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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REFUGIO NIETO and ELVIRA NIETO individually and as the Co-Successors in Interest to ALEJANDRO NIETO;

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, Police Chief GREG SUHR in his individual capacity, Police Officers Jason Sawyer, Roger Morse, Richard Schiff, Nathan Chew & DOES 1-50, individually and in their official capacities as Police Officers for the City and County of San Francisco, inclusive.

Defendants.

CASE NO.: C14-03823- NC

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: November 4, 2015
Time: 1:00 pm
Location: San Jose Courthouse
4th Floor, Courtroom 7

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INTRODUCTION

This case arises out of the shooting death of Alejandro "Alex" Nieto on March 21, 2014, in Bernal Heights Park in San Francisco. Defendant City and County of San Francisco Police Officers Jason Sawyer, Roger Morse, Richard Schiff and Nathan Chew, without prior warning or provocation, shot at Alex 48 times, fatally wounding him in his head, chest and back. While utilizing only select portions of the eyewitnesses' testimony, completely ignoring the testimony of eyewitnesses that directly contradict the Defendant Officers' testimony, and/or outright misrepresenting the testimony of those witnesses they chose to include, Defendants move for summary judgment as to all of Plaintiffs' claims.[1]

Material questions of fact preclude summary judgment in this matter, and Defendants are plainly aware of this fact, otherwise they would not have gone through such histrionic efforts to obfuscate the record and to misrepresent the scope of the evidence to this Court. Plaintiffs can appreciate that if we were at trial, then Defendants would, of course, only present that evidence that supports their theory of the case; however, Defendants attempt to paint this picture on summary judgment is wholly inappropriate and a downright abuse of summary judgment practice. Contrary to Defendants' misguided efforts, when viewed in the light favorable to Plaintiffs, as is required on summary judgment, a trier of fact could determine that:

1. Decedent Alex Nieto was not behaving erratically immediately before or at the time he was contacted by the Defendant Officers;
2. Decedent Alex Nieto obviously possessed a taser;
3. Decedent Alex Nieto's taser was inoperable;
4. Decedent Alex Nieto never pointed or shot the taser at the Defendant Officers;
5. The Defendant Officers did not give any warnings before they opened fire on Decedent Alex Nieto;
6. Decedent Alex Nieto did not verbally threaten the Defendant Officers;

[1] Plaintiffs do not oppose Defendants motion for summary judgment on Plaintiffs' *Monell* claim against Defendant City.

7. The M26C Taser timestamps as recalculated by Mr. Bryan Chiles are unreliable and subject to dispute
8. By shooting at Decedent Alex Nieto 48 times, the Defendant Officers exhibited a purpose to harm unrelated to any legitimate law enforcement objective in violation of Plaintiffs' (Alex's parents) Fourteenth Amendment rights.
9. By shooting at Decedent Alex Nieto 48 times, the Defendant Officers unreasonably used deadly force against Decedent Alex Nieto
10. The Defendant Officers used negligent tactics leading up to and during their use of force against Decedent Alex Nieto

Plaintiffs Opposition is based on the arguments made below, the Declaration of Adanté Pointer (hereinafter the "Pointer Declaration"), filed herewith and all exhibits attached thereto, on the court's file in this matter, and on such oral and/or documentary evidence presented at the hearing of this motion.

STATEMENT OF FACTS

Nearly every fact that Defendants rely on is disputed. Rather than tell Plaintiffs' version of the subject incident in narrative form, Plaintiffs counter the facts that Defendants' rely on and demonstrate the material fact questions presented thereby.

