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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROSEMARY HINOJOSA MULLINS as an individual, and as guardian ad litem for KAYLA ALICIA MULLINS (a minor) Plaintiff, vs. COUNTY OF FRESNO, FRESNO COUNTY SHERIFF'S DEPARTMENT, and DOES 1 through 25 Defendant.	CASE NO. 1:21-cv-00405-AWI-SAB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** Date: June 7, 2021 Time: 1:30 p.m. Ctrm: 2 (8th Floor) District Judge Anthony W. Ishii Complaint Filed: January 15, 2021 Trial Date: TBD

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Defendant County of Fresno (sued herein as County of Fresno and Fresno County Sheriff's Department) ("County") hereby submits the following Memorandum of Points and Authorities in Support of its Motion to Dismiss plaintiffs Rosemary Hinojosa Mullins ("Ms. Mullins") and Kayla Alicia Mullins ("Minor Plaintiff")(collectively "Plaintiffs") First Amended Complaint ("FAC") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

This case involves events arising from the commercial burglary of Jamie's Auto Dismantling on or about March 6, 2020 and ultimately ended in the death of Kenneth Mullins ("Decedent"). Plaintiffs allege that the Decedent was found by the owner of Jaime's Auto Dismantling sleeping inside the warehouse at approximately 5:00 p.m. on March 6, 2020, on a day when the business was closed and no one else was present at the business. Doc. No.6, para. 5. The business owner allegedly reported the Decedent to the Fresno County Sheriff's Department as a "potential trespasser," that no contact had been made with the Decedent at the scene, and that the Decedent was presumed to be sleeping. *Id.*

Several unidentified Fresno County Sheriff's deputies were allegedly dispatched to remove the Decedent from the business. Doc. No. 6, para. 6. They were purportedly told that some sort of firearm was kept in the building, but Plaintiffs assert there was no basis for believing that the Decedent had located the firearm or would have a desire to use it. *Id.*

Plaintiffs also allege that in spite of County allegedly withholding information about the processes and decisions that resulted in the Decedent's death, the deputies dispatched to Jaime's Auto Dismantling were allegedly sent without assessing whether they were appropriate for the task, purportedly faced a situation they had not been trained for, allegedly did not reasonably assess the risk posed by the Decedent and instead inferred that the Decedent was probably armed, and did not request more experienced deputies once the situation evolved into at 30-minute standoff. Doc. No. 6, para. 6, 10. Plaintiffs also assume that because reports identified the deputies who shot the decedent were reserve or volunteer deputies that means that they are amateurs with minimal training. Doc. No. 6, paras. 10, 17.

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The deputies purportedly surrounded the building and used a loudspeaker for approximately thirty minutes in an attempt to call the decedent out of the business. Doc. No. 6, para. 7. The Decedent did not respond to these calls. *Id.* A short time later the Decedent exited the building, he was then contacted and commands were given to him by deputies, which allegedly resulted in the deputies firing their guns multiples times after the Decedent did not comply with those commands. *Id.* The Decedent was struck by the gun fire and was purportedly pronounced dead at the scene. Doc. No. 6, paras. 7-8. Plaintiffs contend that the Decedent did not have a gun or anything resembling a gun at the time and that the Decedent did not make any threats to the deputies. Doc. No. 6, para. 9.

Plaintiffs also generally allege that County has publicly adopted unidentified policies that promote the "customary use of excessive and deadly force" in situations where less extreme procedures would purportedly accomplish the public's interest and that County has a customary practice of using excessive and deadly force under color of law. Doc. No. 6, paras. 13 & 22. In support of that purported custom, Plaintiffs claim that Fresno Sheriff's deputies shot and killed eight persons and that three were allegedly unarmed. Doc. No. 6, para. 23. Plaintiffs further claim that deputies did not try to use less-than-deadly force in those eight incidents. *Id.* No other information was provided about any of those incidents. *Id.*

Plaintiffs also allege that County does not conduct reasonable background checks on deputies and that reserve or volunteer deputies are not adequately screened or trained and that County allegedly allows these purported "amateurs to make life and death judgments." Doc. No. 6, paras. 16-17. Plaintiffs further allege that County failed to train deputies in proper techniques for de-escalating situations, training for volunteer deputies is allegedly de minimis, and training for use of non-lethal options is purportedly poor to non-existent. Doc. No. 6, para. 21.

Plaintiffs further assert that unidentified defendant with policy making authority ratified the deputies' alleged violations of the Decedent's constitutional rights and that County has not acknowledge any wrongdoing by any of the involved deputies. Doc. No. 6, para. 26. Plaintiffs further contend that unidentified comments, statements, and actions by County in response to the Decedent's death allegedly show a long history of advocacy by County on behalf of deputies reinforcing an alleged culture/belief that it is permissible to use deadly force without fear of discipline or consequence. Doc.

No. 6, para. 26. It is also alleged that the supervisory and policy making personnel have done nothing to end such alleged policies and practices. Doc. No. 6, para. 27.

