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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KORI MCCOY, individually and as Co-
Successor-in-Interest to Decedent
WILLIE MCCOY; et al.,

Plaintiffs,

v.

CITY OF VALLEJO, et al.,

Defendants.

No. 2:19-cv-01191-JAM-CKD

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS**

Plaintiff's Second Amended Complaint ("SAC"), ECF No. 84, alleges eight causes of action, including various allegations under 42 U.S.C. § 1983, as well as claims of negligence, battery, conspiracy, supervisory liability, and violations of California Civil Code § 52.1. Id. ¶¶ 75-113.

Defendants move to dismiss Plaintiffs' second cause of action for violation of interference with familial relations, eighth cause of action for negligent supervision, and seventh cause of action for conspiracy. See Mot. to Dismiss ("Mot."), ECF No. 94. Defendant Police Officer Ryan McMahon joins the individual, non-supervisory co-defendants in their Motion to Dismiss the second and seventh causes of action. See McMahon's

1 Joinder, ECF No. 95.

2 For the reasons set forth below, the Court GRANTS IN PART
3 and DENIES IN PART Defendants' motion to dismiss.¹

4
5 I. BACKGROUND

6 The Court has previously described the facts of this case,
7 thus, it will not do so again here. See Order Grant. in Part and
8 Den. in Part Defs.' Mot. to Dismiss at 2, ECF No. 12; see also
9 Order Den. Defs.' Mot. to Bifurcate at 2, ECF No. 61. On March
10 26, 2021, Plaintiffs filed their SAC. See SAC. Following the
11 filing of Defendants' instant motion to dismiss, the parties
12 stipulated that Marquita McCoy cannot pursue state law claims
13 brought in her individual capacity for damages because she failed
14 to timely file a government claim within six months of McCoy's
15 death. See Stip. at 2, ECF No. 97 (citing Cal. Gov. Code §§ 905,
16 905.2, 954.4). The parties, therefore, agreed that Marquita
17 McCoy's state law claims for wrongful death, pursuant to the Bane
18 Act, Cal. Civ. Code § 52.1, battery, conspiracy, and supervisory
19 liability that are found in the SAC's fourth through eighth
20 causes of action should be dismissed with prejudice. Id.

21 As noted above, Defendants' motion to dismiss seeks to
22 eliminate three of the SAC's eight causes of action. See
23 generally Mot. First, Defendants argue that Plaintiffs'
24 Fourteenth Amendment claim for violation of familial relations
25 should be dismissed because siblings have no right to assert such

26
27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for June 22, 2021.

1 a cause of action. Mot. at 13. Next, Defendants argue that
2 Plaintiff's negligent supervision claim is not viable because no
3 special relationship has been alleged, and, moreover, the
4 officers are immune from the allegation. Mot. at 13-18.
5 Finally, Defendant's contend that Plaintiff's conspiracy claim is
6 not a stand-alone claim under state law and cannot be pled
7 against former Chief Bidou, Sergeant Wylie, and Lieutenant Darden
8 as the use of force occurred without their involvement. Mot. at
9 18-20. Defendants also argue that Plaintiffs cannot plead a
10 federal conspiracy claim to commit excessive force. Id.

11 Plaintiffs oppose nearly all of Defendants' motion to
12 dismiss. See Opp'n, ECF No. 98. Plaintiffs concede that
13 Marquita McCoy, Kori McCoy, Shawnmell Mitchell, Marc McCoy, and
14 Barbara Dorsey cannot assert a Fourteenth Amendment claim for
15 familial loss against Defendants. Opp'n at 14, n.2. Defendants'
16 filed a reply. See Reply, ECF No. 99.

17 18 II. OPINION

19 A. Judicial Notice

20 Defendants request judicial notice of the City of Vallejo
21 Police Department's Computer Aided Dispatch ("CAD") Incident
22 Report No. 1902090192, dated February 2, 2019. See Defs.' Req.
23 for Judicial Notice ("RJN"), ECF No. 94-1. Plaintiffs do not
24 oppose this request. The CAD Incident Report is a public record
25 whose accuracy cannot be reasonably questioned. See Harris v.
26 Cty. of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012); Sialoi
27 v. City of San Diego, WL 6410987, at *1, n.2 (S.D. Cal. 2013)
28 (the court took judicial notice of a CAD printout). The Court

1 grants Defendants' request for judicial notice.

