



Estate of Timothy Gene Smith et al v. City of San Diego et al

2020 | Cited 0 times | S.D. California | December 31, 2020

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

ESTATE OF TIMOTHY GENE SMITH, by his successor in interest Wyatt Allen Gunner Smith;
SANDY LYNN SIMMONS; and WYATT ALLEN GUNNER SMITH,

Plaintiffs, v. SCOTT HOLSLAG; NATALIE ANN MACEY, as an individual doing business as Macey Bail Bonds; LEGAL SERVICE BUREAU, INC., a California domestic corporation doing business as Global Fugitive Recovery; DAN ESCAMILLA, as an individual and on behalf of Legal Service Bureau, Inc.; CITY OF SAN DIEGO; DAVID BRECHT; ISMAEL SOTO, as an individual; and DOES 1-50, inclusive,

Defendants.

Case No.: 16-cv-2989-WQH-MSB

ORDER

HAYES, Judge: The matters before the Court are the Motions for Summary Judgment filed by Defendants Dan Escamilla (ECF No. 215); Sergeant Scott Holslag and City of San Diego

(ECF No. 217); Natalie Ann Macey (ECF No. 219); and Sergeant David Brecht and City of San Diego (ECF No. 220). I. PROCEDURAL BACKGROUND

On December 8, 2016, Plaintiffs filed a Complaint for damages based on the fatal shooting of Timothy Gene Smith Scott Holslag. (ECF No. 1). On March 1, 2019,

was filed by Plaintiffs Wyatt Allen Gunner Smith Estate of Timothy Gene Smith interest, Wyatt Allen Gunner Smith, against Defendants City of San Diego ;

SDPD Sergeant Scott Holslag; SDPD Sergeant David Brecht; bail bondsman Natalie Ann Macey d/b/a Macey Bail Bonds ; Legal Service Bureau, Inc. d/b/a Global Fugitive Recovery ; bail bondsman Dan Escamilla; and bail bondsman Ismael Soto. (ECF No. 162).

Plaintiffs allege that in November 2015, bondsmen Macey, Escamilla, and Soto fabricated a story that Smith was armed with a gun and had a history of violent crime. Plaintiffs allege that Escamilla and



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Soto provided false information to SDPD officers to Janie Sanders, who failed to appear in court after Macey paid her bail. Plaintiffs allege that on November 4, 2015, d by Escamilla and told the officers that Smith had felony warrants and was armed with a gun. Plaintiffs allege that at approximately 2:45 p.m., Smith was cornered by several officers in Pacific Beach. Plaintiffs allege that Smith was unarmed. Plaintiffs allege that Sergeant Holslag shot Smith three times, killing him, as Smith Id. ¶ 70).

Plaintiffs bring the following claims: 1) all Plaintiffs against Defendant Sergeant Holslag for violation of the Fourth Amendment of the United States Constitution under 42 U.S.C. § 1983; 2) Plaintiffs Wyatt Smith and Simmons against Defendant Sergeant Holslag for violation of the Fourteenth Amendment of the United States Constitution under 42

U.S.C. § 1983; 3) Plaintiff Estate against Defendants Sergeant Holslag and the City for violation of the Bane Act , Cal. Civ. Code § 52.1; 4) all Plaintiffs against Defendants Sergeant Holslag and the City for battery; 5) all Plaintiffs against Defendants Sergeant Holslag, Sergeant Brecht, and the City for wrongful death under section 377.60 of the California Code of Civil Procedure; 6) all Plaintiffs against Defendants Macey, Escamilla, Soto, and Legal Service Bureau for conspiracy to violate civil rights under 42 U.S.C. § 1983; and 7) all Plaintiffs against Defendants Macey, Escamilla, Soto, and Legal Service Bureau for violation of the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983. Plaintiffs seek damages, including exemplary and punitive damages, and and costs.

On March 15, 2019, Defendants Macey, Sergeant Holslag, Sergeant Brecht, and the City filed Answers to the TAC. (ECF Nos. 164, 165). On March 21, 2019, Defendant Escamilla filed an Answer to the TAC. (ECF No. 168). On July 1, 2020, Defendant Legal Service Bureau filed an Answer to the TAC. (ECF No. 210). Defendant Soto has not appeared in this action. 1

The parties engaged in fact discovery. On August 17, 2020, Defendant Escamilla, proceeding pro se, filed a Motion for Summary Judgment. (ECF No. 215). On August 28, 2020, Motions for Summary Judgment were filed by Defendants Sergeant Holslag and the City (ECF No. 217); Defendant Macey (ECF No. 219); and Defendants Sergeant Brecht and the City (ECF No. 220).

On October 5, 2020, Plaintiffs filed Oppositions to the Motions for Summary Judgment filed by Defendants Sergeant Holslag and the City and Defendants Sergeant Brecht and the City. (ECF Nos. 229, 230). On October 6, 2020, Plaintiffs filed Oppositions to the Motions for Summary Judgment filed by Defendants Macey and Escamilla. (ECF Nos. 234, 235).

1 On December 5, 2019, Plaintiffs filed Proof of Service as to Defendant Soto. (ECF No. 202). Defendant Soto has not filed any responsive pleading.

On October 13, 2020, Defendants Sergeant Holslag, Sergeant Brecht, the City, and Macey filed Replies in support of their Motions for Summary Judgment. 2



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(ECF Nos. 244- 247).

On November 12, 2020, the Court heard oral argument on the Motions for Summary Judgment. On November 30, 2020, Plaintiffs filed a Supplemental Submission on the Civil Conspiracy Cause of Action. (ECF No. 252). On December 14, 2020, Defendants Macey and Escamilla filed Responses to the Supplemental Submission. (ECF Nos. 253, 254). II. FACTS

Defendant Natalie Ann Macey is the owner of Macey Bail Bonds, a Missouri sole proprietorship. On June 29, 2015, Macey posted \$7,500.00 bail in Missouri for Janie Sanders, who was charged with possession of a controlled substance. On July 8, 2015, Sanders failed to appear at a hearing, and a warrant was issued for her arrest. Macey attempted to locate Sanders and her partner, Timothy Gene Smith. The poster stated that Sanders was wanted WITH TIMOTHY GENE SMITH CONSIDERED ARMED (First Wanted Poster, Ex. 14 to Iredale Decl., ECF No. 235-8 at 3).

Macey learned that Sanders and Smith might be in San Diego. Macey hired California bail fugitive recovery agent Defendant Dan Escamilla, an employee and shareholder of Defendant Legal Service Bureau, Inc., to apprehend Sanders. Defendant Ismael Soto, an unlicensed bondsman in California, was also engaged to assist with apprehension. Sanders and Smith. The poster stated that Sanders and Smith were 2

Defendants Sergeant Holslag, Sergeant Brecht, the City, and Macey also submitted evidentiary objections, which have been reviewed by the Court. (ECF Nos. 227, 244-3, 245-3, 247- evidentiary objections do not affect this Order.