A. Decedent did not Threaten or Taunt the Defendant Officers Prior to them Shooting Him

Defendants claim (and Plaintiffs do not dispute for purposes of this motion) that Defendants Schiff and Sawyer drove into the park on a service pathway, stopped their patrol car 25 to 30 yards away from Decedent Nieto and took cover behind their patrol car doors. (See Defendants Motion for Summary Judgment, Document 45 at 9:6-7, 9:13-17, hereinafter cited as "Document 45.") Defendants claims that Decedent Nieto was marching toward them briskly and with purpose. (Document 45 at 9:9-10.) However, eyewitness Antonio Theodore, who was walking his dog in the park and who stood approximately 20 feet above the scene on a hiking trail and who was watching the incident from the same vantage point as the Defendant Officers (i.e., facing Decedent Nieto head on), testified that he observed Decedent Nieto walking casually and coolly as though he had no idea that the police were after him. (See Deposition Testimony of Antonio Theodore at 58:1-19, 99,

attached to the Pointer Declaration as Exhibit A, hereinafter cited as "Theodore Depo.") Defendants claim that both Defendants Schiff and Sawyer said to Decedent Nieto "show me your hands!" and that he responded by saying "show me *your* hands!" (Document 45 at 9:18-21.) However, Mr. Theodore testified that the Defendant Officers only told Decedent Nieto to "stop" and nothing else, and that Decedent Nieto did not say anything in response. (Theodore Depo 58:20-25, 101.) Defendants claim that instead of stopping and showing his hands, Decedent Nieto pulled the taser out of his holster and pointed it at the officers with both hands. (Document 45 at 9:22-23.) However, Mr. Theodore testified the Decedent had both of his hands in his jacket pocket and that he never had the opportunity to pull them out of the pockets. (Theodore Depo 63, 103.) Defendants claim that Defendants Schiff and Sawyer both saw, what they believed to be a black semi-automatic pistol, and the red light of a laser sight pointed directly at them, and that Defendants Schiff also saw a flash of light from the muzzle. (Document 45 at 9:24-27.) However, Mr. Theodore, who was watching Decedent Nieto from the Defendant Officers same vantage point, never saw any lights of any sort emanating from the Decedent. (Theodore Depo 64:21-66:8.)

Defendants claim that Defendants Schiff and Sawyer feared Decedent Nieto was shooting or about to shoot them, so they started shooting at him. (Document 45 at 10:1-4.) However, Mr. Theodore testified that Decedent Nieto did not have anything in his hands and that his hands were in his pockets when the Defendant Officers began shooting him. (Theodore Depo 64:21-66:8, 103.) Mr. Theodore also testified that the Defendant Officers shot Decedent without giving any warning that they would shoot him or saying anything other than "stop," and that the motion happened so quickly, Decedent had no idea what was going on. (Theodore Depo 60:7-10, 105.) Defendants claim that after the initial shots were fired, Decedent Nieto did not go down immediately and that after some shots, he went to the ground in a tactical position (so as to make himself a smaller target), with both arms extended still grasping and pointing the gun at the officers and his head raised towards the officers. (Document 45 at 10:4-8.) However, Mr. Theodore testified that after the first four shots Decedent fell to his knees with his hands still in his pockets, that he appeared to be trying to take his hands out (as if to raise them up) but he never fully made it; he heard another shot and then decedent fell to the ground on his face and on top of his hands that were still in his pockets. (Theodore Depo 64, 70.) Mr.

Theodore also testified that there was virtually no time between the Defendant Officers telling Decedent to "stop" and them shooting him. (Theodore Depo 105.)

Defendants claims that when Defendant Officers Morse and Chew approached they: heard gunshots, observed Decedent Nieto prone on the ground with his arms extended holding a gun shooting or readying himself to shoot their fellows officers, and also saw a red laser sight or muzzle flashes coming from the gun, so they too began shooting at Decedent. (Document 45 at 10:13-5:2.) However, Mr. Theodore testified that he observed another officer approach after the first four shots (which to him appeared to be fatal) had already been fired and after Decedent Nieto had fallen on his face with his hands underneath him. (Theodore Depo 66:14-25.) Mr. Theodore also testified that when Decedent Nieto fell to the ground on his face and with his hands underneath him, he was obviously mortally wounded. (Theodore Depo 64:10-12, 68:4-14.) Despite the appearance of being mortally wounded, Mr. Theodore observed all the officers continue to shoot Decedent. (Theodore Depo 68:14-25, 103.) Finally, Defendants claim once they stopped shooting Decedent Nieto they approached him, realized for the first time that he had a Taser—not a gun—and kicked the Taser away from his body. (Document 45 at 11:3-13.) However, Mr. Theodore did not observe the officers take anything out of Decedent's hands or kick anything away from his body, once they approached and handcuffed Decedent. (Theodore Depo 66:14-25, 102.)

