

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

3
4 JOHN JENNINGS, et al.,
5 Plaintiffs,
6 v.
7 JANET NAPOLITANO, et al.,
8 Defendants.

No. 18-cv-00268-CW

ORDER ON DEFENDANTS' MOTIONS
TO DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT

(Dkt Nos. 57 & 59)

9
10 Before the Court are two motions to dismiss brought by
11 Defendants. The first is a motion brought on behalf of
12 Defendants Janet Napolitano, President of the University of
13 California (UC) Regents; Nicholas Dirks, former Chancellor of UC
14 Berkeley (UCB); Carol Christ, current Chancellor of UCB; Stephen
15 Sutton, Interim Vice Chancellor of Student Affairs Division at
16 UCB; Joseph Greenwell, Associate Vice Chancellor for Student
17 Affairs and Dean of Students at UCB; Margo Bennett, Chief of
18 Police for the University of California Police Department (UCPD);
19 Alex Yao, Operations Division Captain for UCPD; Leroy Harris,
20 Patrol Lieutenant for UCPD; Marc DeCoulode, Services Unit
21 Lieutenant for UCPD; and Joey Williams, Patrol Lieutenant for
22 UCPD (collectively, the UCB Defendants) to dismiss the Second
23 Amended Complaint (SAC) filed by Plaintiffs Katrina Redelsheimer,
24 John Jennings, Trevor Hatch and Donald Fletcher. Defendant Raha
25 Mirabdal, a private citizen who is alleged to have been at Sproul
26 Plaza at the time in question, is also moving to dismiss claims
27 alleged against her in the SAC. Finding the matters appropriate
28 for resolution without oral argument and having reviewed the

1 papers and the record, the Court DENIES in part and GRANTS in
2 part without leave to amend UCB Defendants' Motion to Dismiss
3 Plaintiffs' SAC. The Court also GRANTS Defendant Mirabdal's
4 Motion to Dismiss Plaintiffs' SAC and grants leave to amend.

5 BACKGROUND

6 Unless otherwise noted, the factual background is taken from
7 the SAC, which is assumed to be true for purposes of Defendants'
8 motions to dismiss. Docket No. 56 (SAC).

9 Plaintiffs are four individuals who had planned to attend an
10 event featuring Milo Yiannopolous, a conservative gay media
11 personality and political commentator. The event was hosted at
12 UCB by a registered student organization. Plaintiffs are now
13 bringing suit against UCB Defendants and private citizens
14 Mirabdal and Ian Dabney Miller who were alleged to be rioters in
15 attendance protesting Yiannopolous, along with Riot DOE
16 Defendants.

17 UCB Defendants Napolitano and Bennett are sued in their
18 official capacities only. Defendant Dirk is sued in his
19 individual capacity only. The others (Sutton, Christ, Greenwell,
20 Yao, Harris, DeCoulode and Williams) are sued in both their
21 individual and official capacities.

22 In 2016 and 2017, Yiannopolous went on a speaking tour on
23 college campuses. SAC ¶ 64. He was scheduled to appear at UCB
24 on February 1, 2017. Id. ¶ 1. Prior to the scheduled UCB event,
25 there were violent protests on three university campuses on
26 Yiannopolous' tour. Id. ¶ 68. UCB Defendants were aware of the
27 possibility of potential protestors at the Yiannopolous event.
28 Prior to the event, Defendants Harris and Yao created a crowd

1 control plan that included erecting barricades in Sproul Plaza
2 and increasing police presence, including adding Special Response
3 Teams (SRT) officers. Id. ¶¶ 71, 108.

4 Plaintiffs allege that rioters were making plans to assemble
5 at Sproul Plaza with the purpose of engaging in unlawful and
6 violent riots. Id. ¶ 89. These included groups like By Any
7 Means Necessary (BAMN), which Defendants Mirabdal and Dabney
8 Miller are alleged to be a part of. Id. ¶ 97.

