

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3

4 MICHELE FOTINOS, on behalf of
5 herself and as Guardian ad Litem
6 for her minor children, R.F. and
7 A.F.,

8 Plaintiff,

9 v.

10 JOHN FOTINOS; DAWN GROVER; RENEE
11 LA FARGE; BONNIE MILLER; KAMALA
12 HARRIS, Attorney General; JAYNE
13 KIM, Chief Trial Counsel, State
14 Bar of California; ROBYN PITTS,
15 City of Belmont Police Officer;
16 MARK REED, San Mateo County
17 Deputy Sheriff; PATRICK CAREY,
18 San Mateo County Deputy Sheriff;
19 SHANNON MORGAN; CITY OF BELMONT;
20 COUNTY OF SAN MATEO; and RENEE
21 LAFARGE,

22 Defendant.

No. C 12-953 CW

ORDER GRANTING
DEFENDANTS'
MOTIONS TO DISMISS
SECOND AMENDED
COMPLAINT

United States District Court
For the Northern District of California

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Defendant City of Belmont, Defendant Bonnie Miller,
Defendants County of San Mateo, Mark Reed, Patrick Carey and
Shannon Morgan (San Mateo County Defendants), Defendant John
Fotinos, Defendant Dawn Grover, and Defendant Renee La Farge have
filed motions to dismiss the Second Amended Complaint (2AC) in
this case. Plaintiff has filed oppositions to each of the
motions.¹ The motions were decided on the papers. Having

¹ Each of Plaintiff's oppositions to the motions to dismiss was filed late. Plaintiff has filed ex parte motions seeking relief from the late filing of some, but not all of the oppositions. This is part of an ongoing pattern of Plaintiff's counsel seeking extensions of time after a deadline has passed. See Docket Nos. 44, 65, 85, 87, 88. The Court has already admonished Plaintiff's counsel of her duty to meet the Court's

1 considered the parties' papers, the Court GRANTS Defendant City of
2 Belmont's motion to dismiss (Docket No. 99), GRANTS Defendant
3 Miller's motion to dismiss (Docket No. 100), GRANTS the San Mateo
4 County Defendants' motion to dismiss (Docket No. 101), GRANTS
5 Defendants J. Fotinos and Grovers' motion to dismiss (Docket No.
6 111), and GRANTS Defendant LeFarge's motion to dismiss (Docket No.
7 116). Plaintiff's federal claims are dismissed with prejudice and
8 her state law claims are dismissed without prejudice to refileing
9 in state court.

10 BACKGROUND

11 This case arises out of a nine-year custody battle between
12 Plaintiff Michele Fotinos and her ex-husband, Defendant John
13 Fotinos. In her complaint, Plaintiff accuses her ex-husband of
14 physically and emotionally abusing their two children, R.F. and
15 A.F. and alienating them from her. After numerous setbacks in her
16 efforts to gain custody of her children in state court, Plaintiff
17 filed this lawsuit against numerous Defendants on behalf of
18 herself and as guardian ad litem for R.F. and A.F. Defendants
19 filed several motions to dismiss the First Amended Complaint
20 (1AC), which the Court granted in part, dismissing all of
21 Plaintiff's federal claims and deferring ruling on the motions to
22 the extent they sought to dismiss Plaintiff's state law claims.
23 The Court granted Plaintiff leave to amend several of her federal
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25 deadlines. See Docket No. 92. Nevertheless, the Court has
26 considered all of the opposition briefs filed by Plaintiff and
27 GRANTS the motions for relief from late filing. Docket Nos. 106,
28 113. The Court also notes that two of the motions to dismiss were
not timely filed. See Docket Nos. 111, 116.

1 claims. Plaintiff has now filed a Second Amended Complaint (2AC),
2 alleging four federal claims and six state law claims.

