

1  
2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF CALIFORNIA  
4

5 SUKHWINDER KAUR, individually  
6 and as the successor in  
7 interest for the Decedent  
8 PARMINDER SINGH SHERGILL;  
9 KULBINDER KAUR SOHOTA;  
10 SARABJIT SINGH SHERGILL,

11 Plaintiffs,

12 v.

13 CITY OF LODI; CITY OF LODI  
14 POLICE DEPARTMENT; MARK  
15 HELMS, in his individual  
16 capacity as the Chief of  
17 Police for the City of Lodi;  
18 SCOTT BRATTON, in his  
19 individual capacity as a City  
20 of Lodi Police Officer; ADAM  
21 LOCKIE, in his individual  
22 capacity as a City of Lodi  
23 Police Officer;

24 Defendants.\*

No. 2:14-cv-00828-GEB-AC

**AMENDED ORDER\*\* DENYING ENTITY  
DEFENDANTS' MOTION AND GRANTING  
OFFICER DEFENDANTS' MOTION TO  
DISMISS PORTIONS OF THE SECOND  
AMENDED COMPLAINT**

25 Defendants City of Lodi and City of Lodi Police  
26 Department (collectively, the "Entity Defendants")<sup>1</sup> seek

27 \* The caption has been amended according to the automatic dismissal of Doe  
28 Defendants prescribed in the Status Order. (Status Order 3:2-4, ECF No. 24.)

29 \*\* The June 17, 2015 Order, (ECF No. 86), has been amended as follows: The  
30 word "Officer" on page 9, line 25 of that order is replaced by the word  
31 "Entity."

32 <sup>1</sup> Defendant Chief Helms also joins in the Entity Defendants' motion.  
33 However, the ADA claim is not alleged against Chief Helms, and Plaintiff  
34 argues "all references by [the Entity Defendants] to [Chief] Helms in  
35 this . . . motion should be stricken since he cannot challenge the Monell  
36 claims. (Pl.'s Opp'n to Entity Defs.' Mot. 4:12, ECF No. 52.) Chief Helms does  
37 not respond to this argument in his reply brief. "Monell does not concern  
38 liability of individuals." Guillory v. Cnty. of Orange, 731 F.2d 1379, 1382  
(9th Cir. 1984). Therefore, Defendant Helms cannot challenge the Monell  
claims, and he is not a proper movant to the Entity Defendants' dismissal  
motion.

1 dismissal under Federal Rule of Civil Procedure ("Rule") 12(b)(6)  
2 of Plaintiff Sukhwinder Kaur's<sup>2</sup> Monell claims<sup>3</sup> based on the  
3 alleged (1) failure to enact adequate policies or practices to  
4 educate police officers on how to interact with mentally ill  
5 persons, and (2) deficient training and supervision of police  
6 officers' contact with mentally ill persons; and Plaintiff's  
7 claim alleged under Title II of the Americans with Disabilities  
8 Act ("ADA"), in which Plaintiff alleges the Entity Defendants  
9 failed to reasonably accommodate the Decedent Paraminder Singh  
10 Shergill's disability during his interaction with Defendants  
11 Scott Bratton and Adam Lockie (the "Officer Defendants").

12 The Officer Defendants separately seek dismissal of  
13 Plaintiff's Fourth Amendment provocation claim under Rule  
14 12(b)(6).

15 Each dismissal motion is addressed separately below.

#### 16 I. LEGAL STANDARD

17 "To survive a motion to dismiss, a complaint must  
18 contain sufficient factual matter, accepted as true, to state a  
19 claim to relief that is plausible on its face." Caviness v.  
20 Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir.  
21 2010) (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009)). "A claim  
22

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23 <sup>2</sup> Each of the claims challenged in the referenced motions is "asserted by  
24 Plaintiff Sukhwinder Kaur, as successor in interest for the Decedent Parminder  
Singh Shergill." (SAC ¶¶ 74, 89, 94, ECF No. 47.)