9 On the day of the event, the crowd involving the protesters
10 and attendees at Sproul Plaza became violent. Plaintiffs allege
11 that UCB Defendants' crowd control plan required police presence
12 in Sproul Plaza, and Defendant DeCoulode deviated from the plan
13 when he ordered SRT officers to vacate Sproul Plaza. Id. ¶ 268.
14 Defendant DeCoulode ordered SRT officers to retreat into Martin
15 Luther King Center (MLK Center) and ordered the doors to be
16 locked. Id. The barricades that were erected in anticipation of
17 the riot along with the locked doors to MLK Center prevented
18 alternate routes of escape for attendees of the event including
19 Plaintiffs Jennings, Redelsheimer and Hatch who were in Sproul
20 Plaza. Id. ¶¶ 129, 145-49. Because they were trapped,
21 Plaintiffs suffered injuries from rioters. Once Defendants
22 DeCoulode and Williams along with SRT officers were inside MLK
23 Center, a few officers rescued several victims. Id. ¶ 161.
24 Defendant Williams ordered SRT officers to keep the door closed
25 and not rescue anyone else, allegedly stating, "Those people are
26 on their own." Id. ¶ 164. Defendant DeCoulode told SRT officers
27 that the attendees "deserved what they got," and added, "They put
28 themselves there. I'm not worried about it." Id. ¶ 275.

1 Plaintiffs allege that university administrators including
2 Defendant Dirks were watching these events unfold in real time
3 but continued to do nothing. Id. ¶ 200.

4 On November 14, 2018, the Court granted UCB Defendants'
5 motion to dismiss the First Amended Complaint (FAC), granting
6 Plaintiffs leave to amend their § 1983 claims against UCB
7 Defendants as to Plaintiffs' claim for injunctive relief against
8 UCB Defendants in their official capacities and Plaintiffs' §
9 1983 claims pursuant to the First and Fourteenth Amendments
10 against UCB Defendants in their individual capacities. The Court
11 otherwise dismissed the § 1983 claims against UCB Defendants in
12 their official capacities without leave to amend because these
13 claims were barred by the Eleventh Amendment. Plaintiffs' FAC
14 also alleged state claims of violating the Ralph and Bane Acts,
15 battery, negligence, intentional infliction of emotional distress
16 and false imprisonment against Defendants Mirabdal and Dabney
17 Miller. Defendants Mirabdal and Dabney Miller had filed answers
18 to the FAC. On December 19, 2018, Plaintiffs filed their SAC,
19 adding allegations to bolster their § 1983 claims, and alleging
20 the same state claims against Defendants Mirabdal and Dabney
21 Miller. Mirabdal now moves for the first time to dismiss all
22 claims against her. Defendant Dabney Miller has not moved to
23 dismiss the claims against him and has filed an answer. Docket
24 No. 58.

25 LEGAL STANDARD

26 A complaint must contain a "short and plain statement of the
27 claim showing that the pleader is entitled to relief." Fed. R.
28 Civ. P. 8(a). The plaintiff must proffer "enough facts to state

1 a claim to relief that is plausible on its face.” Ashcroft v.
2 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
3 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule
4 12(b)(6) for failure to state a claim, dismissal is appropriate
5 only when the complaint does not give the defendant fair notice
6 of a legally cognizable claim and the grounds on which it rests.
7 Twombly, 550 U.S. at 555. A claim is facially plausible “when
8 the plaintiff pleads factual content that allows the court to
9 draw the reasonable inference that the defendant is liable for
10 the misconduct alleged.” Iqbal, 556 U.S. at 678.

11 In considering whether the complaint is sufficient to state
12 a claim, the court will take all material allegations as true and
13 construe them in the light most favorable to the plaintiff.
14 Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049,
15 1061 (9th Cir. 2008). The court’s review is limited to the face
16 of the complaint, materials incorporated into the complaint by
17 reference, and facts of which the court may take judicial notice.
18 Id. at 1061. However, the court need not accept legal
19 conclusions, including threadbare “recitals of the elements of a
20 cause of action, supported by mere conclusory statements.”
21 Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

22 When granting a motion to dismiss, the court is generally
23 required to grant the plaintiff leave to amend, even if no
24 request to amend the pleading was made, unless amendment would be
25 futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.
26 Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining
27 whether amendment would be futile, the court examines whether the
28 complaint could be amended to cure the defect requiring dismissal

1 "without contradicting any of the allegations of [the] original
2 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
3 Cir. 1990). "Leave to amend may [] be denied for repeated
4 failure[s] to cure deficiencies by previous amendment."
5 Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 742 (9th Cir.
6 2008).