Ms. Mullins purports to be the Decedent's biological, natural mother, while Minor Plaintiff purports to be the only biological, natural daughter and only surviving heir of the Decedent. Doc. No. 6, paras. 1, 12. Plaintiffs further allege that as a result of the death of the Decedent they lost his love, companionship, comfort, care, assistance, protection, affection, society, as well as both financial and emotional support, and are also seeking recovery of burial expenses and attorneys fees. Doc. No. 6, paras. 12, 28, 33, 39.

The Complaint was originally filed in Fresno County Superior Court on January 15, 2021 and included ten causes of action. County was first served with the Complaint and Summons on February 12, 2021 and subsequently filed notice of removal on March 12, 2021. Doc. No. 1. County filed a motion to dismiss the Complaint on March 19, 2021 (Doc. No. 3) and an amended memorandum of points and authorities in support of that motion on March 22, 2021 (Doc. No. 4). In lieu of filing an opposition, and within 21 days of County filing its motion to dismiss, Plaintiffs filed the FAC on April 9, 2021 (Doc. No. 6), making County's motion to dismiss moot.

The FAC now contains eight causes of action. The first cause of action is for violation of Plaintiffs' Fourteenth Amendment rights brought pursuant to 42 U.S.C. § 1983 ("Section 1983"). The second cause of action is for violation of the Fourth Amendment brought pursuant to Section 1983. The third cause of action is a state law claim pursuant to California Civil Code section 52.1 (the Bane Act). The fourth cause of action is a state law claim for wrongful death and the fifth cause of action is a survival claim. The sixth and seventh causes of action are state law claims for battery and negligence respectively. Finally the eighth cause of action is for declaratory relief.

II. AUTHORITY FOR MOTION

A dismissal under the Federal Rules of Civil Procedure is proper where the plaintiff fails to state a claim upon which relief can be granted and where the defect appears on the face of the complaint. Fed. R. Civ. P. 12(b)(6). While a complaint does not need detailed factual allegations, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Bell Atlantic Corp. v. Twombly*,

550 U.S. 544, 555 (2007) (A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action."). Furthermore, a complaint will not suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id*. at 557. In short, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face," not just conceivable. *Id*., at 570. While " 'information and belief' pleading is allowed–indeed, necessary at times–[] the words are not talismanic, and a plaintiff cannot avoid Rule 12 simply by slapping the 'information and belief' label onto speculative or conclusory allegations." *Miller v. City of Los Angeles*, No. CV 13-5148-GW(CWx), 2014 WL 12610195, at *5 (C.D. Cal. Aug. 7, 2014).

Moreover, it is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562. In other words, the complaint must describe the alleged misconduct in enough detail to lay the foundation for an identified legal claim.

"While the plausibility requirement is not akin to a probability requirement, it demands more than 'sheer possibility that a defendant has acted unlawfully.' This plausibility inquiry is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Knighten v. City of Anderson*, No. 215CV01751TLNCMK, 2016 WL 1268114, at *3 (E.D. Cal. Mar. 31, 2016), *quoting Iqbal*, 556 U.S. at 698-679. While a plaintiff's allegations are taken as true, courts "are not required to indulge unwarranted inferences." *Doe I v. Wal–Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

A court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal. 1998). Therefore, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562, *quoting Car Carriers, Inc. v. Ford Motor Co.*, 745 F. 2d 1101, 1106 (7th Cir. 1984). "Under Rule 8(a), a complaint must do more than name laws

that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws." *Anderson v. U.S. Dept. of Housing and Urban Development*, 554 F.3d 525, 528 (5th Cir. 2008).

"Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008).

III. LEGAL ARGUMENT

A. Fresno County Sheriff's Department is Not a Proper Defendant and Should be Dismissed with Prejudice

The Fresno County Sheriff's Department, as a sub-unit or department of the County of Fresno, is not a proper defendant in this action. Departments or sub-units of a municipal entity are generally not proper parties in a Section 1983 lawsuit. *See Nelson v. County of Sacramento*, 926 F.Supp.2d 1159, 1165 (E.D. Cal. 2013); *Vance v. Cty. of Santa Clara*, 928 F.Supp. 993, 996 (C.D. Cal. 1996); *Neylon v. Cty. of Inyo*, No. 1:16-CV-0712 AWI JLT, 2016 WL 6834097, at *13 (E.D. Cal. Nov. 21, 2016).

Moreover, to allow this matter to proceed against the Fresno County Sheriff's Department in addition to County of Fresno would lead to the possible result of an impermissible double recovery against a single funding source. *See generally Morales v. City of Delano,* No. 1:10-cv-1203-AWI-JLT, 2010 WL 2942645, at *5 (E.D. Cal. July 23, 2010). It is unnecessary to sue both the County and the County Sheriff's Department for identical claims with identical theories of liability to attain full relief. *Shannon v. Cty. of Sacramento*, No. 2:15-cv-00967-KJM-CKD, 2016 WL 1138190, at *6 (E.D. Cal. Mar. 23, 2016). Thus, the Fresno County Sheriff's Department should be dismissed as a defendant.

