

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SABRINA BELLE SHIRAZI,

Plaintiff,

v.

NADER OWEIS, et al.,

Defendants.

Case No. [5:21-cv-00136-EJD](#)

**ORDER GRANTING IN PART
DEFENDANT SILVA’S MOTION TO
DISMISS; GRANTING IN PART
DEFENDANTS OWEIS, FLIPPO AND
BATES’ MOTION TO DISMISS;
GRANTING PLAINTIFF’S MOTION
FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT**

Re: Dkt. Nos. 24, 27, 35

This is a civil rights action for damages. Plaintiff Sabrina Belle Shirazi (“Plaintiff”) alleges she was injured by law enforcement while she was attending a peaceful protest. The following motions are before the Court: (1) Defendants Nader Oweis, Greg Flippo, and Loren Bates’ motion to dismiss (ECF 24); (2) Defendant CHP Officer Silva’s motion to dismiss (ECF 27); and (3) Plaintiff’s motion for leave to file a Second Amended Complaint and to substitute parties for DOES 3 and 4 (ECF 35). The motions are fully briefed. *See* ECF 30-33, 37-38.¹ The

¹ Plaintiff’s Corrected Opposition to UC Defendants Bates, Oweis and Flippo’s Motion to Dismiss (ECF 30) is untimely and exceeds the 25-page limit set by the Local Rules. In the interest of justice, the Court will consider all of the brief. In the future, however, Plaintiff shall comply with the Local Rules. Failure to do so may result in the imposition of sanctions.

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1 Court in its discretion has taken the motions under submission for decision without oral argument
 2 pursuant to Civil Local Rule 7-1(b). For the reasons discussed below, Defendants' respective
 3 motions to dismiss are granted in part and Plaintiff's motion for leave file a second amended
 4 complaint is granted.

5 **I. BACKGROUND²**

6 Plaintiff is a Ph.D. candidate at the University of California Santa Cruz ("UCSC") and is
 7 employed by UCSC as a Graduate Student Research and Teaching Assistant. Prior to the events at
 8 issue, graduate students at UCSC notified the UCSC administration that they would strike and
 9 picket at the University on February 10, 2020. The purpose of the scheduled strike and picket was
 10 to support graduate student workers' demand for a Cost of Living Adjustment.

11 Defendant Nader Oweis ("Oweis") was the Chief of Police of the UCSC Police
 12 Department at the time of the scheduled event. Defendant Greg Flippo ("Flippo") is a Lieutenant
 13 of the UCSC Police Department. Both Defendants knew that a strike and picket were planned for
 14 February 10 and called in "mutual aid" from other law enforcement agencies. *Id.* Defendant
 15 UCPD Officer Loren Bates ("Bates") is a UC Berkeley Police Officer who responded on February
 16 10 "as mutual aid" for the UCSC Police. FAC ¶ 9. Defendant "CHP Officer First Name
 17 Unknown Silva" ("Silva") is a California Highway Patrol officer who also responded on February
 18 10 "as mutual aid" for the UCSC Police. *Id.* ¶ 10. The DOE defendants "include other individuals
 19 responsible for use of excessive force." *Id.* ¶ 12.

20 On February 10, 2020, Plaintiff attended the labor picket near the entrance to UCSC,
 21 along with hundreds of other students, faculty and staff. *Id.* ¶ 19. The event was peaceful. *Id.*
 22 However, when police officers "aggressively" arrested a woman delivering water to the picketers,
 23 the picketers gathered near the police vehicle and chanted. *Id.* ¶ 20. Without warning, DOE

24
 25 _____
 26 ² The Background is a summary of the allegations in the First Amended Complaint ("FAC"), ECF
 27 20.

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1 UCPD and CHP officers then charged into the crowd from behind the picketers, hitting and
2 shoving people with their billy clubs. *Id.* Plaintiff “was standing in the crowd when, without
3 warning, DOE police officers rushed from behind her, shoved, pushed and pulled her, and beat her
4 repeatedly with clubs on the head and body, causing a concussion and other injuries.” *Id.* ¶ 1.
5 Elsewhere in the FAC Plaintiff alleges more specifically that “UCPD Officer BATES, CHP
6 Officer SILVA, and at least one other large male DOE UCPD officer, surrounded her and clubbed
7 her repeatedly on the head, neck, shoulder, and body. Each officer violently shoved her with their
8 clubs toward the others, so that her head, neck, and body whipped rapidly back and forth. Plaintiff
9 was not impeding the police.” *Id.* ¶ 23.

