

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 KIMBERLINA LEA,

12 Plaintiff,

13 v.

14 CITY OF SAN DIEGO, et al.,

15 Defendants.

Case No.: 3:22-cv-01581-RBM-WVG

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS**

[Doc. 17]

16
17 Presently before the Court is a motion to dismiss (“Motion”) filed by Defendants
18 City of San Diego, Ace Ybanez, Joshua Clabough, Jason Gonzalez, Joshua Leiber, David
19 Burns, Kevin Cummins, and Miles Mcardle (collectively “Defendants”). (Doc. 17-1
20 (“Mot.”).) Plaintiff Kimberlina Lea, appearing pro se, filed an opposition to Defendants’
21 motion to dismiss (Doc. 19 (“Opp.”), and Defendants filed a reply (Doc. 20). The Court
22 finds the matter suitable for determination on the papers and without oral argument
23 pursuant to Civil Local Rule 7.1(d)(1).

24 For the reasons discussed below, Defendants’ Motion is granted, and Plaintiff is
25 granted leave to amend.

26 **I. BACKGROUND**

27 Plaintiff filed this action on October 13, 2022 against the City of San Diego and
28 certain officers related to the death of her father, Richard Price. (Doc. 1 (“Compl.”).)

1 Plaintiff alleges that on July 9, 2020, Mr. Price was walking on Menlo Avenue in San
2 Diego. (*Id.* at 1 ¶ 1.) At the time, Mr. Price “was under the influence of many controlled
3 substances” and “was an addict.” (*Id.*) Plaintiff alleges the San Diego Police Department
4 received a report of a man with a gun and, “seeing that Mr. Price was under the influence,”
5 the officers “told Mr. Price that they would get him help and shoot bean bags.” (*Id.* at 4 ¶
6 11.) Plaintiff alleges the officers then shot over 20 rounds of “shooting ammunition” at
7 Mr. Price, who died at the scene from gunshot wounds. (*Id.*)

8 Plaintiff brings five claims against Defendants: (1) use of excessive force in violation
9 of 42 U.S.C. § 1983; (2) a 42 U.S.C. § 1983 claim against the City of San Diego pursuant
10 to *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978);¹ (3)
11 battery; (4) intentional infliction of emotional distress; and (5) wrongful death. (*Id.* at 5–
12 11.)

13 II. LEGAL STANDARD

14 Under Federal Rule of Civil Procedure (“Rule”) 12(b)(6), a party may move to
15 dismiss a complaint for “failure to state a claim upon which relief can be granted.” FED.
16 R. CIV. P. 12(b)(6). At the motion to dismiss stage, all material factual allegations in the
17 complaint are accepted as true and are construed in the light most favorable to the non-
18 moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). “A
19 complaint should not be dismissed unless a plaintiff can prove no set of facts in support of
20 his claim which would entitle him to relief.” *Id.* (citation omitted).

21 To avoid dismissal under Rule 12(b)(6), a complaint need not contain detailed
22 factual allegations; rather, the plaintiff must plead “enough facts to state a claim to relief
23 that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

24
25 ¹ This claim is commonly referred to a “*Monell*” claim. *See Monell v. Dep’t of Soc. Servs.*
26 *of City of New York*, 436 U.S. 658, 694 (1978) (“[A] local government may not be sued
27 under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when
28 execution of a government’s policy or custom, whether made by its lawmakers or by those
whose edicts or acts may fairly be said to represent official policy, inflicts the injury that
the government as an entity is responsible under § 1983.”).

1 “A claim has facial plausibility when the plaintiff pleads factual content that allows the
2 court to draw the reasonable inference that the defendant is liable for the misconduct
3 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).
4 In other words, “the non-conclusory ‘factual content,’ and reasonable inferences from that
5 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v.*
6 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678). “Where
7 a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops
8 short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting
9 *Twombly*, 550 U.S. at 557).

10 When a Rule 12(b)(6) motion is granted, “a district court should grant leave to amend
11 even if no request to amend the pleading was made, unless it determines that the pleading
12 could not possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe v. N.*
13 *Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

14 III. DISCUSSION

15 Defendants move to dismiss all causes of action other than Plaintiff’s excessive force
16 claim. (*See Mot.* at 8–16.) The Court will address each of Defendants’ arguments in turn.

17 A. *Monell* claim (Claim 2)

18 Defendants argue dismissal of Plaintiff’s *Monell* claim is appropriate “because it
19 includes only conclusory allegations and does not sufficiently allege a failure to train nor
20 any widespread custom, policy, or practice to deprive a constitutional right.” (*Id.* at 8.)
21 While Plaintiff does not address Defendants’ substantive arguments with respect to her
22 *Monell* claim, Plaintiff states “any deficiencies not specifically pled in Plaintiff’s second
23 cause of action for *Monell* liability . . . can be cured by amendment.” (*Opp.* at 3.)