7 DISCUSSION

8 I. UCB Defendants' Motion to Dismiss

9 UCB Defendants move to dismiss all claims against them. All
10 four Plaintiffs have asserted § 1983 claims for purported
11 violations of their due process rights under the Fourteenth
12 Amendment (claim I) and their freedom of association right under
13 the First and Fourteenth Amendments (claim III). The Court notes
14 that Plaintiff Fletcher does not appear to join other Plaintiffs
15 in opposing UCB Defendants' Motion to Dismiss and thus is not
16 attempting to argue he has cured the deficiencies identified by
17 the Court previously, so his claims against UCB Defendants are
18 dismissed without leave to amend. Plaintiffs Jennings',
19 Redelsheimer's and Hatch's claims against UCB Defendants are
20 discussed below.

21 A. Ex Parte Young Injunctive Relief Against UCB Defendants 22 in Their Official Capacities

23 State officials sued in their official capacities are
24 considered "arms of the State" and are immune under the Eleventh
25 Amendment from suits brought in federal court because they are
26 not "persons" subject to suit under § 1983. Will v. Mich. Dep't
27 of State Police, 491 U.S. 58, 70-71 (1989). However, there is an
28 exception under Ex Parte Young, 209 U.S. 123 (1908), allowing for

1 injunctive relief against state officials sued in their official
2 capacities.

3 The Court granted Plaintiffs leave to amend their § 1983
4 claim against UCB Defendants in their official capacities seeking
5 injunctive relief if Plaintiffs could allege facts showing “there
6 is a likelihood that [Plaintiffs] will be injured in a similar
7 fashion again” stemming from any alleged actions by UCB
8 Defendants. Docket No. 53 (Order Granting UCB Defendants’ Motion
9 to Dismiss) (Order) at 7. The Court otherwise dismissed
10 Plaintiffs’ § 1983 claims without leave to amend against UCB
11 Defendants in their official capacities to the extent Plaintiffs
12 were seeking damages. Id.

13 Plaintiffs argue that their amended allegations are
14 sufficient because standing for injunctive relief is relaxed in
15 the First Amendment context. As discussed below, Plaintiffs have
16 failed to allege facts arising to a First Amendment violation by
17 UCB Defendants; thus, any purported relaxing of standards
18 pursuant to a First Amendment claim would be inapplicable here.¹

19 Separately, Plaintiffs argue there is a likelihood of such
20 harm occurring again because there is a likelihood of more
21 conservative speakers at UCB pursuant to a settlement of another
22 lawsuit and protesters would attend these speaking engagements
23

24 ¹ Nor is Plaintiffs’ cited authority appropriate here.
25 Plaintiffs’ cited authority relaxes the showing of injury-in-fact
26 for standing purposes in the First Amendment context when the
27 plaintiffs have met their burden of showing a likelihood of
28 success. Thus, irreparable harm from a First Amendment violation
is presumed even if the plaintiffs cannot make such a showing.
Here, as the Court explained in its prior Order, Plaintiffs had
failed, and continue to fail, to show a likelihood of being
harmed again in the same fashion.

1 and because UCB's Crowd Management Policy (CMP) manual continues
2 to suggest using barricades for events. SAC ¶ 382. However,
3 Plaintiffs' own theory of liability is premised, not on the
4 barricades themselves, see id. ¶ 268, n.71, but on the theory
5 that Defendants DeCoulode and Williams deviated from the crowd
6 control plan created for the Yiannopolous event by ordering SRT
7 officers to vacate Sproul Plaza instead of staying, and by
8 locking themselves in MLK Center, despite knowing that the
9 erected barricades would block an alternate exit, and thus they
10 created the danger. There are no factual allegations supporting
11 the notion Plaintiffs will encounter these circumstances again.
12 Thus, Plaintiffs have failed to cure the deficiency identified by
13 the Court despite an opportunity to do so; the Court GRANTS UCB
14 Defendants' motion to dismiss the claim seeking injunctive relief
15 against them (claim X) without leave to amend.

