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7 City of La Mesa and Scott Wulfing

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 BRIANNA BELL, an individual,
11 Plaintiff,

12 v.

13 CITY OF LA MESA, a municipal
entity, SCOTT WULFING, an
14 individual, and DOES 1-10,
inclusive,
15 Defendants.

Case No.: 18-cv-02455-BEN-BLM

**DEFENDANTS CITY OF LA MESA
AND SCOTT WULFING'S NOTICE
OF MOTION AND MOTION TO
DISMISS PLAINTIFF'S
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: December 17, 2018
Time: 10:30 a.m.
Courtroom: 5A
Judge: Roger T. Benitez
Magistrate: Barbara Lynn Major

Complaint Filed: October 29, 2018
Trial Date: None set

17 **TO: PLAINTIFF AND HIS ATTORNEY OF RECORD:**

18 **PLEASE TAKE NOTICE** that on December 17, 2018 at 10:30 a.m. or as
19 soon thereafter as the matter may be heard in Courtroom 5A of the above-entitled
20 court, located at 221 West Broadway, San Diego, California, defendants City of
21 La Mesa and Scott Wulfing will move the Court for an order of dismissal
22 pursuant to Fed. R. Civ. P. 12(b)(6) because plaintiff's complaint, ECF No. 1,
23 fails to state a claim upon which relief can be granted.
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1 This motion will be based on this notice and motion, the memorandum of
2 points and authorities, and the pleadings and papers filed herein.

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Dated: November 15, 2018

Daley & Heft, LLP

By: /s/ Heather E. Paradis

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Heather E. Paradis
Attorneys for Defendants
City of La Mesa and Scott Wulfing

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9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 BRIANNA BELL, an individual,
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entity, SCOTT WULFING, an
14 individual, and DOES 1-10,
inclusive,
15 Defendants.

Case No.: 18-cv-02455-BEN-BLM

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS CITY OF LA MESA
AND SCOTT WULFING'S MOTION
TO DISMISS PLAINTIFF'S
COMPLAINT**

Date: December 17, 2018
Time: 10:30 a.m.
Courtroom: 5A
Judge: Roger T. Benitez
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17 **I.**

18 **INTRODUCTION**

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22 On January 18, 2018, plaintiff Brianna Bell, a senior at Helix High School,
23 was suspended for having a can of pepper spray in her possession. ECF 1, ¶ 6
24 On January 19, 2018, Bell returned to Helix High School to discuss her
25 suspension with the school principal, Ms. Trevino. ECF 1, ¶ 7. Ms. Trevino
26 asked Bell to leave the campus. ECF 1, ¶ 7. Instead of leaving as ordered by
27 Ms. Trevino, Bell went to speak with one of her teachers. ECF 1, ¶ 7. Ms.
28 Trevino contacted the La Mesa Police Department to remove Bell from campus.

1 ECF 1, ¶ 7. La Mesa police officer Scott Wulfing responded to Helix High
2 School. ECF 1, ¶ 8. Officer Wulfing told Bell that she could leave the campus
3 voluntarily or she would be arrested. ECF 1, ¶ 8. Bell held out her arms so she
4 could be handcuffed. ECF 1, ¶ 8. Officer Wulfing placed the handcuffs on Bell
5 and began escorting her in the direction he wanted her to walk. ECF 1, ¶ 9. Bell
6 alleges that Officer Wulfing “body slammed” her into the concrete on two
7 occasions. ECF 1, ¶ 9.

8 Bell filed the instant action alleging claims for Excessive Force, violation
9 of the Bane Act, Intentional Infliction of Emotional Distress and Assault and
10 Battery. Within the Excessive Force claim, Bell insufficiently alleges a *Monell*
11 *v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658 (1987) “*Monell*” claim.
12 Defendants move to dismiss the *Monell* claim.

13 II.

14 MOTION TO DISMISS STANDARDS

15 Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to
16 dismiss a complaint because it “fail[s] to state a claim upon which relief can be
17 granted.” “Under Federal Rule of Civil Procedure 8(a)(2) a pleading must
18 contain a ‘short and plain statement of the claim showing that the pleader is
19 entitled to relief.’ *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). “[A]
20 complaint must contain sufficient factual matter, accepted as true, to state a claim
21 to relief that is plausible on its face.” *Id.* (quotation marks omitted). “The
22 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
23 than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Bell*
24 *Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). “A claim has facial
25 plausibility when the plaintiff pleads factual content that allows the court to draw
26 the reasonable inference that the defendant is liable for the misconduct alleged.”
27 *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere
28 conclusory statements, do not suffice.” *Id.* “A pleading that offers ‘labels and