25 <sup>3</sup> "Monell liability refers to the liability of [local governing  
26 bodies]. . . under 42 U.S.C. § 1983 where [an] official policy or custom  
27 causes a constitutional [injury], see Monell v. Dep't of Social Servs., 436  
28 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)." Angle v. Alameda Cnty.  
Med. Ctr., No. C 07-250 SI, 2008 WL 413738, at \*3 n.2 (N.D. Cal. Feb. 13,  
2008).

1 has facial plausibility when the plaintiff pleads factual content  
2 that allows the court to draw the reasonable inference that the  
3 defendant is liable for the misconduct alleged.” Iqbal, 556 U.S.  
4 at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556  
5 (2007)).

6 “For purposes of a motion to dismiss, we accept all  
7 well-pleaded allegations of material fact as true and construe  
8 them in the light most favorable to the nonmoving party.”  
9 Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 783 (9th  
10 Cir. 2012).

11 [Further,] the court need not accept as true  
12 conclusory allegations, nor make unwarranted  
13 deductions or unreasonable inferences. But so  
14 long as the plaintiff alleges facts to  
15 support a theory that is not facially  
16 implausible, the court’s skepticism is best  
17 reserved for later stages of the proceedings  
when the plaintiff’s case can be [evaluated]  
on evidentiary grounds. “[A] well-pleaded  
complaint may proceed even if it strikes a  
savvy judge that actual proof of those facts  
is improbable, and that a recovery is very  
remote and unlikely.”

18 In re Gilead Sciences Secs. Litig., 536 F.3d 1049, 1057 (9th Cir.  
19 2008) (citation omitted) (quoting Twombly, 550 U.S. at 557).

## 20 **II. FACTUAL ALLEGATIONS**

21 The following factual allegations in the Second Amended  
22 Complaint (“SAC”) are relevant to the motions.

23 The Decedent Paraminder Singh Shergill (“Parminder”)  
24 was a veteran receiving treatment for post-traumatic stress  
25 disorder and schizophrenia, which manifested as periodic  
26 “depression and agitation.” (SAC 2:3-4, ¶ 5.) Parminder  
27 “experienced the symptoms of his mental illness periodically  
28 since 2003. When manifesting symptoms of his mental illness,

1 P[araminder] would become depressed and anxious, but he never  
2 exhibited any violent tendencies or threatened violence to  
3 himself or others." (SAC ¶ 17.) "During his episodes of manifest  
4 mental illness, P[araminder] appeared not to comprehend what was  
5 being said to him or to be capable of responding appropriately."  
6 (Id.)

7 On January 25, 2014, Paraminder "manifested the  
8 symptoms of his mental illness." (SAC ¶ 20.) Parminder's family  
9 called 9-1-1 to request assistance in transporting him to the  
10 Veteran's Clinic to obtain treatment, telling the 9-1-1 operator  
11 that Parminder "was disabled, manifesting symptoms of his mental  
12 illness, acting 'crazy,' and needed to be transported" to the  
13 Clinic. (SAC 2:6-10, ¶¶ 21-22.)

14 When the Officer Defendants arrived, Parminder's family  
15 informed them that he had gone to the park. (SAC 2:10-13, ¶ 26.)  
16 The Officer Defendants told Parminder's family "that there was  
17 nothing they could do" in response to their request for  
18 assistance because Parminder was not a threat to himself or  
19 others, but stated that they would "try to talk with him" if they  
20 saw him. (SAC 2:13-15, ¶¶ 27-28.)

21 The Officer Defendants "saw P[araminder] while he was  
22 walking through the Park and attempted to . . . question him."  
23 (SAC ¶ 30.) When the Officer Defendants "initially confronted  
24 P[araminder], he walked away from the officers, crossed the  
25 street . . . , and began to walk . . . towards his Family Home. He  
26 did not respond to the [Officer Defendants'] verbal  
27 directions . . . and continued to walk despite [their] attempts  
28 to get him to stop by following him and yelling at him." (SAC ¶

1 32.)