10 Plaintiff told Bates, Silva and a DOE officer that they had trapped her and she could not
11 get out, but they continued to hit and shove her until they pushed her down and stepped over her.
12 Silva, as well as one or more DOE officers and/or UCPD police officers saw other officers hit
13 Plaintiff on the head, but failed to intervene. *Id.* ¶¶ 11, 25. None of the Defendants summoned
14 medical care. *Id.* ¶ 25. Plaintiff is informed and believes she was targeted for police violence
15 because she was the only person in her vicinity “who appeared to be Brown and/or of Middle
16 Eastern origin.” *Id.* ¶ 29.

17 Plaintiff asserts the following claims: (1) a civil rights claim pursuant to 42 U.S.C. § 1983
18 for violation of her right to be free from “excessive force” under the Fourth and Fourteenth
19 Amendments to the United States Constitution; (2) a § 1983 claim for violation of her rights to
20 freedom of speech, expression and association under the First and Fourteenth Amendments to the
21 United States Constitution; (3) a § 1983 claim for conspiracy to deprive Plaintiff of her rights; (4)
22 a § 1983 claim for failure to intervene; (5) assault and battery against only the UCPD Defendants;
23 (6) violation of California Civil Code § 51.7 against only the UCPD Defendants; (7) violation of
24 California Civil Code § 52.1 against only the UCPD Defendants; and (8) negligence against only
25 the UCPD Defendants.

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1 **II. STANDARDS**

2 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of claims alleged in the
3 complaint. Fed. R. Civ. P. 12(b)(6); *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th
4 Cir. 2011). To survive a motion to dismiss, the complaint “must contain sufficient factual matter,
5 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
6 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim
7 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
8 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at
9 678 (citation omitted).

10 When reviewing the complaint, the court must accept as true all “well pleaded factual
11 allegations” and determine whether the allegations “plausibly give rise to an entitlement to relief.”
12 *Id.* at 679. The court must also construe the alleged facts in the light most favorable to the
13 plaintiff. *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th
14 Cir. 2014). However, “courts are not bound to accept as true a legal conclusion couched as a
15 factual allegation.” *Iqbal*, 556 U.S. at 678. Dismissal “is proper only where there is no
16 cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal
17 theory.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). If a Rule 12(b)(6) motion to
18 dismiss is granted, the court should grant leave to amend unless it determines that the complaint
19 could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122, 1127
20 (9th Cir. 2000) (*en banc*).

21 **III. DISCUSSION**

22 Defendants Oweis, Flippo and Bates move to dismiss the FAC. Defendant Silva moves to
23 dismiss the first through fourth claims. Each claim is discussed separately below.

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1 **A. First Claim: “Excessive Force”**

2 **1. Reference to Fourteenth Amendment**

3 The first claim for “excessive force” references both the Fourth and Fourteenth
4 Amendments. Defendants contend that the reference to the Fourteenth Amendment should be
5 stricken because a claim for “excessive” force arises under the Fourth Amendment. Plaintiff
6 explains that she cited to both Amendments because the Fourth Amendment is made applicable to
7 the States by the Fourteenth Amendment. Plaintiff acknowledges that her claim for excessive
8 force arises under the Fourth Amendment; she does not intend to assert a separate claim for a
9 violation of the Fourteenth Amendment. Based on Plaintiff’s representation, the Court finds it
10 unnecessary to strike the reference to the Fourteenth Amendment.

11 **2. Oweis and Flippo**

12 Next, Oweis and Flippo argue that the FAC lacks sufficient facts to support the first claim
13 against them. Supervisory officials “may not be held liable under Section 1983 for the
14 unconstitutional actions of their subordinates based solely on a theory of respondeat superior.”
15 *Moss v. U.S. Secret Serv.*, 711 F.3d 941, 967 (9th Cir. 2013), rev’d sub nom. on other grounds,
16 *Wood v. Moss*, 572 U.S. 744 (2014). Instead, the Ninth Circuit has instructed that supervisors may
17 be held liable under § 1983 as follows:

18 (1) for setting in motion a series of acts by others, or knowingly
19 refusing to terminate a series of acts by others, which they knew or
20 reasonably should have known would cause others to inflict
21 constitutional injury; (2) for culpable action or inaction in training,
supervision, or control of subordinates; (3) for acquiescence in the
constitutional deprivation by subordinates; or (4) for conduct that
shows a “reckless or callous indifference to the rights of others.”

