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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAANDRE PETRE,  
Plaintiff,  
v.  
CITY OF SAN LEANDRO, et al.,  
Defendants.Case No. [15-cv-03344-JSC](#)**ORDER GRANTING IN PART MOTION  
TO DISMISS**

Re: Dkt. No. 18

Plaintiff Andre Petre (“Petre”), the cousin, successor-in-interest, and heir to the estate of decedent Stefan Anton (“Decedent”), filed this civil action against Defendants the City of San Leandro (the “City”), San Leandro Police Chief Sandra Spagnoli (“Chief Spagnoli”), and officers Timothy Perry (“Perry”) and Warren DeGuzman (“DeGuzman” and, together, the “Officer Defendants”), alleging that Decedent was subject to excessive force during his arrest following a traffic stop. In the First Amended Complaint (“FAC”), Plaintiff brings a Section 1983 claim against the officers and Section 1983 municipal liability claim against the City and Chief Spagnoli. (Dkt. No. 17.)<sup>1</sup> Now pending before the Court is Defendants’ motion to dismiss for failure to state a claim. Having considered the parties’ submissions, the Court concludes that oral argument is unnecessary, see N.D. Cal. L.R. 7-1(b), and GRANTS IN PART Defendants’ motion as set forth below.

**COMPLAINT ALLEGATIONS**

San Leandro police officers arrested Decedent following a traffic stop on July 21, 2013. (Dkt. No. 17 ¶ 6.) According to the incident report, Decedent was pulled over for having expired

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<sup>1</sup> Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 registration tags. (Id.) The Officer Defendants then removed Decedent from the vehicle and, after  
2 attempting to shoot him with a Taser, wrestled him to the ground into a face-down prone position  
3 and restrained him. (Id.) Eyewitnesses stated that the Officer Defendants hit Decedent and hit his  
4 head on the ground. (Id.) The incident report further states that Decedent stopped breathing while  
5 the Officer Defendants were restraining him. (Id.) Following his arrest, paramedics brought  
6 Decedent, unconscious, to the Intensive Care Unit at St. Rose Hospital in Hayward, California.  
7 (Id.) He never regained consciousness. (Id.) Decedent died on August 19, 2013. (Id.)

8 The incident report itself was withheld as “on hold” or “under investigation” until Plaintiff  
9 initiated this civil action. (Id.) The report references supplemental reports with further  
10 information, but those reports still have not been provided to Plaintiff. (Id.) The coroner’s  
11 investigation report was likely withheld at the request of the San Leandro Police Department. (Id.)  
12 At some point it was released, and it states that a “control hold” was placed on Decedent, whose  
13 causes of death include “cerebral insufficiency,” “anoxic encephalopathy,” and “cardiac arrest  
14 occurring during physical altercation and physical restraint.” (Id.) A toxicology scan of Decedent  
15 was negative for the presence of drugs or alcohol. (Id.)

16 Decedent died due to the excessive and unlawful force used by the Officer Defendants  
17 and the failure of the City to reasonably train its officers in the appropriate use of force, including  
18 limitations on use of control holds, carotid restraint, and other methods of restraint that may result  
19 in “positional asphyxia.” (Id.) Plaintiff further alleges that the City’s withholding of the incident  
20 reports and coroner’s investigation report constituted ratification and implicit authorization of the  
21 wrongful and excessive force used.

22 Plaintiff brings two causes of action in the FAC. The first is against the Officer  
23 Defendants. Plaintiff seeks damages stemming from the Officer Defendants’ deprivation of  
24 Decedent’s right not to be deprived of liberty and property without due process of law, the right to  
25 be free from the use of excessive force and unlawful seizure, and the right to be free from  
26 preconviction punishment. (Id. ¶ 11.) The second cause of action is against the City and Chief  
27 Spagnoli. Plaintiff alleges that Chief Spagnoli and other high-ranking police supervisors “knew of  
28 the repeated misconduct of defendants Perry and DeGuzman” and were or should have been aware

1 of prior instances of people dying during the course of arrests involving improper use of control  
2 holds, carotid restraints, and other restraining tactics that resulted in positional asphyxiation. (Id.  
3 ¶ 14.) Plaintiff alleges that Chief Spagnoli and the City had a custom and policy of this type of  
4 police misconduct and also “ratified, condoned such conduct and failed to ascertain compliance by  
5 its officers with standards for arrest and detention” which constitutes deliberate indifference to  
6 citizens’ constitutional right not to be subjected to unlawful use of force and unreasonable  
7 searches. (Id. ¶ 15.) Plaintiff seeks \$5,000,000 in general damages, as well as punitive damages  
8 against the individual officers. (Id. at 7.)