The Defendant Officers shot at Alex Nieto a total of 48 times and he was struck at least 14 times throughout his body. (See Medical Examiner's Report at p. 3, attached to the Pointer Declaration as Exhibit B and Deposition of Rosalyn Rouede 39:20-25, attached to Pointer Declaration as Exhibit K, hereinafter "Rouede Depo.") At the time of the incident, Alex Nieto was working as a security guard. (See Deposition Testimony of Refugio Nieto at p. 31:9-10; see Deposition Testimony of Elvira Nieto at p. 21:17-22:5; 22:14-22 attached to the Pointer Declaration as Exhibits C and D.) In addition, Decedent Nieto had no reported mental health incidents since a voluntary hospital-stay nearly three years prior to the subject-incident in 2011. (*Id.*)

B. Defendants Misrepresent Witness Testimony Regarding Decedent's Behavior Just Prior to the Shooting[2]

Defendants claim that three independent witnesses (Evan Snow, Timothy Isgit, and Justin Fritz) observed Decedent Nieto behaving erratically on Bernal Hill shortly before the shooting. (Document 45 at 12:18-13:12.) However, there is conflict amongst the three witnesses Defendants proffer as supporting their position that Decedent Nieto was behaving erratically immediately before the shooting took place. For example, the first of the three witnesses proffered by the Defendants as having seen Decedent Nieto prior to the shooting incident is Mr. Evan Snow. Mr. Snow testified that when he initially observed Decedent Nieto, he made a quick judgment about him (Mr. Nieto) in that he did not want to mess with him based upon Decedent Nieto's attire. (See Deposition testimony of Evan Snow at 22:22-23:1, attached to the Pointer Declaration as Exhibit E, hereinafter cited as "Snow Depo.") Decedent Nieto was wearing a red San Francisco 49ers windbreaker, black jeans, and a black San Francisco 49ers ballcap, and because of this attire, Mr. Snow thought Decedent Nieto was a Latino or Mexican gangster. (Snow Depo 44:12-23)

While Defendants represent that Mr. Snow and Decedent Nieto had a confrontation over Mr. Snow's dog, Defendants do not describe the incident precipitating the confrontation. (Document 45 12:22-13:3.) The altercation derived from Mr. Snow's Siberian Husky approaching Decedent Nieto, causing him to move quickly from right to left in an attempt to keep his food away from the dog. (Snow Depo 25:20-26:3.) Decedent then ran to a set of benches and jumped on top of them in an effort to try and get away from the dog, but the Husky chased after him. (Snow Depo 28:16-18.) The

[2] As discussed in depth below, Plaintiffs maintain that evidence of Decedent's behavior not observed by or reported to the Defendant Officers is not properly considered when analyzing the reasonableness of their use of deadly force and should not be considered by this Court because the Officers were not aware of this conduct at the time of the shooting. *Glenn v. Washington County*, 673 F.3d 864, 873, fn. 8 (9th Cir. 2011). Defendants only present this evidence to bias the Court against the Decedent and to bolster Defendants' version of the facts (which they are legally constrained from doing on summary judgment). That notwithstanding, Plaintiffs present evidence on this aspect of the subject-incident to provide the Court with a more truthful account of the incident and to show that material fact questions preclude reliance on Defendants' representations even if this evidence is properly considered on summary judgment.

Husky was not on a leash and Mr. Snow was 40 feet away, not paying attention to what his dog was doing. (Snow Depo 46:22-47:2, 47: 18-19) Mr. Snow's attention was directed away from his dog and focused upon a young lady that happened to be jogging nearby. (Snow Depo 46:22-47:19.) Mr. Snow is well aware that a person can interpret his dog as being aggressive when acting as he did toward Decedent Nieto. (Snow Depo 48:1-14.)