16 B. Section 1983 Claims Against UCB Defendants in Their
17 Individual Capacities

18 1. Plaintiffs' Freedom of Association Claim

19 To state a claim for infringement of free assembly, "a
20 plaintiff must [plead] that the [defendant] imposed a serious
21 burden upon, or affected in a significant way, or substantially
22 restrained the plaintiff's ability to associate." Mandel v. Bd.
23 Of Trustees of California State Univ., 17-cv-3511-WHO, 2018 WL
24 1242067, at *10 (N.D. Cal. Mar. 9, 2018) (quoting San Jose
25 Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1033 (9th
26 Cir. 2004)) (internal alteration marks omitted). The Court
27 dismissed Plaintiffs' freedom of association claim (claim III)
28 with leave to amend, finding that Plaintiffs failed to plead

1 "affirmative acts by UCB Defendants that interfered with
2 Plaintiffs' First Amendment right to associate." Order at 15.
3 While Plaintiffs did amend their § 1983 First Amendment claim and
4 added allegations that UCB Defendants had colluded with Riot DOE
5 Defendants to encourage violent riots at conservative events to
6 suppress speech, they seem to have abandoned this theory and
7 failed to address it in their opposition. Instead, Plaintiffs
8 argue again that their right to freely associate with one another
9 was impinged by UCB Defendants' purported "affirmative acts" of
10 failing to provide adequate protection. However, this merely
11 rehashes the same argument raised in Plaintiffs' opposition to
12 the motion to dismiss the FAC and previously rejected by this
13 Court. Plaintiffs have failed to plead how UCB Defendants
14 affirmatively interfered with their right to associate, as
15 opposed to merely failing to protect Plaintiffs "against the
16 actions of others." Id. Because Plaintiffs have failed to cure
17 the deficiencies identified by the Court despite the opportunity
18 to do so, the Court dismisses Plaintiffs' freedom of association
19 claim (claim III) without leave to amend.

20 2. Plaintiffs' Due Process Claim

21 "[M]embers of the public have no constitutional right to sue
22 state actors who fail to protect them from harm inflicted by
23 third parties" unless a "special relationship" between the state
24 and the plaintiffs exists because the plaintiffs are within the
25 state actor's custody, or there is a danger created by the state.
26 Johnson v. Seattle, 474 F.3d 634, 639 (9th Cir. 2007).

27 Plaintiffs are alleging a state-created danger here. To state a
28 claim under the state-created danger exception, a plaintiff must

1 allege that "an affirmative act by the [defendants] [left] the
2 plaintiff in a more dangerous position than the one in which they
3 found him." Estate of Amos ex rel. Amos v. City of Page,
4 Arizona, 257 F.3d 1086, 1091 (9th Cir. 2001) (original emphasis
5 and citations omitted).

6 a. State-Created Danger

7 The Court dismissed Plaintiffs' § 1983 due process claim
8 with leave to amend, finding that Plaintiffs failed to allege
9 facts showing that Defendants placed Plaintiffs in a state-
10 created danger with deliberate indifference. Specifically,
11 Plaintiffs did not allege any affirmative acts by UCB Defendants
12 that placed them in a more dangerous position than one in which
13 UCB Defendants found Plaintiffs, except possibly as to erecting
14 barricades that prevented alternate safety routes and locking
15 doors to MLK Center. Order at 9-10. The Court nevertheless
16 dismissed the claim because Plaintiffs failed to sufficiently
17 plead that Defendants Harris and Yao, who were alleged to have
18 ordered that the barricades be erected, were deliberately
19 indifferent. Plaintiffs also failed to allege that locking the
20 doors to MLK Center prevented alternate safety routes and
21 therefore they failed to allege that Plaintiffs were in a worse
22 situation than if the doors were not locked. Id. Plaintiffs
23 appear to abandon the theory that Harris' and Yao's order for the
24 barricades created the danger. See SAC ¶ 268, n.71.