### 9 **LEGAL STANDARD**

10 To survive a Rule 12(b)(6) challenge a complaint must allege “enough facts to state a  
11 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
12 A facial plausibility standard is not a “probability requirement” but mandates “more than a sheer  
13 possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
14 (2009) (internal quotation marks and citations omitted). For purposes of ruling on  
15 a Rule 12(b)(6) motion, the court “accept[s] factual allegations in the complaint as true and  
16 construe[s] the pleadings in the light most favorable to the non-moving party.” *Manzarek v. St.*  
17 *Paul Fire & Mar. Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). “[D]ismissal may be based on  
18 either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a  
19 cognizable legal theory.” *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir.  
20 2008) (internal quotation marks and citations omitted); see also *Neitzke v. Williams*, 490 U.S. 319,  
21 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue  
22 of law.”).

23 Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), under  
24 which a party is only required to make “a short and plain statement of the claim showing that the  
25 pleader is entitled to relief,” a “pleading that offers ‘labels and conclusions’ or ‘a formulaic  
26 recitation of the elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678 (quoting  
27 *Twombly*, 550 U.S. at 555). “[C]onclusory allegations of law and unwarranted inferences are  
28 insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.

1 2004); see also *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (“[A]llegations in a complaint  
2 or counterclaim may not simply recite the elements of a cause of action, but must contain  
3 sufficient allegations of underlying facts to give fair notice and to enable the opposing party to  
4 defend itself effectively”). The court must be able to “draw the reasonable inference that the  
5 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663. “Determining whether a  
6 complaint states a plausible claim for relief . . . [is] a context-specific task that requires the  
7 reviewing court to draw on its judicial experience and common sense.” *Id.* at 663-64.

8 If a Rule 12(b)(6) motion is granted, the “court should grant leave to amend even if no  
9 request to amend the pleading was made, unless it determines that the pleading could not possibly  
10 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en*  
11 *banc*) (internal quotation marks and citations omitted).

12 **DISCUSSION**

13 **A. First Cause of Action**

14 1. Whether the Claim is Time-Barred

15 Under California law, which governs the applicable statute of limitations, a two-year  
16 statute of limitations applies to personal injury claims, including Section 1983 actions. *Cal. Code*  
17 *Civ. Proc.* § 335.1; *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1041 (9th Cir.  
18 2011) (“The statute of limitations applicable to an action pursuant to 42 U.S.C. § 1983 is the  
19 personal injury statute of limitations of the state in which the cause of action arose.”); see, e.g.,  
20 *Thompson v. City of Shasta Lake*, 314 F. Supp. 2d 1017, 1023 (E.D. Cal. 2004). Federal law  
21 determines when that statutory clock begins to run for a Section 1983 claim in federal court.  
22 *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). Under federal law the so-called  
23 “discovery rule” provides that “a claim accrues when the plaintiff knows or has reason to know of  
24 the injury which is the basis of the action.” *Id.* at 991-92.

25 The injuries related to Decedent’s arrest occurred on July 21, 2013, and he died on August  
26 19, 2013. (Dkt. No. 17 ¶ 9.) The statutory period expired two years after Decedent’s death, on  
27 August 19, 2015. See *Cal. Code Civ. Proc.* § 335.1. Plaintiff filed the instant FAC approximately  
28 two months later, on October 24, 2015. (Dkt. No. 17.) However, Plaintiff filed his initial

1 complaint on July 20, 2015, which would have been timely.

2 The question is thus whether Plaintiff’s FAC claim against the Officer Defendants relates  
3 back to the initial complaint. When a federal cause of action is brought under 42 U.S.C. § 1983,  
4 “the relation back provisions of state law, rather than [Federal Rule of Civil Procedure] 15(c)  
5 govern[.]” *Merritt v. Cnty. of Los Angeles*, 875 F.2d 765, 768 (9th Cir. 1989); see, e.g., *Garland*,  
6 2013 WL 4198278, at \*2. An amended complaint relates back to the original complaint under  
7 California law “if the amended complaint . . . (1) rest[s] on the same general set of facts, (2)  
8 involve[s] the same injury, and (3) refer[s] to the same instrumentality, as the original one.”  
9 *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 408-09 (1999) (emphasis in original); *M.G. ex rel.*  
10 *Goodwin v. Cnty. of Contra Costa*, No. C 11-0453 WHA, 2013 WL 706801, at \*4 (N.D. Cal. Feb.  
11 26, 2013) (same).

