



1 the County of Sacramento ("the County"). Presently before the  
2 court is defendants' Motion to Dismiss the First Amended  
3 Complaint. (Docket No. 26.)

4 I. Factual and Procedural Background

5 According to reports, at approximately 5:00 a.m. on  
6 September 23, 2016, Attaway entered a home in Fair Oaks,  
7 Sacramento. (First Amended Compl. (FAC) (Docket No. 22) ¶ 17.)  
8 He had no connection to the house and did not know the homeowner.  
9 (Id.) The homeowner discovered Attaway standing in the front  
10 room holding a carton of milk. (Id.) When confronted by the  
11 homeowner, Attaway asked the homeowner for his car keys and  
12 pleaded for the homeowner not to harm him. (Id.) Attaway  
13 expressed paranoid thoughts that the police were after him and  
14 seemed to be experiencing a psychotic episode. (Id.) After  
15 several minutes, Attaway left the home without further incident.  
16 He did not cause any harm to the home or its residents, or  
17 threaten to do so. (Id.)

18 Attaway then attempted to enter a neighboring house  
19 through a partially open sliding glass door. (Id. ¶ 18.) He was  
20 confronted by two individuals, at which point Attaway backed away  
21 from the door while begging not to be hurt. (Id.) Again,  
22 Attaway did not cause any harm to this house or its residents,  
23 nor did he threaten to do so.

24 Attaway's behavior prompted multiple calls to 911.  
25 (Id. ¶ 19.) None of the callers mentioned that Attaway had any  
26 weapons, and Attaway was in fact unarmed at all times. (Id. ¶  
27 20.) Deputies Cater and Mai were dispatched to respond to these  
28 calls. (Id. ¶ 19) Cater and Mai found Attaway a few blocks away

1 from where the 911 calls had been placed. (Id. ¶ 21.) Attaway  
2 initially ignored the deputies' commands to come toward them.  
3 (Id.) The deputies therefore slowly followed Attaway in their  
4 car until he came to a stop. (Id.) At that point, the deputies  
5 exited their car and assumed "positions of cover." (Id.)

6           The First Amended Complaint alleges that Attaway was  
7 unarmed and empty-handed throughout the entire incident.  
8 However, it also acknowledges that the deputies claim that when  
9 Attaway turned to face them, he raised his hands in response to  
10 their commands and they mistook the wallet he was holding for a  
11 firearm. (Id. ¶ 22.) Both deputies then fired their weapons,  
12 and at least one of the first shots hit Attaway. (Id.) The  
13 deputies contend that after Attaway was shot, he raised his hand  
14 again. (Id.) At that point, the deputies fired another round of  
15 shots at Attaway, and he was hit again. (Id. ¶ 23.) Attaway  
16 then fell to the ground and allegedly tried to raise his empty  
17 hands again. (Id. ¶ 24.) Both deputies again fired at Attaway  
18 as he remained on the ground, and one of those shots fatally  
19 struck Attaway in the head. (Id.)

20           The deputies claim to have found Attaway's wallet  
21 approximately four feet away from his right foot after the  
22 shooting. (Id. ¶ 26.) In total, the deputies fired at least  
23 eighteen rounds at Attaway. (Id. ¶ 27.) Cater fired at least  
24 eleven, while Mai fired seven. (Id.) Twelve seconds passed  
25 between the first and last rounds of shots. (Id. ¶ 25.)

26           On January 1, 2018, plaintiffs filed this action,  
27 alleging violation of decedent's Fourth Amendment right to be  
28 free from unreasonable seizure and excessive force pursuant to 42

1 U.S.C. § 1983; violation of decedent's rights under the  
2 California Constitution; negligence, wrongful death, assault, and  
3 battery pursuant to California State Common Law; failure to  
4 adequately train, supervise, and discipline police officers on  
5 the proper use of force pursuant to 42 U.S.C. § 1983; and  
6 violation of plaintiffs' Fourteenth Amendment right of  
7 substantive due process pursuant to 42 U.S.C. § 1983.

8 On February 20, 2018, defendants filed a Motion to  
9 Dismiss the entire Complaint. (Docket No. 13.) On April 4,  
10 2018, the court issued an order in which it denied defendants'  
11 Motion to Dismiss the first, second, third, fourth, and seventh  
12 claims, but granted the Motion to Dismiss the fifth and sixth  
13 claims. (Docket No. 17.) Plaintiffs were given twenty days to  
14 file a First Amended Complaint ("FAC").

15 Plaintiffs complied and filed a First Amended Complaint  
16 on April 24, 2018. (FAC (Docket No. 22).) The First Amended  
17 Complaint continues to allege the first, second, third, fourth,  
18 fifth, and seventh causes of action,<sup>1</sup> but no longer alleges a  
19 failure to adequately train, supervise, and discipline police  
20 officers on the proper use of force. (Id.) Defendants now move  
21 to dismiss only the third and fifth causes of action pursuant to  
22 Federal Rule of Civil Procedure 12(b)(6). (Docket No. 26.)

## 23 II. Legal Standard

24 On a Rule 12(b)(6) motion, the inquiry before the court  
25 is whether, accepting the allegations in the complaint as true  
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27 <sup>1</sup> Because plaintiffs have removed a cause of action, the  
28 seventh cause of action is now renumbered in the First Amended  
Complaint as the sixth cause of action.