24 Municipalities cannot be held vicariously liable under 42 U.S.C. § 1983 for the
25 actions of their employees. *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S.
26 658, 691 (1978). “Instead, it is when execution of a government’s policy or custom,
27 whether made by its lawmakers or by those whose edicts or acts may fairly be said to
28 represent official policy, inflicts the injury that the government as an entity is responsible

1 under § 1983.” *Id.* at 694. To prevail in a civil action against a local governmental entity,
2 the plaintiff must establish “(1) that he possessed a constitutional right of which he was
3 deprived; (2) that the municipality had a policy; (3) that this policy ‘amounts to deliberate
4 indifference’ to the plaintiff’s constitutional right; and (4) that the policy is the ‘moving
5 force behind the constitutional violation.’” *Oviatt By & Through Waugh v. Pearce*, 954
6 F.2d 1470, 1474 (9th Cir. 1992) (quoting *City of Canton v. Harris*, 489 U.S. 378, 389–91
7 (1989)).

8 A plaintiff may establish municipal liability under 42 U.S.C. § 1983 in one of three
9 ways. “First, the plaintiff may prove that a city employee committed the alleged
10 constitutional violation pursuant to a formal governmental policy or a longstanding practice
11 or custom which constitutes the standard operating procedure of the local governmental
12 entity.” *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992) (internal quotation marks
13 omitted) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). Second, the
14 plaintiff may establish that a governmental official with “final policy-making authority”
15 ratified a subordinate’s unconstitutional conduct. *Id.* at 1346–47 (citations omitted).
16 Finally, a municipality may be held liable for inadequate training of its employees, but only
17 where “the need for more or different training is so obvious, and the inadequacy so likely
18 to result in the violation of constitutional rights, that the policymakers of the city can
19 reasonably be said to have been deliberately indifferent to the need.” *City of Canton*, 489
20 U.S. at 390.

21 Here, Plaintiff’s *Monell* claim “lack[s] any factual allegations that would separate
22 [it] from the ‘formulaic recitation of a cause of action’s elements’ deemed insufficient by
23 *Twombly*.” *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (quoting
24 *Twombly*, 550 U.S. at 555). Plaintiff’s Complaint merely recites some of the elements of
25 a *Monell* claim without including specific facts about Mr. Price’s encounter with
26 Defendants. For example, Plaintiff alleges only that the City of San Diego “failed to
27 provide adequate supervision and discipline to officers that hold power, authority, insignia,
28 equipment and arms entrusted to them” and that the City “was aware of the widespread

1 problems with the use of excessive force” and “has a lengthy history of ratifying deputy
2 misconduct.” (See Compl. at 7 ¶¶ 9–16.) And while Plaintiff alleges the City of San Diego
3 has “an official policy of acquiescence in the wrongful conduct” of its officers, the
4 Complaint contains no facts about a specific custom, policy, or procedure Plaintiff is
5 challenging in this lawsuit. (*Id.* at 7 ¶ 12.) Plaintiff’s failure to train allegations are
6 similarly conclusory, as the Complaint states only that the City “failed to institute, require,
7 and enforce proper and adequate training . . . when the need for such training and
8 supervision was obvious.” (*Id.* at 8 ¶ 13.)

9 Accordingly, the Court **GRANTS** Defendants’ motion to dismiss Plaintiff’s *Monell*
10 claim. See *Koistra v. Cnty. of San Diego*, No. 16CV2539-GPC(AGS), 2017 WL 4700073,
11 at *8 (S.D. Cal. Oct. 19, 2017) (dismissing *Monell* claim where complaint “merely presents
12 a recitation of the elements of *Monell* causes of action based on policy, practice or custom,
13 and failure to train and supervise and does not provide any supporting facts”). In light of
14 Plaintiff’s pro se status, the Court grants Plaintiff leave to amend her *Monell* claim to
15 address the pleading deficiencies identified in this Order. See *Cook, Perkiss & Liehe*, 911
16 F.2d at 247.