1 conclusions' or 'a formulaic recitation of the elements of a cause of action will
 2 not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of
 3 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 557).
 4 Facts “‘merely consistent with’ a defendant’s liability” are insufficient. *Id.*
 5 (quoting *Twombly*, 550 U.S. at 557). And “‘legal conclusions couched as a
 6 factual allegation’” are not accepted as true. *Twombly*, 550 U.S. at 555.
 7 “[W]here the well-pleaded facts do not permit the court to infer more than the
 8 mere possibility of misconduct, the complaint has alleged—but it has not
 9 ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.*

10 The *Twombly/Iqbal* pleading standards apply to *Monell* claims. *AE v.*
 11 *County of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012); *Dougherty v. City of*
 12 *Covina*, 654 F.3d 892, 900-901 (9th Cir. 2011); *Oceanside Organics v. County of*
 13 *San Diego*, 2018 WL 1156431, at *3 (S.D. Cal. Mar. 5, 2018); *Ayala v. County*
 14 *of Imperial*, 2017 WL 469016, at *6 (S.D. Cal. Feb. 3, 2017); *McMaus v. County*
 15 *Of San Diego*, 2016 WL 3552007, at *6 (S.D. Cal. June 30, 2016). Thus, "in
 16 order to withstand a motion to dismiss for failure to state a claim, a *Monell* claim
 17 must consist of more than mere 'formulaic recitations of the existence of
 18 unlawful policies, customs, [] habits [or inappropriate training].' [Citation]."
 19 *J.K.G. v. County of San Diego*, 2011 WL 5218253, at *8 (S.D. Cal. Nov. 2,
 20 2011); see *Ayala*, 2017 WL 469016, at *6 ("Reciting theories of recovery, and
 21 concluding that a defendant's conduct falls within them will not suffice.
 22 [Citation]. This is true regardless of how vehement the recitals are, and how
 23 many words are used.”).

24 III.

25 ARGUMENT

26 A. Bell’s *Monell* claim is Insufficiently Plead

27 Bell’s first claim titled “Excessive Force” asserts that the City of La Mesa
 28 is liable because it has created a *de facto* policy of lawlessness by failing to

1 supervise its officers' actions against citizens and ignored and failed to
2 investigate and discipline officers using the same or similar actions as those used
3 by Officer Wulfing. ECF 1, ¶ 13. Bell contends that the City's alleged failure to
4 supervise, investigate and discipline has created lawlessness within the City's
5 police force and its longstanding practice has made the conduct of Officer
6 Wulfing standard operating procedure and custom within the San Diego (sic)
7 department. ECF 1, ¶ 13.

8 **1. Liability Under *Monell***

9 A municipality can only be liable under section 1983 where the
10 municipality or a policy making official causes the constitutional violation
11 through "execution of a government's policy or custom, whether made by its
12 lawmakers or by those whose edicts or acts may fairly be said to represent
13 official policy." *Monell*, 436 U.S. at 694. Negligence is patently insufficient for
14 a *Monell* claim. *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011)
15 (citing *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

16 "In order to establish liability for governmental entities under *Monell*, a
17 plaintiff must prove (1) that [the plaintiff] possessed a constitutional right of
18 which she was deprived; (2) that the municipality had a policy [or custom];
19 (3) that this policy [or custom] amounts to deliberate indifference to the
20 plaintiff's constitutional right; and, (4) that the policy [or custom] is the moving
21 force behind the constitutional violation." *Dougherty*, 654 F.3d at 900 (quotation
22 marks and citations omitted).

23 "In a *Monell*, claim, there are three ways to show a policy or custom of a
24 municipality: (1) by showing a longstanding practice or custom which constitutes
25 the standard operating procedure of the local government entity; (2) by showing
26 that the decision-making official was, as a matter of state law, a final
27 policymaking authority whose edicts or acts may fairly be said to represent
28 official policy in the area of decision; or (3) by showing that an official with final

1 policymaking authority either delegated that authority to, or ratified the decision
2 of, a subordinate.” *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 964
3 (9th Cir. 2008) (quotation marks and citations omitted). “A plaintiff cannot prove
4 the existence of a municipal policy or custom based solely on the occurrence of a
5 single incident of unconstitutional action by a non-policymaking employee.”
6 *Davis v. City of Ellensburg*, 869 F.2d 1230, 1233 (9th Cir. 1989) (emphasis
7 omitted). In this case, Bell’s *Monell* claim is based on insufficient allegations
8 that the City failed to supervise and discipline its officers.