1 and drawing all reasonable inferences in the plaintiff's favor,  
2 the plaintiff has stated a claim to relief that is plausible on  
3 its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The  
4 plausibility standard is not akin to a 'probability requirement,'  
5 but it asks for more than a sheer possibility that a defendant  
6 has acted unlawfully." Id. "A claim has facial plausibility  
7 when the plaintiff pleads factual content that allows the court  
8 to draw the reasonable inference that the defendant is liable for  
9 the misconduct alleged." Id. Under this standard, "a well-  
10 pleaded complaint may proceed even if it strikes a savvy judge  
11 that actual proof of those facts is improbable." Bell Atl. Corp.  
12 v. Twombly, 550 U.S. 544, 556 (2007).

### 13 III. Discussion

#### 14 A. Third Claim: Negligence/Wrongful Death

15 Plaintiffs allege negligence and wrongful death against  
16 Officers Cater and Mai and against the County. Defendants only  
17 move to dismiss the cause of action against the County.

##### 18 1. Claim Against the County

19 In their initial Complaint, plaintiffs alleged  
20 negligence against the County based on both a theory of direct  
21 liability and a violation of California Government Code § 815.2.  
22 In its April 4, 2018 Order, the court dismissed this claim to the  
23 extent it was premised on direct liability. (Docket No. 17.)  
24 According to defendants, as written the First Amended Complaint  
25 appears to still state a direct liability claim for negligence.  
26 However, although the wording in the First Amended Complaint is  
27 unchanged, plaintiffs represent that they are no longer  
28 attempting to hold the County liable based on a theory of direct

1 liability but instead rely solely upon California Government Code  
2 § 815.2. (Pls.' Opp'n (Docket No. 27) at 2.) To ensure all  
3 parties are in agreement, the court reiterates that the  
4 negligence claim is dismissed to the extent it is based upon  
5 direct liability. To the extent plaintiffs' negligence claim  
6 against the County is based on California Government Code §  
7 815.2., it is not dismissed.

8 B. Fifth Claim: Municipal Liability (Ratification)  
9 Against Jones and the County

10 Plaintiffs allege that Sheriff Jones and the County are  
11 liable for the actions of Cater and Mai based on a theory of  
12 ratification. A municipality may be held liable for a  
13 constitutional violation under the theory of ratification if an  
14 authorized policymaker approves a subordinate's decision and the  
15 basis for it. Lytle v. Carl, 382 F.3d 978, 987 (9th Cir. 2004).  
16 However, "mere failure to overrule a subordinate's actions,  
17 without more, is insufficient to support a § 1983 claim." Id. at  
18 393. For there to be ratification, there must be "something  
19 more" than a single failure to discipline or the fact that a  
20 policymaker concluded that the officer's actions were in keeping  
21 with the applicable policies and procedures: the plaintiff must  
22 show that the decision was the product of a "conscious,  
23 affirmative choice" to ratify the conduct in question. Gillette  
24 v. Delmore, 979 F.2d 1342, 1347 (9th Cir. 1992).

25 As with the original Complaint, plaintiffs do not  
26 allege that Sheriff Jones was present at the time Attaway was  
27 shot, but instead merely allege that Jones and the County  
28 "approved, tolerated, and/or ratified the deputies' conduct in

1 shooting Attaway by determining the shooting was reasonable,  
2 justified and within policy.” (FAC ¶ 65.) Although plaintiffs  
3 have added to their First Amended Complaint allegations that  
4 Sheriff Jones was given a full briefing of the shooting and thus  
5 had knowledge of its surrounding circumstances (id. ¶ 64), the  
6 allegations remain insufficient to state a § 1983 claim against  
7 the County or Jones based on ratification. Mere failure to  
8 overrule a subordinate’s action, even after having been fully  
9 briefed on the event, does not rise to the level of ratification.  
10 Ratification “requires that an official policymaker make a  
11 deliberate choice from among various alternatives to follow a  
12 particular course of action.” Gillette, 979 F.2d at 1348; see  
13 also Peterson v. City of Fort Worth Texas, 588 F.3d 838, 848 (5th  
14 Cir. 2009) (no ratification of use of excessive force where Chief  
15 of Police determines, after investigation, that the officers  
16 complied with department policies).

17 Plaintiffs have also added allegations that during  
18 Sheriff Jones’s seven-plus years as Sheriff, he has determined  
19 that every officer-involved shooting was consistent with  
20 department policy. (FAC ¶ 33.) Obviously, no two incidents can  
21 be factually identical, and Sheriff Jones’ responses to those  
22 prior incidents are irrelevant to whether, in this particular  
23 incident, his actions rose to the level of ratification.  
24 Plaintiffs’ Amended Complaint thus still fails to meet the  
25 requirements for pleading a claim of liability under the  
26 ratification theory. Accordingly, this claim must be dismissed.

27 IT IS THEREFORE ORDERED that defendants’ Motion to  
28 Dismiss (Docket No. 26) be, and the same hereby is, GRANTED as

1 follows:

2 1. With regard to plaintiffs' third cause of action,  
3 the court GRANTS the Motion to Dismiss, but solely to  
4 the extent the claim is premised on direct liability.

5 2. With regard to plaintiffs' fifth cause of action,  
6 the court GRANTS defendants' Motion to Dismiss.

7 Plaintiffs' first, second, fourth, and sixth claims  
8 remain, as does the third claim, to the extent that it is not  
9 premised on direct liability.

10 Dated: July 11, 2018



11 WILLIAM B. SHUBB

12 UNITED STATES DISTRICT JUDGE

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