12 Put another way, an amended complaint may “relate[ ] back to a timely filed original  
13 complaint, and thus avoid[ ] the bar of the statute of limitations, only if it rests on the same general  
14 set of facts and refers to the same ‘offending instrumentalities,’ accident and injuries as the  
15 original complaint.” *Davaloo v. State Farm Ins. Co.*, 135 Cal. App. 4th 409, 415 (2005). But  
16 even if an earlier complaint rests on the same set of facts, the amended complaint may not relate  
17 back unless a “reasonable defendant [would] have understood the [original] complaint to allege  
18 that it was in some way responsible for plaintiff’s injury[.]” *Bell v. Tri-City Hosp. Dist.*, 196 Cal.  
19 App. 3d 438, 449 (1987), disapproved of on other grounds by *State v. Super. Ct. (Bodde)*, 32 Cal.  
20 4th 1234 (2004). Thus, “[t]he relation-back doctrine is inapplicable . . . where [a plaintiff]  
21 attempts to relate back an amended [complaint] to a complaint which failed to name [defendant] or  
22 any Doe defendants.” *Kralow Co. v. Sully-Miller Contracting Co.*, 168 Cal. App. 3d 1029, 1035-  
23 36 (1985); see also *Anderson v. Allstate Ins. Co.*, 630 F.2d 67, 683 (9th Cir. 1980) (“Under  
24 California law, if a defendant is added to an amended complaint as a new defendant, and not as a  
25 Doe defendant, the amendment does not relate back to the time of the original complaint.”).

26 Plaintiff’s FAC naming Perry and DeGuzman as defendants relates back to the timely  
27 filing of the initial complaint. First, the FAC’s underlying facts arise out of the same set of facts  
28 alleged in the initial complaint: injuries decedent sustained during his July 21, 2013 arrest that

1 resulted in his August 19, 2013 death. The initial complaint brought a Section 1983 claim against  
2 Doe Defendants because “[t]he officers responsible for the death of [Decedent] are unidentified  
3 due to the refusal of the City of San Leandro Police Department to release the report of the  
4 incident” and noted that Plaintiff would “seek leave to amend this complaint to allege the names  
5 and capacities of the law enforcement personnel[.]” (Dkt. No. 1 ¶¶ 3-4.) The incident report and  
6 coroner’s investigation report having been released, the FAC includes further details of the same  
7 incident. Thus, the FAC and initial complaint involve the same “accident and injuries” as the  
8 original complaint which suffices for relation back. *Davaloo*, 135 Cal. App. 4th at 415. While the  
9 FAC explicitly brings claims against the two Officer Defendants, the initial complaint’s  
10 allegations referred to the officers involved in Decedent’s July 2013 arrest, listed Doe defendants  
11 in the case caption, and expressly noted that their true names and identities would be added. (See  
12 Dkt. No. 1 ¶¶ 3-4.) The FAC claims against the Officer Defendants therefore relate back to the  
13 initial complaint against the Does. Cf. *Krakow*, 168 Cal. App. 3d at 1035-36.

14 Defendants’ arguments to the contrary are unpersuasive. Defendants contend that the FAC  
15 fails to allege that Plaintiff was unaware of the Officer Defendants’ identities. But that is precisely  
16 what the initial complaint alleged. (See Dkt. No. 1 ¶¶ 3-4.) Defendants also note that Plaintiff’s  
17 counsel attempted to file a California government claim related to the same incident involving  
18 Decedent’s arrest, and if Plaintiff had time to utilize the government claim filing procedures, he  
19 must have had enough time to determine the true identities of the Officer Defendants before the  
20 limitations period expired.<sup>2</sup> The government tort claim did not name individual officers, indicated