22 *Moss*, 711 F.3d at 967 (internal citation omitted); *see also Menotti v. City of Seattle*, 409 F.3d
23 1113, 1149 (9th Cir. 2005) (same).

24 **a. Plaintiff’s Request For Judicial Notice**

25 As an initial matter, Plaintiff asks the Court to take judicial notice of the California

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1 Disaster and Civil Defense Master Mutual Aid Agreement (“Agreement”), and argues that
 2 pursuant to this Agreement, Oweis and Flippo were responsible for supervising officers at the
 3 scene of the strike. “As a general rule, ‘a district court may not consider any material beyond the
 4 pleadings in ruling on a Rule 12(b)(6) motion.’” *Lee v. City of Los Angeles*, 250 F.3d 668, 688
 5 (9th Cir. 2001) (quoting *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)). There are two
 6 recognized exceptions to this rule. In ruling on a 12(b)(6) motion, a court may consider, without
 7 converting the motion to a motion for summary judgment (1) “material which is properly
 8 submitted as part of the complaint” where the authenticity of the material is not contested and (2)
 9 matters of public record. *Id.* Here, the Agreement could be characterized as a matter of public
 10 record. However, Plaintiff fails to connect this Agreement to the alleged constitutional violations.
 11 The FAC does not allege that Defendants were operating under the Agreement, much less allege
 12 that the Agreement led Defendants to (1) set in motion a series of acts by others, or knowingly
 13 refuse to terminate a series of acts by others, which they knew or reasonably should have known
 14 would cause others to inflict constitutional injury; (2) engage in culpable action or inaction in
 15 training, supervision, or control of subordinates; (3) acquiesce in the constitutional deprivation by
 16 subordinates; or (4) act recklessly or with callous indifference to the rights of others. The Court
 17 declines to take judicial notice of the Agreement because Plaintiff has not shown it is relevant.
 18 *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 n.13 (9th Cir. 1998) (denying request for
 19 judicial notice, in part because information to be noticed did not bear on the “relevant issue”
 20 before the court).

21 **b. Allegations in the FAC**

22 Turning to the FAC, Plaintiff alleges that Oweis and Flippo “caused [P]laintiff’s injuries
 23 and the violation of her rights through their decisions to respond to the protest, and to the young
 24 student’s attempt to deliver water to the picketers in a car, with unnecessary escalation and in a
 25 manner that said defendants knew or reasonably should have known would inevitably lead to

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1 excessive force, and/or by allowing officers to use excessive force and/or failing to intervene to
2 prevent or stop such use of excessive force.” FAC ¶ 33.

3 **i. “Setting in Motion” / “Refusing to Terminate” Acts**

4 It is unclear from the FAC whether or not Oweis and Flippo were even present at UCSC
5 when the events at issue unfolded. *See* FAC ¶ 33 (DOE UCPD and CHP police supervisors were
6 present at the protest *and/or* monitored the police response) (emphasis added). Although a
7 plaintiff is not required to allege a supervisor was physically present when the injury occurred, a
8 plaintiff must allege some culpable action or inaction. *Moss*, 711 F.3d at 968. The FAC fails to
9 do so. The FAC does not allege that Oweis and Flippo directed or were aware of the arrest of the
10 student attempting to deliver water to picketers. Nor does the FAC allege that Oweis and Flippo
11 knew or reasonably should have known the arrest of the student would set in motion picketers
12 gathering near the police vehicle, much less that the picketers’ behavior would lead to the officers’
13 use of force. Nor does the FAC allege that Oweis and Flippo knew or reasonably should have
14 known the use of force would be excessive and consequently violative Plaintiff’s constitutional
15 rights.