EXTRADITABLE FELONIES OUT OF (Second Wanted Poster, Ex. 17 to Iredale Decl., ECF No. 234-10 at 2). HOMELESS AND ON FOOT IN THE PACIFIC BEACH AREA AS OF 11/4/15.

CAUTION: CI HAS ADVISED THAT SUBJECT SMITH RECENTLY LEFT MISSOURI BY TRAIN ARMED WITH AN AK-47 and/or Revolver and is a convicted Id.).

On November 3, 2015, Soto called SDPD and Sanders, had been traced to the Pacific Beach neighborhood. (Transcript of

COSD000370-PD15-0369.wav, Ex. 5 to Iredale Decl., ECF No. 229-8 at 1; Audio Rec. of Soto Call, Disc Ex. 3A to Iredale Decl.). Soto told the dispatcher that Smith and Sanders (Transcript of COSD000370-PD15-0369.wav, Ex. 5 to Iredale Decl., ECF No. 229-8 at 1; Audio Rec. of Soto Call, Disc Ex. 3A to Iredale Decl.). re used to dealing (Transcript of COSD000370-PD15- 0369.wav, Ex. 5 to Iredale Decl., ECF No. 229-8 at 1; Audio Rec. of Soto Call, Disc Ex. 3A to Iredale Decl.). .38 revolver and an AK- (Transcript of COSD000370-PD15-0369.wav, Ex. 5 to Iredale

Decl., ECF No. 229-8 at 1; Audio Rec. of Soto Call, Disc Ex. 3A to Iredale Decl.). Soto gave the



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dispatcher a description of Smith and Sanders but provided an incorrect birthdate for Smith. At the time of the call, Smith had three outstanding warrants and a lengthy history of felony offenses dating back to 1986, including second degree burglary, unlawful use of a weapon, theft, fraud, forgery, and possession of a controlled substance. However, the dispatcher was not able to locate any warrants for Smith using his name and the birthdate provided by Soto.

Later on November 3, Escamilla called SDPD requesting police assistance. Escamilla, Soto, and a third bondsman believed they located Smith and Sanders in a bathroom at Fanuel Park in Pacific Beach. SDPD officers responded to the call, including Defendant Sergeant David Brecht. The dispatcher confirmed the warrant for Sanders but

told the responding officers that as to Smith, -PD15-0369_51.wav, Ex. 5 to Iredale Decl.,

ECF No. 229-8 at 12; Audio Rec. of Police Radio, Disc Ex. 3A to Iredale Decl.). The suspects in the bathroom at Fanuel Park were not Smith or Sanders. Escamilla gave from the poster.

On the morning of November 4, 2015, Soto called SDPD and stated that he could confirm an 800-meter location. Soto - (Transcript of COSD000373-PD15-

0369_3.wav, Ex. 5 to Iredale Decl., ECF No. 229-8 at 16-17; Audio Rec. of Soto Call, Disc Ex. 3D to Iredale Decl.). will blow your mind. From child molestation to forgery. I mean, thi ently she carries a .38 and he carries an AK in his

-PD15-0369_3.wav, Ex. 5 to Iredale Decl., ECF No. 229-8 at 16-17; Audio Rec. of Soto Call, Disc Ex. 3D to Iredale Decl.).

During the SDPD morning lineup, Sergeant Brecht gave copies of Smith and Sanders to his team of officers, including Ricardo Escalante and Benjamin Douglas. Sergeant Brecht told the officers that Smith and Sanders were possibly armed. Shortly before 3:00 p.m., Officers Escalante and Douglas were patrolling the 1700 block of Garnet Avenue when they saw a male they believed was Smith. Officer Escalante stepped out of the patrol car, and Smith fled on foot. Officer Escalante chased and lost sight of Smith in a residential area of Pacific Beach.

Officer Escalante aired over the police radio that he was involved in a foot pursuit. (Transcript of SDPD Dispatch Calls of 11-4-15, Ex. 4 to Sweda

Decl., ECF No. 220-10 at 6; Audio Rec. of Police Radio, Disc Ex. 3 to Sweda Decl.). The (Transcript of SDPD Dispatch Calls of 11-4-15, Ex. 4 to Sweda Decl., ECF No. 220-10 at 6; Audio Rec. of Police Radio, Disc Ex. 3 to Sweda Decl.). The dispatcher relayed, - armed and dangerous. (Transcript of SDPD Dispatch Calls of 11-4-15, Ex. 4 to Sweda Decl., ECF No. 220-10 at 8, 9; Audio Rec. of Police Radio, Disc Ex. 3 to Sweda Decl.). Multiple officers responded to the call, including a lieutenant who



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responds to high priority calls, an ABLE police helicopter, Sergeant Brecht, and Defendant Sergeant Scott Holslag.

Officers chased Smith to an area near 1636 Thomas Avenue, determined that he was likely in a storage shed, and set up a perimeter. Sergeant Holslag arrived at the scene and walked toward the entrance to the eastern side yard of 1636 Thomas Avenue with his police dog. Sergeant -3 ¶ 33). Smith ran out of the

storage shed towards the fence separating 1636 and 1644 Thomas Avenue, as the officers shouted. Smith was wearing tan shorts and was shirtless. Sergeant Holslag deployed the jumped the fence and climbed onto a ledge protruding from the exterior wall of 1644

Thomas Avenue. The officers continued to yell at Smith to put his hands up, to get on the ground, to not reach, and to put his hands behind his back.

Sergeant Holslag states in his Declaration: I saw [Smith] plunge both hands deep into his pants pockets. His left hand appeared to me to be shallow, to knuckle-level. However, his right hand plunged deep into his right pocket . . . I thought he had a handgun in his pocket and was reaching for it. The suspect looked straight at me with a thousand- right pocket. I was fearful that he was going to pull a handgun. As his hand came out to knuckle level, I was 100% convinced in the moment that he had a gun and was going to shoot me. (Holslag Decl., Ex. 1 to Sweda Decl., ECF No. 217-7 ¶¶ 32-34). Sergeant Holslag shot Smith three times in his chest, right torso, and left torso, killing him. Smith was unarmed. ///

III. LEGAL STANDARD

or the part of each claim or defense on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any

56(a). A material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The materiality of a fact is determined by the substantive law governing the claim or defense. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

The moving party has the initial burden of demonstrating that summary judgment is proper. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). Where the party moving for summary judgment does not bear the burden of proof that is, pointing out to the district court that there

is an absence of evidence to support the nonmoving party *Celotex*, 477 U.S. at 325; see also *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542-43 (9th Cir. 1989) burden of proof, the



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defendant may claim. The defendant is not required to produce evidence showing the absence of a genuine

issue of material fact with respect to an issue where the plaintiff has the burden of proof. Nor does Rule 56(c) require that the moving party support its motion with affidavits or s omitted)).