B. The Second Cause of Action for Violation of the Fourth Amendment is a Survival Claim and Cannot Form the Basis of a Claim by Plaintiffs for Loss of Familial Companionship

Plaintiffs start the second cause of action off by asserting that it is being brought by Minor Plaintiff, acting through Ms. Mullins as her guardian ad litem, as the successor in interest to the Decedent for the alleged violation of his Fourth Amendment rights. Doc. No. 6, para. 35. They also appear to assert a violation of their own individual rights for the loss of familial companionship with the Decedent. *See* Doc. No. 6, paras. 38-39. However, it is the Substantive Due Process clause of the Fourteenth Amendment that provides a vehicle for a deprivation of familial relationship claim. *Moore*

v. City of Vallejo, 73 F. Supp. 3d 1253, 1258 (E.D. Cal. 2014) ("the Fourteenth Amendment, not the Fourth Amendment, allows plaintiffs to bring claims for deprivation of or interference with familial relationship."); *see also Jarreau-Griffin v. City of Vallejo*, No. 2:12-CV-02979-KJM, 2013 WL 6423379, at *4 (E.D. Cal. Dec. 9, 2013); *Arres v. City of Fresno*, CV F 10–1628 LJO SMS, 2011 WL 284971, at *16 (E.D.Cal. Jan.26, 2011) (dismissing plaintiff's familial relationship claim with prejudice to the extent it was based on the Fourth Amendment). Moreover, such a claim is duplicative of Plaintiffs' first cause of action which includes a deprivation of familial relationship claim premised on the Fourteenth Amendment.

Consequently, Plaintiffs' second cause of action should be dismissed to the extent it attempts to allege a deprivation of familial relationship claim under the Fourth Amendment.

C. Plaintiffs' Claim for Excessive Force Under the Fourteenth Amendment is Properly Analyzed Under the Fourth Amendment and Thus Duplicative of Plaintiffs' Second Cause of Action

The substantive component of the Fourteenth Amendment's due process clause "forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.' " *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998), *quoting United States v. Salerno*, 481 U.S. 739 (1987).

The Substantive Due Process violation alleged for Plaintiffs appears to be based upon Decedent's excessive force claim, however, such claims are to be analyzed under the Fourth Amendment. *See* Doc. No. 6, paras. 30-32. "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright* v. *Oliver*, 510 U.S. 266, 273 (1994). For this reason, all claims of excessive force are to be analyzed under the Fourth Amendment and its reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Quintanilla v. City of Downey*, 84 F.3d 353, 357 (9th Cir. 1996). Thus, to the extent the first cause of action is attempting to assert a claim for relief for excessive force under the Fourteenth Amendment, that claim should be dismissed. Equally, to the extent the first cause of action is alleging an excessive force claim under the Fourth Amendment, it is duplicative of Plaintiffs' second cause of action and should be dismissed.

D. Plaintiffs Have Failed To Allege Non-Conclusory Facts to Support a *Monell* Claim

It is well-established that "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Monell v. Department of Social Servs*., 436 U.S. 691 (1978). "More generally, a plaintiff must show the following: (1) the plaintiff was deprived of a constitutional right; (2) the defendant had a policy or custom; (3) the policy or custom amounted to deliberate indifference to the plaintiff's constitutional right; and (4) the policy or custom was the moving force behind the constitutional violation." *Gonzalez v. Cty. of Merced*, 289 F. Supp. 3d 1094, 1098 (E.D. Cal. 2017), *citing Mabe v. San Bernardino Cnty.*, 237 F.3d 1101, 1110–11 (9th Cir. 2001). Simple negligence or even heightened negligence is not a sufficient basis to impose liability on a municipality. *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 407 (1997).

"Municipal liability under *Monell* may be premised on: (1) conduct pursuant to a formal or expressly adopted official policy; (2) a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity; (3) a decision of a decision-making official who was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or (4) an official with final policymaking authority either delegating that authority to, or ratifying the decision of, a subordinate." *Gonzalez*, 289 F. Supp. 3d at 1098, *citing Thomas v. County of Riverside*, 763 F.3d 1167, 1170 (9th Cir. 2014).

It is not particularity clear what customs, practices, or policies form the basis of Plaintiffs' *Monell* claim. "A plaintiff asserting a *Monell* claim, including a claim based on a policy, practice, or custom, must contain sufficiently detailed factual allegations 'to give fair notice and to enable the opposing party to defend itself effectively' and which 'plausibly suggest an entitlement to relief.' " *Estate of Mendez v. City of Ceres*, 390 F. Supp. 3d 1189, 1206 (E.D. Cal. 2019) (citations omitted). "While the Ninth Circuit Previously had a liberal pleading standard for *Monell* claims, '[c]ourts in this circuit now generally dismiss claims that fail to identify the specific content of the municipal entity's alleged policy or custom.'" *Brown v. Cty. of Mariposa*, No. 118CV01541LJOSAB, 2019 WL 1993990, at *9 (E.D. Cal. May 6, 2019), *quoting Little v. Gore*, 148 F. Supp. 3d 936, 957 (S.D. Cal. 2015).

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While not the model of clarity, Plaintiffs appear to attempt to invoke municipal liability by using almost entirely conclusory allegations that County not only has a deficient formal written policy, but that it also has inadequate training, and a long standing custom or practice of using excessive and deadly force. Doc. No. 6, paras. 13-23. Plaintiffs also appear to allege that some unidentified policymaker(s) ratified the unidentified deputies' "violations of [the Decedent's] constitutional rights." Doc. No. 26.

