UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DYLAN COOKE, et al.,

Plaintiffs,

v.

CITY OF BERKELEY, et al.,

Defendants.

Case No. 18-cv-04420-JSW

ORDER GRANTING, IN PART, AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS; GRANTING PLAINTIFFS LEAVE TO AMEND; AND SETTING INITIAL CASE MANAGEMENT CONFERENCE

Re: Dkt. No. 14

Now before the Court for consideration is the motion to dismiss filed by the City of Berkeley (the "City"), Berkeley Chief of Police Andrew Greenwood ("Chief Greenwood"), Sergeant Sean Ross ("Sgt. Ross"), Sergeant Spencer Fomby ("Sgt. Fomby"), Sergeant Todd Sabins ("Sgt. Sabins"), Sergeant Samantha Speelman ("Sgt. Speelman"), Officer Brian Mathis ("Officer Mathis"), and Officer Christopher Schulz ("Officer Schulz").

The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it found the motion suitable for disposition without oral argument.[1] *See* N.D. Civ. L.R. 7-1(b). The Court GRANTS, IN PART, AND DENIES, IN PART, Defendants' motion to dismiss. The Court also grants Plaintiffs leave to amend.

BACKGROUND

Plaintiffs allege that on the evening of June 20, 2017, they were among "[h]undreds of people" who attended a City Council meeting relating to the City's continued participation in a

[1] The footnotes in Defendants' briefs do not comply with Northern District Civil Local Rule 3-4(c)(2), which requires that footnotes be in twelve-point font. All parties are HEREBY ADVISED that if they fail to comply with that rule in the future, the Court shall strike an offending brief without prejudice.

program called Urban Shield. (Compl. ¶ 26.) At about 12:30 a.m., the council voted to continue participating in the program. (*Id.*) As the meeting was ending, Ms. Cooke alleges that she and several other "activists" stepped on to the stage and "peacefully unfurled a banner reading 'Stop Urban Shield, End the Militarization of Our Communities.'" (*Id.*¶¶ 26-27.) Ms. Cooke alleges before she touched the banner, and "without saying a word," Sgt. Ross "twisted [her] wrist and shoulder in an excruciating pain hold." Ms. Cooke alleges Sgt. Speelman assisted Sgt. Ross. (*Id.* ¶ 27.) Ms. Cooke also alleges that Sgt. Ross did not give her the opportunity to comply with any orders before doing so and that he did not respond when she said he was hurting her. Ms. Cooke also alleges that she was handcuffed and that as she was taken to a police car, Sgt. Speelman, or a "Doe officer", wrenched her arm harder. (*Id.* ¶ 28.) Ms. Cooke was arrested and taken to jail but was never charged with any crime. (*Id.* ¶ 30.)

Plaintiffs also allege:

> Defendants' unprovoked visible use of pain on [Ms. Cooke] and the other person who was arrested, on the stage, caused others to gather around pleading with the officers to stop hurting the activists. Despite the activists' and a Councilmember's attempts to deescalate the police officers' aggression, Defendants began forcefully pushing people out of the auditorium. Outside, when people expressed verbal opposition to the brutal and unnecessary arrests, Defendants advanced on the crowd, using their batons with unnecessary and aggressive force.

(*Id.* ¶ 31.)

Ms. Anderson, a photojournalist, alleges she took photographs of the event, wore a visible press pass, and identified herself as a member of the press to the police. Ms. Anderson also alleges she was wearing a brace on one arm. According to Ms. Anderson, Officer Mathis "and/or" unknown Doe officers repeatedly hit her with batons on her injured arm and shoved her camera into her face with batons. (*Id.* ¶¶ 32-33.) Mr. Williams, who is 74 years old, alleges an unknown Doe officer forcefully shoved him with a baton as he was trying to back up but was hemmed in by the crowd behind him. Mr. Williams' glasses also fell to the ground. When he went to pick them up, he alleges a Doe officer hit him on the top of his head and caused a laceration and a concussion. (*Id.* ¶ 34.) Mr. Williams alleges that none of the officers or City employees offered him help or medical assistance. Mr. Williams also alleges the officers did not report the fact that

he was struck on the head as required by Berkeley Police Department policy. (*Id.* ¶ 34-35.) Plaintiffs also allege that "Defendants" violated Berkeley Police Department General Orders C-64 and U-2, which had been revised to address complaints during Black Lives Matter demonstrations in late 2014. (*Id.* ¶ 39.)