If the moving party meets the initial burden, the burden shifts to the opposing party to show that summary judgment is not appropriate. See Anderson, 477 U.S. at 256; Celotex, 477 U.S. at 322, 324. The nonmoving party cannot defeat summary judgment merely by Matsushita, 475 U.S. at 586; see Anderson

depositions, answers to interrogatories, and admissions on file, designate specific facts

Celotex, 477 U.S. at 324 (citations omitted). drawn in its favor. See Anderson, 477 U.S. at 256.

IV. JUDICIAL NOTICE

Defendants Sergeant Holslag, Sergeant Brecht, and the City request that the Court take judicial notice of the warrant for Smith issued on June 27, 2015, in connection with Case No. 15RY-CR00255, the warrant for Smith issued on July 13, 2015, in connection with Case No. W24155277, the warrant for Smith issued on October 14, 2015, in connection with Case No. 15CA-CR00999, and conviction history. (ECF Nos. 217-3, 220-2). Under Rule 201 of the Federal Rules of Evidence, the court may take judicial ccurately and readily Fed. R. Evid. 201(b)(2); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted). and conviction history are matters of public record, and Plaintiffs do not dispute their authenticity. s for judicial notice are granted. V. DEFENDANTS SERGEANT HOLSLAG, SERGEANT BRECHT, AND THE

S FOR SUMMARY JUDGMENT Defendant Sergeant Holslag moves for summary judgment on the first claim for violation of the Fourth Amendment under 42 U.S.C. § 1983 and the second claim for violation of the Fourteenth Amendment under 42 U.S.C. § 1983 3

. Defendants Sergeant Holslag and the City move for summary judgment on the third claim for violation of the Bane Act and the fourth claim for battery. Defendants Sergeant Holslag, Sergeant Brecht, and the City move for summary judgment on the fifth claim for wrongful death.

3 Plaintiffs have represented that they will dismiss the Fourteenth Amendment claim. (See ECF No. 229 at 29). The Court does not address the Fourteenth Amendment claim.

a. Claim 1 - Fourth Amendment Defendant Sergeant Holslag contends that the individual heirs lack standing to bring a Fourth Amendment claim. Sergeant Holslag contends that qualified immunity protects him from liability. Sergeant Holslag contends that the use of deadly force was reasonable



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because Smith was possibly armed with a concealable handgun, resisted arrest, and Sergeant Holslag and other SDPD officers -1 at 18-19). Sergeant Holslag contends that at the time of the shooting, it was not clearly established that the use of deadly force was unconstitutional under these circumstances.

Plaintiff contend that they have standing. Plaintiffs contend that the use of deadly force was unreasonable. Plaintiffs contend that at the time of the shooting, Smith was unarmed, Smith was not threatening officers or attempting to evade arrest, and Sergeant Holslag gave no warning prior to shooting Smith. Plaintiffs contend that at the time of the shooting, clearly established federal law prevented officers from shooting an unarmed man who did not pose an immediate threat to police or others.

i. Standing of Individual Heirs *Moreland v.* , 159 F.3d 365, 369 (9th Cir. 1998)

(alteration in original) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)), as amended Amendment ri Id. However,

[i]n § 1983 actions, . . . the survivors of an individual killed as a result of an party seeking to bring a survival action bears the burden of demonstrating that

Hayes v. Cty. of San Diego, 736 F.3d 1223, 1228-29 (9th Cir. 2013) (second alteration in original) (quoting *Moreland*, 159 F.3d at 369).

that survives the death of the person entitled to commence an action or

proceeding passes to the de

Id. at 1229 (quoting Cal. Civ. Proc. Code § 377.30).

In this case, all Plaintiffs bring a claim against Sergeant Holslag under § 1983 for The only proper Plaintiff under state law The Court concludes that individual heirs Simmons and Wyatt Smith lack standing to bring a Fourth Amendment claim against Sergeant Holslag.

ii. Qualified Immunity civil damages insofar as their conduct does not violate clearly established statutory or

Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 to liability . . . it is effectively lost if a case is erroneously permitted to go to trial. Id.

(quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). have stressed the importance of resolving immunity questions at the earliest possible stage



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Id. at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

plaintiff *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010) (alterations in

original) (quoting *Pearson* the two prongs of the qualified immunity analysis should be addressed first in light of the

Pearson, 555 U.S. at 236.

1. Violation of the Fourth Amendment To bring a claim against an individual defendant under § 1983, a plaintiff must show that the conduct deprived the claimant of some right, privilege, or immunity protected by

Leer v. Murphy, 844 F.2d 628, 632-33 (9th the meaning of sect affirmative acts, or omits to perform an act which he is legally required to do that causes

Id. at 633 (alteration in original) (emphasis omitted) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

The Fourth Amendment U.S. Const. amend. IV. Apprehension by deadly force is a seizure subject to

the Fourt *Wilkinson*, 610 F.3d at 550. An officer may use only the amount of force that is objectively reasonable in light of the *Graham v. Connor*, 490 U.S. 386, 397 (1989); see *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the *Wilkinson*, 610 F.3d at 550 (quoting *Graham* allowance for the fact that police officers are often forced to make split-second

judgments in circumstances that are tense, uncertain, and rapidly evolving about the Id. (alteration in original) (quoting *Graham*, 490 U.S. at 396-97). highly fact-specific, but the inquiry is an objective one. Id. at 551 (citations omitted).

Thompson v. Rahr, 885 F.3d 582, 586 (9th Cir. 2018) (citing *Espinoza v. City & Cty. of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010)).

First, we a Case 3:16-cv-02989-WQH-MSB Document 255 Filed 12/31/20 PageID.5712 Page 12 of 34 Amendment rights by evaluating the type and amount of force inflicted. Then, whether the suspect posed an immediat safety; and whether the suspect was resisting arrest or attempting to escape.

Finally, we balance the gravity of the intrusion on the individual against the

Id. (citations omitted).



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The Chew v. Gates, 27 F.3d 1432, 1441 (9th Cir.

1994). Wilkinson, 610 F.3d at 551 (quoting

Garner esc Id. (alteration in

original) (quoting Garner, 471 U.S. at 11). Only information known to the officer at the Nehad v. Browder, 929 F.3d 1125, 1132 (9th Cir. 2019) (citing Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546-47 (2017); Glenn v. Washington Cty., 673 F.3d 864, 873 n.8 (9th Cir. 2011)), r , 2019 U.S. App. LEXIS 29633 (9th Cir. Oct. 2, 2019), cert. denied, Browder v. Nehad, 2020 U.S. LEXIS 4507 (Oct. 5, 2020).

[I]n the deadly force context the person most likely to rebut the officers version of events the one killed can t testify. Estate of Elkins v. Pelayo 835 (9th Cir. 2018) (quoting Cruz v. City of Anaheim, 765 F.3d 1076, 1079 (9th Cir. 2014)).