2 B. Legal Standard

3 Federal Rule of Civil Procedure 8(a)(2) requires "a short
4 and plain statement of the claim showing that the pleader is
5 entitled to relief." A Rule 12(b)(6) motion attacks the
6 complaint as not alleging sufficient facts to state a claim for
7 relief. "To survive a motion to dismiss [under 12(b)(6)], a
8 complaint must contain sufficient factual matter, accepted as
9 true, to state a claim to relief that is plausible on its face."
10 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (internal quotation
11 marks and citation omitted). While "detailed factual
12 allegations" are unnecessary, the complaint must allege more
13 than "[t]hreadbare recitals of the elements of a cause of
14 action, supported by mere conclusory statements." Id. at 678.
15 "In sum, for a complaint to survive a motion to dismiss, the
16 non-conclusory 'factual content,' and reasonable inferences from
17 that content, must be plausibly suggestive of a claim entitling
18 the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d
19 962, 969 (9th Cir. 2009).

20 C. Analysis

21 1. Familial Relationship

22 Defendants argue that Plaintiff's second cause of action
23 for violation of their right to a familiar relationship pursuant
24 to the Fourteenth Amendment must be dismissed because Plaintiffs
25 are McCoy's siblings. See Mot. at 13. Plaintiffs concede this
26 as to all of McCoy's siblings except for his brother, Louis
27 McCoy. See Opp'n at 14-15. McCoy and his brother Louis were
28 orphaned in their early teens and McCoy took care of Louis,

1 "providing him with financial support, guidance, and
2 companionship." Opp'n at 5. Thus, Plaintiffs contend that the
3 Court should consider them to be more than just siblings. See
4 Mot. at 14.

5 The Court declines to do so. The Ninth Circuit has clearly
6 held that "[n]either the legislative history nor Supreme Court
7 precedent supports an interest for siblings consonant with that
8 recognized for parents and children." Ward v. City of San Jose,
9 987 F.2d 280, 284 (9th Cir. 1991); see also Wheeler v. City of
10 Santa Clara, 894 F.3d 1046, 1058 (9th Cir. 2018) ("Few close
11 relationships—even between blood relatives—can serve as a basis
12 for asserting Fourteenth Amendment loss of companionship
13 claims."). Plaintiffs' allegation that their right to a
14 familial relationship was violated fails as a matter of law.
15 The Court dismisses Plaintiffs' second cause of action with
16 prejudice.

17 2. Supervisory Liability

18 Plaintiffs, in their eighth cause of action, allege that
19 Sergeant Wiley and Lieutenant Darden are liable for the
20 excessive force used against McCoy because they failed to
21 properly supervise the other officers. See SAC ¶¶ 111-13. The
22 SAC fails to specify whether Plaintiffs' supervisory liability
23 claim is brought under state or federal law, however, Plaintiffs
24 only respond to Defendants' arguments made pursuant to federal
25 law. See Opp'n at 6-11 ("Plaintiffs allege Section 1983
26 supervisory liability"). Thus, Plaintiffs' eighth cause
27 of action arises exclusively under federal law. The Court need
28 not address whether Plaintiffs' claim of supervisory liability

1 fails under California law.

2 Federal law does not impose liability on a supervisor for a
3 subordinate's action by virtue of that relationship alone. See
4 Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658, 691
5 (1978). A supervisor can only be held liable for the
6 constitutional violations of his subordinates if the supervisor
7 either had personal involvement in the constitutional
8 deprivation or there was a sufficient causal connection between
9 the supervisor's unlawful conduct and the constitutional
10 violation. Edgerly v. City & Cty. of S.F., 599 F.3d 946, 961
11 (9th Cir. 2010). The causal connection is established "by
12 setting in motion a series of acts by others or by knowingly
13 refus[ing] to terminate a series of acts by others, which [the
14 supervisor] knew or reasonably should have known would cause
15 others to inflict a constitutional injury." Rodriguez v. Cty.
16 of L.A., 891 F.3d 776, 798 (9th Cir. 2018) (alteration in
17 original) (citation omitted). Thus, supervisors can be held
18 liable for: "(1) their own culpable action or inaction in the
19 training, supervision, or control of subordinates; (2) their
20 acquiescence in the constitutional deprivation of which a
21 complaint is made; or (3) for conduct that showed a reckless or
22 callous indifference to the rights of others." Cunningham v.
23 Gates, 229 F.3d 1271, 1292 (9th Cir. 2000).