Based on these and other allegations that the Court shall address as necessary, Plaintiffs bring claims on behalf of themselves and a putative class for: (1) violations of their rights under the Fourth Amendment to the U.S. Constitution, pursuant to 42 U.S.C. section 1983 ("Section 1983"); (2) violations of their rights under the First Amendment to the U.S. Constitution, pursuant to Section 1983; (3) assault and battery; (4) false arrest and false imprisonment; (5) violations of California Civil Code section 51.7, the Ralph Civil Rights Act of 1976 (the "Ralph Act claim"); (6) violations of California Civil Code section 52.1, the Tom Bane Civil Rights Act (the "Bane Act claim"); and (7) negligence.[2]

ANALYSIS

Defendants move to dismiss Plaintiffs' claims, in part, and Plaintiffs make certain concessions and clarifications in their opposition. Sgt. Ross and Sgt. Speelman do not move to dismiss Ms. Cooke's claims against them, and the City has not moved to dismiss the state law claims.

Plaintiff concedes that the Section 1983 claim for unlawful arrest and the state law claim against Officer Mathis should be dismissed, and they request a dismissal without prejudice. The Court grants Officer Mathis' motion to dismiss on that basis. That ruling is without prejudice to Plaintiffs seeking leave to amend as the case progresses.

Plaintiffs also state that Officer Schulz should not have been named as a Defendant, and the Court grants, in part, the motion to dismiss on that basis as well. This ruling is without

[2] Some of Plaintiffs' allegations are made on information and belief, which is permissible. *Park v. Thompson*, 851 F.3d 910, 929 (9th Cir. 2017) (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)). However, Plaintiffs do not include facts to show the basis for allegations made on information and belief, and it is not clear that additional facts supporting their claims are peculiarly within Defendants' possession and control. Plaintiffs shall rectify this deficiency in the amended complaint permitted by this Order.

prejudice to Plaintiff seeking leave to amend to include Officer Schulz as a defendant as this case proceeds.

Finally, Plaintiff clarifies that her request for punitive damages pertains only to the individual defendants. Although the individual defendants argue the allegations are insufficient, the Court concludes resolution of that issue is premature. It denies, in part, Defendants' motion to the extent it rests on that argument.

Defendants also move to dismiss: (1) Ms. Anderson's and Mr. Williams' claims for excessive force; and (2) any Section 1983 claims for unlawful arrest and any state law claims for false arrest and imprisonment asserted by Ms. Anderson and Mr. Williams. Chief Greenwood, Sgt. Fomby, Sgt. Sabins, and Officer Mathis move to dismiss on the basis that Plaintiffs fail to allege their personal participation in the conduct or facts to show there is a basis to hold them liable under a theory of supervisory liability.[3] The City moves to dismiss on the basis that Plaintiffs fail to allege facts sufficient to hold it liable under *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658 (1978).[4]

A. Applicable Legal Standard.

A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The Court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a

[3] Chief Greenwood, Sgt. Fomby, Sgt. Sabins, and Officer Mathis also argue they are entitled to qualified immunity. The Court is dismissing the claims against Sgt. Fomby and Sgt. Sabins for failure to state a claim, and so it does not reach this alternative argument. With respect to Chief Greenwood and Officer Mathis, the Court concludes the issue of qualified immunity cannot be resolved at this juncture, and it denies their motion to dismiss on that ground. That ruling is without prejudice to addressing the issue as the litigation proceeds.