2 When under stress, Parminder, like other  
3 mentally ill persons, typically exhibited  
4 symptoms of his mental illness, conducting  
himself in delusional, irrational and non-  
compliant ways . . . .

5 (SAC ¶ 36.)

6 The Officer Defendants "had not been trained to  
7 understand, assess, and respond, without lethal force, to the  
8 types of irrational and non-compliant behavior which is typically  
9 exhibited by mentally ill persons . . . in their interactions  
10 with law enforcement." (SAC ¶ 33.) "This training, which is  
11 widely available and implemented throughout the nation," (SAC ¶  
12 33), includes instruction on:

13 (1) maintaining physical distance from  
14 mentally ill subjects . . . . (termed  
"comfort zones" or "boundaries"); (2)  
15 engaging in non-threatening  
communications . . . ; (3) managing the  
16 contact . . . by deliberately pulling back,  
and allowing the subject more time to  
17 respond, . . . ; (4) calling and consulting  
for advice or bringing to the scene persons  
18 trained in crisis intervention or others  
trained in how appropriately to deal with  
19 mentally ill persons . . . ; [and] (5) having  
at hand and using non-lethal weapons to  
20 control mentally ill subjects . . . , which  
will typically modify the irrational behavior  
21 of such subjects and bring about compliance,  
thereby rendering lethal force unnecessary.

22 (SAC ¶ 34.)

23 Had [the Officer Defendants] been adequately  
24 trained to deal with persons suffering from  
mental illness . . . they would have realized  
25 that [Paraminder] would not respond to  
commands in a traditional way, that he would  
26 become upset by intrusive voices, and that he  
would become scared or paranoid when being  
27 followed by armed officers and ordered to  
follow commands and directions . . . . Had  
28 [they] received proper training they would  
have known there were multiple options

1 available to them both prior to and after  
2 confronting P[araminder]. [The Officer  
3 Defendants] pursued none of these available  
4 options, due to their deficient training  
5 related to contacts and confrontations with  
6 mentally ill persons.

7 (SAC ¶ 37.) "Instead of using any of the techniques listed above,  
8 or others in which they should have been trained," the Officer  
9 Defendants "followed closely behind P[araminder] and repeatedly  
10 yelled at [him], demanding that [he] submit to their  
11 questioning." (SAC ¶ 38.) The Officer Defendants "drew their  
12 police-issued firearms and trained them on P[araminder], as he  
13 was facing away from the officers and continued to walk towards  
14 his Family Home." (Id.)

15 The Officer Defendants "continued to pursue P[araminder]  
16 in an aggressive manner, . . . by shouting commands, closely  
17 following, and brandishing firearms trained on Parminder." (SAC ¶  
18 39.) "Due to [the Officer Defendants' actions] Parminder became  
19 increasingly upset and afraid, exacerbating the symptoms of his  
20 mental illness. . . ." (Id.) When "approximately six house-  
21 lengths separate[d] P[aramidner] from his Family Home[,] " the  
22 Officer Defendants yelled "Stop!" (SAC ¶¶ 42-43.) As Parminder  
23 "turn[ed] around to face them," "he held his hands in the air and  
24 stated 'Don't Shoot!'" (SAC ¶¶ 43-44.) "Before P[araminder] could  
25 complete the 180° turn to face [the Officer Defendants], [they]  
26 both opened fire on P[araminder]." (SAC ¶ 45.)