24 Defendants argue that Plaintiffs' allegations are
25 insufficient to establish a failure to supervise theory of
26 liability. See Mot. at 16-18. Defendants contend Sergeant
27 Wylie and Lieutenant Darden had no personal involvement in the
28 use of force as they were not on the scene and had no special

1 relationship with McCoy. Mot. at 16; see SAC ¶¶ 2, 34, 37-43
2 (Officers Mark Thompson, Collin Eaton, Jordan Patzer, Bryan
3 Glick, Anthony Romero-Cano, and Ryan McMahon were on the scene
4 and involved in the use of force). Sergeant Wylie and
5 Lieutenant Darden arrived on the scene after McCoy was shot by
6 the other officers. See SAC ¶¶ 38, 112. The shooting occurred
7 at about 22:51, shots were confirmed at 22:52:38, and Sergeant
8 Wylie and Lieutenant Darden arrived at 22:52:51 and 22:54:30,
9 respectively. See CAD Incident Report, Ex. A to RJN, ECF No.
10 94-1. The Court agrees that neither was personally involved in
11 the shooting.

12 However, it is not true that Plaintiffs have failed to
13 allege sufficient facts to suggest a causal connection between
14 Sergeant Wylie and Lieutenant Darden's alleged acts and
15 omissions and the use of force. The officers that first arrived
16 on the scene and stood around McCoy's car, "put over the radio
17 that they may have a potential shooting situation." SAC ¶ 3.
18 They "called out over dispatch" to "summon[] other officers."
19 SAC ¶ 37. And, "[e]ven though Defendant Romero-Cano dispatched
20 that they had a potential officer-involved shooting situation,"
21 the on-duty supervisors—Sergeant Wylie and Lieutenant Darden—
22 "ignored the call . . . instead of supervising their
23 subordinates during a high-risk, and ultimately deadly
24 encounter." SAC ¶ 38. Plaintiffs allege that, without Sergeant
25 Wylie and Lieutenant Darden's supervision, "the officers
26 formulated no plan or strategy, and recklessly [shot and killed
27 McCoy]." SAC ¶ 39.

28 These factual allegations amount to more than conclusory

1 statements. Instead, they state a plausible claim of relief.
2 "If taken as true, as required, [Plaintiffs'] factual
3 allegations show [Sergeant Wylie and Lieutenant Darden] knew of
4 unconstitutional conduct by [their] subordinates and did not
5 terminate these actions, satisfying each of the elements of a
6 successful supervisory liability claim." Calhoon v. City of
7 South Lake Tahoe, WL 5982087, at *8 (E.D. Cal. 2020).

8 Defendants cite to Edgerly, 599 F.3d at 961-62 and Wereb v.
9 Maui Cty., 727 F.Supp.2d 898, 919-20 (D. Haw. 2010), in support
10 of the argument that Sergeant Wylie and Lieutenant Darden cannot
11 be held responsible for the actions of their subordinates. See
12 Reply at 6-7. However, both are distinguishable. In Edgerly,
13 the sergeant was not found liable because he was merely
14 responsible for day-to-day operations at the station when he was
15 on duty and provided only informal training to the officers.
16 599 F.3d at 961. The sergeant was not personally involved in
17 the incident because he "was not aware of the arrest or search
18 until after they were completed." Id. By contrast, the SAC
19 alleges that Sergeant Wylie and Lieutenant Darden were aware
20 that officers were responding to a call about McCoy; that the
21 officers already on the scene were possibly about to use an
22 unlawful amount of force against him; and that Sergeant Wylie
23 and Lieutenant Darden did nothing to deescalate the situation or
24 intervene. Wereb is distinguishable because, there, the
25 supervisory liability claim was based on a failure to train, not
26 a failure to supervise. 727 F.Supp.2d at 919-20.

27 Defendants make a final attempt to dismiss this claim by
28 arguing that qualified immunity applies. See Mot. at 17-18.