25 Instead, Plaintiffs now allege that officers supervised by
26 Defendant DeCoulode made dispersal orders that aggravated the
27 crowd, and Defendant DeCoulode deviated from the crowd control
28 plan that required police presence, instead ordering SRT officers

1 to vacate Sproul Plaza. Plaintiffs further allege that Defendant
2 DeCoulode ordered that the doors to MLK Center be locked once the
3 officers proceeded from Sproul Plaza into MLK Center, which
4 blocked an alternate safety route. Defendant Williams ordered
5 that the doors remain locked despite observing the violence on
6 the other side. While ordering SRT officers to vacate Sproul
7 Plaza and issuing dispersal orders do not arise to conduct that
8 would have placed Plaintiffs in a more dangerous situation than
9 they otherwise would have been in, the Court finds that
10 Plaintiffs' other allegations sufficiently plead that Defendants
11 DeCoulode and Williams created a danger by locking themselves in
12 MLK Center which Plaintiffs now sufficiently allege blocked them
13 from safety in the building.

14 Plaintiffs lastly argue that the university administrator
15 UCB Defendants should also be held liable for this state-created
16 danger because they were alleged to have monitored the events in
17 real time and were "principally involved in policy
18 determinations." See SAC ¶ 200. First, the SAC only alleges
19 that Defendant Dirks was present, and does not specify any other
20 UCB Defendants were present, to support any claims as to the
21 other university administrator UCB Defendants (Christ, Sutton and
22 Greenwell). While Plaintiffs allege that university
23 administrators were watching, they have not alleged facts showing
24 how university administrator UCB Defendants contributed to the
25 danger allegedly created by DeCoulode and Williams.

26 Plaintiffs sufficiently plead that affirmative actions taken
27 by Defendants DeCoulode and Williams placed Plaintiffs in danger.
28 Plaintiffs have failed to identify such affirmative actions by

1 any other UCB Defendants.

2 b. Requisite Mental State

3 In addition to alleging that defendants took affirmative
4 actions to create a danger, plaintiffs must also show that
5 defendants were deliberately indifferent. Patel v. Kent School
6 Dist., 648 F.3d 965, 974 (9th Cir. 2011). "Deliberate
7 indifference is 'a stringent standard of fault, requiring proof
8 that a[n] . . . actor disregarded a known or obvious consequence
9 of his action.'" Id. (citing Bryan Cnty. v. Brown, 520 U.S. 397,
10 410 (1997)). Because only Defendants DeCoulode and Williams were
11 identified as allegedly responsible for a state-created danger,
12 the Court will analyze whether Plaintiffs allege they had the
13 requisite intent.

14 Defendants argue that the purpose-to-harm standard, whereby
15 Plaintiffs must show that Defendants "act[ed] with a purpose to
16 harm unrelated to legitimate law enforcement objectives," M.H. v.
17 Cnty. of Alameda, 62 F. Supp. 3d 1049, 1095 (N.D. Cal. 2014),
18 should apply to Defendants DeCoulode and Williams who were on the
19 ground making tactical decisions at the time, whereas the
20 deliberate indifference standard should apply to the other UCB
21 Defendants charged with preliminary planning.

22 The Court finds that because Plaintiffs sufficiently plead
23 that Defendants DeCoulode and Williams had the requisite intent
24 under either standard, it need not decide which standard should
25 apply to DeCoulode's and Williams' actions. Plaintiffs plead
26 that DeCoulode ordered SRT officers to retreat to MLK Center and
27 Williams ordered them to keep the doors to MLK Center locked,
28 preventing a viable alternate exit. Viewing all of the facts in

1 the light most favorable to Plaintiffs, keeping the doors locked,
2 despite seeing individuals including Plaintiffs being injured due
3 to the officers' actions raises an inference that these actions
4 were taken with a purpose to harm for reasons unrelated to
5 legitimate law enforcement objectives. Plaintiffs plead that
6 Williams and DeCoulode made statements that, construed in the
7 light most favorable to Plaintiffs, raise a reasonable inference
8 that their intent was to harm attendees. For example, Defendant
9 Williams allegedly stated, "Those people are on their own," after
10 ordering SRT officers to stop saving attendees and stop allowing
11 them into MLK Center. SAC ¶ 164. Similarly, Defendant DeCoulode
12 allegedly said that attendees "deserved what they got." Id. ¶
13 275. See e.g., Porter v. Osborn, 546 F.3d 1131, 1140-41 (9th
14 Cir. 2008) (noting that the purpose-to-harm standard could be met
15 if an officer purportedly used force "meant only to 'teach him a
16 lesson' or to 'get even'").