In order for allegations of *Monell* liability to be sufficient for purposes of Rule 12(b)(6), they must: (1) identify the challenged policy/custom; (2) explain how the policy/custom is deficient; (3) explain how the policy/custom caused the plaintiff harm; and (4) reflect how the policy/custom amounts to deliberate indifference, i.e. show how the deficiency involved was obvious and the constitutional injury was likely to occur. *See Young v. City of Visalia*, 687 F.Supp.2d 1155, 1163 (E.D.Cal.2010).

1. *Formal or Expressly Adopted Official Policy*

"For purposes of liability under *Monell*, a 'policy' is 'a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008). Plaintiffs appear to attempt to allege a form of expressly adopted official policy, by alleging that County has publicly adopted policies that promote the customary use of excessive and deadly force in situations where less extreme procedures would allegedly accomplish the public's interest. Doc. No. 6, paras. 13, 32 & 38. Plaintiffs do not clearly identify what exactly those written or official policies are. However, in an effort to support the purported policies of promoting excessive or deadly force in lieu of lesser levels of force, Plaintiffs point to statements by Sheriff Mims that deputies should have "maximum flexibility" to use "whatever" methods they need to control suspects and that it is "important that we don't create a ladder where you have to go from one step to the next" before using deadly force. Doc. No. 6, para. 14. Plaintiffs appear to interpret these statements to mean lethal force should be used at all times, but an more plausible interpretation is that a deputy should not be required to start with the least intrusive forms of force (command presence, control holds, pepper spray, etc.) before they can progress through a continuum of force to lethal force when they are

confronted with a suspect armed with and pointing a firearm at them or in some other situation where lethal force is threatened against them.

It is a plaintiff's burden in federal court to identify a specific policy and show that such policy was the moving force behind the violation of that plaintiff's rights, supported by "more that mere 'formulaic recitations of the existence of a unlawful policies, conducts or habits.'" *Jones v. Cty. of Contra Costa*, No. 13-CV-05552-TEH, 2016 WL 1569974, at *2 (N.D. Cal. Apr. 19, 2016) ("Such a burden is especially important here, where it is facially implausible that the County maintains an official, County-sanctioned policy to attack people during traffic stops without justification."). Similar to *Jones*, Plaintiffs allegation that County maintains an official, County-sanctioned policy of promoting excessive or deadly force in lieu of lesser available levels of force is facially implausible. *Id., see also Brown v. County of Mariposa*, No. 1:18-cv-01541-LJO-SAB, 2019 WL 4956142, at *4 (E.D. Cal. Oct. 8, 2019).

Plaintiffs also, in conclusory fashion, claim there is a policy of recruiting, hiring and arming all deputies regardless of their qualifications and that County fails to conduct reasonable background checks, including failing to determine whether the individual failed in a comparable position elsewhere or checking social media to identify persons likely to misuse police power in service of their political or racial objectives. Doc. No. 6, para. 16. However, Plaintiffs fail to explain how such an alleged policy caused Plaintiffs' harm as there are no allegations that any deputies or reserve deputies had something in their background to indicate they had abused or misused police power in the past or that they had been involved in a prior similar shooting at some other agency before being hired by County.

Moreover, "a complaint must contain sufficient factual allegations to plausibly suggest a policy or custom, as opposed to merely random, unconnected acts of misconduct" and "must pair general averments of a policy or custom with particular examples." *Murguia v. Langdon*, No. 119CV00942DADBAM, 2020 WL 3542310, at *10 (E.D. Cal. June 30, 2020) (citations omitted). Seeing as Plaintiffs have failed to do just that, County's motion to dismiss should be granted as to Plaintiffs' official policy portion of their *Monell* claim.

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2. *Custom or Practice*

Plaintiffs assert that County has a custom or practice of "using excessive and deadly force under color of law." Doc. No. 6, para. 22. However, "[l]iability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996), *holding modified on other grounds by Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001). "The line between 'isolated or sporadic incidents' and 'persistent and widespread conduct' is not clearly delineated." *Warkentine v. Soria*, No. 1:13-cv-01550-LJO, 2014 WL 2093656, at *6 (E.D. Cal. May 19, 2014). It has been observed, however, that "[p]erhaps the most that can be said is that one or two incidents ordinarily cannot establish a policy or custom, while more incidents may permit the inference of a policy, taking into account their similarity, their timing, and subsequent actions by the municipality." *J.M. by & Through Rodriguez v. Cty. of Stanislaus*, No. 118CV01034LJOSAB, 2018 WL 5879725, at *5 (E.D. Cal. Nov. 7, 2018).

Plaintiffs have not provided non-conclusory factual allegations of any prior, contemporaneous, or subsequent instance(s) of similar conduct that would provide notice to County that it was potentially providing inadequate hiring, training, supervision, or discipline that amounts to deliberate indifference to the rights of the persons its employees were likely to come into contact. Nor are there non-conclusory allegations specifying how County failed to train, supervise or discipline its employees or that any of the involved deputies or reserve/volunteer deputies had a history of similar bad behavior of which County was aware.