21 \_\_\_\_\_  
22 <sup>2</sup> Pursuant to Federal Rule of Evidence 201, the Court “may judicially notice a fact that is not  
23 subject to reasonable dispute because it: (i) is generally known within the trial court’s territorial  
24 jurisdiction; or (ii) can be accurately and readily determined from sources whose accuracy cannot  
25 reasonably be questioned.” Judicial notice is appropriate for “matters of public record.” *Coto*  
26 *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). Here, Defendants request that the  
27 Court take judicial notice of three documents related to an administrative government tort claim  
28 that Plaintiff’s counsel filed, including the claim itself, correspondence from the City claims  
administrator to Plaintiff’s counsel, and the City’s notice rejecting the claim. (Dkt. No. 19.) It is  
well established that the Court may take judicial notice of records from other proceedings not to  
credit the truth of the allegations or facts set forth therein, but rather “for purposes of noticing the  
existence of the [prior] lawsuit, the claims made in the lawsuit, and the fact that various documents  
were filed therein.” *McMunigal v. Bloch*, No. C 1002765 SI, 2010 WL 5399219, at \*2 (N.D. Cal.  
Dec. 23, 2010) (citation omitted). To that end, district courts in California have taken judicial  
notice of similar tort claims and the city’s rejection of such claims. See, e.g., *Shaw v. City of*

1 that the San Leandro Police Department had given no explanation for the incident, and claimed—  
 2 just as the initial complaint in this action—that the department had been withholding the incident  
 3 report. (Dkt. No. 19-1.) The City’s letter rejecting the claim did not reveal the officers’ identities  
 4 either. (Dkt. Nos. 19-1, 19-2.) To the contrary, as of the filing of the initial complaint, the City  
 5 was still withholding the incident report, which caused Plaintiff to file suit without knowing the  
 6 officers’ names. Thus, the government tort claim does not suggest, let alone establish, that  
 7 Plaintiff’s claims are now time-barred. Because the FAC claims relate back to the initial  
 8 complaint’s allegations, Plaintiff’s claims against the Officer Defendants are not barred by the  
 9 statute of limitations.

10 2. Sufficiency of the Allegations

11 To state a claim under Section 1983, a complaint “must both (1) allege the deprivation of a  
 12 right secured by the federal Constitution or a statutory law, and (2) allege that the deprivation was  
 13 committed by a person acting under color of state law.” *Anderson v. Warner*, 451 F.3d 1063,  
 14 1067 (9th Cir. 2006). Defendants appear to concede that the FAC adequately alleges the second  
 15 element. However, they take issue with whether—or more appropriately, how—the FAC  
 16 adequately alleges a constitutional deprivation. As currently written, the FAC fails to comply with  
 17 Rule 8(a).

18 It appears that Plaintiff invokes two different underlying constitutional violations—the  
 19 Fourth and Fourteenth Amendments—but the FAC does not clarify the theory behind each alleged  
 20 violation. Moreover, it is unclear whether Plaintiff is asserting the claim on behalf of Decedent  
 21 and/or Decedent’s estate, on his own behalf, or both: on the one hand, the FAC alleges that the  
 22 Officer Defendants interfered with *Decedent’s* constitutional rights (Dkt. No. 1 ¶ 11), but on the  
 23 other, the claim alleges that Plaintiff—not decedent—suffered damages as a result (*id.* ¶ 12), and  
 24

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25 Porterville, No. 1:15-cv-00671-SKO, 2015 WL 3795026, at \*4 (E.D. Cal. June 17, 2015); *Clarke*  
 26 *v. Upton*, 703 F. Supp. 2d 1037, 1042 (E.D. Cal. 2010). Plaintiff does not contest the authenticity  
 27 of plaintiff’s complaint in this court.” (Dkt. No. 23 at 2.) And while the government tort claim  
 28 was filed by Fiodor Filipov, not Plaintiff, in the initial complaint Plaintiff appeared by and through  
 Filipov and the tort action was filed by the same Plaintiff’s counsel. (Dkt. No. 1 ¶ 2.) The Court  
 will therefore take judicial notice of Exhibits A through C, as Defendants request.

1 that Plaintiff suffered the consequential loss of his familial relationship with Decedent (id. ¶ 7).  
2 Plaintiff's opposition does not clarify either issue. As written, the FAC therefore fails to comply  
3 with Rule 8's mandate that a complaint include a short and plain statement of the claims.