16 Similarly, there are insufficient facts to support an inference that Oweis and Flippo
17 knowingly refused to terminate any of the officers’ actions. The absence of any facts to show
18 Oweis and Flippo’s knowledge or acquiescence in the officers’ actions against Plaintiff
19 distinguishes this case from other cases cited by her. *See Maxwell v. Cty. of San Diego*, 708 F.3d
20 1075, 1086 (9th Cir. 2013) (reversing summary judgment as to two officers because they were
21 aware of the plaintiffs’ detention and witnessed at least part of the arrest and beating at issue);
22 *Keating v. City of Miami*, 598 F.3d 753, 763–765 (11th Cir. 2010) (finding cognizable claim based
23 on allegations that supervising officers (i) approved orders permitting police line to advance while
24 beating unarmed demonstrators and discharging projectiles and tear gas, (2) made the decision to
25 use “herding techniques” to corral demonstrators by personally directing the police lines; and (3)

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1 directed police lines to begin discharging weapons at unarmed demonstrators); *Baker v. Monroe*
 2 *Tr.*, 50 F.3d 1186, 1193–94 (3d Cir. 1995) (holding that knowledge could be inferred from
 3 supervising officer (i) “hollering instructions” outside to others who were holding plaintiffs in
 4 handcuffs and at gunpoint, and (ii) being present in a small apartment where plaintiffs were being
 5 held in one room). Unlike in *Maxwell, Keating*, and *Baker*, there are no allegations to suggest
 6 Oweis and Flippo gave the orders in this case. Nor are there allegations from which to infer
 7 Oweis and Flippo were aware that batons were at the ready and that they had the ability to stop the
 8 officers from hitting Plaintiff.

9 **ii. Inadequate Training**

10 Plaintiff alleges that Oweis and Flippo knew officers had inadequate training and that they
 11 “caused the violation of [P]laintiff’s constitutional rights as a result of their . . . deliberate
 12 indifference to the need for more or different training.” FAC ¶¶ 33-34. This allegation is too
 13 conclusory. The FAC fails to allege that Oweis and Flippo were responsible for training the
 14 officers who were present at the protest. The FAC also fails to allege any facts about the
 15 purported inadequacies of the officers’ training. Accordingly, the Section 1983 claim against
 16 Defendants Oweis and Flippo is dismissed with leave to amend. *Moss*, 711 F.3d at 968 (affirming
 17 dismissal of §1983 against supervisors because the protestors “allege[d] no facts whatsoever about
 18 the officers’ training or supervision, nor d[id] they specify in what way any such training was
 19 deficient.”).

20 **B. Second Claim for Violation of Rights to Freedom of Speech, Expression and**
 21 **Association**

22 There are three elements to a First Amendment retaliation claim. *Pinard v. Clatskanie Sch.*
 23 *Dist. 6J*, 467 F.3d 755 (9th Cir. 2006). “[A] plaintiff must show that (1) he was engaged in a
 24 constitutionally protected activity, (2) the defendant’s actions would chill a person of ordinary
 25 firmness from continuing to engage in the protected activity and (3) the protected activity was a
 26 substantial or motivating factor in the defendant’s conduct.” *Id.* at 770 (citing *Mendocino Env’t*

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1 *Cntr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999)). To satisfy the causation
 2 requirement, a plaintiff must plead and ultimately prove that a defendant’s desire to cause the
 3 chilling effect was a but-for cause of defendant’s action. *Dietrich v. John Ascuaga’s Nugget*, 548
 4 F.3d 892, 901 (9th Cir. 2008). Only the third element is at issue in Defendants’ motions.

5 Courts have held that the “indiscriminate” use of force against all protestors supports an
 6 inference that law enforcement’s actions were substantially motivated by a plaintiff’s protected
 7 First Amendment activity. *See e.g., Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle*
 8 *Police Dep’t*, 466 F. Supp. 3d 1206, 1214 (W.D. Wash. 2020). Here, Plaintiff alleges on
 9 information and belief that her “protected speech and perceived position in a labor dispute were
 10 substantial and motivating factors for . . . use of excessive force on her.” FAC ¶ 43. Although
 11 this allegation is conclusory, there are other factual allegations that could support an inference
 12 Silva and Bates engaged in an indiscriminate use of force, which in turns supports an inference
 13 that their actions were substantially motivated by Plaintiff’s First Amendment activity. Plaintiff
 14 alleges that the strike and picket were peaceful. She alleges she was “standing nearby,” but not
 15 blocking the police car when DOE UCPD and CHP officers, including Bates and Silva, rushed in
 16 from behind her. *Id.* ¶ 22. The police allegedly did not give any warning or dispersal order before
 17 charging. *Id.* ¶ 20. She alleges that even though she was not impeding the police officers or
 18 presenting any threat, police officers, including Bates and Silva, surrounded her and clubbed her
 19 repeatedly. *Id.* ¶ 23.