1 Qualified immunity "protects government officials from liability
2 for civil damages insofar as their conduct does not violate
3 clearly established statutory or constitutional rights of which
4 a reasonable person would have known." Pearson v. Callahan, 555
5 U.S. 223, 231 (2009) (internal quotation marks and citation
6 omitted). In determining whether it applies, courts ask:
7 (1) whether there was a deprivation of a constitutional or
8 statutory right, and/or (2) whether that right was "clearly
9 established" at the time of the incident. Saucier v. Katz, 533
10 U.S. 194, 201-02 (2001); Pearson, 555 U.S. at 236.

11 It is clearly established law that supervisors may be held
12 liable for the unconstitutional actions of their subordinates
13 when: (1) they knew the actions were about to be taken; and
14 (2) did not attempt to terminate these actions. See Cunningham,
15 229 F.3d at 1292 (in conducting its qualified immunity analysis,
16 the Ninth Circuit treats supervisory liability for failing to
17 supervise, or failing to intervene in unconstitutional actions,
18 as clearly established law). Because the clearly established
19 prong is met, there is no need to analyze whether the facts
20 presently before the Court establish a deprivation of a
21 constitutional right. See Pearson, 555 U.S. at 236-42 (holding
22 that the Saucier prongs need not be analyzed in a particular
23 order and need not both be analyzed if one is met). As a
24 result, qualified immunity does not apply at this stage.

25 Defendants' motion to dismiss Plaintiffs' eighth cause of
26 action for supervisory liability against Sergeant Wylie and
27 Lieutenant Darden is denied.

28 ///

3. Conspiracy

Plaintiffs' seventh cause of action alleges a conspiracy between Officers McMahon, Romero-Cano, Thompson, Patzer, Glick, Eaton, Sergeant Wylie, Lieutenant Darden, former Chief Bidou, and the City of Vallejo. See SAC ¶¶ 108-10. Plaintiffs concede with silence that they have not pled a valid state-law claim for conspiracy. See Opp'n at 11-14; Ardente, Inc. v. Shanley, 2010 WL 546485, at *6 (N.D. Cal. 2010) ("Plaintiff fails to respond to this argument and therefore concedes it through silence."); see also E.D. Cal. L.R. 230(c). Plaintiffs only allege a conspiracy claim under § 1983. See Opp'n at 11. In order to allege a conspiracy under § 1983, a plaintiff must show "an agreement or meeting of the minds to violate constitutional rights." Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002) (internal quotation marks and citation omitted). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." Id. at 441.

This agreement or meeting of the minds may be inferred based on circumstantial evidence, such as the actions of the defendants. Mendocino Env'tl. Ctr. v. Mendocino Cty., 192 F.3d 1283, 1301 (9th Cir. 1999). In addition, a conspiracy to violate constitutional rights must be predicated on a viable underlying constitutional claim. See Thornton v. City of St. Helens, 425 F.3d 1158, 1168 (9th Cir. 2005). The claim requires "an actual deprivation of constitutional rights." Hart v. Parks, 450 F.3d 1059, 1071 (9th Cir. 2006). "The defendants must have, by some concerted action, intended to accomplish some

1 unlawful objective for the purpose of harming another which
2 results in damage.” Mendocino Env'tl. Ctr., 192 F.3d at 1301.

3 Plaintiffs have alleged facts supporting a § 1983
4 conspiracy as to most of the individual officer defendants.
5 Officers Thompson, Eaton, Patzer, Glick, Romero-Cano, and
6 McMahon arrived on the scene and found McCoy unconscious in his
7 car. SAC ¶ 2. These officers stood around McCoy's vehicle and
8 put out a dispatch over the radio saying, “they may have a
9 potential shooting situation.” SAC ¶¶ 3, 37. Officer Romero-
10 Cano then “commanded his fellow officers to shoot [] McCoy if he
11 moved and to not give [] McCoy a chance.” Id. As McCoy began
12 to rouse, Officers Thompson, Eaton, Patzer, Glick, and Romero-
13 Cano opened fire on him. SAC ¶¶ 4, 41. In the midst of their
14 fire, Officer McMahon arrived and, “without [seeing] or []
15 apprehend[ing] any of the circumstances,” began shooting into
16 the car. SAC ¶¶ 4, 42. None of the officers identified
17 themselves prior to opening fire on McCoy. SAC ¶ 45. Nor did
18 they provide warning that they would shoot. Id. And, as
19 described above, Sergeant Wiley and Lieutenant Darden ignored
20 the call from their subordinates that shooting may occur. SAC
21 ¶ 38. The officers shot fifty-five times, killed McCoy, and
22 killed a bystander. SAC ¶ 38.