-serving account by the Id. (quoting Cruz carefully examine[s] all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, . . . to determine whether the officer s story is internally consistent and consistent with other known facts. Gonzalez v. City of Anaheim, 747 F.3d 789, 795 (9th Cir. 2014) (en banc) (second alteration in original) (quoting Scott

v. Henrich, 39 F.3d 912 Id. (quoting

Scott, 39 F.3d at 915).

In this case, on November 4, 2015, Smith fled from Officer Escalante, leading him on a foot chase through a residential area of Pacific Beach. Sergeant Holslag states in his Declaration that just before 3:00 p.m., as he was refueling his vehicle after a lengthy SWAT standoff, he heard the radio call for the foot pursuit. (Holslag Decl., Ex. 1 to Sweda Decl., ECF No. 217-7 ¶ 7). Sergeant to be possibly armed with a .38 caliber handgun. Id. ¶ 10). Sergeant Holslag states that

he heard that Id. ¶ 11). Sergeant Holslag testified at his deposition that he understood that Smith was wanted for a felony warrant but did not know what crime Smith had committed. (Holslag Dep., Ex. 9 to Iredale Decl., ECF No. 229-12 at 58:22-59:13).

After officers arrived at the scene and set up a perimeter around the storage shed where Smith was hiding, Smith ran out of the shed, jumped the fence separating 1636 and 1644 Thomas Avenue, and climbed onto a ledge protruding from the exterior wall of 1644 Thomas Avenue. Smith was wearing tan shorts and was shirtless. Video recordings of the incident include video from body worn cameras by Officers Escalante, Douglas, Christopher Bernard, John White, Dustin Welsh, Corey Harris, and



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Brandon Orr, and video from the ABLE police helicopter. Officers shouted various commands to Smith at the same time, seconds before the shooting, including your See, e.g., Transcript of Bernard

Body Worn Camera Video, Ex. 4 to Iredale Decl., ECF No. 229-7 at 5-6; ABLE and Body Worn Camera Video Recordings, Disc Ex. 2 to Iredale Decl.; Body Worn Camera Video Recordings, Disc Exs. 10, 13, 16, 19 to Sweda Decl.; see also Escalante Decl., Ex. 9 to Sweda Decl., ECF No. 217-14 ¶ 23; Bernard Decl., Ex. 12 to Sweda Decl., ECF No. 217- 17 ¶ 16; White Decl., Ex. 18 to Sweda Decl., ECF No. 217-23 ¶ 8).

Sergeant Holslag states in his Declaration: I saw [Smith] plunge both hands deep into his pants pockets. His left hand appeared to me to be shallow, to knuckle-level. However, his right hand plunged deep into his right pocket . . . I thought he had a handgun in his pocket and was reaching for it. The suspect looked straight at me with a thousand- right pocket. I was fearful that he was going to pull a handgun. As his hand came out to knuckle level, I was 100% convinced in the moment that he had a gun and was going to shoot me. In response I recall firing two to three rounds. I later learned I fired three rounds. I saw my first round hit him in the chest. Based on information and belief, I shot two more rounds, I then saw him fall to the ground. (Holslag Decl., Ex. 1 to Sweda Decl., ECF No. 217-7 ¶¶ 32-34). Officer Bernard states in his Declaration:

thousand-yard stare. He was looking around with his hands shoved into his pockets, reaching frantically in his pockets as if he was looking for something. Then I saw the suspect start to pull his hands out from his pockets. I thought I saw his left hand come out first. I saw something fall from his pocket as his hand was coming out. As I was processing this, simultaneously making the decision whether to shoot, I heard what I thought was two rounds fired. The suspect fell to the ground. (Bernard Decl., Ex. 12 to Sweda Decl., ECF No. 217-17 ¶ 18). Officer Welsh states in his Declaration:

After [Smith] looked around briefly, I saw him put his right hand into his right pocket pretty quickly, and then make a gripping of an object motion [to] pull something out. I did not know if he had an object in his hand and if so, I did not know what the object was. His motions while putting his hands into his pockets and pulling them from his pockets were rapid. He was not standing casually with his hands in his pockets. This was a frantic confrontation. Multiple officers were yelling commands at him. I did not observe him comply with any police commands. When the suspect quickly pulled his hand out of his pocket, that is when I heard three shots fired. The suspect fell from the shed. (Welsh Decl., Ex. 21 to Sweda Decl., ECF No. 217-26 ¶¶ 7-8).

Officer Escalante states in his Declaration that he saw Smith turn to face the officers Ex. 9 to Sweda Decl., ECF No. 217- (Id.). Escalante states that he was looking away when the three shots were fired. (Id. ¶ 24).

Officer White sta Ex. 18 to Sweda Decl., ECF No. 217-23 ¶ 8). Smith was unarmed at the time of the



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shooting.

Sergeant A.K.H. ex rel. Landeros v. City of Tustin, 837 F.3d 1005, 1011 (9th

Cir. 2016). The most severe crime that SDPD had probable cause to believe Smith committed at the time of the shooting was resisting arrest a misdemeanor. See Cal. Pen. Code § 148. Viewing the facts in the light most favorable to Plaintiffs, at the time of the shooting Smith had climbed onto a ledge and was standing still. A reasonable juror could conclude that at the time of the shooting Smith did not pose an immediate threat to Sergeant Holslag or anyone else. Viewing the facts in the light most favorable to Plaintiffs, a reasonable juror could conclude that the not render the use of deadly force reasonable under the Fourth Amendment. See Thompson,

885 F.3d at 586 (citations omitted); see also Nehad Nehad had indisputably not engaged in any such conduct when Browder arrived, let alone when

Browder fired his weapon. A juror could, therefore, conclude that the severity of Nehad crimes, whether characterized as a misdemeanor or an already completed felony, did not

. A reasonable juror could conclude that Sergeant Amendment.

///

2. Clearly Established Federal Law

of the challenged cond Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (alterations in original) (quoting Anderson

v. Creighton, 483 U.S. 635, 640 (1987)). protected by qualified immunity unless the very action in question has previously been held

unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be Anderson, 483 U.S. at 640 (citation on point, but existing precedent must have placed the statutory or constitutional question

Ashcroft, 563 U.S. at 741.

ses a threat of serious physical harm . . .

. Torres v. City of Madera, 648 F.3d 1119, 1128 (9th Cir. 2011) (quoting Garner, 471 U.S. at 11); see Nehad was unarmed, had not said anything, was not threatening anyone,



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and posed little to no danger to [the officer] or anyone else Estate of Lopez v. Gelhaus, 871 F.3d 998, 1020 (9th Cir. 2017) (explaining that

the officer fair notice [in 2013] that the use of deadly force is unreasonable where the , , 2017 U.S. App. LEXIS 26742 (9th Cir. Dec. 22, 2017), cert. denied, Gelhaus v. Estate of Lopez, 2018 U.S. LEXIS 3898 (June 25, 2018); see also George v. Morris, 736 F.3d at 832, 838-39 (9th Cir. 2013) (holding that a reasonable fact finder could find the use of deadly force constitutionally excessive where the victim held a gun pointed down, the victim did not take any action that could be viewed as objectively threatening, and the officers gave no warning); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997) officials may not kill suspects who do not pose an immediate threat to their safety or to the

Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991) (of deadly force was lawful because [the victim] did not point the gun at the officers and .