20 Defendants view the allegations in the FAC differently. Defendants focus on the
 21 allegation that the event precipitating the use of force was the picketers gathering near the police
 22 vehicle. The FAC alleges that Plaintiff became “trapped” when officers pushed a crowd that had
 23 gathered near a police vehicle where an arrestee had been detained. Defendants also highlight
 24 allegations that she was “standing nearby” the crowd of picketers that had gathered near the police
 25 vehicle and that she was rushed from behind. *Id.* According to Defendants, the reasonable

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1 inference from these allegations is that police officers were separating the crowd of picketers from
 2 the arrestee detained in the police vehicle. Defendants also argue that it is not reasonable to infer
 3 that state-funded law enforcement officers would be motivated to use force on other state
 4 employees seeking higher wages.

5 “Often, defendants’ conduct has several plausible explanations.” *Watson Carpet & Floor*
 6 *Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 458 (6th Cir. 2011). In this case, the Court finds
 7 Defendants’ alternative interpretation of the FAC is indeed plausible. Nevertheless, “[f]erretting
 8 out the most likely reason for the defendants’ actions is not appropriate at the pleadings stage. *Id.*;
 9 *see also Martinez v. City of Santa Rosa*, 499 F. Supp. 3d 748 (N.D. Cal. 2020) (noting that court’s
 10 concern about the veracity of plaintiff’s allegations was not a reason to grant a motion to dismiss).
 11 When Plaintiff’s factual allegations are construed in the light most favorable to her, they are
 12 sufficient at the pleading stage to support a cognizable First Amendment claim against Bates and
 13 Silva.

14 Defendant Bates and Silva’s respective motions to dismiss the second claim are denied.
 15 The claim is dismissed as to Oweis and Flippo with leave to amend.

16 **C. Section 1983 Conspiracy Claim**

17 “To state a conspiracy claim under § 1983, a plaintiff must show (1) an agreement between
 18 the defendants to deprive the plaintiff of a constitutional right, (2) an overt act in furtherance of the
 19 conspiracy, and (3) a constitutional deprivation.” *Davis v. Powell*, 901 F. Supp. 2d 1196, 1217
 20 (S.D. Cal. 2012). The “agreement need not be overt, and may be inferred on the basis of
 21 circumstantial evidence such as the actions of the defendants.” *Crowe v. Cty. of San Diego*, 608
 22 F.3d 406, 440 (9th Cir. 2010) (quoting *Mendocino Env’tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283,
 23 1301 (9th Cir. 1999)). “To be liable, each participant in the conspiracy need not know the exact
 24 details of the plan, but each participant must at least share the common objective of the
 25 conspiracy.” *Id.* (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539,

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1 1541 (9th Cir. 1989) (en banc)).

2 Here, Plaintiff alleges that Oweis and Flippo knew that there was going to be a strike and
 3 began planning for the strike days earlier. FAC. ¶ 17. Plaintiff further alleges that Oweis, Flippo
 4 and DOE UCPD and CHP police supervisors were present at the protest and/or monitored the
 5 police response. *Id.* ¶ 33. They allegedly “acted in concert with each other and conspired by
 6 concerted action to accomplish an unlawful purpose by unlawful means.” *Id.* ¶ 48. Plaintiff also
 7 alleges that Defendants “took concrete steps to enter into an agreement” and “committed specific
 8 overt acts.” *Id.* ¶¶ 49-50.

9 The conclusory allegations above are inadequate. There are no facts to show an agreement
 10 or a meeting of the minds to accomplish an unlawful purpose. Allegations that Defendants
 11 planned for the event, were present at the event, and used force on the picketers, do not support a
 12 reasonable inference that Defendants agreed to commit constitutional violations. Mere association
 13 does not make a conspiracy. *Newton v. Am. Debt Servs., Inc.*, No. 11-3228 EMC, 2013 WL
 14 5592620, at *9 (N.D. Cal. 2013). Plaintiff argues that “[a]cquiescence can amount to a conspiracy
 15 agreement when, as here, one police officer watches an open breach of the law and does nothing to
 16 seek its prevention.” Opp’n at 6 (quoting *Hafner v. Brown*, 983 F.2d 570, 578, 37 Fed. R. Evid.
 17 Serv. 935 (4th Cir. 1992)). The argument is unavailing because the FAC fails to plead facts to
 18 show acquiescence.

