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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

11 MICHELLE HORTON,

12 Plaintiff,

13 v.

14 COUNTY OF SAN DIEGO; EVAN
15 SOBZCAK; JACOB MACLEOD;
16 UNKNOWN SAN DIEGO SHERIFF'S
17 DEPARTMENT PERSONNEL; CITY OF
18 LA MESA; and UNKNOWN LA MESA
POLICE DEPARTMENT PERSONNEL,

19 Defendants.

Case No.: 21-cv-00400-H-BGS

**ORDER GRANTING DEFENDANT
CITY OF LA MESA'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

[Doc. No. 21.]

20 On August 27, 2021, Defendant City of La Mesa filed a motion for judgment on the
21 pleadings pursuant to Federal Rule of Civil Procedure 12(c). (Doc. No. 21.) On September
22 13, 2021, Plaintiff filed a response in opposition to La Mesa's motion for judgment on the
23 pleadings. (Doc. No. 23.) On September 16, 2021, the La Mesa filed its reply. (Doc. No.
24 25.) The Court, pursuant to its discretion under Civil Local Rule 7.1(d)(1), determines the
25 matter is appropriate for resolution without oral argument, submits the motion on the
26 parties' papers, and vacates the hearing. For the reasons below, the Court grants La Mesa's
27 motion for judgment on the pleadings.

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1 **Background**

2 The following factual background is taken from the allegations in Plaintiff’s
3 complaint. On May 30, 2020, Plaintiff’s children were peacefully participating in mass
4 protests in La Mesa, California. (Doc. No. 1, Compl. ¶¶ 1-2, 17-18.) Plaintiff was waiting
5 to meet up with her children, so they could go home. (Id.) At the relevant time, Plaintiff
6 was standing on a sidewalk, near a well-lit gas station, at the corner of Spring Street and
7 University Avenue in La Mesa. (Id. ¶ 17.)

8 Plaintiff alleges that while standing there, law enforcement officers, believed to
9 include Defendants Evan Sobzcak and Jacob MacLeod, shot her in the breast with a less-
10 lethal projectile while driving past her. (Id.) Plaintiff alleges that, when shot, she was
11 unarmed; not engaged in any criminal, raucous, or destructive activity; did not pose any
12 threat of harm to anyone; and was not resisting or fleeing arrest. (Id. ¶ 19.) Plaintiff alleges
13 that she was not immersed in a crowd of unruly protestors, nor was she near anyone
14 engaged in criminal, raucous, or destructive activity. (Id.)

15 On March 5, 2021, Plaintiff filed a complaint against Defendants County of San
16 Diego, Sobzcak, MacLeod, and La Mesa, alleging claims for: (1) 42 U.S.C. § 1983 –
17 excessive force; (2) 42 U.S.C. § 1983 – Monell;¹ (3) Bane Act, California Civil Code §
18 52.1(b); (4) battery; and (5) negligence. (Doc. No. 1, Compl.) By the present motion,
19 Defendant La Mesa moves pursuant to Federal Rule of Civil Procedure 12(c) for judgment
20 on the pleadings on all of Plaintiff’s claims against La Mesa. (Doc. No. 21-1 at 4, 7.)

21 **Discussion**

22 **I. Legal Standards for a Rule 12(c) Motion for Judgment on the Pleadings**

23 Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed—but
24 early enough not to delay trial—a party may move for judgment on the pleadings.”
25 “‘Judgment on the pleadings is properly granted when[, accepting all factual allegations in
26 the complaint as true,] there is no issue of material fact in dispute, and the moving party is
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28 ¹ Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).

1 entitled to judgment as a matter of law.” Chavez v. United States, 683 F.3d 1102, 1108
2 (9th Cir. 2012). The Ninth Circuit has explained that the standard for deciding a Rule 12(c)
3 motion “is ‘functionally identical’” to the standard for deciding a motion to dismiss under
4 Federal Rule of Civil Procedure 12(b)(6). Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys.,
5 Inc., 637 F.3d 1047, 1055 n.4 (9th Cir. 2011) (quoting Dworkin v. Hustler Magazine Inc.,
6 867 F.2d 1188, 1192 (9th Cir. 1989)); accord Chavez, 683 F.3d at 1108.