3 LEGAL STANDARD

4 A complaint must contain a "short and plain statement of the
5 claim showing that the pleader is entitled to relief." Fed. R.
6 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
7 state a claim, dismissal is appropriate only when the complaint
8 does not give the defendant fair notice of a legally cognizable
9 claim and the grounds on which it rests. Bell Atl. Corp. v.
10 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
11 complaint is sufficient to state a claim, the court will take all
12 material allegations as true and construe them in the light most
13 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
14 896, 898 (9th Cir. 1986). However, this principle is inapplicable
15 to legal conclusions; "threadbare recitals of the elements of a
16 cause of action, supported by mere conclusory statements," are not
17 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
18 (citing Twombly, 550 U.S. at 555).

19 When granting a motion to dismiss, the court is generally
20 required to grant the plaintiff leave to amend, even if no request
21 to amend the pleading was made, unless amendment would be futile.
22 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
23 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
24 amendment would be futile, the court examines whether the
25 complaint could be amended to cure the defect requiring dismissal
26 "without contradicting any of the allegations of [the] original
27 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
28 Cir. 1990).

DISCUSSION

I. First Cause of Action--42 U.S.C. § 1985(2)

In its March 22, 2013 order dismissing the 1AC, the Court found that Plaintiff failed to allege "a class-based invidiously discriminatory animus" as required to state a claim under the second clause of § 1985(2). Specifically, the Court found that (1) Plaintiff failed to allege "that any conspiracy, assuming that one existed, was motivated by animus against victims of domestic violence" and (2) Plaintiff failed to establish that victims of domestic violence are a protected class as required by § 1985(2). Docket No. 84 at 11-12. Accordingly, the Court dismissed Plaintiff's § 1985(2) claim, and instructed, "If Plaintiff can allege, consistent with her original complaint, additional facts sufficient to establish that Defendants acted out of animus against her and her children because they are members of a recognized protected class, she may replead this claim in her second amended complaint." Docket No. 84 at 15.

As in the 1AC, Plaintiff again alleges that Defendants J. Fotinos, Grover, Miller and La Farge conspired "for the purpose of impeding, hindering, obstructing, or defeating the due course of justice in the custody proceeding in the California superior court" in violation of 42 U.S.C. § 1985(2). Plaintiff again makes a bare allegation that these Defendants acted with the intent to deny "M. Fotinos, R.F. and A.F. equal protection of the law as victims of domestic violence based on the gender of their mother who is also a victim of J. Fotinos' domestic violence." 2AC ¶ 252; see also ¶ 255 (same). Plaintiff alleges that these Defendants did so by coercing the children to testify falsely in

1 the state court proceedings. However, the 2AC alleges that the
2 conspiracy "was designed to keep the children from testifying
3 about the abuse of their father, Grover's cover up of the abuse,
4 what Grover, J, Fotinos, and LaFarge said about their mother to
5 defeat M. Fotinos' request for custody, and that they wanted to
6 live with their mother so that M. Fotinos would not regain custody
7 of her children solely on the ground that she is a mother and
8 because she is alleging domestic violence and alienation by J.
9 Fotinos, the male parent." 2AC ¶ 252. Although Plaintiff now
10 alleges that the conspiracy acted "on the ground that she is a
11 mother and because she is alleging domestic violence," this does
12 not change the stated primary purpose of the conspiracy, which was
13 to prevent Plaintiff from regaining custody of her children.
14 Indeed, the 2AC alleges that actions were taken "to defeat their
15 mother's claim for custody" and "for the sole purpose of defeating
16 M. Fotinos' OSC for change of custody." 2AC ¶¶ 254, 258.
17 Moreover, the 2AC asserts that these actions "succeeded in
18 successfully defeating M. Fotinos' request for custody of R.F. and
19 A.F." 2AC ¶ 274. The Court finds that Plaintiff has again failed
20 to allege that any conspiracy, assuming one existed, was motivated
21 by animus against women.²

22 Accordingly, Plaintiff's § 1985(2) claim is dismissed.
23 Because she has already been granted leave to amend this claim and
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25 ² To the extent that Plaintiff continues to argue that she
26 has alleged that the conspiracy was motivated by animus against
27 victims of domestic violence, the Court notes that it has already
28 held that victims of domestic violence are not a recognized
protected class for purposes of § 1985(2).

1 it appears that further amendment would be futile, her claim is
2 now dismissed with prejudice.