9 A failure to supervise can constitute a policy or custom for purposes of
10 *Monell* liability only when it is widespread and longstanding. *Jackson v. Barnes*,
11 749 F.3d 755, 763 (9th Cir. 2014); *Johnson v. County of Riverside*, 2015 WL
12 13649444, at *13 (C.D. Cal. Feb. 17, 2015). Thus, “[t]he contours of a section
13 1983 failure to supervise claim against a municipality are similar to those of a
14 failure to train claim. Failure to supervise can be a basis for section 1983 liability
15 under *Monell*, but only if the plaintiff [alleges and] can prove that the
16 municipality failed properly to supervise its employees, the inadequate
17 supervision caused a violation of the plaintiff’s rights, and the inadequate
18 supervision amounted to deliberate indifference because the County disregarded
19 a known or obvious risk that its inadequate supervision would lead to a
20 constitutional violation. [Citations].” *Collier v. United States*, 2008 WL 927911,
21 at *12 (C.D. Cal. Apr. 3, 2008), *aff’d sub nom. Collier v. Cty. of Los Angeles*, 296
22 F. App’x 594 (9th Cir. 2008).

23 A section 1983 claim against a municipality based on a failure to
24 discipline is based on ratification. *See Garcia v. City of Imperial*, 2010 WL
25 3911457, at *2 (S.D. Cal. Oct. 4, 2010). But ““a single failure to discipline is
26 insufficient to make out a claim for liability under 42 U.S.C. section 1983.’
27 [Citations].” *Dannebaum v. County of San Diego*, 2016 WL 2931114, at *2
28 (S.D. Cal. May 18, 2016); *see Clouthier v. County of Contra Costa* 591 F.3d

1 1232, 1253–54 (9th Cir.2010) (holding that the failure to discipline employees,
2 without more, was insufficient to establish ratification). “To show ratification, a
3 plaintiff must show that the ‘authorized policymakers approve a subordinate's
4 decision and the basis for it.’ [Citation]. The policymaker must have knowledge
5 of the constitutional violation and actually approve of it; a mere failure to
6 overrule a subordinate's actions, without more, is insufficient to support a section
7 1983 claim. [Citations].” *Herd v. County of San Bernardino*, 2018 WL 2095833,
8 at *8–9 (C.D. Cal. Apr. 27, 2018).

9 **2. Bell’s Allegations are Insufficient**

10 As stated *ante*, the *Twombly/Ibqal* standards apply to *Monell* claims. Thus,
11 *Monell* claims must be asserted with sufficient “factual allegations that would
12 separate them from the ‘formulaic recitation of a cause of action's elements’
13 deemed insufficient by *Twombly*.” *Dougherty*, 654 F.3d at 900. Allegations are
14 insufficient when they consist only of “‘threadbare’ conclusions that track the
15 elements for *Monell* liability.” *Young v. City of Visalia*, 687 F.Supp.2d 1141,
16 1149 (E.D. Cal. 2009); *Jackson v. County of San Diego*, 2009 WL 3211402, at
17 *3 (S.D. Cal. Sept. 29, 2009). A plaintiff does not sufficiently allege *Monell*
18 liability when he “merely presents a recitation of the elements of *Monell* causes
19 of action” without “any supporting facts.” *Koistra v. County of San Diego*, 2017
20 WL 4700073, at *8 (S.D. Cal. Oct. 19, 2017); *Fuentes v. City of San Diego*, 2017
21 WL 2670976, at *5 (S.D. Cal. June 20, 2017); *Valenzuela v. City of Calexico*,
22 2015 WL 2184304, at *4–5 (S.D. Cal. May 11, 2015); *Shoval v. Sobzak*, 2009
23 WL 2780155, at *2 (S. D. Cal. Aug. 31, 2009).

24 Here, Bell’s *Monell* claims lack any factual allegations that would separate
25 them from the “formulaic recitation of a cause of action's elements” deemed
26 insufficient by *Twombly*. *See* 550 U.S. at 555. Regarding the *Monell* claim, Bell
27 alleges only that (1) the City created a *de facto* policy of lawlessness by failing to
28 supervise its officers’ actions against citizens, (2) the City had knowledge of the