4 To the extent Plaintiff is alleging a Section 1983 claim premised on violation of  
5 Decedent's Fourth Amendment right to be free from excessive force, Plaintiff cannot bring such a  
6 claim on his own behalf. See *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th  
7 Cir. 1998) ("The general rule is that only the person whose Fourth Amendment rights were  
8 violated can sue to vindicate those rights.") (citation omitted); *Brown v. City & Cnty. of San*  
9 *Francisco*, No. C 11-02162 LB, 2011 WL 5025138, at \*2 (N.D. Cal. Oct. 20, 2011) (describing  
10 survivor's rights to bring Section 1983 claims following decedent's death from excessive force by  
11 police). Indeed, Plaintiff fails to respond to Defendants' argument that no such claim is available  
12 and thus concedes that such is the case. See *Ardente v. Shanley*, No. 07-4479 MHP, 2010 WL  
13 546485, at \*6 (N.D. Cal. Feb. 9, 2010) ("Plaintiff fails to respond to this argument and therefore  
14 concedes it through silence."). The Court therefore grants Defendants' motion to dismiss any  
15 direct claim by Plaintiff for violation of Decedent's Fourth Amendment rights.

16 A plaintiff may, however, assert a Fourth Amendment claim on a decedent's behalf to the  
17 extent that California law authorizes a survival action. *Moreland*, 159 F.3d at 369 ("[T]he  
18 survivors of an individual killed as a result of an officer's excessive use of force may assert a  
19 Fourth Amendment claim on that individual's behalf if the relevant state's law authorizes a  
20 survival action.") (citations omitted). A plaintiff must make clear in the complaint that he brings a  
21 claim in a representative capacity. See *Moreland*, 159 F.3d at 370. California law provides for a  
22 survival action: "[u]nder California law, if an injury giving rise to liability occurs before a  
23 decedent's death, then the claim survives to the decedent's estate." *Tatum v. City & Cnty. of San*  
24 *Francisco*, 441 F.3d 1090, 1094 n.2 (9th Cir. 2006); see also Cal. Code Civ. Proc. § 337.30. For  
25 such a claim, however, the "damages recoverable are limited to the loss or damage that the  
26 decedent sustained or incurred before death, including any penalties or punitive damages that the  
27 decedent would have been entitled to recover had the decedent lived, and do not include damages  
28 for pain, suffering, or disfigurement." Cal. Code Civ. Proc. § 377.34. Defendants appear to



1 concede that the FAC states a claim for violation of Decedent’s Fourth Amendment rights. Still,  
2 Plaintiff has not made clear that he brings such claim in a representative capacity, which he must  
3 do to state a claim for relief. See *Moreland*, 159 F.3d at 370.

4 A plaintiff may also bring a Section 1983 claim on his own behalf for violation of his  
5 Fourteenth Amendment right to familial association “based on the related deprivation of their  
6 liberty interest arising out of their relationship with [a decedent].” *Moreland*, 159 F.3d at 371;  
7 *Brown*, 2011 WL 5025138, at \*2 (citation omitted). “This substantive due process claim may be  
8 asserted by both the parents and children of a person killed by law enforcement officers[.]”  
9 *Moreland*, 159 F.3d at 371, as well as others who have alleged a sufficiently intimate association  
10 to support Fourteenth Amendment protection, *Estate of Angel Antonio Mendoza-Saravia ex rel.*  
11 *successors of interest v. Fresno Cnty. Sheriff’s Dep’t*, No. 1:10-cv-0618 OWW SMS, 2011 WL  
12 720061, at \*3 (E.D. Cal. Feb. 22, 2011) (contending that domestic partner of decedent had alleged  
13 sufficient facts about their relationship to support a Fourteenth Amendment liberty interest claim  
14 for unlawful state inference with a protected family relationship). Any such claim must be alleged  
15 separately from a related Fourth Amendment claim. See *Burns v. City of Concord*, No. C 14-  
16 00535 LB, 2014 WL 3613250, at \*3 (N.D. Cal. July 22, 2014) (finding the excessive force  
17 complaint failed to comply with Rule 8(a) and instructing the plaintiff to amend the complaint to  
18 bring one claim on the estate’s behalf for violation of the Fourth Amendment and a separate claim  
19 for violation of survivors’ Fourteenth Amendment rights to familial association).

20 Plaintiff argues generally that the first cause of action is sufficiently pleaded based on his  
21 allegations that Defendants removed Decedent from his vehicle after a traffic stop, attempted to  
22 shoot him with a Taser, restrain him, and hit him, and that his death was due to excessive and  
23 unlawful force. Plaintiff urges that these factual allegations are enough to put Defendants on  
24 notice of the claim and move on to discovery to determine if the allegations are true. But as  
25 currently written, the FAC leaves Defendants uncertain as to what underlying constitutional  
26 violations are alleged by Plaintiff and in what capacity. The first cause of action is therefore  
27 dismissed with leave to amend. Plaintiff must separately allege Fourth Amendment claims being  
28 brought on behalf of the estate and any Fourteenth Amendment claims brought on his own behalf.