19 The conspiracy claim is dismissed with leave to amend. *See Ivey v. Bd. of Regents of the*
 20 *Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982) (“Vague and conclusory allegations of official
 21 participation in civil rights violations are not sufficient to withstand a motion to dismiss.”).

22 **D. Section 1983 Failure to Intervene Claim**

23 “Police officers have a duty to intercede when fellow officers commit violations, but must
 24 have a realistic opportunity to intercede.” *Adams v. Kraft*, No. 10-00602 LHK, 2011 WL
 25 3240598, at *21 (N.D. Cal. July 29, 2011) (citing *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th

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1 Cir. 2000) (quotation omitted)); *see also Garlick v. Cty. of Kern*, 167 F. Supp. 3d 1117, 1161
 2 (E.D. Cal. 2016) (“If an officer fails to intervene when fellow officers use excessive force, despite
 3 not acting to apply the force, he would be responsible for violating the Fourth Amendment.”).
 4 “Moreover, the inquiry is specific to the individual defendant.” *Id.* (citing *Chuman v. Wright*, 76
 5 F.3d 292, 294 (9th Cir. 1996)). In *Adams*, the plaintiff alleged he was subjected to false arrest and
 6 excessive force, and that none of the state park rangers present at the scene attempted to intervene
 7 to protect him, despite the fact that they were in a position to do so. *Id.* The plaintiff also alleged
 8 that three officers “were in a position to and could have stopped the arrest and intervened to
 9 prevent the excessive use of force after” the kick. *Id.* The *Adams* court characterized these
 10 allegations as conclusory and merely a formulaic recitation of the legal standard. *Id.*

11 Here, the FAC alleges the following regarding the alleged failure to intervene:

12 During the events described above, the defendants stood by without
 13 intervening to prevent the violations of plaintiff’s constitutional rights
 14 heretofore alleged, even though the violations occurred in plain view
 of numerous police officers and all of the defendants had the
 opportunity and duty to do so.

15 FAC ¶ 55. Like *Adams*, the allegations in the instant case are conclusory. Furthermore, just
 16 because the alleged violation occurred in “plain view” does not mean that Defendants had a
 17 realistic opportunity to intercede. The FAC also fails to allege facts specific to each individual
 18 Defendant. The failure to intervene claim is therefore dismissed with leave to amend.

19 **E. Assault and Battery Claim (Against UCPD Defendants Only)**

20 “[T]o state a cause of action for assault a plaintiff must establish (1) that defendant
 21 intended to cause harmful or offensive contact, or the imminent apprehension of such contact, and
 22 (2) that plaintiff was put in imminent apprehension of such contact.” *Brooks v. U.S.*, 29 F. Supp.
 23 2d 613, 617 (N.D. Cal. 1998). The elements of battery are: (1) defendant intentionally performed
 24 an act that resulted in a harmful or offensive contact with the plaintiff’s person; (2) plaintiff did not
 25 consent to the contact; and (3) the harmful or offensive contact caused injury, damage, loss or

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1 harm to plaintiff. *Nguyen v. City of Union City*, No. 13-1753 DMR, 2013 WL 3014136, at *5
2 (N.D. Cal. June 17, 2013).

3 Here, the FAC fails to allege any facts to show Oweis or Flippo were personally involved
4 in the alleged assault and battery. *Oster v. City of Capitola*, No. 21-3562 SI, 2022 WL 1033547,
5 at *5 (N.D. Cal. Jan. 11, 2022) (dismissing claims against officer and chief who were not
6 personally involved in alleged assault and battery). The claim is therefore dismissed with leave to
7 amend as to Oweis and Flippo.³

8 **F. Ralph Civil Rights Act Claim - Section 51.7 (Against UCPD Defendants Only)**