Next, Mr. Fritz and his partner Mr. Isgit were standing side-by-side when they observed Decedent Nieto at Bernal Park. However, despite Mr. Isgit's claim the Decedent was acting strangely, Mr. Fritz does not tell this same story. Fritz testified that when he first observed Decedent Nieto, he was just standing around and that nothing in particular caught his attention. (See Deposition Testimony of Justin Fritz at 16:13-14, 43:25-44:3, attached to the Pointer Declaration as Exhibit F, hereinafter cited as "Fritz Depo.") Fritz also testified that during the entire time he observed Decedent Nieto, he did not see Decedent with a gun and Decedent never threatened him, Isgit or their dogs. (Fritz Depo, 45:8-11, 46:3-11.) Even Mr. Isgit admits Decedent Nieto never took any object from his holster nor did he threaten him, Mr. Fritz or their dogs. (See Deposition testimony of Timothy Isgit at 34:20-22, 35:6-17, attached to the Pointer Declaration as Exhibit G.)

C. Decedent Obviously Carried a Taser that was not Reasonably Mistaken as a Firearm

Defendants claim that the Taser Decedent Nieto had looked like a gun. (Document 45 at 11:10-13.) However, Plaintiffs submit that the overly boxy nature and yellow grip gives the object a very distinctive and obvious appearance of a Taser. (See Photograph of the Taser attached to the Pointer Declaration as Exhibit H.) Moreover, Evan Snow, a layperson, testified that he could tell by the height and rectangular nature of the muzzle of the object Decedent had in his hand that it was a taser or some type of stun gun. (Snow Depo 34:9-17.) Snow also testified that upon seeing the object and realizing it was taser or stun gun, he breathed a sigh of relief and did not fear it or Decedent Nieto from then on. (*Id*.) Indeed, after making this observation, Snow ultimately turned his back on Decedent and walked away from him, eventually losing sight of Decedent Nieto. (Snow Depo 36:23-25.)

1. The Decedents' Taser does not Operate or Function Like a Handgun

Unlike a firearm which has recoil effects, a Taser does not jerk or move within the hand when the trigger is pulled. (See Deposition Testimony of Bryan Chiles at 73:1-15, attached to the Pointer Declaration as Exhibit I, hereinafter cited as "Chiles Depo.") Likewise, a taser does not emit smoke or muzzle flash like a gun when it is fired. (Chiles Depo 72:23-25.) Instead, depending upon the mode it is in when the trigger is pulled, the taser will display a static discharge across the muzzle area but only when it's in drive stun mode. (Chiles Depo 51:20-52:12, 70:22-72:7.) In addition, the taser does not emit sounds similar to a firearm as it merely makes a crackling and/or a single firecracker like sound one would not expect to hear from 100 feet away. (Chiles Depo 74:22-76:23.)

D. Bryan Chiles's Examination of Decedent Nieto's Taser Presents Many Fact Questions

Defendants present the deposition testimony of Bryan Chiles, the engineer from Taser International who examined Decedent Nieto's taser at the request of the San Francisco District Attorney's Office, and they claim he corroborates the Defendant Officers' version of the subject incident. (Document 45 at 13:13-16:22.) However, Defendants only present those select portions of Chiles's testimony and findings that are favorable to their version of the incident, not that which is favorable to Plaintiffs, and, here again, Defendants fail to present the portions of Chiles's testimony and findings that present material fact questions.