7 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
8 sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiff has
9 failed to state a claim upon which relief can be granted. See Conservation Force v. Salazar,
10 646 F.3d 1240, 1241 (9th Cir. 2011). Federal Rule of Civil Procedure 8(a)(2) requires that
11 a pleading stating a claim for relief contain “a short and plain statement of the claim
12 showing that the pleader is entitled to relief.” The function of this pleading requirement is
13 to “give the defendant fair notice of what the . . . claim is and the grounds upon which it
14 rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

15 A complaint will survive a Rule 12(b)(6) motion to dismiss if it contains “enough
16 facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has facial
17 plausibility when the plaintiff pleads factual content that allows the court to draw the
18 reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v.
19 Iqbal, 556 U.S. 662, 678 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a
20 formulaic recitation of the elements of a cause of action will not do.” Id. (quoting
21 Twombly, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’
22 devoid of ‘further factual enhancement.’” Id. (quoting Twombly, 550 U.S. at 557).
23 Accordingly, dismissal for failure to state a claim is proper where the claim “lacks a
24 cognizable legal theory or sufficient facts to support a cognizable legal theory.”
25 Mendondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

26 In reviewing a Rule 12(b)(6) motion to dismiss, a district court must accept as true
27 all facts alleged in the complaint, and draw all reasonable inferences in favor of the
28 claimant. See Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d

1 938, 945 (9th Cir. 2014). But a court need not accept “legal conclusions” as true. Iqbal,
 2 556 U.S. at 678. Further, it is improper for a court to assume the claimant “can prove facts
 3 which it has not alleged or that the defendants have violated the . . . laws in ways that have
 4 not been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of
 5 Carpenters, 459 U.S. 519, 526 (1983).

6 In addition, a court may consider documents incorporated into the complaint by
 7 reference and items that are proper subjects of judicial notice. See Coto Settlement v.
 8 Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). If the court dismisses a complaint for
 9 failure to state a claim, it must then determine whether to grant leave to amend. See Doe
 10 v. United States, 58 F.3d 494, 497 (9th Cir. 1995); see Telesaurus, 623 F.3d at 1003 (9th
 11 Cir. 2010).

12 **II. Analysis**

13 **A. Plaintiff’s Monell Claim**

14 In the complaint, Plaintiff alleges a Monell claim against Defendant La Mesa. (Doc.
 15 No. 1, Compl. ¶¶ 33-40.) Defendant La Mesa argues that Plaintiff’s Monell claim should
 16 be dismissed because Plaintiff does not allege that any employee of the City of La Mesa
 17 committed a constitutional violation against her. (Doc. No. 25 at 2-5.)

18 “[A] municipality cannot be held liable solely because it employs a tortfeasor—or,
 19 in other words, a municipality cannot be held liable under § 1983 on a respondeat superior
 20 theory.” Monell, 436 U.S. at 691; see also Castro v. Cty. of Los Angeles, 833 F.3d 1060,
 21 1073 (9th Cir. 2016) (“[A] municipality may not be held liable for a § 1983 violation under
 22 a theory of respondeat superior for the actions of its subordinates.”). Rather,
 23 “municipalities may only be held liable under section 1983 for constitutional violations
 24 resulting from official county policy or custom.” Benavidez v. Cty. of San Diego, 993 F.3d
 25 1134, 1153 (9th Cir. 2021); see also Monell, 436 U.S. at 692 (Section 1983 “imposes
 26 liability on a government that, under color of some official policy, ‘causes’ an employee
 27 to violate another’s constitutional rights.”).