3 II. Second Cause of Action--First Amendment Claim

4 In its March 2013 order dismissing Plaintiff's 1AC with leave
5 to amend, the Court found that Plaintiff failed to state a § 1983
6 claim against Defendants Morgan, Carey and Reed for violations of
7 Plaintiff's and R.F.'s rights under the First Amendment to the
8 United States Constitution. As in the original complaint, the
9 primary allegations in the 2AC are that Defendants Morgan, Carey
10 and Reed are violating provisions of California law. The Court
11 stated in its order dismissing the original complaint, "As a
12 general rule, a violation of state law does not lead to liability
13 under § 1983." Campbell v. Burt, 141 F.3d 927, 930 (1998).

14 The only allegations added in support of Plaintiff's First
15 Amendment claim in the 2AC are irrelevant quotations from
16 unrelated opinions of the Inter-American Commission of Human
17 Rights and facts about unrelated cases in other California courts.
18 Accordingly, Plaintiff's First Amendment claim is dismissed.
19 Because she has already been granted leave to amend this claim and
20 it appears that further amendment would be futile, her claim is
21 now dismissed with prejudice.

22 III. Third Cause of Action--Equal Protection and Due Process
23 Claim

24 As in her original complaint, Plaintiff next alleges that the
25 same actions by Defendants Morgan, Carey and Reed that underlie
26 her § 1983 First Amendment claim constituted a violation of
27 Plaintiff's and her children's rights to due process and their
28 "equal protection rights" to child protective and police services

1 "as victims of domestic violence." 2AC ¶¶ 369, 372. In its prior
2 order, the Court dismissed this claim on three independent
3 grounds, none of which Plaintiff has remedied.

4 First, the Court found that Plaintiff's allegation that
5 Defendant Morgan violated her and her children's due process
6 rights by providing a report regarding alleged child abuse to J.
7 Fotinos's attorney "knowing he would forward it" to the judge
8 presiding over Plaintiff's request for a domestic violence
9 restraining order was not sufficient to establish a constitutional
10 violation. The court found that, even assuming that the report
11 was improperly considered by the judge, it was not clear how
12 Defendant Morgan can be held liable for the actions of J.
13 Fotinos's attorney in submitting the report to the court, or the
14 action of the judge in considering the report. In her amended
15 complaint, Plaintiff now alleges that "having voluntarily offered
16 them the report, [Morgan] was obligated not to discriminate
17 against M. Fotinos and R.F. because of their gender and their
18 status as victims of domestic violence, but she did." 2AC ¶ 299.
19 This bare allegation is not sufficient to establish an equal
20 protection or due process claim.

21 Next, the Court found that Plaintiff's allegation that
22 various shortcomings in the manner in which Defendants Carey and
23 Reed responded to R.F.'s report of abuse by her father were not
24 enough to establish a due process claim because "the Due Process
25 Clauses generally confer no affirmative right to governmental aid,
26 even where such aid may be necessary to secure life, liberty, or
27 property interests of which the government itself may not deprive
28 the individual." Deshaney v. Winnebago County Dep't of Social

1 Svcs., 489 U.S. 189, 196 (1989). Plaintiff has not altered the
2 paragraphs of the complaint containing these allegations.

3 Finally, the Court found that Plaintiff's equal protection
4 claim also failed because Plaintiff did not allege that any of the
5 Defendants acted because of her and her children's status as
6 victims of domestic violence. Accordingly, the Court found that
7 she has failed to make a showing of discriminatory intent
8 necessary to support an equal protection claim. Navarro v. Block,
9 72 F.3d 712, 716 n.5 (9th Cir. 1995) (quoting Personnel Adm'r of
10 Mass. v. Feeny, 442 U.S. 256, 279 (1979)). However, Plaintiff has
11 not made any substantive changes to these allegations. Indeed,
12 Plaintiff again alleges that Morgan acted "for damage control on
13 behalf of the San Mateo judicial establishment." 2AC ¶ 301. This
14 contradicts Plaintiff's allegation that Defendant Morgan acted
15 with discriminatory intent.

16 Plaintiff's equal protection and due process claim is
17 dismissed. Because she has already been granted leave to amend
18 this claim and it appears that further amendment would be futile,
19 her claim is now dismissed with prejudice.