17 **B. Battery (Claim 3), Intentional Infliction of Emotional Distress (Claim 4), and**
18 **Wrongful Death (Claim 5)**

19 Defendants next argue Plaintiff’s claims for battery, intentional infliction of
20 emotional distress, and wrongful death should be dismissed due to Plaintiff’s failure to
21 comply with the requirements of the Government Claims Act, CAL. GOV’T CODE §§ 810 *et*
22 *seq.*

23 California’s Government Claims Act provides certain requirements a plaintiff must
24 comply with prior to filing a lawsuit against a public entity for money or damages. The
25 plaintiff must present to the public entity his or her claim “for injury to person or to personal
26 property” no later than six months after the accrual of the cause of action, and for claims
27 relating to any other cause of action, no later than one year after the accrual of the cause of
28 action. See CAL. GOV’T CODE § 911.2(a). “However, if the injured party fails to present a

1 timely claim, a written application may be made to the public entity for leave to present a
2 late claim.” *Coble v. Ventura Cnty. Health Care Agency*, 288 Cal. Rptr. 3d 431, 434 (Cal.
3 Ct. App. 2021) (cleaned up) (citing CAL. GOV’T CODE § 911.4(a)). The application must
4 be presented to the public entity no later than one year after the accrual of the cause of
5 action. *See* CAL. GOV’T CODE § 911.4(b). Unless the one-year period is tolled, “the public
6 entity is ‘powerless to grant relief’ if an application for leave to file a late claim was
7 presented after the one-year deadline.” *Coble*, 288 Cal. Rptr. 3d at 434 (quoting *Hom v.*
8 *Chico Unified School Dist.*, 61 Cal. Rptr. 920, 923 (Cal. Ct. App. 1967)).

9 “The filing of a claim is a condition precedent to the maintenance of any cause of
10 action against the public entity and is therefore an element that a plaintiff is required to
11 prove in order to prevail.” *DiCampli-Mintz v. Cnty. of Santa Clara*, 289 P.3d 884, 888
12 (Cal. 2012) (emphasis and citations omitted). Additionally, “a plaintiff must allege facts
13 demonstrating or excusing compliance with the claim presentation requirement.
14 Otherwise, his complaint . . . fail[s] to state facts sufficient to constitute a cause of action.”
15 *State of Cal. v. Sup. Ct.*, 90 P.3d 116, 122 (Cal. 2004).

16 In her Complaint, Plaintiff alleges she “complied with the administrative tort claim
17 requirement” by filing a claim with the City of San Diego on July 11, 2022. (Compl. at 3
18 ¶ 10.) Plaintiff alleges the City denied her claim in writing on July 29, 2022. (*Id.*) In her
19 opposition brief, however, Plaintiff “concedes that her [battery] and [wrongful death]
20 causes of action may not comply with the claim presentation requirements of the
21 Government Claims Act.” (Opp. at 3 (emphases omitted).) Plaintiff argues her claim for
22 intentional infliction of emotional distress, on the other hand, “can be cured by
23 amendment.” (*Id.* (emphasis omitted).) Defendants argue dismissal is appropriate because
24 (i) Plaintiff never filed a claim with the City and (ii) even if she did file a claim as alleged
25 in the Complaint, the claim was untimely “by approximately a year and a half and two
26 years and two days after the accrual of the cause of action.” (Mot. at 12–13 (emphasis
27 omitted).)
28

1 Plaintiff alleges the incident giving rise to her state law claims occurred on July 9,
2 2020. (Compl. at 4 ¶ 11.) Accordingly, it appears that even if Plaintiff filed a claim with
3 the City of San Diego on July 11, 2022, such claim was untimely. The Court therefore
4 **GRANTS** Defendants' motion to dismiss Plaintiff's claims for battery, intentional
5 infliction of emotional distress, and wrongful death.


6 Although Defendants argue such dismissal should be with prejudice because
7 Plaintiff cannot cure the deficiency, the Court declines at this time to find Plaintiff's claims
8 fail as a matter of law for failure to comply with the Government Claims Act. In light of
9 Plaintiff's pro se status and the contradictory information about Plaintiff's compliance with
10 the Government Claims Act detailed in the Complaint and Plaintiff's opposition brief, the
11 Court will grant Plaintiff leave to amend her state law claims. Accordingly, Plaintiff's state
12 law claims are **dismissed without prejudice**. Plaintiff is cautioned that any amendment
13 to her claims for battery, intentional infliction of emotional distress, and wrongful death
14 must plausibly allege Plaintiff's compliance with the Government Claims Act.

15 IV. CONCLUSION

16 For the reasons discussed above, Defendants' motion to dismiss (Doc. 17) is
17 **GRANTED**. Plaintiff may file an amended complaint on or before **July 28, 2023** which
18 cures the deficiencies noted above. Plaintiff is cautioned that conclusory allegations
19 unsupported by specific allegations of fact are insufficient to properly comply with the
20 Federal Rules of Civil Procedure. **If Plaintiff fails to file an amended complaint on or**
21 **before July 28, 2023, the case will proceed on Plaintiff's remaining claim of excessive**
22 **force.**

23 **IT IS SO ORDERED.**

24 DATE: June 28, 2023

25
26 
27 HON. RUTH BERMUDEZ MONTENEGRO
28 UNITED STATES DISTRICT JUDGE