result of a ‘longstanding practice or custom which constitutes the standard operating procedure  
of the local government entity;’ (2) the tortfeasor was an official whose acts fairly represent official  
policy such that the challenged action constituted official policy; or (3) an official with final  
policy-making authority ‘delegated that authority to, or ratified the decision of, a subordinate.’”  
Price v. Sery, 513 F.3d 962, 966 (9th Cir. 2008) (citing Ulrich v. City & County of San Francisco,  
308 F.3d 968, 984-85 (9th Cir. 2002)); accord Villegas, 541 F.3d at 964 (Thomas, J., dissenting).

1 however, plaintiff's written opposition suggests that plaintiff might abandon her separate claims  
2 against the Sheriff's Office and might abandon her state law claim as to all parties. If true,  
3 plaintiff's intimation in this regard would resolve the Sheriff's Office's arguments in favor of  
4 dismissal of the wrongful death claim asserted against it.

5           Nevertheless, the undersigned briefly addresses the Sheriff's Office's substantive  
6 arguments. The undersigned concludes that plaintiff's state law claim should be dismissed as  
7 untimely filed, and plaintiff should only re-allege her state law wrongful death claim in a second  
8 amended complaint if she has a legal and factual basis for overcoming this hurdle.

9           1.       Sheriff's Office As a Subdivision of the County

10           The Sheriff's Office contends that the County—and not the Sheriff's Office—is a  
11 proper defendant insofar as plaintiff's wrongful death claim is concerned because the Sheriff's  
12 Office is merely a subdivision of the County. (Sheriff's Memo. at 2-3.) None of the authority  
13 cited by the Sheriff's Office persuasively supports the argument that the Sheriff's Office is not a  
14 proper party here. Nevertheless, the undersigned need not resolve the Sheriff's Office's  
15 argument because, as discussed below, plaintiff's state law claim is time-barred.

16           In any event, plaintiff's only response to the Sheriff's Office's argument is:

17           Under established § 1983 law, Defendant County of San Joaquin is a  
18 proper party, and it is important to note that the moving party on the  
19 12(b)(6) motion is not the County of San Joaquin. The sheriff's  
20 department should more accurately be identified in the complaint as  
21 Defendant County of San Joaquin, d.b.a. County of San Joaquin Sheriff's  
22 Department. This can simply be corrected.

21 (See Pl.'s Opp'n at 6.) Again, this signals plaintiff's apparent intent to pursue her claim only  
22 against the County, and not against the Sheriff's Office as a separate entity. Thus, it appears that  
23 plaintiff does not oppose the Sheriff's Office's argument and, regardless, does not intend to  
24 pursue a separate wrongful death claim under state law against the Sheriff's Office.

25 ////

26 ////

1                   2.       Plaintiff’s Standing to Bring Wrongful Death Claim Under California Law

2                   The Sheriff’s Office also seeks dismissal of plaintiff’s wrongful death claim on  
3 the grounds that Mr. Gollihar’s wife—not his mother, who is the plaintiff here—is the only party  
4 that has standing to bring a wrongful death claim under California law. (Sheriff’s Memo. at 3.)  
5 The Sheriff’s Office cites a screening order from the matter of Maria-Gollihar v. County of San  
6 Joaquin et al., which dismissed a wrongful death claim asserted by one of Mr. Gollihar’s minor  
7 children with leave to amend. (Order, May 3, 2010, at 2, Maria-Gollihar v. County of San  
8 Joaquin et al., 2:10-cv-00135, Dkt. No. 5.) The Sheriff’s Office’s argument is unpersuasive.

9                   The Sheriff’s Office asserts that a statement from an order in the Maria-Gollihar  
10 matter guides this case.<sup>12</sup> It states: “As stated by this Court in [the Maria-Gollihar] action when  
11 the complaint was amended to reflect one of Casey Gollihar’s children as plaintiff, ‘[w]hether  
12 cast as a survivor action or a wrongful death action, the complaint as it now stands does not  
13 establish the right of plaintiff to proceed in this action. See Cal. Code Civ. Proc. §§377.30,  
14 377.32, 377.60.” (Sheriff’s Memo. at 3.) As an initial matter, then-Magistrate Judge Mueller’s  
15 order only stated that the complaint failed to assert a wrongful death claim as then-drafted, not  
16 that such a claim could not be brought as a matter of law. Moreover, that order did not contain  
17 any detailed analysis regarding why the complaint as drafted was subject to dismissal. Finally,  
18 the order provided the plaintiff in that action leave to amend. For these reasons, the order from  
19 the Maria-Gollihar matter relied on by the Sheriff’s Office does not control here.