9 The Ralph Act provides a civil action for damages resulting from “violence, or
10 intimidation by threat of violence” committed against a person “because of political affiliation” or
11 because of a “position in a labor dispute,” or other protected characteristics. Cal. Civ. Code §
12 51.7. A Ralph Civil Rights Act claim can be asserted against a supervisor in the same way as for a
13 § 1983 claim. *Black Lives Matter-Stockton Chapter v. San Joaquin Cty. Sheriff’s Off.*, 398 F.
14 Supp. 3d 660, 679 (E.D. Cal. 2019). As discussed above, the FAC lacks sufficient facts to show
15 supervisory liability for the § 1983 claims. Accordingly, the Ralph Civil Rights Act claim is
16 dismissed with leave to amend as to Oweis and Flippo.

17 As to Bates, the FAC alleges that “the bias against plaintiff’s perceived race, color,
18 religion, ancestry, national origin, position in the labor dispute, and/or political affiliation was a
19 substantial motivating reason for defendants BATES . . . above-described misconduct toward her.”
20 FAC ¶ 67. This allegation is sufficient at the pleading stage. “[A]s a practical matter, it would be
21 extremely difficult for Plaintiff to allege the individual defendants’ racial animus absent a blatant
22 comment by one of the defendants – which is highly unlikely – or some degree of discovery.”
23

24 _____
25 ³ The doctrine of respondeat superior is inapplicable in this case. *See Wheat v. Lee*, No. 12-6299
26 EMC, 2013 WL 2285174, at 1*13 n.6 (N.D. Cal. May 23, 2013) (dismissing assault and battery
27 claim against supervisor who was not alleged to be part of the group of officers who “rushed”
28 plaintiff).

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1 *Jones v. Cty. of Contra Costa*, No. 13-5552 TEH, 2016 WL 1569974, at *5 (Apr. 19, 2016). The
2 motion to dismiss the Section 51.7 claim against Bates is denied.

3 **G. Bane Civil Rights Act Claim - Section 52.1 (Against UCPD Defendants Only)**

4 “The essence of a Bane Act claim is that the defendant, by the specified improper means
5 (i.e., ‘threats, intimidation or coercion’), tried to or did prevent the plaintiff from doing something
6 he or she had the right to do under the law or to force the plaintiff to do something that he or she
7 was not required to do under the law.” *Meyers v. City of Fresno*, No. CV F 10-2359 LJO, 2011
8 WL 902115, at *6 (E.D. Cal. Mar. 15, 2011) (quoting *Austin B. v. Escondido Union Sch. Dist.*,
9 149 Cal. App. 4th 860, 883, 57 Cal. Rptr. 3d 454 (2007)). Section 52.1 “provides a cause of
10 action for violations of a plaintiff’s state or federal civil rights committed by ‘threats, intimidation,
11 or coercion.’” *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014) (quoting
12 Cal. Civ. Code § 52.1).

13 A Bane Act claim can be asserted against a supervisor in the same way as for a § 1983
14 claim. *Black Lives Matter-Stockton Chapter v. San Joaquin Cty. Sheriff’s Off.*, 398 F. Supp. 3d at
15 679. As discussed above, the FAC fails to allege sufficient facts to state a cognizable claim
16 against Oweis and Flippo. Therefore, the Bane Act claim is dismissed as to these two Defendants.

17 As to the Bates, Defendants argue that the FAC fails to plead he acted with the requisite
18 intent. The Bane Act requires a “specific intent” to violate a person’s rights. *Reese v. Cty. of*
19 *Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) (quoting *Cornell v. City & Cty. of San*
20 *Francisco*, 17 Cal. App. 5th 766, 801-02 (2017)). Construing the alleged facts in the light most
21 favorable to Plaintiff, “specific intent” may be reasonably inferred from the allegation that Bates
22 surrounded her and clubbed her repeatedly on the head, neck, shoulder, and body. *Cf. John v.*
23 *Lake Cty.*, No. 18-06935 WHA, 2019 WL 859227, at *5 (N.D. Cal. Feb. 22, 2019) (holding that
24 plaintiffs pled a cognizable Bane Act claim based on allegations that defendant officers searched
25 their homes without a warrant or probable cause, threatened violence, and alleged that it was done

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1 willfully and maliciously); *Cornish v. Oakland Hous. Auth.*, No. 18-5947 LB, 2019 WL 1746070,
 2 at *6 (Apr. 18, 2019) (holding that plaintiff pled a cognizable Bane Act claim based on allegations
 3 that defendant pulled her out of her car, threw her to the ground and threatened to tase her). Bates’
 4 motion to dismiss the Bane Act claim is denied.