23 The Court finds that an agreement or meeting of the minds
24 could be inferred to support the agreement element of a
25 conspiracy. See Steel v. City of San Diego, 726 F.Supp.2d 1172,
26 1179 (finding telephone conversations between a lawyer hired by
27 the plaintiff's ex-wife, private investigators, and a San Diego
28 police officer, in the context of a contentious divorce, and

1 around the time the plaintiff was allegedly unlawfully pulled
2 over for a DUI, was sufficient to support the agreement
3 element). The facts above suggest the officers acted in unison
4 and no officer or supervisor questioned the decision to unload
5 fifty-five rounds into McCoy's car. The Court also finds that
6 the allegations support a potentially unlawful use of force
7 against McCoy. Id. (finding that, if the plaintiff was not
8 ultimately convicted of a DUI, the allegations would support the
9 unlawful objective element). Thus, both elements of a civil
10 conspiracy pursuant § 1983 are sufficiently met by the facts
11 alleged in the SAC as to Officers McMahon, Romero-Cano,
12 Thompson, Patzer, Glick, Eaton, Sergeant Wylie, and Lieutenant
13 Darden. With regard to the City of Vallejo, Defendants make no
14 argument as to why it should be dismissed. See Mot. at 18-20;
15 Reply at 8-9.

16 As for Chief Bidou, the SAC does not allege sufficient
17 facts to plausibly connect him to the conspiracy to use an
18 unlawful amount of force against McCoy. The facts alleged
19 against Chief Bidou have to do with an attempt by Chief Bidou to
20 dispose of evidence pertaining to the "Badge of Honor" gang.
21 See SAC ¶¶ 47, 57, 60, 61-63. However, the existence of the
22 "Badge of Honor" gang does not constitute the § 1983 conspiracy
23 here. The "actual deprivation of [a] constitutional right[]"
24 was the excessive use of force that killed McCoy. Hart, 450
25 F.3d at 1071. Chief Bidou "must have, by some concerted action,
26 intended to accomplish some unlawful objective for the purpose
27 of harming another which results in damage." Mendocino Env'tl.
28 Ctr., 192 F.3d at 1301. Chief Bidou did not dispose of the

1 evidence in order to harm McCoy. McCoy had already been harmed
2 by that point. The conspiracy claim against Chief Bidou must,
3 therefore, be dismissed.

4
5 III. ORDER

6 For the reasons set forth above, the Court GRANTS in part
7 and DENIES in part Defendants' motion to dismiss. The Court:

8 1. GRANTS Defendants' motion to dismiss the second cause
9 of action for violation of Plaintiffs' right to a familiar
10 relationship pursuant to 18 U.S.C. § 1983 WITH PREJUDICE;

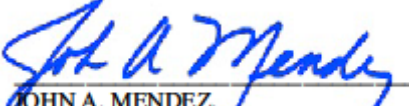
11 2. DENIES Defendants' motion to dismiss the eighth cause
12 of action for supervisory liability pursuant to 18 U.S.C. § 1983;
13 and

14 3. DENIES Defendants' motion to dismiss the seventh cause
15 of action for conspiracy pursuant to 18 U.S.C. § 1983 as to
16 Officers McMahon, Romero-Cano, Thompson, Patzer, Glick, Eaton,
17 Sergeant Wylie, Lieutenant Darden, and the City of Vallejo;

18 3. GRANTS Defendants' motion to dismiss the seventh cause
19 of action for conspiracy pursuant to 18 U.S.C. § 1983 as to
20 former Chief Bidou WITH PREJUDICE.

21 IT IS SO ORDERED.

22 Dated: June 28, 2021

23
24 
25 JOHN A. MENDEZ,
26 UNITED STATES DISTRICT JUDGE
27
28