In this case, viewing the facts in the light most favorable to Plaintiffs, Sergeant Holslag shot Smith within a matter of seconds and without warning, even though Smith was unarmed, was not threatening anyone, and did not pose a danger to Sergeant Holslag or anyone else. The Court concludes that on November 4, 2015, Sergeant Holslag was on notice that under the circumstances reasonably presented by Plaintiffs, the use of deadly force against Smith would be objectively unreasonable. Further, although qualified PearsonSergeant Holslag

could have reasonably perceived a threat to himself or others are disputed questions of fact that preclude a grant of summary judgment on qualified immunity. Nehad, 929 F.3d at 1140; see Morales v. Fry, 873 F.3d 817, 824 (9th Cir. 2017). The Court concludes that Sergeant Holslag is not entitled to summary judgment based on qualified immunity. The Motion for Summary Judgment on the claim against Sergeant Holslag under § 1983 for violation of the Fourth Amendment is granted as to the claim by individual heirs Simmons and Wyatt Smith and denied as to the claim by the Estate.

b. Claim 3 - Bane Act Plaintiff Estate brings a claim against Sergeant Holslag and the City for violation of the Bane Act, Cal. Civ. Code § 52.1. Plaintiffs assert that Sergeant Holslag interfered by threats, intimidation, or coercion to be free from excessive force and with integrity. Plaintiffs assert that the City is liable because Sergeant Holslag was acting within the course and scope of his employment.

Defendants Sergeant Holslag and the City contend that the Bane Act claim fails because Sergeant Holslag did not violate or act with an Plaintiffs contend that there is a

genuine issue of material fact as to whether Sergeant Amendment rights, and a reasonable juror could conclude that Sergeant Holslag acted with

The Bane Act provides a cause of action for violations of a plaintiff s state or federal civil rights



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committed by threats, intimidation, or coercion. *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014) (quoting Cal. Civ. Code § 52.1). [T]he Bane Act does not require the threat, intimidation or coercion element of the claim to be transactionally independent from the constitutional violation alleged. *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) (citing *Cornell v. City & Cty. of San Francisco*, 17 Cal. App. 5th 766, 798 (2017), modified by 2017 Cal. App. LEXIS 1018 (Nov. 17, 2017), review denied, 2018 Cal. LEXIS 1730 (Feb. 28, 2018)), as corrected (May 3, 2018), , 2018 U.S. App. LEXIS 19905 (9th Cir. July 18, 2018). However, proving a Fourth Amendment violation alone does not vicariously trigger[] Bane Act liability. Instead, proving a Bane Act claim [] requires specific intent to violate protected *Sandoval v. Cty. of Sonoma*, 912 F.3d 509, 520 (9th Cir. 2018), , 2019 U.S. App. LEXIS 5100 (9th Cir. Feb. 21, 2019), cert. denied, *Cty. of Sonoma v. Sandoval*, 2019 U.S. LEXIS 5757 (Oct. 7, 2019). R to demonstrate specific intent. *Cornell*, 17 Cal. App. 5th at 804.

In this case, the claim against Sergeant Holslag and the City for violation of the Bane Act is based on the same facts as the claim for excessive force under the Fourth Amendment. The Court has concluded that, viewing the facts in the light most favorable to Plaintiffs, a reasonable juror could conclude that Sergeant Holslag acted unreasonably under the Fourth Amendment when he shot and killed Smith. From these same facts, a reasonable juror could conclude that Sergeant Holslag acted with reckless disregard for Smith rights. The Motion for Summary Judgment on the claim against Sergeant Holslag and the City for violation of the Bane Act is denied. /// ///

c. Claim 4 - Battery All Plaintiffs bring a claim against Sergeant Holslag and the City for battery. Plaintiffs assert that Sergeant Holslag committed a battery when he shot and killed Smith and that the City is vicariously liable for Sergeant

Defendants Sergeant Holslag and the City contend that the battery claim fails because Sergeant r the Fourth Amendment. Sergeant Holslag and the City further contend that the individual heirs lack standing to bring a battery claim. Plaintiffs contend that there is an issue of material fact as to whether Sergeant actions were reasonable under the Fourth Amendment, so there is also an issue of fact as to whether Sergeant Holslag committed battery. Plaintiffs contend that they have standing.

State law claims for battery are analyzed under the same standard as claims for excessive force under the Fourth Amendment. See *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1273 (1998) making a lawful arrest or detention commits a battery upon the person being arrested or

detained as to such e In this case, the claim against Sergeant Holslag and the City for battery is based on the same facts as the claim for excessive force under the Fourth Amendment. The Court has concluded that, viewing the facts in the light most favorable to Plaintiffs, a reasonable juror could conclude that Sergeant Holslag acted unreasonably under the Fourth Amendment when he shot and killed Smith. Accordingly, a reasonable juror could conclude that Sergeant Holslag committed a battery. However, individual heirs lack standing to bring this survival action claim. See Cal. Civ.



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Proc. Code § 377.30; Hayes, 736 F.3d at 1229. The Motion for Summary Judgment on the claim against Sergeant Holslag and the City for battery is granted as to the claim by individual heirs Simmons and Wyatt Smith and denied as to the claim by the Estate.

d. Claim 5 - Wrongful Death All Plaintiffs bring a claim against Sergeant Holslag, Sergeant Brecht, and the City for wrongful death under section 377.60 of the California Code of Civil Procedure.

Plaintiffs assert that Sergeant Holslag committed a battery against Smith, causing his death. Plaintiffs assert that Sergeant Holslag was negligent in his use of excessive force. Plaintiffs assert that Sergeant Holslag and Sergeant Brecht negligently accepted unsubstantiated and false information. Plaintiffs assert that the City is vicariously liable for Sergeant Holslag and Sergeant

i. Standing of Individual Heirs Defendants Sergeant Holslag, Sergeant Brecht, and the City contend that the individual heirs lack standing to bring a wrongful death claim. Plaintiffs contend that they have standing, and Simmons was financially dependent on Smith sufficient to confer standing.

ruled solely by statute, and the Scott v. Thompson, 184 Cal. App. 4th 1506, 1510 (2010), (June 25, 2010). Standing to sue for wrongful death is governed by section 377.60 of the California Code of Civil Procedure by any of the following surviving . . . children, . . . or if there is no surviving issue of the decedent, the persons

including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession. Civ. Proc. § 377.60(a).