5 **H. Negligence Claim (Against UCPD Defendants Only)**

6 To state a negligence claim against a police officer, a plaintiff must allege: “(1) the officer
 7 owed plaintiff a duty of care; (2) the officer breached that duty by failing to use such skill,
 8 prudence, and diligence as other members of the profession commonly possess; (3) proximate
 9 cause between the negligent conduct and the resulting injury; and (4) actual loss or damage
 10 resulting from the officer’s negligence.” *Ramos v. Orange Cty. Sheriff’s Dep’t*, No. SA CV 13-
 11 1140 GHK, 2014 WL 12575767, at *7 (C.D. Cal. July 25, 2014) (citing *Harris v. Smith*, 157 Cal.
 12 App. 3d 100, 104 (1984)).

13 Here, Plaintiff’s negligence claim against Oweis and Flippo is based on an alleged failure
 14 to supervise, hire, train, supervise and discipline officers. Defendants contend that the claim fails
 15 because the FAC fails to allege a special relationship that would give rise to a duty of care. In
 16 response, Plaintiff clarifies that she is asserting negligence against Oweis and Flippo under a
 17 negligent supervision theory. Opp’n at 28, 30. As discussed previously, the FAC lacks sufficient
 18 facts to support supervisory liability. The negligence claim against Oweis and Flippo is therefore
 19 dismissed.

20 As to Bates, the alleged Fourth Amendment violation “suffices to establish the breach of a
 21 duty of care under California law.” *Johnson v. City of Berkeley*, No. 15-5343 JSC, 2016 WL
 22 928723, at *7 (N.D. Cal. Mar. 11, 2016) (citing *Young v. Cty. of Los Angeles*, 655 F.3d 1156, 1170
 23 (9th Cir. 2011) (reversing the district court’s dismissal of a negligence claim predicated on
 24 excessive force)). Defendants’ motion to dismiss the negligence claim against Bates is denied.

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I. Motion for Leave to File Second Amended Complaint

All Defendants filed conditional non-oppositions to Plaintiff’s motion for leave to file a Second Amended Complaint *See* ECF 37, 38. Defendants condition their non-opposition on this Court first ruling on the pending motions to dismiss and using that ruling to frame any leave subsequently granted to Plaintiff. Having ruled on the pending motions to dismiss the FAC, the Court grants as unopposed Plaintiff’s motion for leave to file a Second Amended.

IV. CONCLUSION

For the reasons set forth above, the Court orders as follows.

1. Silva’s motion to dismiss is GRANTED as to the third claim for conspiracy and fourth claim for failure to intervene, and DENIED in all other respects. The third and fourth claim are dismissed with leave to amend.
2. Oweis, Flippo and Bates’ motion to dismiss is GRANTED IN PART.
 - The first claim for excessive force is DISMISSED with leave to amend as to Oweis and Flippo;
 - The second claim for violation of the First Amendment is DISMISSED with leave to amend as to Oweis and Flippo;
 - The third claim for conspiracy is DISMISSED with leave to amend as to Oweis, Flippo and Bates;
 - The fourth claim for failure to intervene is DISMISSED with leave to amend as to Oweis and Flippo;
 - The fifth claim for assault and battery is DISMISSED without leave to amend as to Oweis and Flippo;
 - The sixth claim for violation of Section 51.7 is DISMISSED with leave to amend as to Oweis and Flippo;
 - The seventh claim for violation of Section 52.1 is DISMISSED with leave to amend as to Oweis and Flippo; and

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United States District Court
Northern District of California

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- The eighth claim for negligence is DISMISSED with leave to amend as to Oweis and Flippo.

Defendants Oweis, Flippo and Bates’ motion to dismiss is DENIED in all other respects.

3. Plaintiff’s motion for leave to file a Second Amended Complaint and to substitute parties for DOES 3 and 4 is GRANTED.

Plaintiff may file a Second Amended Complaint no later than March 7, 2022.

IT IS SO ORDERED.

Dated: February 14, 2022



EDWARD J. DAVILA
United States District Judge

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