20                   In any event, plaintiff has alleged facts in this case that support her standing to  
21 pursue a wrongful death claim under California law. Pursuant to California Code of Civil  
22 Procedure § 377.60, a parent who was dependant on the decedent has standing to assert a cause  
23 of action for the death of a person caused by the wrongful act or negligence of another. Plaintiff  
24

---

25                   <sup>12</sup> The Sheriff’s Office has not expressly asserted that Magistrate Judge Mueller’s order has  
26 some sort of claim preclusive or issue effect on this case and has presented no legal authority that  
would support such an argument.

1 alleges that she was dependent on her son, Mr. Gollihar, who is the decedent. (First Am. Compl.  
2 at 2.) Accordingly, taking plaintiff's allegations as true, plaintiff has standing to pursue a  
3 wrongful death claim under California law, and the Sheriff's Office's argument to the contrary  
4 lacks merit.

5 3. Timeliness of Plaintiff's Wrongful Death Claim Under California Law

6 Finally, the Sheriff's Office argues that plaintiff's wrongful death claim is time-  
7 barred under California law because plaintiff did not comply with the timing and presentation  
8 requirements attendant to tort claims against public entities. (See Sheriff's Memo. at 3-4.)  
9 Plaintiff only responds that arguments regarding the presentation and timing requirements under  
10 California tort law should be "summarily disregarded" because pre-lawsuit notice provisions  
11 under state law do not apply to Section 1983 claims. (Pl.'s Opp'n at 5 (citing Felder v. Casey,  
12 487 U.S. 131, 142 (1988).) Again, this argument appears to confirm that plaintiff intends to  
13 abandon her state law claim for wrongful death.

14 Assuming, however unlikely, that plaintiff intends to pursue a state law wrongful  
15 death claim, such a claim is time-barred. Under California's Tort Claims Act, a plaintiff must  
16 present his or her tort claim to the public entity at issue and, relevant here, commence his or her  
17 tort action against the public entity within six months of receiving written notice of the rejection  
18 of the claims presented. See Cal. Gov't Code § 945.6. Here, judicially noticeable documents  
19 attached to the Sheriff's Office's motion to dismiss plaintiff's original complaint indicate that  
20 plaintiff submitted her claim for damages to the San Joaquin County Clerk of the Board of  
21 Supervisors on July 18, 2008, and that plaintiff was given notice of the rejection of her claim on  
22 July 23, 2008. (See Maiolini Decl. ¶¶ 2-5 & Exs. 1-2, Dkt. No. 14, Doc. No. 14-2.)

23 Accordingly, plaintiff was required to commence her action against the County and/or the  
24 Sheriff's Office on or before January 23, 2009. Plaintiff did not commence this action until  
25 November 30, 2009. Accordingly, her claim is time-barred. Plaintiff's state law wrongful death  
26 claim is dismissed without prejudice. However, plaintiff should not re-plead this claim unless

1 she can allege facts and legal authorities sufficient to overcome the conclusion that her claim is  
2 time-barred.

3 IV. CONCLUSION

4 For the foregoing reasons, IT IS HEREBY ORDERED that:

5 1. The motion to dismiss filed by defendant County of San Joaquin Sheriff's  
6 Office (Dkt. No. 22) is granted.

7 2. Plaintiff's First Amended Complaint is dismissed without prejudice, and  
8 plaintiff is granted leave to file an amended complaint consistent with this order.

9 3. Plaintiff shall have sixty (60) days from the date of entry of this order  
10 within which to file and serve a further amended complaint entitled "Second Amended  
11 Complaint." *No requests for extensions of this 60-day period will be considered by the court.*  
12 Plaintiff is informed that the court cannot refer to prior pleadings in order to make an amended  
13 complaint complete. An amended complaint must be complete in itself. See E. Dist. Local Rule  
14 220. This requirement is because, as a general rule, an amended complaint supersedes the  
15 original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Accordingly, once  
16 plaintiff files an amended complaint, the prior complaints no longer serve any function in the  
17 case. Therefore, "a plaintiff waives all causes of action alleged in the original complaint which  
18 are not alleged in the amended complaint." London v. Coopers & Lybrand, 644 F.2d 811, 814  
19 (9th Cir. 1981). *Finally, plaintiff is reminded that this is her final opportunity to amend her*  
20 *pleading in order to state a claim on which relief can be granted.*

21 ////

22 ////

23 ////

24 ////

25 ////

26 ////