Generally, where a decedent leaves issue, heirs at all Chavez v. Carpenter, 91 Cal. App. 4th 1433, 1440 (2001) of their status as heirs, parents may sue for the wrongful death of their

Id. at 1445 (quoting Cal. Code Civ. Proc. § 377.60(b)). Id. (citations omitted). The plaintiff must present evidence that Hazelwood v. Hazelwood, 57 Cal. App. 3d 693, 698 (1976).

[A] parent cannot claim they are dependent within the meaning of Code of Civil Procedure section 377 if they receive financial support from their children which merely makes available to them some of the niceties of life they might not otherwise be able to afford. But, if a parent receives financial support from their child which aids them in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without, the parent is dependent upon their child. Perry v. Medina, 192 Cal. App. 3d 603, 610 (1987). In this case, Wyatt Smith is the surviving child of Smith and has standing to bring a See Cal. Code Civ. Proc. § 377.60(a). Simmons is the surviving parent of Smith. Simmons testified at her deposition that when Smith stayed (Simmons Dep., Ex. 26 to Sweda Decl., ECF No. 217-31 at 29:23-30:1). Simmons testified

that Smith did not give and did not send her money when he was not staying with her. (Id. at 30:6-9). Plaintiffs have failed to present evidence sufficient for a reasonable juror to conclude that Simmons



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was financially dependent, to some extent, on Smith for the necessities of life. See *Hazelwood*, 57 Cal. App. 3d at 698. The Court concludes that Simmons lacks standing to bring a wrongful death claim.

ii. Sergeants Holslag & Brecht Defendants Sergeant Holslag, Sergeant Brecht, and the City contend that the wrongful death claim fails because Sergeant Brecht did not owe any duty to Smith, and Sergeant death. Plaintiffs contend that a reasonable juror could conclude that Sergeant actions were unreasonable under the circumstances of this case. Plaintiffs contend that

Sergeant unverified information about Smith to SDPD officers and failing to correct officers that repeated the information on the police radio. Plaintiffs contend that Sergeant Holslag was preconditioned to believe that Smith would shoot and kill him as a result of Sergeant

ts of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs *Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1264 (2006) (emphasis omitted) (citation omitted). When a plaintiff's wrongful death claim is premised on a defendant's negligence, the plaintiff must establish the standard elements of negligence to prevail. See *Hayes*, 736 F.3d at 1231. To support a finding of negligence, a plaintiff must show that [the] defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause. *Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 629 (2013) (alterations in original) (quoting *Id.*, 47 Cal. 3d 278, 292 (1988)).

Id. (citations omitted). *Id.* This

narrowly on the moment when deadly force was used. *Id.* at 639.

There will virtually always be a range of conduct that is reasonable. As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence. It would be unreasonable to require police officers in the field to engage in the sort of effective and least dangerous method of handling an immediate and dangerous situation, particularly when officers are forced to make split-second decisions under tense and often perilous conditions. *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 537 (2009).

use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions

show, as part of the totality of the circumstances, that the use of deadly force was unreasonable. *Hayes*, 57 Cal. 4th at 639. Summary judgment is appropriate when, viewing the facts most favorably to the defendant, no reasonable jury could find in favor of the plaintiff. *Id.* at 632.



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In this case, the cause of action against Sergeant Holslag for wrongful death is based on Sergeant Holslag shooting and killing Smith. See *id.* at 630 a single indivisible cause of action, seeking recovery for a single wrong the shooting

. The Court has concluded that a reasonable juror could conclude that Sergeant Holslag did not act reasonably under the Fourth Amendment and committed battery. Viewing the facts in the light most favorable to Plaintiffs, a reasonable juror could conclude that under the totality of the circumstances Sergeant Holslag was negligent in shooting Smith. Sergeant Holslag is not entitled to summary judgment on the wrongful death claim. Sergeant Brecht and the City contend that Sergeant Brecht took no preshooting actions that caused Sergeant Holslag to shoot Smith. Sergeant Brecht and the City contend that providing officer safety information about a possibly armed and dangerous suspect did not create a dangerous situation that was the proximate cause. The City contends that Sergeant Brecht created a dangerous situation that resulted in Officer Holslag

shooting Smith by providing unverified information about Smith to SDPD officers.

Sergeant Brecht responded to the call that Smith and Sanders were possibly at Fanuel Park on the day before the shooting. Sergeant Brecht spoke to Escamilla at the park, and Escamilla gave Sergeant and Sanders from the poster. Sergeant Brecht states in his Declaration that on November

4, 2015, he gave copies of the photograph of Smith and Sanders to his squad at the lineup (Brecht Decl., Ex. 1 to Sweda Decl., ECF No. 220-7 ¶ 10). Sergeant Brecht testified at his

deposition that he told approximately fifteen officers at the lineup that Smith and Sanders AK-47. (Brecht Dep., Ex. 10 to Iredale Decl., ECF No. 229-13 at 25:2-26:14). Officer

-37 ¶ 3). Sergeant Holslag

was not present at the lineup.

Sergeant Brecht responded to Officer Smith. Sergeant Brecht heard Officer

11-4-15, Ex. 4 to Sweda Decl., ECF No. 220-10 at 6; Audio Rec. of Police Radio, Disc Ex. 3 to Sweda Decl.). Sergeant armed and dangerous. (Transcript

of SDPD Dispatch Calls of 11-4-15, Ex. 4 to Sweda Decl., ECF No. 220-10 at 6-8; Audio Rec. of Police Radio, Disc Ex. 3 to Sweda Decl.). Sergeant Brecht helped set up a perimeter around the shed. Sergeant Brecht did not use any force during the incident.

Proximate cause that the defendant's negligence was a substantial factor in producing. *Ileto v. Glock, Inc.*,



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349 F.3d 1191, 1206 (9th Cir. 2003) (quoting *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1342 (1998)). The proximate cause question asks whether the unlawful conduct is closely enough tied to the injury that it makes sense to hold the defendant legally liable. *Mendez v. Cty. of Los Angeles*, 897 F.3d 1067, 1076 (9th Cir. 2018), , 2018 U.S. App. LEXIS 25361 (9th Cir. Sept. 6, 2018), cert. denied, *Cty. of Los Angeles v. Mendez* Whether an act is the proximate cause of injury is generally a question of fact; it is a question of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn from those facts. *Ileto*, 349 F.3d at 1206 (quoting *Garman v. Magic Chef, Inc.*, 117 Cal. App. 3d 634, 638 (1981)).