### 27 III. DISCUSSION

#### 28 A. The Entity Defendants' Dismissal Motion

The Entity Defendants seek "dismiss[al of] Plaintiff's  
[ADA] claim[] . . . and the Monell claims related to inadequate

1 mental health training [and policies/procedures,]" arguing that  
2 "[a]fter two attempts to amend the complaint to put forth factual  
3 allegations that there was a [causal] connection between the  
4 shooting and [Paraminder's] mental illness, the [SAC] still falls  
5 short[; t]he [SAC] does not add any additional *facts* that connect  
6 the alleged wrongful conduct to [Paraminder's] mental health."  
7 (Entity Defs.' Mem. P.&A. Supp. Mot. Dismiss SAC 2:4-10, ECF No.  
8 49-1.) Specifically, the Entity Defendants contend the SAC fails  
9 to state an ADA claim "because [Plaintiff] fails to [allege] how  
10 [Paraminder] was discriminated against by reason of his  
11 disability[; Plaintiff] fails to state how accommodating  
12 [Paraminder's] mental illness would have changed the Officer[s']  
13 decision to shoot him." (Id. at 5:21-25 (citations omitted).) The  
14 Entity Defendants similarly argue Plaintiff has not alleged a  
15 Monell claim because the SAC "fail[s] to plead how the alleged  
16 deficiencies were the moving force behind the constitutional  
17 injury." (Id. at 7:6-9.)

18 Plaintiff rejoins that the Entity "Defendants construe  
19 Parminder's killing in a vacuum, focusing solely on the facts  
20 alleged to exist moments before Parminder was shot to death."  
21 (Pl.'s Opp'n to Entity Defs.' Mot. 8:12-13.) Plaintiff counters  
22 as follows concerning the Monell claims:

23 [The Entity] Defendants ignore the context of  
24 the encounter, which has been exhaustively  
25 pled as a build-up from the time that the  
26 Officer Defendants encountered Parminder to  
27 the time that the shooting occurred.  
28 Plaintiff[] ha[s] pled that, had adequate  
policies or practices[ and/or training] been  
adopted by [the Entity] Defendants, the  
entire encounter between Parminder and the  
Officer Defendants[] would not have occurred  
in the manner it did, and Parminder would not

1 have been shot and killed. [The Entity]  
2 Defendants refuse to face these allegations,  
3 merely labeling them "legal conclusions and  
4 speculations." [The Entity] Defendants are  
5 incorrect, because Plaintiff['s] allegations  
6 specifically explain how the deficient  
7 polic[ies/training] caused the harm  
8 identified, i.e., that the encounter between  
9 Parminder and the Officer Defendants would  
10 never have occurred or would have been  
11 defused without resort to the lethal force  
12 which resulted in Parminder's death.

13 (Id. at 9:12-22, see also id. at 10:25-28.) Plaintiff similarly  
14 responds concerning the ADA claim as follows:

15 [The Entity] Defendants' argument  
16 demonstrates a failure to comprehend the  
17 scope of Plaintiff['s] ADA claim. Plaintiff[]  
18 are alleging that Parminder's ADA rights were  
19 violated not only by Officer Defendants'  
20 shooting, but also by every tactic employed  
21 by the Officer Defendants prior to the  
22 shooting, beginning when Officer Defendants  
23 chose to confront Parminder in the park.

24 (Id. at 14:28-15:5.)

25 "A government entity may not be held liable under 42  
26 U.S.C. § 1983, unless a policy, practice, or custom of the entity  
27 can be shown to be **a moving force** behind a violation of  
28 constitutional rights." Dougherty v. City of Covina, 654 F.3d  
892, 900 (9th Cir. 2011) (emphasis added) (citing Monell, 436  
U.S. at 694). "For a policy to be the moving force behind the  
deprivation of a constitutional right, the identified deficiency  
in the policy must be closely related to the ultimate injury."  
Long v. Cnty. of L.A., 442 F.3d 1178, 1190 (9th Cir. 2006)  
(citation omitted).