While Plaintiffs do identify some purported statistics which allege that Fresno Sheriff's deputies shot and killed eight persons, at least three of which were allegedly unarmed. Doc. No. 6, para. 23. Other than claiming that deputies never tried to use less than deadly force in those eight instances, no other information is provided about the severity of the crime involved, whether the individual resisted or not, whether the deputies involved were volunteer or reserve deputies or even the same deputies involved in this incident. *Id.* Plaintiffs also point to one instance, in another jurisdiction, where a volunteer deputy shot an unarmed individual in Tulsa, Oklahoma in 2015. Doc. No. 6, para. 18. Plaintiffs seem to take the position that incident put County of notice of the risks

posed by volunteer deputies. *Id.* However, there are no factual allegations indicating that Tulsa, Oklahoma's volunteer deputy program has similar requirements to the one employed by the Fresno County Sheriff's Office. *Id.* Furthermore, the factual circumstances of the shooting are completely different from those alleged by Plaintiffs, as the deputy in that instance intended to use his Taser, but unfortunately used his firearm instead. *Id.*

Ultimately, Plaintiffs' allegations amount to the speculative assertion that the unidentified involved deputies and/or reserve/volunteer deputies must not have been trained, supervised, or disciplined, otherwise what happened to the Decedent would not have happened. Doc. No. 6, paras. 9-10,13-28; *see also City and County of San Francisco v. Sessions*, 372 F.Supp.3d 928, 940 (N.D. Cal. 2019) ("While courts do not require 'heightened fact pleading of specifics,' a plaintiff must allege facts sufficient to 'raise a right to relief above the speculative level.' There must be 'more than a sheer possibility that a defendant has acted unlawfully.' " (citations omitted).) Consequently, County's motion to dismiss should be granted as to Plaintiffs' custom and practice portion of their *Monell* claim.

3. *Failure to Train*

"A local governmental entity's failure to train its employees can [ ] create §1983 liability where the failure to train 'amounts to deliberate indifference to the rights of persons' with whom those employees are likely to come into contact." *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001), *quoting City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-389 (1989). A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. at 61. In order to properly allege municipal liability, the failure to train must reflect a "deliberate" or "conscious" choice by that municipality and the identified deficiency of the training must be closely related to the ultimate injury. *See Estate of Mendez*, 390 F. Supp. 3d at 1207. "Mere negligence in training or supervision [ ] does not give rise to a *Monell* claim." *Id.*, at 1208, *quoting Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011).

"A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Connick*, 563 U.S. at 62 (internal citations and quotations omitted). In a "narrow range of circumstances," a single incident may suffice to establish deliberate indifference where the violation of constitutional rights is a "highly

predictable consequence" of a failure to train because that failure to train is "so patently obvious." *Id.,* at 63-64. "However, 'adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the [municipality] liable.' " *Gonzales v. City of Clovis*, No. 1:12-CV-00053-AWI, 2013 WL 394522, at *10 (E.D. Cal. Jan. 30, 2013), *citing City of Canton*, 489 U.S. at 391; see also *Merritt v. Cnty. of L.A.*, 875 F.2d 765, 770 (9th Cir.1989); *McDade v. West*, 223 F.3d 1135, 1141 (9th Cir. 2000). "Mere proof of a single incident of errant behavior is a clearly insufficient basis for imposing liability on the County." *Castro ex rel. Castro v. City of Mendota*, No. 1:10-CV-618 AWI BAM, 2012 WL 4468419, at *6 (E.D. Cal. Sept. 26, 2012), *quoting Merritt*, 875 F.2d at 770.

The other conduct pointed to by Plaintiffs that Fresno Sheriff's deputies allegedly shot and killed eight persons, at least three of which were allegedly unarmed, lacks additional factual development to be able to determine whether those other purported shooting shared any similarities with the alleged conduct in this case. Doc. No. 6, para. 23. Other than claiming that deputies never tried to use less than deadly force in those eight instances, no other information is provided about the severity of the crime involved, whether the individual resisted or not, whether the deputies involved were volunteer or reserve deputies or even the same deputies involved in this case. *Id.* Similarly, there is no indication of what training the deputies in those eight incidents had or any indication that some lesser level of force was appropriate or even feasible given the circumstances of those previous eight instances. *Id.* In other words, Plaintiffs' conclusory allegations do not indicate these purported other instance(s) of conduct would provide notice to County that it was potentially providing inadequate training, supervision, or discipline that would amount to deliberate indifference to the rights of the persons its employees were likely to come into contact.

Instead, Plaintiffs in conclusory fashion assert that County "consistently avoided any training that would emphasize how to avoid deadly force at important steps during an encounter with a potentially dangerous person," "failed to train full-time deputies in proper techniques for de-escalating conflicts, while training for volunteer deputies is de minimis," and does "a poor to nonexistent job in training deputies on the use of non-lethal force such as tasers, batons, projectiles, and pepper spray." Doc. No. 6, paras. 20-21. In effect, Plaintiffs are not alleging that County deputies did not have any

knowledge of how to use de-escalation tactics or less-lethal, but rather that such training did not live up to Plaintiffs' discerning standard of what represents proper or effective training. *See Serna v. City of Bakersfield*, No. 117CV01290LJOJLT, 2019 WL 2164631, at *6 (E.D. Cal. May 17, 2019)("showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability.") As a consequence, County's motion to dismiss should be granted as to Plaintiffs' failure to train portion of their *Monell* claim.