[4] Plaintiffs refer to the defendants collectively throughout their complaint. In the amended complaint permitted by this Order, Plaintiffs shall not lump the Defendants together. Rather, they clearly identify the conduct supporting each claim against each named defendant, including any facts required to show a particular defendant is subject to supervisory liability.

formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

B. The Court Dismisses, in Part, the Claims Asserted by Ms. Anderson and Ms. Williams.

Each of Ms. Anderson's and Mr. Williams' claims, including the claim for negligence, arise out of the alleged use of excessive force. Defendants contend these claims should be limited to the Doe defendants. Mr. Williams has not alleged any of the named defendants personally used excessive force on him. Accordingly, the Court grants, in part, the motion to dismiss on this basis. This ruling is without prejudice to Mr. Williams seeking leave to amend to name officers who are alleged to have engaged in the conduct underlying these claims.

Although he argues otherwise, the Court concludes that paragraphs 32 and 33 read together are sufficient to allege that Officer Mathis used excessive force against Ms. Anderson. In the opposition, Plaintiffs assert they are not sure that Officer Mathis personally used excessive force against Ms. Anderson. The Court will not presume Plaintiffs made the allegation without a good faith basis to do so, and it will deny the motion on that basis. However, unless Ms. Anderson can, in good faith and in compliance with her obligations under Rule 11, continue to allege that Officer Mathis used excessive force against her, she shall not assert these claims against him in the amended complaint permitted by this Order.

Plaintiffs seem to argue that even though Ms. Anderson and Mr. Williams are not asserting claims for damages on the Section 1983 claim for unlawful arrest, they do seek injunctive and

declaratory relief on that claim. (Opp. Br. at 4:8-12.) Plaintiffs have asserted only one Fourth Amendment claim, which includes allegations relating to the use of excessive force and unlawful arrest. In the context of requests for injunctive relief, the standing inquiry requires a plaintiff to "demonstrate that [they have] suffered or [are] threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that [they] will again be wronged in a similar way." *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (internal quotations and citations omitted). Ms. Anderson and Mr. Williams were not arrested and, thus, have not shown they were injured by such conduct or that they are likely to be injured by such conduct in the immediate future. Accordingly, the Section 1983 claim for unlawful arrest and the state law claim for false arrest are limited to the claims asserted by Ms. Cooke on behalf of herself and putative class members.

C. The Court Dismisses, in Part, the Claims Against Chief Greenwood, Sgt. Fomby, and Sgt. Sabins.

Plaintiffs' claims against Chief Greenwood, Sgt. Fomby, and Sgt. Sabins are premised on a theory of supervisory liability.[5] It is well established that government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. *Iqbal*, 556 U.S. at 676; *Monell*, 436 U.S. at 691. Under Section 1983, a supervisor may be individually liable where: (1) he or she was personally involved "in the constitutional violation, or (2) a sufficient causal connection [exists] between the supervisor's wrongful conduct and the constitutional violation." *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 798 (9th Cir. 2018) (quotations and citations omitted). "The requisite causal connection can be established by setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury." *Id.* (quoting *Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir. 2011) (brackets, quotation marks, and ellipses in *Rodriguez* omitted). In addition, "[o]fficers may not be held liable merely for being present at the scene of a constitutional violation or for being a

[5] Plaintiffs do not appear to rely on a theory of "integral participation." *See, e.g., Chuman v. Wright*, 76 F.3d 292, 294-95 (9th Cir. 1996).

member of the same operational unit as a wrongdoer." *Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018).