29 To plead a prima facie case of disability  
30 discrimination under the ADA, a plaintiff must allege, *inter*  
31 *alia*, that "he was . . . discriminated against by the public



1 entity; and . . . such . . . discrimination was **by reason of**  
2 **[his] disability.**" E.R.K. ex rel. R.K. v. Haw. Dep't of Educ.,  
3 728 F.3d 982, 992 (9th Cir. 2013) (emphasis added) (quoting  
4 McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004)).  
5 "[T]he phrase 'by reason of' [as used] in the [ADA] establishes a  
6 'motivating factor' causal standard for liability . . . ." Martin  
7 v. Cal. Dep't of Veteran Affairs, 560 F.3d 1042, 1048 (9th Cir.  
8 2009).

9 Here, Plaintiff alleges that when the Officer  
10 Defendants encountered Parminder, they confronted him and, as a  
11 result of his mental illness, Parminder was non-compliant. (SAC  
12 ¶¶ 36, 38.) Plaintiff further alleges the Officer Defendants  
13 "continued to pursue P[araminder] in an aggressive manner, . . .  
14 by shouting commands, closely following, and brandishing firearms  
15 trained on P[araminder,]" and that if the Officer Defendants had  
16 been properly trained to appreciate the effect Parminder's mental  
17 illness had on his behavior, they would have responded  
18 differently. (SAC ¶¶ 33, 36, 39.) Specifically, Plaintiff alleges  
19 they would have "maintain[ed] physical distance [from him], . . .  
20 engag[ed] in non-threatening communications, . . . allow[ed]  
21 [him] more time to respond . . . , call[ed] and consult[ed] [with  
22 a person who is trained in how to] . . . deal with mentally ill  
23 persons without the use of lethal force . . . , [and] use[d] non-  
24 lethal weapons to control" Parminder. (SAC ¶¶ 33-34.)

25 The Entity Defendants have not shown that these  
26 allegations, together with all reasonable inferences that can be  
27 drawn therefrom, do not plausibly allege that the alleged  
28 inadequate policies/practices and training was a moving force

1 behind Plaintiff's alleged constitutional injuries, and that  
2 Paraminder's disability was a motivating factor in his alleged  
3 discriminatory treatment. Therefore, the Entity Defendants'  
4 dismissal motion is DENIED.

5 **B. The Officer Defendants' Dismissal Motion**

6 The Officer Defendants seek dismissal of Plaintiff's  
7 Fourth Amendment provocation claim, arguing, *inter alia*,  
8 "[w]here an officer intentionally or recklessly provokes a  
9 violent confrontation, if the provocation is an *independent*  
10 Fourth Amendment violation, he may be liable for his  
11 [subsequent,] otherwise defensive use of deadly force[,]'  
12 Billington v. Smith (9th Cir. 2002) 292 F.3d 1177, 1189[,]” and  
13 “the [Second Amended Complaint (“SAC”)] fails to state facts  
14 sufficient to constitute an *independent* Fourth Amendment  
15 [v]iolation because it fails to [allege] the Decedent was seized  
16 prior to the shooting.” (Officer Defs.’ Mem. P.&A. Supp. Mot.  
17 Dismiss SAC 8:5-9, 13:5-8; ECF No. 48-1 (second use of brackets  
18 in original) (emphasis added).) The Officer Defendants contend:

19 A person is not seized for purposes of  
20 the Fourth Amendment unless, by means of  
21 physical force or show of authority, his  
22 freedom of movement is restrained. [Absent]  
23 physical force, a subject must submit to an  
24 assertion of police authority in order for  
25 there to be a seizure. Without compliance,  
26 there is no seizure. . . .

27 . . . .

28 Here, the pleaded facts are such that no  
independent Fourth Amendment violation  
occurred prior to [the Officer Defendants']  
shooting of [Paraminder] because no seizure  
occurred.

After receiving a 9-1-1 call from the  
Decedent's family . . . , [the Officer

1 Defendants] located [Paraminder and] . . .  
2 attempted to detain and question [him, but  
he] did not comply. . . .

3 At this point in the chronological  
4 sequence of events there are no allegations  
5 that [Paraminder] submitted to the [Officer  
Defendants'] authority . . . .