4. *Failure to Discipline/Ratification*

A claim of failure to discipline is arguably a species of ratification claim. "To show ratification, a plaintiff must allege and prove that an official with final policy-making authority approved a subordinate's decision or action and the basis for it." *Bernier v. California Highway Patrol Officer Michael Walker*, No. 118CV01131NONESKO, 2020 WL 3642510, at *5 (E.D. Cal. July 6, 2020), *citing Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1231 (9th Cir. 2014), *rev'd in part on other grounds City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015) and *Paulos v. FCH1, LLC*, 685 F. App'x 581, 582 (9th Cir. 2017). This means that a final policymaker must actually have knowledge of the constitutional violation and make a deliberate choice to approve of the conduct resulting in the constitutional violation. *Id.* The mere fact that a defendant was not disciplined without more, does not amount to ratification. *Id., citing Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004); *Sheehan*, 743 F.3d at 1231; *Jarreau-Griffin v. City of Vallejo*, 2013 WL 6423379, at *7 (E.D. Cal. Dec. 9, 2013) ("[A] policymaker's knowledge of an unconstitutional act does not, by itself, constitute ratification . . . . [R]atification requires an authorized policymaker to make a 'conscious, affirmative choice.' ")

Plaintiffs provide conclusory allegations that "Defendants, and each of them, who had policy making authority ratified the Deputies' violations of [Decedent's] constitutional rights" and that they have not acknowledged any wrongdoing, but rather allegedly attempt to explain and justify the appropriateness of the unidentified deputies conduct on the day in question. Doc. No. 6, para. 26. Plaintiffs also generically allege in a conclusory fashion that unidentified comments, statements, and actions by "Defendants" following the Decedent's death are examples that there is a long history of advocating on behalf of deputies, allegedly creating a belief that it is permissible to use deadly force

without fear of discipline. *Id.*

Such conclusory allegations, however, do not plausibly suggest that a final policymaker had knowledge of what happened to the Decedent or that they made a deliberate choice to approve the deputies' alleged decisions or actions or the basis for them. *Sheehan*, 743 F.3d at 1231. Nor does it show what exactly the unidentified policy maker did that shows a knowing and " 'conscious affirmative choice' to ratify the conduct at issue." *Atayde v. Napa State Hosp.*, No. 116CV00398DADSAB, 2016 WL 4943959, at *11 (E.D. Cal. Sept. 16, 2016), *citing Garcia v. City of Imperial*, No. 08CV2357 BTM(PCL), 2010 WL 3911457, at *1 (S.D. Cal. Oct. 4, 2010). While, "ratification can be shown by a superior officer's decision to exculpate alleged misconduct based on the findings of noticeably flawed investigation;" something more than mere threadbare recitals quoting back the same language found in opinions, instead of developing the factual record, is still required. *See generally, Atayde v. Napa State Hosp.*, 2016 WL 4943959, at *11. For this reason, County's motion to dismiss should be granted as to the failure to discipline portion of Plaintiffs' *Monell* claim.

For reasons outlined above, Plaintiffs have not alleged sufficient non-conlusory facts to plausibly allege a *Monell* claim against County and as a result the *Monell* claims alleged in Plaintiffs' first and second causes of action should be dismissed.

E. Plaintiffs Have Failed to Allege Sufficient Facts to Support a Cause of Action for Direct Liability Against County for the State Law Claims Alleged

The Government Code provides that a public entity is not liable for an injury, "(e)xcept as otherwise provided by statute." Cal. Gov. Code § 815(a). As such, the liability of a public entity must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care. *Eastburn v. Regional Fire Protection Authority*, 31 Cal.4th 1175, 1183 (2003).

As a result, "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of [California] Civil Code section 1714." *Eastburn,* 31 Cal.4th at 1183; *see also*, *de Villers v. County of San Diego,* 156 Cal.App.4th 238, 251-253 (2007) ("there is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices"); *Munoz v. City of Union City,* 120 Cal.App.4th 1077, 1112 (2004).

Plaintiffs do not identify a statute or "enactment" which establishes a basis for liability against County for the state law claims alleging battery, negligence, wrongful death, survival, or violation of California Civil Code section 52.1 (the Bane Act); nor do they plead with particularity a statutory duty. *Searcy v. Hemet Unified School Dist*., 177 Cal.App.3d 792, 802 (1986) ("Since the duty of a governmental agency can only be created by statute or 'enactment,' the statute or 'enactment' claimed to establish the duty must at the very least be identified."); *Lopez v. So. Cal. Rapid Transit Dist.,* 40 Cal.3d 780, 795 (1985).

Direct tort liability must be provided by statute and specifically pled by a plaintiff; "[o]therwise, the general rule of immunity would be largely eroded by the routine application of general tort principles." *All Angels Preschool/Daycare v. County of Merced,* 197 Cal.App.4th 394, 400 (2011); *see also Brenner v. City of El Cajon*, 113 Cal.App.4th 434, 439 (2003).