17 C. Qualified Immunity

18 In order to determine whether a defendant is entitled to
19 qualified immunity under § 1983, Hernandez v. City of San Jose
20 (Hernandez II) holds, "The Court asks, in the order it chooses,
21 (1) whether the alleged misconduct violated a constitutional
22 right and (2) whether the right was clearly established at the
23 time of the alleged misconduct." 897 F.3d 1125, 1132 (9th Cir.
24 2018). It is Plaintiffs' burden to identify a case that would
25 put Defendants on notice in this case that their particular
26 conduct was unlawful. Sharp v. Cnty. of Orange, 871 F.3d 901,
27 911 (9th Cir. 2017).

28 As stated above, the Court finds that Plaintiffs

1 sufficiently plead facts showing Defendants DeCoulode and
2 Williams violated Plaintiffs Jennings', Redelsheimer's and
3 Hatch's due process rights under the Fourteenth Amendment. The
4 next step requires the Court to determine whether the right was
5 clearly established. Plaintiffs point to Hernandez II, which is
6 instructive. In Hernandez II, the defendants were at a rally for
7 then-candidate Donald Trump which turned violent. The district
8 court in Hernandez I found that the defendants created a danger
9 when they continued to direct rally attendees in a certain
10 direction despite knowing there were violent counter-protesters
11 in that direction, as opposed to letting attendees walk in a
12 different direction. Hernandez II, 897 F.3d at 1130. The Ninth
13 Circuit in Hernandez II affirmed the district court's finding
14 that the defendants were not entitled to qualified immunity
15 because Johnson, 474 F.3d at 634, a case involving police conduct
16 during a weekend-long event that became increasingly violent over
17 its course, "clearly establishes the state-created danger
18 doctrine applies to the crowd-control context." Id. at 1138. In
19 applying Johnson, Hernandez II found the violation of attendees'
20 due process right was "obvious" based on allegations that the
21 defendants shepherded attendees into a violent mob even while
22 witnessing the violence firsthand. Id. at 1138-39.

23 Similarly, Johnson placed Defendants DeCoulode and Williams
24 on notice of the state-created danger doctrine in a crowd control
25 context here. As alleged, it was obvious that once Defendants
26 DeCoulode and Williams ordered SRT officers to withdraw from
27 Sproul Plaza and lock themselves in MLK Center, they could see
28 that these actions in combination with the barricades blocking

1 possible exits, placed Plaintiffs and other attendees in danger
2 of violence because they did not have alternate means of escape.
3 This is sufficient to raise a reasonable inference that
4 Plaintiffs' due process rights were violated, and that these
5 rights were clearly established. However, Defendants are not
6 barred from raising qualified immunity again as the evidentiary
7 record is further developed. Morley v. Walker, 175 F.3d 756, 761
8 (9th Cir. 1999) (determinations of qualified immunity are better
9 suited for summary judgment where "those allegations must be
10 supported" as opposed to a motion to dismiss where all factual
11 allegations must be regarded as true).

12 D. Punitive Damages

13 "In § 1983 cases, punitive damages [against government
14 officials in their individual capacities] are recoverable 'when
15 the defendant's conduct is shown to be motivated by evil motive
16 or intent, or when it involves reckless or callous indifference
17 to the federally protected rights of others.'" Knapps v. City of
18 Oakland, 647 F. Supp. 2d 1129, 1171 (N.D. Cal. 2009) (quoting
19 Smith v. Wade, 461 U.S. 30, 56 (1983)). Section 1983 punitive
20 damages are also available if the defendant's conduct includes
21 "malicious, wanton, or oppressive acts or omissions." Dang v.
22 Cross, 422 F.3d 800, 807 (9th Cir. 2005).