1 same or similar actions by this and other officers for which the City routinely
2 ignored and faied (sic) to meaningfully investigate and discipline its officers, and
3 failed to take any meaningful action on complaints made on governmental claim
4 forms such as the one submitted by Ms. Bell and (3) their [the City's] failure to
5 supervise, investigate and discipline has created lawlessness within their police
6 force and its longstanding practice has made the conduct of defendant Wulfing
7 standard operating procedure and custom within the San Diego (sic) police
8 department. ECF 1, ¶ 13. The complaint lacks any factual allegations regarding
9 the key elements of the *Monell* claim, and more specifically, any facts
10 demonstrating that Bell's constitutional deprivation was the result of a custom or
11 practice of the City or that the custom or practice was the "moving force" behind
12 her constitutional deprivation. Bell fails to articulate a non-conclusory custom,
13 practice or policy attributable to the City. The complaint does not allege
14 whether existing supervision was defective or an absence of supervision specific
15 to the alleged conduct involved here. There are no allegations to demonstrate
16 deliberate indifference. There are no allegations to show a pattern of
17 constitutional violations. There are no allegations that any policymakers made a
18 deliberate decision to approve, endorse and ratify the alleged unconstitutional
19 conduct of its officers. The complaint allegations are insufficient and Bell's
20 *Monell* claim must be dismissed.

21 **IV.**

22 **CONCLUSION**

23 Bell's complaint lacks factual allegations to support a *Monell* claim
24 against the City. The complaint merely lists some elements of municipal

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1 liability, but lacks any specific allegations to support this claim. Therefore,
2 defendants respectfully request that this Court grant its motion to dismiss.

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Dated: November 15, 2018

Daley & Heft, LLP

By: /s/ Heather E. Paradis

Mitchell D. Dean
Heather E. Paradis
Attorneys for Defendants
City of La Mesa and Scott Wulfing

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20 individual, and DOES 1-10,
21 inclusive,
22 Defendants.

Case No.: 18-cv-02455-BEN-BLM

CERTIFICATE OF SERVICE

Courtroom: 5A
Judge: Roger T. Benitez
Magistrate: Barbara Lynn Major
Complaint Filed: October 29, 2018
Trial Date: None set

23 I, Maria E. Kilcrease, certify and declare as follows:

24 I am over the age of 18 and not a party to the action. I am employed in the
25 County of San Diego, California. My business address is 462 Stevens Avenue,
26 Suite 201, Solana Beach, California. My electronic address is
27 mkilcrease@daleyheft.com.

28 On November 15, 2018, I served all interested parties in this action the
following documents described and addressed as follows:

**DEFENDANTS CITY OF LA MESA AND SCOTT WULFING'S
NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S
COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**

[X] BY ELECTRONIC SERVICE: On the date stated below, I served
the above referenced documents via CM/EFC described above on the designated

1 recipients below through electronic transmission of said documents; a certified
2 receipt is issued to filing party acknowledging receipt by CM/EFC's system.

3 The following are those who are currently on the CM/ECF service list:

4 Douglas S. Gilliland, Esq.
5 The Gilliland Firm
6 402 West Broadway, Suite 1760
7 San Diego, CA 92101
8 Tel: (619) 878-1580
9 Fax: (619) 878-6630
10 **Attorneys for Plaintiff Brianna Bell**

11 [] BY OVERNIGHT DELIVERY. I enclosed the documents in an
12 envelope or package provided by an overnight delivery carrier and addressed to
13 the persons at the addresses in item5. I placed the envelope or package for
14 collection and overnight delivery at an office or a regularly utilized drop box of
15 the overnight delivery carrier.

16 [] BY FACSIMILE: Based on an agreement of the parties to accept
17 service by fax transmission, I faxed the documents to the persons at the fax
18 number listed above. No error was reported by the fax machine (858) 755-7870
19 that I used.

20 The following counsel will also be served:

21 Troy Patrick Owens, Jr.
22 Law office of Troy P. Owens, Jr.
23 333 H Street, Suite 5000
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28 **Attorneys for Plaintiff Brianna Bell**

[X] BY MAIL: By placing an envelope for collection and mailing
following our ordinary business practices, I am readily familiar with the office's
practice of collecting and processing of documents for mailing. Under that
practice it would be deposited with the United States Postal Service on the same

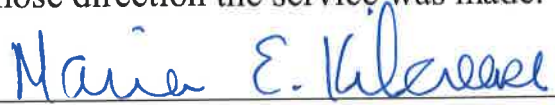
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1 day in a sealed envelope with first-class postage prepaid at Solana Beach,
2 California in the ordinary course of a business day.

3 I declare under penalty of perjury under the laws of the State of California
4 that the foregoing is true and correct. I declare that I am employed in the office
5 of a member of the bar of this court at whose direction the service was made.

6 Executed on November 15, 2018


7 Maria E. Kilcrease
8 Maria E. Kilcrease
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