Since County is a public entity[1], Plaintiffs would have to specifically plead a statute declaring liability or establishing a specific duty of care as to County. *See In re Groundwater Cases*,154 Cal.App.4th 659, 689 (2007)("the enactment allegedly creating the mandatory duty must impose a duty on the specific public entity sought to be held liable."), *citing Forbes v. County of San Bernardino*, 101 Cal.App.4th 48, 54 (2002). This was not done by Plaintiffs. *See* Doc. No. 6, paras. 41-61.

Furthermore, courts have already found no statutory basis for declaring a public entity directly liable for negligence in their training and supervision of their employees, as is apparently alleged in their wrongful death and negligence causes of action. *See* Doc. No. 6, paras. 49, 61. In *Munoz*, the court of appeal discussed the plaintiffs' allegations against the defendant city based on "negligence in the selection, training, retention, supervision and discipline of police officers." *Munoz*, 120 Cal.App.4th at 1112. The *Munoz* court noted that the parties were unable to refer "to any statutory basis for direct liability under the circumstances of the case or, at least one creating a special duty of care." *Id*., at 1113. Although public entities "always act through individuals, that does not convert a claim for direct negligence into one based on vicarious liability." *Id.*

[1] "Local public entity" is defined as "a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State." Cal. Gov. Code § 900.4.

Similarly, the court of appeal in *de Villers* found "[T]here is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices and, accordingly, plaintiffs' claim against County based on that theory is barred." *de Villers*, 156 Cal.App.4th at 254. The *de Villers* court further concluded "that a direct claim against a governmental entity asserting negligent hiring and supervision, when not grounded in the breach of a statutorily imposed duty owed by the entity to the injured party, may not be maintained." *Id.*, at 255–256.

While Government Code section 815.6 can provide a basis for direct liability where the public entity is under a mandatory duty imposed by an enactment, Plaintiffs did not specifically plead this code section in their FAC or any statutory enactment creating a mandatory duty, thus making section 815.6 inapplicable. Doc. No. 6, paras. 41-61. This is because, "application of [Government Code] section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; . . . [i]t is not enough . . . that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion." *Haggis v. City of Los Angeles,* 22 Cal.4th 490, 498–499 (2000).

Therefore, to the extent Plaintiffs' third, fourth, fifth, sixth, and seventh causes of action allege direct liability (as opposed to vicarious liability) against County, they fail to sufficiently state a claim and should be dismissed.

F. Fourth Cause of Action - Wrongful Death

1. The Fourth Cause of Action is Duplicative of Plaintiffs' Seventh Cause of Action for Negligence, and Should be Dismissed

"For a wrongful death action to survive a motion to dismiss, 'the complaint must contain allegations as to all elements of actionable negligence.'" *Chipman v. Nelson*, No. 211CV2770TLNEFBPS, 2016 WL 4943843, at *11 (E.D. Cal. Sept. 15, 2016), *report and recommendation adopted*, No. 211CV2770TLNEFBPS, 2016 WL 5870765 (E.D. Cal. Oct. 7, 2016), *quoting Van Horn v. Hornbeak*, 2009 WL 435104 (E.D. Cal. Feb. 19, 2009), *citing Jacoves v. United Merchandising Corp*., 9 Cal. App. 4th 88, 105 (1992). The fourth cause of action for wrongful death is premised on the same underlying conduct as the seventh cause of action for negligence. *See Zion v. County of Orange*, No. SACV 14-1134 JVS (RNBx), 2014 WL 12798107, at *4 (C.D. Cal. Nov.

17, 2014) (dismissing negligence claim as duplicative of wrongful death claim); *A.C. v. Griego*, No. 2:16-cv-00746-JAM-CKD, 2016 WL 5930592, at *5 (E.D. Cal. Oct. 12, 2016) (same); *Estate of Hatfield v. County of Lake*, No. C 11-2396 PJH, 2012 WL 1949327, at *6 (N.D. Cal. May 29, 2012) (same); *Truong v. Nguyen*, 156 Cal. App. 4th 865, 872 (2007) (same). Because Plaintiffs' fourth cause of action relating to wrongful death is duplicative of Plaintiffs' seventh cause of action for negligence, it should be dismissed.

2. Ms. Mullins Does Not Have Standing to Bring a Wrongful Death Claim

A cause of action for wrongful death is a "creature of statute," existing only so far and in favor of such person as the legislature declares. *Cruz v. City of Anaheim*, No. Cv 10-10-03997 MMM(JEMx), 2011 WL 13217016, at *4 (C.D. Cal. Mar. 1, 2011). In wrongful death actions, standing is governed by California Code of Civil Procedure § 377.60. In relevant part, the statute states that "[a] parent may only assert a wrongful death claim if there are no children or issue or if he or she is 'dependent on the decedent.' " *Foster v. City of Fresno*, 392 F.Supp.2d 1140, 1146 (E.D. Cal. 2005), *citing* Cal. Code Civ. Proc. § 377.60; *see also Venerable v. City of Sacramento,* 185 F.Supp.2d 1128, 1130 (E.D. Cal. 2002) ("decedent's mother[ ] has standing to maintain a wrongful death claim because she may be able to establish at trial that she was [her son]'s dependent"); *Chavez v. Carpenter*, 91 Cal.App.4th 1433, 1445 (2001) ("Regardless of their status as heirs, parents may sue for the wrongful death of their child 'if they were dependent on the decedent,' " *citing* Cal. Code Civ. Proc. § 377.60).