Courts in this circuit have denied motions for summary judgment on negligence claims where a police officer creates a dangerous situation that results in another officer using lethal force. See *Dorger v. City of Napa*, No. 12-cv-00440-WHO, 2013 U.S. Dist. LEXIS 153696, at *33 (N.D. Cal. Oct. 24, 2013) (denying summary judgment on

whether [the non-shooting preshooting conduct (e.g., her plan to detain [the victim], including the presence of armed officers) played a role in negligently provoking a dangerous situation that resulted in the use of reasonable or unreasonable use of lethal force, is relevant under the totality of *Howard v. Cty. of Riverside*, EDCV 12-00700 VAP (OPx), 2014 U.S. Dist. LEXIS 196517, at *27 (C.D. Cal. May 7, 2014) (denying summary judgment on negligence claim against officer who did not use force to open the

Viewing the facts in the light most favorable to Plaintiffs, Sergeant Brecht provided safety information that he received from the bondsmen that Smith was possibly armed to his squad of officers, which did not include Sergeant Holslag. Sergeant Brecht responded to the call about the foot pursuit of Smith and helped set up a perimeter. Sergeant Brecht did not directly communicate with Sergeant Holslag and did not use force during the incident. The Court concludes that no reasonable juror actions created a dangerous situation that resulted in Sergeant Holslag using deadly force.

The use of deadly force by Sergeant Holslag was not a foreseeable consequence of the officer safety information provided by Sergeant Brecht. The Court concludes that no reasonable juror could find that Sergeant shooting of Smith by Sergeant Holslag. Sergeant Brecht is entitled to summary judgment

on the wrongful death claim.

iii. The City Defendant the City contends that it is entitled to summary judgment on the wrongful death claim because Plaintiffs failed to identify a statute or enactment in the TAC authorizing liability for wrongful death against the City. Plaintiffs contend that the City is liable based on respondeat superior.

Searcy v. Hemet Unified Sch. Dist., 177 Cal. App. 3d 792, 802 (1986)



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(citations omitted). Section 815(a) of the California Government Code provides that, whether such injury arises out of an act or omission of the public entity or a public

see *Cowing v. City of Torrance, California*; and except as otherwise provided by statute, there is no liability on the part of

in the complaint. *Searcy*, 177 Cal. App. 3d at 802.

Section 815.2 of the California Government Code, the California Tort Claims Act in 1963 (§ 810 et seq.), a governmental entity can be held

vicariously liable when a police officer acting in the course and scope of employment uses *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 215 (1991).

In this case, the Court has determined that Sergeant Holslag is not entitled to summary judgment on the wrongful death claim. At the time of the shooting, Sergeant Holslag was acting in the course and scope of his employment as a police sergeant for the City. A reasonable juror could conclude that the City is vicariously liable for Sergeant onstrues the claim against the City for wrongful death to be alleged under section 815.2 of the California Government Code. The Motion for Summary Judgment on the wrongful death claim is granted as to the claim by Simmons and as to the claim against Sergeant Brecht and is otherwise denied.

e. Joinder Defendants Sergeant Holslag, Sergeant Brecht, and the City surviving daughter must be joined under Rule 19 of the Federal Rules of Civil Procedure

to protect Defendants against the risk of incurring multiple obligations. Plaintiffs contend that there is no evidence that Smith had a daughter.

Rule 19 of the Federal Rules of Civil Procedure requires joinder of a person to a existing parties; or . . . that person claims an interest relating to the subject of the action

and is so situated that disposi party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent

In this case, Simmons testified at her deposition that Smith was not sure if he had a daughter. Simmons did not know any See Simmons Dep., Ex. 26 to Sweda Decl., ECF No. 217-31 at 15:17-17:7). The Court concludes that there is insufficient evidence that there is any other party required to be joined in this action.

The Motion for Summary Judgment filed by Sergeant Scott Holslag and City of San Diego (ECF No. 217) is granted in part and denied in part. The Motion is granted as to the first claim by individual



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heirs Wyatt Smith and Simmons for violation of the Fourth Amendment, the fourth claim by individual heirs Wyatt Smith and Simmons for battery, and the fifth claim by Simmons for wrongful death, and is otherwise denied. The Motion for Summary Judgment filed by Sergeant David Brecht and City of San Diego (ECF No. 220) is granted. VI. DEFENDANTS ESCAMILLA MOTIONS FOR SUMMARY

JUDGMENT Defendants Escamilla and Macey move for summary judgment on the sixth claim for conspiracy to violate civil rights under 42 U.S.C. § 1983 and the seventh claim for violation of the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983. Escamilla and Macey further move for summary judgment on the request for punitive damages. /// ///

a. Claim 7 - 42 U.S.C. § 1983 All Plaintiffs bring a claim against Escamilla and Macey under § 1983 for violation of the Fourth and Fourteenth Amendments. Plaintiffs assert that Escamilla and Macey acted under color of state law by conducting a joint venture with SDPD. Plaintiffs assert that Escamilla and Macey provided false information to police about Smith, increasing the likelihood that excessive force would be used and constituting a substantial factor in

Escamilla and Macey contend that Plaintiffs fail to submit evidence that Escamilla and Macey acted under color of state law. Escamilla and Macey contend that they were engaged in purely private conduct. Escamilla and Macey contend that Plaintiffs fail to submit evidence that any of the information Escamilla or Macey provided was false. Plaintiffs contend that Macey provided false information to Escamilla, who then extensively coordinated with police and provided false information about Sanders and Smith to induce SDPD to arrest Sanders .

An individual is not liable for the deprivation of rights under § 1983 unless they were Leer, 844 F.2d at 632-33 (citations omitted). Plaintiffs Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

for measuring state action for purposes of section 1983 liability. Rather, it is a process of lead [the court] to a correct , 505 F.2d 547, 550 (9th Cir. 1974) (en banc) (quoting Reitman v. Mulkey, 387 U.S. 369, 378 (1967)).

s Johnson v. Knowles, 113 F.3d 1114, 1118 (9th Cir.1997). The Supreme Court has articulated four tests for determining whether a private individual s actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test. Id. . . . examine whether state officials and private parties have acted in concert in effecting a particular deprivation Gallagher v. Neil

Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995) The test interdependence with [the private actor] that it must be recognized as a joint Gorenc v. Salt River Project Agric. Improvement & Power Dist., 869 F.2d 503, 507 (9th Cir. 1989) Franklin v. Fox, 312 F.3d 423, 444-45 (9th Cir. 2002); see Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987) (bail bondsman was a state actor where a



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police officer assisted bondsman searched her home).