1     **B.     Second Cause of Action**

2             The second cause of action is against the City and Chief Spagnoli for municipal liability  
3     stemming from Decedent’s injuries during arrest and subsequent death.

4             1.     Improper Defendant

5             Plaintiff brings the municipal liability claim against the City and Chief Spagnoli. Where  
6     both the public entity and a municipal officer are named in a lawsuit, a court may dismiss the  
7     individual named in her official capacity as a redundant defendant. See *Ctr. for Bio-Ethical*  
8     *Reform, Inc. v. Los Angeles Cnty. Sheriff Dep’t*, 533 F.3d 780, 799 (9th Cir. 1986) (“An official  
9     capacity suit against a municipal officer is equivalent to a suit against the entity.”) (citing  
10    *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)). The FAC does not allege that Spagnoli is  
11    sued in her individual capacity, and all allegations point to the contrary: the FAC alleges that she,  
12    as Chief of Police, ratified the Officer Defendants’ conduct and acted as a policymaking official.  
13    (Dkt. No. 1 ¶¶ 3, 9.) Defendants argued that the claims against Chief Spagnoli are alleged against  
14    her in her official capacity and should therefore be dismissed as redundant. Plaintiff did not  
15    oppose that argument. The Court will therefore dismiss the second cause of action alleged against  
16    Chief Spagnoli. If Plaintiff wishes to amend to bring suit against Chief Spagnoli in her individual  
17    capacity, the amended complaint must specify that she is sued in her individual capacity and must  
18    include sufficient facts to render her individual liability plausible.

19            2.     Sufficiency of Allegations

20            To state a claim for municipal liability, a plaintiff must show (1) he possessed a  
21    constitutional right of which he was deprived; (2) the entity had a policy; (3) the policy amounts to  
22    deliberate indifference to the plaintiff’s constitutional rights; and (4) the policy is the moving force  
23    behind the constitutional violation. *Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill*, 130 F.3d 432,  
24    438 (9th Cir. 1997). A plaintiff must plead sufficient facts regarding the specific nature of the  
25    alleged policy, custom, or practice to allow the defendant to effectively defend itself, and these  
26    facts must plausibly suggest that the plaintiff is entitled to relief. See *AE v. Cnty. of Tulare*, 666  
27    F.3d 631, 636-37 (9th Cir. 2012). It is not sufficient to merely allege that a policy or custom  
28    existed or that individual officers’ wrongdoing conformed to that policy or custom. *Id.* at 636-38.

1           With respect to the first element—violation of a constitutional right—the municipal  
2 liability claim suffers from the same defect as the claims against the Officer Defendants. Plaintiff  
3 appears to premise the municipal liability claim on the Fourth and Fourteenth Amendment rights  
4 to be free from excessive force. This certainly sounds in the Fourth Amendment. Defendants  
5 argue that there is no applicable Fourteenth Amendment right to be free from excessive force and  
6 unlawful seizure, and Plaintiff does not appear to dispute that the municipal liability claim for  
7 excessive force does not state a claim under the Fourteenth Amendment. Thus, Plaintiff’s  
8 municipal liability claim may only proceed to the extent that it alleges a violation of the Fourth  
9 Amendment on behalf of the estate.

10           A complaint must also include sufficient facts to plausibly establish that the entity had a  
11 policy that was the moving force behind that Fourth Amendment violation. See *Plumeau*, 130  
12 F.3d at 438. A plaintiff may allege municipal liability in any of three ways: (1) by alleging that  
13 there was a formal policy or longstanding practice or custom that constitutes the standard  
14 operating procedure of the local government entity; (2) that the individual who committed the  
15 constitutional tort was an official with final policy-making authority and thus the challenged  
16 action itself was an act of government policy; or (3) that an official with final policy-making  
17 authority ratified a subordinate’s unconstitutional conduct and the basis for it. *Menotti v. City of*  
18 *Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005) (citing *Ulrich v. City & Cnty. of San Francisco*, 308  
19 F.3d 968, 984 (9th Cir. 2002)).

20           Here, Plaintiff contends that he has adequately alleged all three bases for municipal  
21 liability. First, Plaintiff argues that he has adequately alleged municipal liability because the FAC  
22 alleges that Chief Spagnoli committed the constitutional tort in her role as official policymaker.  
23 But the FAC does not allege that Chief Spagnoli is the individual who committed the  
24 constitutional tort at issue here—that is, that she was the person who used unlawful, excessive  
25 force in connection with arresting Decedent. Thus, this path to liability is a non-starter.