20 IV. Fourth Cause of Action--Monell Claim

21 In its earlier order, the Court dismissed Plaintiff's Monell
22 claim against Defendants City of Belmont and San Mateo County
23 because Plaintiff failed to allege either of two necessary
24 elements, a constitutional injury or facts to support a finding
25 that any of the individual Defendants acted according to any city
26 or county policy or practice. As discussed above, Plaintiff has
27 again failed to allege a constitutional injury. Moreover,
28 Plaintiff has again failed to allege facts demonstrating that the

1 individual Defendants acted according to a city or county policy
2 or practice.

3 Plaintiff alleges that individual Defendants failed to comply
4 with various state statutory requirements and City of Belmont
5 policies. However, this only posits that the individual
6 Defendants were not acting according to policies or statutes.
7 Plaintiff goes on to allege that one can infer from these failures
8 to comply with statutory requirements and policies "that there is
9 a countywide and citywide policy of deliberate indifference to the
10 training of police officers and deputy sheriffs in Belmont and in
11 the County concerning domestic violence." 2AC ¶ 309. However,
12 three officers' alleged failure to comply with policies in this
13 individual case is an insufficient basis for such an inference.

14 Accordingly, the Court finds that Plaintiff has failed to
15 state a Monell claim. Because she has already been granted leave
16 to amend this claim and it appears that further amendment would be
17 futile, her claim is now dismissed with prejudice.

18 V. State Law Claims

19 Plaintiff also alleges five state law claims against
20 Defendants J. Fotinos, Grover, Miller and La Farge. Title 28
21 U.S.C. § 1367(c)(2) authorizes district courts to decline to
22 exercise supplemental jurisdiction over a state law claim if "the
23 claim substantially predominates over the claim or claims over
24 which the district court has original jurisdiction." In
25 determining whether to decline to exercise supplemental
26 jurisdiction, the Court should consider whether remanding the rest
27 of the case to state court will accommodate the values of
28 "economy, convenience, fairness, and comity." Executive Software

1 North America, Inc. v. United States District Court, 24 F.3d 1545,
2 1557 (9th Cir. 1994), overruled on other grounds by Cal. Dep't of
3 Water Res. v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008).

4 In this order, the Court dismisses all of Plaintiff's federal
5 claims. Therefore, it is more efficient for the state court to
6 evaluate Plaintiff's state law claims. The values of economy,
7 convenience, fairness, and comity favor dismissing the state law
8 claims without prejudice to refile in state court.

9 VII. Docket Items Containing Confidential Information

10 On March 19, 2013, the Court issued an order directing
11 Plaintiff to take steps to ensure that her filings did not
12 improperly include confidential information on the public docket
13 and temporarily sealing the entire docket to permit Plaintiff the
14 opportunity to review all of her filings, and to file appropriate
15 motions to seal. The Court directed Plaintiff to submit a list of
16 all documents she has filed, separated into three categories, and
17 counsel for Plaintiff has filed a declaration providing answers to
18 the Court's requests. Plaintiff's response is discussed by
19 category below.

20 A. Documents that can be filed on the public docket

21 The Court asked Plaintiff to list, "The docket numbers of
22 documents she has filed that do not contain any names of minor
23 children or information that should be filed under seal."

24 Counsel declares that Docket Numbers 46, 50, 53, 55, 56, 57,
25 63, 65, 66, 68, 69, 80, 81, 85, 87, 88, 91 and 93 do not contain
26 the names of minor children or other information that should be
27 filed under seal. See Docket No. 98 at 2. Accordingly, these
28 documents should be restored to the public docket.