28 A Monell claim is derivative of a claim against a municipal employee and requires

1 an underlying civil rights claim against a municipal employee. Lockett v. Cty. of Los
2 Angeles, 977 F.3d 737, 740 (9th Cir. 2020); see also Santor v. Harwell, No. 1:19-CV-1593
3 AWI SKO, 2020 WL 5017616, at *15 (E.D. Cal. Aug. 25, 2020) (“Without a constitutional
4 violation by an employee of a governmental entity, there is no Monell liability.”). In light
5 of this, several courts have held a plaintiff cannot bring a Monell claim against a
6 municipality if the tortfeasors at issue are not employees of that municipality. See, e.g.,
7 Buckheit v. Dennis, No. C 09-5000 JCS, 2010 WL 3751889, at *5 (N.D. Cal. Sept. 24,
8 2010) (“Plaintiff cannot plead a Monell claim against the County. The arresting officers
9 were not County employees. Plaintiff has not cited a single case that extends Monell
10 liability to employees of another municipality.”); Smith v. Cty. of Stanislaus, No. CV 11-
11 1655-LJO-SKO, 2012 WL 1205522, at *5 (E.D. Cal. Apr. 11, 2012) (“To state a Monell
12 claim against the County, Ms. Smith must allege that an employee of the County violated
13 her constitutional rights. As set forth above, however, grand jury members are not County
14 employees. Accordingly, Ms. Smith has failed to state a Monell claim against the County,
15 because the alleged wrongful acts were performed by the grand jury members, not County
16 employees.”).

17 In the complaint, Plaintiff alleges that law enforcement officers, believed to include
18 Defendants Sobzcak and MacLeod, shot her in the breast with a less-lethal projectile while
19 driving past her even though she was unarmed; not engaged in any criminal, raucous, or
20 destructive activity; did not pose any threat of harm to anyone; and was not resisting or
21 fleeing arrest. (Doc. No. 1, Compl. ¶¶ 17, 19.) Defendants Sobzcak and MacLeod are the
22 underlying tortfeasors with respect to Plaintiff’s Monell claim. (See id. ¶¶ 17, 34-35.) But
23 Plaintiff does not allege that Defendants Sobzcak and MacLeod are employees of
24 Defendant La Mesa. To the contrary, Plaintiff alleges that Defendants Sobzcak and
25 MacLeod “are each individuals who, at all times relevant hereto, were County [of San
26 Diego] employees engaged in the course and scope of their employment as Department
27 Deputies, and acting under color of state law.” (Id. ¶ 12)

28 Because the alleged torfeasors at issue, Defendants Sobzcak and MacLeod, are not

1 employees of Defendant La Mesa, Plaintiff's Monell claim against Defendant La Mesa
 2 fails as a matter of law.² See, e.g., Buckheit, 2010 WL 3751889, at *5; Smith, 2012 WL
 3 1205522, at *5; Santor, 2020 WL 5017616, at *15. As such, the Court dismisses Plaintiff's
 4 Monell claim against Defendant La Mesa without leave to amend.

5 C. Plaintiff's State Law Claims

6 In the complaint, Plaintiff alleges three state law claims against La Mesa for: (1)
 7 violation of the Bane Act, California Civil Code § 52.1; (2) battery; and (3) negligence.
 8 (Doc. No. 1, Compl. ¶¶ 41-56.) Defendant La Mesa argues that all of Plaintiff's state law
 9 claims against it should be dismissed because there is no statutory basis for holding La
 10 Mesa vicariously liable for the alleged conduct of the individual defendants at issue. (Doc.
 11 No. 21-1 at 7.)

12 “[California Government Code §] 815 establishes that public entity tort liability is
 13 exclusively statutory.” C.A. v. William S. Hart Union High Sch. Dist., 53 Cal. 4th 861,
 14 868 (2012). Section 815 provides: “Except as otherwise provided by statute: (a) A public
 15 entity is not liable for an injury, whether such injury arises out of an act or omission of the
 16 public entity or a public employee or any other person.” Cal. Gov't Code § 815.

17 As the statutory basis for asserting liability against the City of La Mesa, Plaintiff
 18 cites to California Government Code § 815.2 in her complaint. (Doc. No. 1, Compl. ¶¶ 45,
 19 51, 56.) California Government Code § 815.2 provides: “A public entity is liable for injury
 20 proximately caused by an act or omission of an employee of the public entity within the
 21 scope of his employment if the act or omission would, apart from this section, have given
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23 ² The Court does not find persuasive Plaintiff's citation to Silberberg v. Lynberg, 186 F. Supp. 2d
 24 157, 170 n.11 (D. Conn. 2002), (Doc. No. 23 at 7), as it is a non-binding out-of-circuit district court
 25 decision. District courts within the Ninth Circuit have held that a Monell claim cannot proceed against a
 26 municipality if the tortfeasors at issue are not employees of that municipality. See Buckheit, 2010 WL
 27 3751889, at *5; Smith, 2012 WL 1205522, at *5. In addition, Silberberg involved “a cooperative law
 28 enforcement operation” called the “Valley Street Crime Unit (‘VSCU’)” that involved at least six different
 towns. 186 F. Supp. 2d at 161 (“The VSCU is a law enforcement body created by an interlocal agreement
 among municipalities in the Naugatuck Valley area, and involving personnel from each of the member
 municipalities and from the Connecticut State Police.”). Plaintiff fails to adequately explain how the
 VSCU at issue in Silberberg is analogous to the alleged facts in this case.