6 The SAC goes on to allege that  
7 [Paraminder] did not respond to the [Officer  
Defendants'] verbal directions . . . and  
8 continued to walk despite [their] attempts to  
get him to stop by following him and yelling  
at him. . . .

9 [The Officer Defendants] then continued  
10 to pursue [Paraminder] by shouting commands,  
11 closely following, and brandishing firearms  
12 trained on the Decedent. . . . [T]his does  
13 not constitute a seizure because [Paraminder]  
14 continued to walk away from the officers with  
15 no indication that he was submitting to their  
16 authority.

17 Finally, as [Paraminder] was  
18 approximately six house lengths from the  
19 family home, [the Officer Defendants] yelled  
20 at him to stop from approximately twenty feet  
21 away. While simultaneously putting his hands  
22 in the air, stating "don't shoot" and  
23 beginning to turn around, [Paraminder] was  
24 shot and killed by [the Officer Defendants].

25 . . . . [T]his act is pleaded as occurring  
26 contemporaneously with the shooting. In fact,  
27 [Paraminder] was shot before he could  
28 complete the 180° turn to face [the  
Defendant] Officers . . . .

29 . . . .

30 Because no pre-shooting seizure is  
31 pleaded, the . . . [p]rovocation claim should  
32 be dismissed.

33 (Id. at 8:13-13:21 (quotation marks, citations, and alteration  
34 omitted).)

35 Plaintiff rejoins that the "Officer Defendants [are]  
36 renew[ing an earlier] motion to dismiss [Plaintiff's provocation  
37 claim], in violation of the 'law of the case,'" by "ask[ing] this  
38

1 Court . . . to consider their arguments which it previously and  
2 explicitly rejected." (Pl.'s. Opp'n to Officer Defs.' Mot. 3:25-  
3 28, ECF No. 51.) Plaintiff contends "[t]his Court previously  
4 rejected Officer Defendants' motion to dismiss . . . finding that  
5 Plaintiff[] had properly stated a[] . . . provocation claim."  
6 (Id. at 4:23-24.) Plaintiff further counters that even "[i]f the  
7 Court is inclined to consider Officer Defendants' motion to  
8 dismiss Plaintiff['s] [provocation] claim[,] . . . the motion is  
9 . . . without merit." (Id. at 6:17-18.) Plaintiff argues:

10           In this case, [the] SAC alleges that  
11           Officer Defendants' pre-shooting conduct  
12           directed at Paraminder whom they knew was  
13           suffering from mental illness, which included  
14           bullying tactics in the form of confronting,  
15           harassing, stalking, and pointing firearms at  
16           Paraminder as he walked away from the Officer  
          Defendants towards his home, constituted an  
          independent Fourth Amendment violation  
          provoking a response from Paraminder which  
          precipitated the Officer Defendants' use of  
          deadly force.

17 (Id. at 7:21-26 (emphasis omitted).)

18           The Officer Defendants reply, *inter alia*, that the law  
19 of the case doctrine does not apply because "Defendants' initial  
20 motion to dismiss Plaintiff['s] provocation claim did not raise  
21 the issue of whether [Paraminder] was seized prior to the  
22 shooting . . . Defendants raise th[is] issue[] now in light of  
23 the new factual allegations in the [SAC]." (Officer Defs.' Reply  
24 1:20-25, ECF No. 53.) The Officer Defendants argue: "the new  
25 factual allegation[] that the [Decedent] was . . . shot '[b]efore  
26 [he] could complete the 180° turn to face [the Officer  
27 Defendants] . . . g[a]ve rise to new arguments that have never  
28 been considered by the court in this case." (Id. at 2:19-25.)