1 Counsel also included Docket Numbers 74 and 75 in the list of
2 documents she stated did not include the names of minor children
3 or other information that should be filed under seal. However, in
4 a footnote, counsel stated, "Buried in a quote is A.F.'s first
5 name on p.16 of Doc. #75. Only a close reading of the very long
6 document would the reader catch the name [sic]. I request to be
7 excused from filing a redacted Doc[.] #75 because then the Court
8 will have to strike the originally filed document." Docket No. 98
9 at 2 n.1. The Court has reviewed Docket Number 75, and the
10 document does not contain the first name of any minor child.
11 Accordingly, Docket Number 75 should be restored to the public
12 docket. However, page 16 of Docket Number 74 does contain A.F.'s
13 first name. The Court denies Plaintiff's request to allow this
14 document to remain on the public docket. The Court STRIKES Docket
15 No. 74 and directs the Clerk to delete it from the public docket.
16 Plaintiff is directed to file a redacted version of Docket Number
17 74 within seven days of the date of this order.

18 B. Documents which contain the names of minor children

19 The Court next asked Plaintiff to identify, "Which documents
20 Plaintiff is re-filing only to substitute initials for names (For
21 each such document, please provide the docket number of the
22 document that should be stricken from the docket and the
23 corresponding docket number of the newly filed replacement
24 document)."

25 Counsel declared that Docket Numbers 1, 7 and 10 should be
26 stricken and that newly filed Docket Numbers 94, 96 and 97,
27 respectively, should substitute for those documents. Accordingly,
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1 the Court STRIKES Docket Nos. 1, 7 and 10 and directs the Clerk to
2 delete them from the public docket.

3 Counsel also indicated that Docket Number 3, her application
4 to act as guardian ad litem, should be stricken and replaced with
5 a redacted version, filed at Docket Number 95, using only the
6 minor children's initials. In a footnote, counsel further states,
7 "I removed Dr. Susan Wilde's psychological evaluation of R.F.
8 which was a part of the [guardian ad litem] application to avoid
9 having to file an Administrative Motion to Seal." Docket No. 98
10 at 2 n.2. The Court finds that the psychological evaluation was
11 immaterial to the application to act as guardian ad litem.
12 Accordingly, the Court STRIKES Docket Number 3 and directs the
13 Clerk to delete it from the public record.

14 Counsel further requests that the Court strike Docket Number
15 79, exhibits filed in support of Plaintiff's motion to amend the
16 1AC. The Court did not rely on those documents when denying the
17 motion to amend. Accordingly, the Court STRIKES Docket Number 79
18 and directs the Clerk to delete it from the public record.

19 C. Documents which contain information that should be filed
20 under seal

21 Finally, the Court asked Plaintiff to identify, "Which
22 documents contain information that Plaintiff believes should be
23 filed under seal (For each such document, please provide the
24 docket number of the document that should be stricken from the
25 docket and the corresponding Docket Number of the administrative
26 motion to seal related to that document.)" Counsel declares that,
27 if the Court strikes Docket Numbers 3 and 79, which it has, there
28 are no such documents.

1 Counsel's declaration further states that she "did not
2 download [Docket Number 14]." Docket No. 98 at 3. Accordingly,
3 counsel was unable to determine whether the document contained the
4 names of minor children or any other information that should be
5 filed under seal. It appears that counsel filed the 1AC twice, on
6 March 8, 2012 at Docket Number 7 and on April 4, 2012 at Docket
7 Number 14. Plaintiff has already requested that Docket Number 7
8 be stricken and has already filed a redacted version of the
9 document at Docket Number 96. Accordingly, the Court STRIKES
10 Docket Number 14 and directs the Clerk to remove it from the
11 public record.

12 After the revisions discussed above are made to the docket,
13 the Clerk shall unseal the docket.

14 CONCLUSION

15 For the foregoing reasons, the Court GRANTS Defendant City of
16 Belmont's motion to dismiss (Docket No. 99), GRANTS Defendant
17 Miller's motion to dismiss (Docket No. 100), GRANTS the San Mateo
18 County Defendants' motion to dismiss (Docket No. 101), GRANTS
19 Defendants J. Fotinos and Grover's motion to dismiss (Docket No.
20 111), and GRANTS Defendant LeFarge's motion to dismiss (Docket No.
21 116). All of Plaintiff's federal claims are dismissed with
22 prejudice. Plaintiff's state claims are dismissed without
23 prejudice to refile in state court.

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25 IT IS SO ORDERED.

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27 Dated: 2/7/2014

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CLAUDIA WILKEN

United States District Judge