23 Here, Plaintiffs sufficiently allege that Defendants
24 DeCoulode and Williams acted with a purpose to harm. It follows
25 that these allegations are sufficient to plead "reckless or
26 callous indifference."

27 For the foregoing reasons, the Court DENIES UCB Defendants'
28 Motion to Dismiss the Fourteenth Amendment claim against

1 Defendants DeCoulode and Williams in their individual capacities,
2 and the punitive damages claim to the extent this relies on the
3 Fourteenth Amendment claim as alleged by Plaintiffs Jennings,
4 Redelsheimer and Hatch. Because Plaintiffs have failed to cure
5 the other deficiencies, the Court GRANTS UCB Defendants' motion
6 as to the other claims and other UCB Defendants, without leave to
7 amend.

8 II. Defendant Mirabdal's Motion to Dismiss

9 Defendant Mirabdal moves to dismiss Plaintiffs' claims
10 against her. All four Plaintiffs asserted state law claims of
11 violations of the Ralph Act (claim IV) and the Bane Act (claim
12 V). Separately, Plaintiffs Jennings, Redelsheimer and Hatch
13 allege state law claims of civil battery and conspiracy (claim
14 VI), negligence (claim VII), intentional infliction of emotional
15 distress (claim VIII) and false imprisonment (claim IX) against
16 Mirabdal.

17 Mirabdal argues that Plaintiffs have failed to plead facts
18 identifying her as an assailant of any of them; rather,
19 Plaintiffs are merely arguing Mirabdal is vicariously liable for
20 the acts of the other purported joint tortfeasors who assaulted
21 Plaintiffs.

22 In reviewing the SAC, the Court identified the specific
23 allegations against Mirabdal as follows: (i) on information and
24 belief, Mirabdal is part of BAMN, an alleged left-wing militant
25 group, SAC ¶¶ 97, 92; (ii) Mirabdal "participated in, abetted,
26 encouraged, and aided the violent battery upon Plaintiffs
27 Jennings and Redelsheimer," id. ¶ 218; (iii) "Mirabdal assaulted
28 Plaintiff Jennings by attempting to batter him after he had been

1 beaten unconscious and was lying defenseless on the ground," id.
2 ¶ 219; and, (iv) "Mirabdal is jointly and severally liable with
3 all concurrent joint tortfeasors for each and every one of the
4 injuries suffered by Plaintiffs Jennings and Redelsheimer," id. ¶
5 220. All of Plaintiffs' allegations against Mirabdal are merely
6 conclusory and unsupported by any factual allegations.²
7 Plaintiffs have failed to plead facts against Defendant Mirabdal
8 specifically as to any of the elements of the state law claims
9 sufficient to survive a motion to dismiss.

10 The actions of other rioters cannot be imputed to Mirabdal
11 here. Plaintiffs argue that the allegations against Riot DOE
12 Defendants include Mirabdal and, thus, their allegations should
13 survive the pleading stage. However, aside from the claim of
14 conspiracy to batter, Plaintiffs have not identified how Mirabdal
15 could be vicariously liable for the acts of others by merely
16 being at the same place as the other alleged rioters. See. e.g.,
17 Workman v. City of San Diego, 267 Cal. App. 2d 36, 38-40 (1968)
18 (discussing various legal doctrines for imputing negligence from
19 one party to another). Nor is Plaintiffs' conspiracy claim any
20 more meritorious. Any purported conspiracy requires "proof that
21 the defendant and another person had the specific intent to agree
22 or conspire to commit an offense, as well as the specific intent
23 to commit the elements of that offense, together with proof of
24 the commission of an overt act by one or more of the parties to

25
26
27 ² These conclusory allegations only purport to allege actions
28 taken against Plaintiffs Jennings and Redelsheimer. Thus,
Plaintiffs Fletcher's and Hatch's claims against Mirabdal
separately fail because they have failed to make any allegations
against Mirabdal specifically, conclusory or otherwise.