1           “The law of the case doctrine is a judicial invention  
2 designed to aid in the efficient operation of court affairs.  
3 Under the doctrine, a court is generally precluded from  
4 reconsidering an issue previously decided by the same court, or a  
5 higher court in the identical case.” United States v. Lummi  
6 Nation, 763 F.3d 1180, 1184 (9th Cir. 2014) (internal quotation  
7 marks and citations omitted). “The ‘law of the case [doctrine]  
8 acts as a bar only when the issue in question was actually  
9 considered and decided [previously].’” United Steelworkers of Am.  
10 v. Retirement Income Plan for Hourly-Rated Employees of Asarco,  
11 Inc., 512 F.3d 555, 564 (9th Cir. 2008) (quoting United States v.  
12 Cote, 51 F.3d 178, 181 (9th Cir. 1995)). Here, the Court “ha[s]  
13 not previously decided” whether Paraminder was seized prior to  
14 the shooting since the Officer Defendants did not raise that  
15 argument as a basis for their motion to dismiss the original  
16 Complaint. United States v. Lepp, 446 F. App’x 44, 46 (9th Cir.  
17 2011) (citing Cote, 51 F.3d at 181). Therefore, the Officer  
18 Defendants’ current dismissal motion is not precluded by the law  
19 of the case doctrine, and the Court considers its merits.

20           “[W]here an officer intentionally or recklessly  
21 provokes a violent confrontation, *if the provocation is an*  
22 *independent Fourth Amendment violation*, he may be held liable for  
23 his [subsequent,] otherwise defensive use of deadly force.”  
24 Billington, 292 F.3d at 1189 (emphasis added). “In such a case,  
25 the officer’s *initial* unconstitutional provocation . . . would  
26 proximately cause the *subsequent* application of deadly force.”  
27 Id. at 1191 (emphasis added).

1           In deciding whether Plaintiffs have alleged an  
2 *independent* Fourth Amendment violation as required to plead a  
3 provocation claim, the Court must determine whether Paraminder  
4 was seized prior to the Officer Defendants' use of deadly force.  
5 Cf. United States v. McClendon, 713 F.3d 1211, 1215 (9th Cir.  
6 2013) (emphasis added) (reviewing a district court's denial of a  
7 suppression motion, stating "[i]n deciding whether evidence is  
8 the product of an unlawful seizure, we first determine whether  
9 the defendant was seized at the time the handgun was discarded").

10                   The general rule is that a person has  
11 been 'seized' within the meaning of the  
12 Fourth Amendment only if, in view of all of  
13 the circumstances surrounding the incident, a  
14 reasonable person would have believed that he  
was not free to leave. This determination is  
a necessary, but not a sufficient, condition  
for seizure. In addition, some form of  
touching or submission is also required.

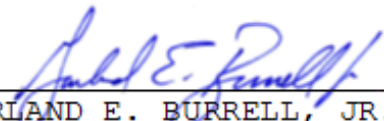
15 Id. (internal quotation marks and citations omitted). "A police  
16 officer may make a seizure by a show of authority and without the  
17 use of physical force, but there is no seizure without actual  
18 submission; otherwise, there is at most an attempted seizure, so  
19 far as the Fourth Amendment is concerned." Brendlin v. Cal., 551  
20 U.S. 249, 254 (2007); see, e.g., United States v. McClendon, 713  
21 F.3d 1211, 1215 (9th Cir. 2013) (holding an individual was not  
22 seized "when [police] officers drew their guns and told him he  
23 was under arrest" "where . . . [he] walk[ed] away from and  
24 refuse[d] to comply with the commands of [the] officers").

25           Here, Plaintiff has not alleged facts, which plausibly  
26 state Paraminder was seized prior to the Officer Defendants' use  
27 of deadly force. Therefore, the Officer Defendants' motion to  
28 dismiss Plaintiff's Fourth Amendment provocation claim (Second

1 Claim) is GRANTED. However, Plaintiff is granted fourteen (14)  
2 days leave from the date on which this order is filed to file a  
3 Third Amended Complaint addressing the referenced deficiencies in  
4 the Fourth Amendment provocation claim.

5 Dated: June 18, 2015

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GARIAND E. BURRELL, JR.  
Senior United States District Judge