Providing false information to the police does not automatically transform a private individual into a state actor. . Machs. Corp., 637 F.2d 1350, 1357- 58 (9th Cir. 1981) (a person who supplies inaccurate information that leads to arrest is not involved in joint activity with that state and is thus not liable under § 1983 (citing Butler v. Goldblatt Bros., Inc., 589 F.2d 323, 327 (7th Cir. 1978)); Daniel v. Ferguson, 839 F.2d iven by a

In this case, Macey attempted to locate Sanders after a warrant was issued for Macey testified at her deposition that another bondsman, Leland Chapman, created the poster, and Macey posted it to her Facebook account. TIMOTHY GENE SMITH CONSIDERED ARMED AND EXTREMELY

Decl., ECF No. 235-8 at 3).

talking to former roommate, Tiffany Moore, who told Macey and

Ex. B to Obra-White Decl., ECF No. 219-6 at 65:2-3). Tiffany Moore stated in her police interview that she told the bondsmen that Sanders and Smith had a gun. assertion Smith tried to run Macey over with his car when Macey located Smith and Sanders in Kansas City. (Id. at 65:2-20; 93:7-94:21). Macey

- Id. at 84:21-23). Macey learned that Sanders and Smith might be in San Diego and hired Escamilla to apprehend Sanders. Macey did not have any contact with SDPD before the shooting.

poster. The poster stated that Sanders and (Second Wanted Poster, Ex. 17 to Iredale Decl., ECF No. 234-10 at 2). The poster stated,

AREA AS OF 11/4/15. CAUTION: CI HAS ADVISED THAT SUBJECT SMITH

RECENTLY LEFT MISSOURI BY TRAIN ARMED WITH AN AK-47 and/or Revolver Id.). Escamilla from Macey, Chapman, and

On November 3, 2015, Escamilla called SDPD requesting assistance in apprehending Smith and Sanders at Fanuel Park. Escamilla gave Sergeant Brecht either the Escamilla states in his Declaration that his only communication with any SDPD member before the activities on November 3, 2015, as is required by law (Penal Code § 1299.08) and, later

that day, providing the photo, given to me by Natalie Macey and contained in the [Wanted (Escamilla Decl., ECF No. 215-1 ¶ 7).

The asserted constitutional violation in this case is the use of lethal force by Sergeant Holslag in



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violation of the Fourth Amendment. Sergeant Holslag testified that he shot Smith because he believed that Smith was armed with a gun and was going to shoot him. Viewing the facts in the light most favorable to Plaintiffs, Macey assisted in the creation information to Soto, who told the police dispatcher that Smith was armed, dangerous, and

had a long history of violent crime. Viewing the facts in the light most favorable to Plaintiffs, Holslag heard on the police radio that Smith was possibly armed and dangerous and believed that Smith had a gun when he shot Smith.

The Court concludes that Macey providing information to Escamilla, and Escamilla providing information to SDPD about Smith, even if false, did not constitute joint participation with SDPD in the use of lethal force. Plaintiffs have failed to present evidence sufficient for a reasonable juror to conclude that Macey or Escamilla acted in concert with SDPD in the depriv . See Franklin, 312 F.3d at 445 (quoting Gorenc, 869 F.2d at 507). The Court concludes that Plaintiffs have failed to present facts sufficient to show that either Macey or Escamilla was a state actor rather than engaged in Burton, 365 U.S. at 722; see Ouzts [W]e [] know that the bail bondsman is in the business in order to make money and is not acting out of a high-minded sense of devotion to the administration of justice [T]he bondsman People v. Houle, 13 Cal. App. 3d 892, 895 (1970)). The Motions for

Summary Judgment on the claims against Macey and Escamilla for violation of § 1983 are granted.

b. Claim 6 - Conspiracy All Plaintiffs bring a claim against Macey and Escamilla for conspiracy to violate civil rights under § 1983. Plaintiffs assert that Macey, Escamilla, Legal Service Bureau, and Soto conspired to deprive Smith of his constitutionally protected rights under the Fourth and Fourteenth Amendments by providing false information about Smith to SDPD with the expectation that SDPD would use excessive force. Plaintiffs assert that the bondsmen agreed wi falsely telling SDPD that Smith was a violent, armed criminal.

Macey and Escamilla contend that they did not conspire with SDPD to deprive Smith of his constitutional rights. Macey contends that she hired Escamilla to apprehend Sanders. Macey and Escamilla assert that the information provided was not false. Plaintiffs contend

that a reasonable juror could conclude that Macey and Escamilla conspired with each other and Soto to falsify information, resulting in the use of excessive force by Sergeant Holslag.

To establish a conspiracy under § 1983, a plaintiff must satisfy the following elements: (1) the existence of an express or implied agreement among the defendant officers to deprive him of his constitutional rights; and (2) an actual deprivation of those Avalos v. Baca, 596 F.3d 583, 592 (9th Cir. 2010).

Conspiracy is not itself a constitutional tort under § 1983. See Cassettari v. Nev. Cnty allegations to



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support a section 1983 violation precludes a conspiracy claim predicated upon *Landrigan v. City of Warwick*, 628 establish a section 1983 *Hampton v. Hanrahan*, 600 F.2d 600, 622 (7th Cir. 1979), other grounds, 446 U.S. 754, 100 S. Ct. 1987, 64 L. Ed. 2d 670 (1980)). It does not enlarge the nature of the claims asserted by the plaintiff, as there must always be an underlying constitutional violation. Conspiracy may, however, enlarge the pool of responsible defendants by demonstrating their causal connections to the violation; the fact of the conspiracy may make a party liable for the unconstitutional actions of the party with whom he has conspired. Conspiracy in § 1983 actions is usually alleged by plaintiffs to draw in private parties who would otherwise not be susceptible to a § 1983 action because of the state action doctrine, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002), or to aid in proving claims against otherwise tenuously connected parties in a complex case, see *Gilbrook [v. City of Westminster]*, 177 F.3d [839,] 856-58 [(9th Cir. 1999)]. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 934-935 (9th Cir. 2012), superseded by statute on other grounds. In this case, the conspiracy claim is based on the same facts as the claim against the bondsmen for violation of § 1983. The underlying constitutional violation in this case is the use of excessive force by Sergeant Holslag against Smith. Viewing the facts in the light most favorable to Plaintiffs, the bondsmen provided information to each other and to SDPD that Smith was armed with one or more guns and had a history of violent crime, in order to

There is insufficient evidence of a causal unconstitutional actions of Sergeant Holslag. Plaintiffs have not come forward with evidence sufficient for a reasonable juror to conclude that Escamilla and Macey conspired with SDPD to deprive Smith of his right to be free from excessive force. The Motions for Summary Judgment filed by Defendants Dan Escamilla (ECF No. 215) and Natalie Ann Macey (ECF No. 219) are granted. VII. CONCLUSION

IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by Defendant Dan Escamilla (ECF No. 215) is granted.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by Defendants Sergeant Scott Holslag and City of San Diego (ECF No. 217) is granted in part and denied in part. The Motion is granted as to the first claim by individual heirs Wyatt Smith and Simmons for violation of the Fourth Amendment, the fourth claim by individual heirs Wyatt Smith and Simmons for battery, and the fifth claim by Simmons for wrongful death, and is otherwise denied.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by Defendant Natalie Ann Macey (ECF No. 219) is granted.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by Defendants Sergeant David Brecht and City of San Diego (ECF No. 220) is granted. Dated: December 31, 2020