Plaintiffs' allegations against Sgt. Fomby and Sgt. Sabins are that they were "on scene and supervised, directed, approved, acquiesced, and failed to intervene in officers' constitutional violations[.]" (Compl. ¶¶ 9-10.) Their mere presence at the scene is not sufficient to state a claim. *Felarca*, 891 F.3d at 820. With respect to the allegations of failure to intervene, that is a viable theory of liability. *See Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000); *Bagley v. City of Sunnyvale*, No. 16-cv-2250-JSC, 2017 WL 3021030, at *1 (N.D. Cal. July 17, 2017). "Importantly, however, officers can be held liable for failing to intercede only if they had an opportunity to intercede." *Cunningham*, 229 F.3d at 1289. A plaintiff must also demonstrate the officer knew of the alleged violations. *See, e.g., Ramirez v. Butte Silver-Bow Co.*, 298 F.3d 1022, 1029-30 (9th Cir. 2002); *Bagley*, 2017 WL 3021030, at *1. There are no such facts alleged to support a failure to intervene theory against these three defendants. The remaining allegations in paragraphs 9 and 10 are no more than a formulaic recitation of the elements of a claim based on supervisory liability.[6]

Accordingly, the Court grants the motion to dismiss claims against Sgt. Fomby and Sgt. Sabins. Because the Court cannot say it would be futile, the Court grants Plaintiffs leave to amend.

Plaintiffs include allegations regarding General Orders the City adopted to address complaints about tactics police officers used during Black Lives Matter protests in 2014. Those General Orders include prohibitions about how batons are used and about how crowds should be disbursed. Plaintiffs also allege that Sgt. Ross, Sgt. Speelman, Officer Mathis, and other unidentified officers engaged in conduct that directly violated these General Orders. (Compl. ¶¶ 27-34, 36, 39.) According to Plaintiffs, their injuries were caused by the fact that Chief Greenwood "never fully implemented or enforced" the General Orders. (*Id.*) The Court concludes that these facts are sufficient to state claims against Chief Greenwood.

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[6] It also is not clear how Sgt. Fomby or Sgt. Sabins could supervise fellow Sergeants, but the Court will not dismiss on that basis. *Cf. Felarca*, 891 F.3d at 821.

Accordingly, the Court grants, in part, and denies, in part, the motion to dismiss claims against Chief Greenwood.

D. The Court Dismisses, in Part, the Ralph Act and the Bane Act Claims.

The Ralph Act provides that "[a]ll persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation[.]" Cal. Civ. Code § 51.7(a). The essential elements of this claim are that: (1) the defendant threatened or committed violent acts against the plaintiff; (2) the defendant was motivated by his or her perception of plaintiff's political affiliation; (3) the plaintiff was harmed; and (4) the defendant's conduct was a substantial factor in causing harm to the plaintiff. *Austin B. v. Escondido Union Sch. Dist.*, 149 Cal. App. 4th 860, 880-81 (2007).

The Bane Act provides, in part:

> Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.

Cal. Civ. Code § 52.1(b).

Section 52.1 requires "an attempted or completed act of interference with a legal right, accompanied by a form of coercion." *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 334 (1998). If a plaintiff is successful in establishing an excessive force claim, those facts also can support a claim under the Bane Act. *See, e.g., Chaudry v. City of Los Angeles*, 751 F.3d 1096, 1105-06 (9th Cir. 2014); *Bender v. Los Angeles County*, 217 Cal. App. 4th 968, 976-81 (2013). In contrast to claims asserted under Section 1983, courts have held that Bane Act claims can be asserted against governmental entities, such as the City, on a theory of *respondeat superior*. *See, e.g., Cameron v. Craig*, 713 F.3d 1012, 1023 (9th Cir. 2013); *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 215 (1991).

Plaintiffs acknowledge that the only defendants whom they specifically allege engaged in

acts of violence are Sgt. Ross, Sgt. Speelman, and Officer Mathis. Although Officer Mathis argues otherwise, for the reasons set forth above, the Court concludes that Ms. Anderson states claims against Officer Mathis. However, if Ms. Anderson cannot maintain the allegation that Officer Mathis used excessive force against her, in good faith and in compliance with her obligations under Rule 11, she shall not assert these claims against Officer Mathis in the amended complaint permitted by this Order. Because Plaintiffs have stated Bane Act and Ralph Act claims against Sgt. Ross and Sgt. Speelman, and because the City has not argued those defendants are entitled to immunity, the Bane and Ralph Act claims against the City may proceed.