1 rise to a cause of action against that employee or his personal representative.”

2 In her state law claims, Plaintiff seeks to hold Defendant La Mesa vicariously liable
3 for the acts of the individual defendants, Defendants Sobzcak and MacLeod, pursuant to
4 Section § 815.2. But Defendant La Mesa can only be vicariously liable under Section
5 815.2 for the acts “of an employee.” Cal. Gov’t Code § 815.2. Plaintiff does not allege
6 that the individual defendants, Defendants Sobzcak and MacLeod, are employees of
7 Defendant La Mesa. To the contrary, Plaintiff alleges that Defendants Sobzcak and
8 MacLeod “are each individuals who, at all times relevant hereto, were County [of San
9 Diego] employees engaged in the course and scope of their employment as Department
10 Deputies, and acting under color of state law.” (Doc. No. 1, Compl. ¶ 12.) As such,
11 Plaintiff’s reliance on Section 815.2 to assert liability on Defendant La Mesa is deficient
12 as a matter of law.

13 Plaintiff notes that California law defines “an employee” as “an officer, judicial
14 officer as defined in Section 327 of the Elections Code, employee, or servant, whether or
15 not compensated, but [not] an independent contractor.” Cal. Gov’t Code § 810.2. (Doc.
16 No. 23 at 7.) But this is of no consequence. Plaintiff does not assert that she can adequately
17 allege that Defendants Sobzcak or MacLeod constitute “employees” of Defendant La Mesa
18 under the definition set forth in Section 810.2.³ As such, Plaintiff has failed to adequately
19 allege a statutory basis for holding Defendant holding La Mesa vicariously liable for the
20 alleged conduct of the individual defendants with respect to Plaintiff’s state law claims.

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23 ³ In her opposition, Plaintiff attempts to assert that “right to control” by itself is sufficient to establish
24 that an individual defendant is an “employee” of a public entity. (Doc. No. 23 at 7-8.) To support this
25 assertion, Plaintiff cites to Townsend v. State of California, 191 Cal. App. 3d 1530, 1535 (1987).
26 Townsend does not support Plaintiff’s assertion. In Townsend, the California Court of Appeal noted that
27 the Restatement defined the term “servant” as “. . . [a] person employed to perform services in the affairs
28 of another and who with respect to the physical conduct in the performance of the services is subject to
the other’s control or right to control.” Townsend, 191 Cal. App. 3d at 1535 (quoting Rest. 2d. Agency
§ 220(1)). Thus, both Townsend and the Restatement defined the term “servant” as someone who is not
only subject to a “right to control,” but who is also “employed to perform services.” Id. Plaintiff does not
allege that the individual defendants, Defendants Sobzcak and MacLeod, are or were employed by
Defendant La Mesa.

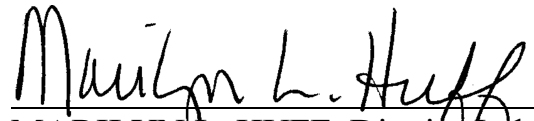
1 As a result, the Court dismisses Plaintiff's state law claims against La Mesa without leave
2 to amend.

3 **Conclusion**

4 For the reasons above, the Court grants Defendant City of La Mesa's motion for
5 judgment on the pleadings without leave to amend. Because the Court has dismissed all
6 of Plaintiff's claims against Defendant City of La Mesa without leave to amend, the Court
7 dismisses Defendant City of La Mesa from the action with prejudice. The action will
8 proceed against the remaining Defendants: County of San Diego, Evan Sobczak, and Jacob
9 MacLeod.

10 **IT IS SO ORDERED.**

11 DATED: September 23, 2021

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14 MARILYN L. HUFF, District Judge
15 UNITED STATES DISTRICT COURT
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