26           Second, Plaintiff contends that the FAC adequately pleads municipal liability through  
27 ratification. Municipal liability based on a policymaker’s ratification of unconstitutional conduct  
28 may be premised on a single incident of wrongdoing. See *Trevino*, 99 F.3d at 918. However, to

1 plausibly plead ratification, the plaintiff must allege facts that show that “the authorized  
2 policymakers approve a subordinate’s decision and the basis for it.” *Christie v. Iopa*, 176 F.3d  
3 1231, 1239 (9th Cir. 1999) (internal quotation marks and citation omitted). The allegations must  
4 indicate that the policymaker obtained knowledge of the constitutional violations “before [they]  
5 ceased” and nonetheless approved the decision. *Id.* Put another way, ratification requires “a  
6 conscious, affirmative choice” on the part of the authorized policymaker. *Clouthier v. Cnty. of*  
7 *Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010) (quotation marks and citation omitted). Thus,  
8 “[m]ere refusal to overrule a subordinate’s completed act does not constitute approval.” *Id.* at  
9 1239; see also *Kanae v. Hodson*, 294 F. Supp. 2d 1179, 1189 (D. Haw. 2003) (“The Ninth Circuit  
10 appears to require something more than a failure to reprimand to establish . . . ratification[.]”).  
11 Plaintiff states that Defendants knew that the Officer Defendants had engaged in misconduct  
12 before and that Defendants “ratified” and “condoned” the Officer Defendants’ conduct with  
13 respect to Decedent. (Dkt. No 17 ¶¶ 14-15.) Neither allegation is sufficient to plausibly suggest  
14 ratification. With respect to knowledge of earlier misconduct, there are no facts describing the  
15 type of misconduct such that the Court reasonably could infer that Chief Spagnoli and the City  
16 ratified the improper use of chokeholds. Nor are the conclusory allegations of ratification enough,  
17 as Plaintiff provides no facts to support this conclusion. See, e.g., *Linder v. City of Emeryville*,  
18 No. C-13-01934 EDL, 2013 WL 5609319, at \*3 (N.D. Cal. Oct. 11, 2013) (concluding that  
19 complaint failed to plausibly allege ratification where it alleged that the incident was not  
20 thoroughly investigated, those responsible were not punished, and procedures and policies were  
21 not modified after the incident because there were “no facts to support these conclusions” and no  
22 factual allegations that the use of force “was ratified by any final policymaker”). Lastly,  
23 Plaintiff’s allegation of the City’s withholding of the police is insufficient, as it does not on its  
24 own without more plausibly suggest ratification. See *Clouthier*, 591 F.3d at 1250. While Plaintiff  
25 insists that the Court must accept as true the allegations of ratification on a motion to dismiss, it is  
26 well established that the Court need not accept as true legal conclusions couched as factual  
27 allegations. See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (noting that  
28 the court need not accept legal conclusions, unwarranted deductions of fact, or unreasonably

1 inferences as true). Accordingly, the FAC fails to plausibly allege ratification.

2 Lastly, a plaintiff may establish municipal liability by showing a policy, custom or  
3 practice. An isolated incident of unconstitutional action by a non-policymaking employee is  
4 insufficient to allege a municipal policy or custom. See *McDade v. West*, 223 F.3d 1135, 1141  
5 (9th Cir. 2000); *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (“Liability for improper  
6 custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices  
7 of sufficient duration, frequency and consistency that the conduct has become a traditional method  
8 of carrying out policy[.]”). Instead, a plaintiff must allege facts sufficient to plausibly establish the  
9 municipality’s deliberate indifference—that is, that it was “on actual or constructive notice that its  
10 omissions would likely result in a constitutional violation.” *Gibson v. Cnty. of Washoe, Nev.*, 290  
11 F.3d 1175, (9th Cir. 2002). In the FAC, Plaintiff alleges that Chief Spagnoli

12 and other high ranking police supervisors knew of the repeated  
13 misconduct of defendants Perry and DeGuzman [and] were aware  
14 or should have been aware of prior instances of people dying  
15 during the course of arrest by the improper use of control holds,  
16 carotid restraint and restraining tactics that resulted in the  
17 positional asphyxiation of individuals taken into custody.