Plaintiffs argue they are pursuing the Ralph Act and Bane Act claims against Chief Greenwood, Sgt. Fomby, and Sgt. Sabins on a theory of supervisory liability. "[I]t does not appear that the California courts have explicitly addressed this question[.]" *Johnson v. Baca*, No. 13-cv-04496 MMM (AJWx), 2014 WL 12588641, at *16 (C.D. Cal. Mar. 3, 2014). In *Johnson*, the court noted that "several [courts], including the California Supreme Court, have implicitly held that a Ralph or Bane Act claim can be asserted against a sheriff based on his or her conduct as a supervisor rather than on personal involvement in violence or a threat of violence against a plaintiff." *Id.* (citing, *inter alia*, *Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 841 (2004)); *see Venegas*, 32 Cal. 4th at 841-43 (concluding plaintiffs had stated Bane Act claim against, inter alia, Los Angeles County sheriff). Based on the lack of clear authority to the contrary, the *Johnson* court denied the defendants' motion to dismiss. *Id.*, 2014 WL 12588641, at *16 & n.100; *see also Johnson v. Baca*, No. 13-cv-4496 MMM (AJWx), 2014 WL 12558252, at *21 (C.D. Cal. Oct. 9, 2014) (declining to hold as a matter of law that plaintiff could not proceed on Bane Act claim on a theory of supervisory liability).

The *Johnson* court's view is not universal. Several district courts within the Ninth Circuit have declined to extend the concept of supervisory liability to Ralph Act and Bane Act claims. *See, e.g., San Diego Branch of N.A.A.C.P. v. County of San Diego*, No. 16-cv-2575-JLS (BGS), 2018 WL 1382807, at *7 (S.D. Cal. Mar. 19, 2018) (citing *Redmond v. San Jose Police Dep't*, No. 14-cv-02345-BLF, 2017 WL 5495977, at *30 (N.D. Cal. Nov. 16, 2017) and *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1118 n. 19 (E.D. Cal. 2012)). The *San Diego Branch* court cited

and followed the decisions in *Redmond* and *Sanchez.* The *Redmond* court also cited and followed *Sanchez*, in which the court did not analyze the issue extensively but stated that "no case has actually applied supervisor liability to a Bane Act claim and this federal Court is loathe to expand the reach of Bane Act liability." 914 F. Supp. 2d at 1118 n. 19.

The Court recognizes that more recent cases have dismissed Bane Act and Ralph Act claims premised on supervisory liability. However, those courts have not extensively analyzed the issue. The Court concludes the parties do not adequately brief the issue, and at this juncture, it declines to rule as a matter of law that Plaintiffs cannot premise their Ralph Act and Bane Act claims on that theory. The Court has dismissed the Section 1983 claims against Sgt. Fomby and Sgt. Sabins, and it therefore dismisses the Bane Act and Ralph Act claims asserted against them, with leave to amend. The claims may proceed against Chief Greenwood. These rulings are without prejudice to Defendants renewing this argument on a subsequent motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment.

E. The Court Dismisses the Section 1983 Claims Against the City, With Leave to Amend.

The City moves to dismiss the Section 1983 claims on the basis that there are insufficient facts to hold it liable under *Monell*. It is well established that a municipality cannot be found liable under Section 1983 on a respondeat superior theory. *Monell*, 436 U.S. at 694. Municipal liability can be imposed only for injuries inflicted pursuant to an official governmental policy or custom. *Id.* at 690-94. "A *Monell* claim for section 1983 liability against the City may be stated in one of three circumstances: (1) when official policies or established customs inflict a constitutional injury; (2) when omissions or failures to act amount to a local government policy of 'deliberate indifference' to constitutional rights; or (3) when a local government official with final policy-making authority ratifies a subordinate's unconstitutional conduct." *Dorger v. City of Napa*, No. 12-cv-00440-YGR, 2012 WL 3791447, at *7 (N.D. Cal. Aug. 31, 2012) (citing *Clothier v. County of Contra Costa*, 591 F.3d 1232, 1249-50 (9th Cir. 2010), *overruled on other grounds Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016)).