The FAC makes it clear that Minor Plaintiff is the Decedent's child. Doc. No. 6, paras. 1, 12. This means Ms. Mullins must allege that she was financially dependent upon her son the Decedent, however, no such allegation has been made. *See* Doc. No. 6; *see Chavez v. Carpenter*, 91 Cal.App.4th at 1445 (holding that financial, rather than emotional, dependence was required for parents who are not heirs of the decedent). While Plaintiffs allege that they have been denied the Decedent's "financial and emotional support" and "have each suffered a loss of familial relationships, companionship, comfort, and financial and other support," such allegations do not raise an inference that Ms. Mullins was dependent on the Decedent. Doc. No. 6, paras. 12 & 48.

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As a consequence, Ms. Mullins does not have standing to bring a claim for wrongful death as to the Decedent and to the extent the fourth and seventh causes of action could be read to include a wrongful death claim on her behalf, that claim should be dismissed as to Ms. Mullins only.

G. Plaintiffs Have Not Alleged an Actual Controversy or Standing to Warrant Declaratory or Injunctive Relief

Federal courts are courts of limited jurisdiction and in considering a request for equitable relief, such as declaratory or injunctive relief, are bound by the requirement that as a preliminary matter, they have before them an actual case or controversy. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). If the Court does not have an actual case or controversy before it, it has no power to hear the matter in question. *Lyons*, 461 U.S. at 102. Even though Plaintiffs seek compensatory damages in addition to declaratory and injunctive relief, "[a] plaintiff 'must demonstrate standing separately for each form of relief sought.'" *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646-RMW, 2014 WL 46822, at *9 (N.D. Cal. Jan. 6, 2014), *quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

Plaintiffs attempt to couch their declaratory and injunctive relief as being prospective, as opposed to retrospective, in nature by contending that County will continue to insist that the deputies did nothing wrong and that County has not instituted appropriate policies, procedures, and training "to reduce the use of unreasonable force is likely to result in the violation of the rights of Plaintiffs and other residents of Fresno . . ." Doc. No. 6, paras. 65-67. Yet, the allegations in the FAC do not point to any actual ongoing violations involving either of the Plaintiffs, nor are there allegations explaining how a "continuing failure to institute appropriate policies and training to reduce the use of unreasonable force is likely to result in the violation of the rights of Plaintiffs." *See* Doc. No. 6, paras. 5-10, 66-67.

"'A case or controversy exists justifying declaratory relief only when the challenged government activity is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.'" *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). Plaintiffs have failed to

present facts which establish an actual controversy as to the Plaintiffs, as there are no allegations that they are currently being deprived of any constitutional rights, such that a claim for declaratory relief would be ripe. While Plaintiffs allege that other Fresno County residents' rights are likely to be violated in the future, "this ignores the fact that 'the injury also must be direct and personal to the particular plaintiff.'" *Medina v. Garcia*, 165 F.Supp.3d 861, 896 (N.D. Cal. 2016), *quoting Catholic League for Religious & Civil Rights v. City & Cty. of S.F.,* 624 F.3d 1043, 1066 (9th Cir. 2010); *Friends of the Earth, Inc*., 828 U.S. at 181 ("The relevant showing for purposes of Article III standing, however, is not injury to [others] but injury to the plaintiff.") Additionally, the mere existence of an ongoing policy does not confer standing to attack future uses of such a policy. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 868 (9th Cir. 2017) ("The mere existence of an ongoing policy is insufficient to establish that a plaintiff challenging that policy has standing to attack all its future applications." "Because *Bayer* has produced no evidence to show the conduct complained of in this action presently affects him or can reasonably be expected to affect him in the future [Citation] we conclude the circumstances prevailing since he filed this action have forestalled any occasion to award him meaningful declaratory relief . . . .") Plaintiffs have not alleged that they are presently affected by any conduct by County or that they can reasonably be expected to be involved in an altercation with Fresno County Sheriff deputies while trespassing at a closed business.

Similarly, a plaintiff seeking injunctive relief must have Article III standing to seek an injunction by showing "a real and immediate threat that the plaintiff will be wronged again" in a similar way. *Lyons*, 461 U.S. at 111. As with the declaratory relief, Plaintiffs lack a case or controversy entitling them to injunctive relief. Plaintiffs have not alleged a real possibility that they will be wronged again in a similar way, nor have they provided non-conclusory factual allegations demonstrating that the monetary damages that they seek are inadequate to compensate them for their injury. As a result, Plaintiffs' eighth cause of action for declaration relief should be dismissed, as should their request injunctive relief.

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IV. CONCLUSION

Based on the foregoing, County respectfully requests that its motion to dismiss be granted in its entirety.

Date: April 23, 2021

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