18 (Dkt. No. 17 ¶ 14.) The allegation that Defendants knew of the Officer Defendants’ “misconduct”  
19 is vague and does not give rise to a plausible inference of deliberate indifference. See *Jaa v. City*  
20 *of Dublin*, No. 14-cv-03260-WHO, 2014 WL 6986234, at \*3 (N.D. Cal. Dec. 10, 2014) (finding  
21 insufficient an allegation that the City was deliberately indifference to “repeated acts of police  
22 misconduct”). What was their misconduct? For example, if Perry and DeGuzman were known to  
23 have altered police reports, that would not necessarily put the City on notice of the probability that  
24 they would violate an arrestee’s Fourth Amendment right to be free from excessive force. While  
25 the Court must draw inferences in Plaintiff’s favor, the Court can draw no plausible inference of  
26 deliberate indifference to Fourth Amendment violations from this vague allegation.

27 However, the allegation that the City was aware of prior instances of people dying due to  
28 control holds is enough to establish deliberate indifference, which can demonstrate a de facto  
policy. A plaintiff alleging a Monell claim based on inadequate training must allege facts  
sufficient to plausibly show that the municipality had a training policy that results in deliberate

1 indifference, which generally involves showing a pattern of similar constitutional violations. See  
2 *Connick v. Thompson*, 563 U.S. 51, 62 (2011) (citation omitted); *Williams v. Cnty. of Alameda*, 26  
3 F. Supp. 3d 925, 947 (N.D. Cal. 2014). The allegations must show that “the need for more or  
4 different training is so obvious, and the inadequacy so likely to result in the violation of  
5 constitutional rights” to demonstrate deliberate indifference. *Clouthier*, 591 F.3d at 1249 (citation  
6 omitted). The FAC alleges just enough to establish deliberate indifference due to inadequate  
7 training. Plaintiff identifies both the particular type of training that was insufficient and a pattern  
8 of similar violations: he alleges that the City failed to train its employees, including the Officer  
9 Defendants, in “standards for arrest and detention, including limitations on the use of force that  
10 can reasonably be foreseen to cause death” (Dkt. No. 17 ¶ 9), and that the City had “knowledge of  
11 prior instances of people dying during the course of arrest by the improper use of control holds,  
12 carotid restraint and restraining tactics that resulted in the positional asphyxiation of individuals  
13 taken into custody.” (Id.) While the FAC does not include facts describing what those similar  
14 instances are, the allegation that they have occurred is enough to eke out a claim at this stage of  
15 the litigation. Thus, the FAC plausibly alleges municipal liability deliberate indifference through  
16 inadequate training.

17 In short, the FAC adequately pleads an underlying constitutional violation—the Fourth  
18 Amendment only, not the Fourteenth—and sufficiently pleads municipal liability through  
19 inadequate training, but not ratification or the acts of a policy-maker. The Court therefore declines  
20 to dismiss the second cause of action. Plaintiff may, however, amend the second cause of action  
21 to add facts to support his currently inadequate theories of municipal liability.

## 22 CONCLUSION

23 For the reasons described above, the Court GRANTS IN PART and DENIES IN PART  
24 Defendants’ motion to dismiss. The Officer Defendants’ statute of limitations motion is denied.  
25 The first cause of action is nonetheless dismissed with leave to amend to separately allege any  
26 claims on behalf of the estate and any claims on behalf of Plaintiff personally, as well as to  
27 identify the constitutional basis for each claim. The Court dismisses the second cause of action  
28 with respect to Chief Spagnoli, but Plaintiff shall have leave to amend to bring suit against her in

1 her individual capacity. As currently pled, the second cause of action may only proceed based on  
2 a Fourth Amendment violation arising from an inadequate training/deliberate indifference theory  
3 of municipal liability, but plaintiff shall have leave to amend to add allegations regarding his  
4 alternative theories of municipal liability claims. Plaintiff shall file his amended complaint on or  
5 before January 15, 2016. The case management conference scheduled for January 28, 2016 shall  
6 remain on calendar as Plaintiff has pleaded a claim for municipal liability and as it is apparent that  
7 he can, at a minimum, plead a Fourth Amendment excessive force claim against the Officer  
8 Defendants on behalf of the estate.

9 This Order disposes of Docket No. 18.

10 **IT IS SO ORDERED.**

11 Dated: January 4, 2016

  
JACQUELINE SCOTT CORLEY  
United States Magistrate Judge

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