Plaintiffs rely on each of these three theories. Their allegations against the City consist

either of conclusions that are couched as fact or a "formulaic recitation of the elements" necessary to establish each of the three theories of municipal liability. (*See, e.g.*, Compl. ¶¶ 42-44, 53-55.) Plaintiffs do allege that the alleged use of excessive force and violations of their First Amendment rights was caused, in part, by a failure to implement or enforce revised General Orders C-64, U-2, and P-29. (*Id.* ¶¶ 7, 39, 53.) Although the Court concludes the allegations are sufficient to state a claim against Chief Greenwood in his individual capacity, the Court concludes the allegations are not sufficient to show the City is liable.

Although Plaintiffs allege there were "repeated violations" and a "repeated course of conduct," there are no underlying facts to support those allegations. Plaintiffs refer only to the incident on June 20-21, 2017. Therefore, the Court concludes Plaintiffs fail to allege sufficient facts to show that the City had a policy or custom of failing to comply with or to enforce these General Orders. *See, e.g., Knighten v. City of Anderson*, No. 15-cv-01781-TLN-CMK, 2016 WL 1268114, at *6 (E.D. Cal. Mar. 30, 2016) (finding plaintiff alleged existence of policy but failed to allege facts beyond incident in question and concluding "Plaintiff's claims lack any factual allegations that would separate them from the formulaic recitation of the elements of the claim").

Plaintiffs also premise their claims against the City on a failure to train theory of liability. The Court concludes that there are insufficient factual allegations to show "(1) a pattern of constitutional violations of which policy-making officials can be charged with knowledge, or (2) that training is obviously necessary to avoid constitutional violations[.]" *Knighten*, 2016 WL 1268114, at *6 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390-91 (1989)). Finally, Plaintiffs rely on a ratification theory. (*See, e.g.*, Compl. ¶ 54.) The fact that a policymaker had "knowledge of an unconstitutional act does not, by itself, constitute ratification." *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 791 (9th Cir. 1997). Rather, a plaintiff must show a policy maker made a "conscious, affirmative choice[.]" *Knighten*, 2016 WL 1268114, at *7 (quoting *Gillete v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992)).

Plaintiffs allege "Defendants have taken no action to prevent a recurrence of the civil rights violations alleged herein at future demonstrations in the" City. (Compl. ¶ 45.) Although Plaintiffs argue these allegations are sufficient to support their ratification theory, the Court disagrees. For

example, Plaintiffs have not alleged that the City or Chief Greenwood failed to reprimand the officers in question or that they failed to or delayed an investigation into the incident. *See, e.g., Dorger*, 2012 WL 3791447, at *6. The Court concludes Plaintiffs have failed to allege underlying facts that would be sufficient to allege the City is liable based on a ratification theory.

Accordingly, the Court GRANTS the motion to dismiss the Section 1983 claims against the City. Because the Court cannot say it would be futile, the Court will grant Plaintiffs leave to amend.

CONCLUSION

For the foregoing reasons, the Court GRANTS, IN PART, AND DENIES, IN PART, Defendants' motion to dismiss, and GRANTS Plaintiffs leave to amend. Plaintiffs may file an amended complaint by January 9, 2019. Defendants shall answer or otherwise respond within 21 days after service of the amended complaint. The parties shall appear for an initial case management conference on March 1, 2019 at 11:00 a.m., and they shall file a joint case management conference statement on or before February 22, 2019.

IT IS SO ORDERED.

Dated: December 12, 2018

JEFFREY S. WHITE
United States District Judge

United States District Court
Northern District of California