1 such agreement in furtherance of the conspiracy.” In re Y.R.,
2 226 Cal. App. 4th 1114, 1121 (2014). Plaintiffs argue that they
3 have alleged Mirabdal is a co-conspirator with other BAMN members
4 to cause harm to Plaintiffs. However, putting aside the
5 conclusory assertion unsupported by any facts to show Mirabdal
6 was a BAMN member or that there was any agreement among BAMN
7 members, even under Plaintiffs’ own theory, Plaintiffs have not
8 alleged that any BAMN members battered or assaulted Plaintiffs.
9 Plaintiffs only allege that various Riot DOE Defendants battered
10 and assaulted them and that numerous purported liberal militant
11 groups were part of this riot. See SAC ¶¶ 90-93 (noting
12 “[v]arious left-wing militant political groups, some organized
13 and some decentralized” included “Berkeley Antifa,” “It’s Going
14 Down,” and “Refuse Fascism” along with BAMN). Thus, Plaintiffs
15 have failed to allege that Mirabdal was a part of BAMN or had any
16 intent to conspire with other BAMN members to assault and batter
17 Plaintiffs. Even if they were able to sufficiently allege such a
18 conspiracy between Mirabdal and BAMN members, Plaintiffs failed
19 to allege non-conclusory facts that any BAMN members (as opposed
20 to other rioters) actually committed any overt act against
21 Plaintiffs.

22 In their Opposition, Plaintiffs include a screenshot
23 purporting to depict Mirabdal “in the middle of the pack
24 attacking Plaintiff [Jennings].” Docket No. 63 (Plaintiffs’
25 Opposition to Mirabdal’s Motion to Dismiss) at 3. However, the
26 screenshot was not referred to in the SAC, nor did Plaintiffs
27 request judicial notice of it. Lee v. City of Los Angeles, 250
28 F.3d 668, 688-89 (9th Cir. 2001) (“[A] district court may not

1 consider any material beyond the pleadings in ruling on a Rule
2 12(b)(6) motion" except when the authenticity of the documents is
3 not contested or when a court takes judicial notice as a matter
4 of public record). Thus, the screenshot is not incorporated for
5 purposes of assessing Plaintiffs' allegations. Furthermore, even
6 if the screenshot was considered, at most, it depicts Mirabdal
7 among the rioters. It does not actually appear to depict
8 Mirabdal battering any of the Plaintiffs. See Opp. to Mirabdal
9 Mot. to Dismiss at 3.

10 Because this is Mirabdal's first motion to dismiss, and
11 because it is not clear that amendment would be futile, the Court
12 GRANTS Mirabdal's motion to dismiss and grants Plaintiffs leave
13 to amend their claims against her to remedy these deficiencies if
14 they can truthfully do so.

15 CONCLUSION

16 For the foregoing reasons, the Court hereby rules as
17 follows:

18 As to UCB Defendants' motion to dismiss, the Court DENIES it
19 against Defendants DeCoulode and Williams in their individual
20 capacities as to Plaintiffs Jennings', Redelsheimer's and Hatch's
21 due process claim under the Fourteenth Amendment (claim I), and
22 GRANTS it as to the rest of the claims (claim I with regard to
23 the other UCB Defendants, claims III and X as to all UCB
24 Defendants, and claims I and X as to Fletcher against all UCB
25 Defendants), without leave to amend.

26 The Court GRANTS Mirabdal's motion to dismiss in its
27 entirety (claims IV, V, VI, VII, VIII and IX) with leave to
28 amend. Plaintiffs shall have twenty-one days to file their Third

1 Amended Complaint if they can truthfully cure the defects
2 addressed in this Order as to the claims against Mirabdal.
3 Mirabdal may choose to file her answer or motion to dismiss no
4 later than April 22, 2019. If Mirabdal files a motion to
5 dismiss, Plaintiffs shall file their response no later than May
6 6, 2019. Mirabdal may file her reply no later than May 13, 2019.
7 The matter will be decided on the papers unless the Court deems
8 oral argument necessary.

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IT IS SO ORDERED.

Dated: March 12, 2019



CLAUDIA WILKEN
United States District Judge

United States District Court
Northern District of California