1. The Accuracy of the Time Stamps the Defendants' Rely Upon Are Subject to Dispute

Defendants claim that Bryan Chiles's examination of Decedent Nieto's taser indicates its trigger was pulled three times during the shooting incident. (Document 45 14:25-16:22.) However, this data is not as absolute as Defendants suggest. For example, the Defendants fail to mention the time stamps they rely upon are actually a set of re-calculated time stamps that differ from those Chiles initially reported to the Defendants. The initial set of time stamps he reported conflicted with the Defendant Officers' version of the events. In fact, the San Francisco District Attorney requested that he calculate new timestamps because "the times [didn't] line up with someone's story," prompting Chiles' to recalculate new timestamps upon which Defendants now rely. (Chiles Depo 63:16-64:6.) Furthermore, Chiles's testimony suggests that his recalculated time stamps/findings are subject to debate because he explained that all clocks drift and the average clock drift for decedent's model of taser is 1 minute per month, but an expert from his own company, that he refers to as an

authority and "the mastermind" of all things related to tasers, published that the average clock drift for decedent's model taser is 8-10 minutes. (Chiles Depo 109:4-5, 110:1-10). Futhermore, clock drift varies from individual CEW to CEW and because there are no recorded time synchronization "some speculation and some logic" must be inserted to determine the accuracy of timestamps. (Chiles Depo 36:24-37:2, 92:11-13, 93:21-94:2, 107:6-9.)

2. Decedent Nieto's Taser Was Not Capable of Functioning as the Defendants Claim

Chiles testified that Decedent Nieto's taser ("CEW") is a M26C model which is only sold to civilians. (Chiles Depo 17:6-25.) Decedent Nieto's taser can be used in two different methods: 1) drive stun mode that requires a person to be in close or actual physical contact with the Taser in order for the Taser to deliver its electrical charge and 2) in dart mode which allows the Taser to shoot out two darts from a cartridge that is attached to the end of the Taser. The darts are connected to the Taser by way of small wires that deliver the electrical charge from the Taser through the wires into the darts and then into the object the darts are attached to. (Chiles Depo 69:13-70:7.)

Chiles explained that when Decedent's CEW safety is turned off (meaning that the weapon is on), its laser turns on; however, in the photo of decedent's taser the safety is on and its laser, is off, therefore suggesting either someone (along the chain of custody) tampered with decedent's taser or that its laser was never turned on during the incident. (Chiles Depo 26:6-25.) Chiles testified that a very fast and brief electrical charge can be seen from the CEW but only when it is in drive-stun mode. (Chiles Depo 70:22-72:13.) Chiles also explained that the laser does not flash while the CEW is being used, the laser is steady and continuous while it is on. (Chiles Depo 73:16-22.) Chiles explained that when the darts are deployed, the M26C makes a pop that sounds like a single firecracker going off and that it is unlikely a person standing 100 feet away would hear this sound. (Chiles Depo 74:22-75:24.)

The Defendant Officers claim they recovered Decedent Nieto's taser with the cartridge attached and the taser coils extended out from the cartridge, insinuating that it had been fired. (See Deposition Testimony of Defendant Schiff at 79:12-21; 88:19-24, attached as Exhibit J.) However, neither of the Taser's blast doors were recovered from the scene, which undermines the Defendants' version of events. (Roude Depo 55:7-13.) Chiles testified that the cartridge attached to Decedent

Nieto's taser was manufactured with yellow blast doors. (Chiles Depo 17:10-19:1.) Chiles explained that the main purpose of blast doors is to hold the darts and wires in place while carrying the taser and that if the taser is jostled with a cartridge attached but with the blast doors removed the taser darts and wires will likely fall out. (Chiles Depo 27:11-25.) Chiles went on to explain the secondary purpose is to help guide the arc to the primer, such that if the blast doors are removed the darts would likely not deploy. (Chiles Depo 77:2-20.) Indeed, Chiles testified that there is only a 10% chance that darts would deploy with the blast doors removed and a 90% likelihood that the darts would not deploy without the blast doors. (Chiles Depo 77:21-78:7.)

ARGUMENT

A. LEGAL STANDARD ON SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(a) provides that "[a] party may move for summary judgment, identifying each claim or defense-or the part of each claim or defense-on which summary judgment is sought." It further provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are those that may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id*. Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to designate "specific facts showing there is a genuine issue for trial." *Id*. (citing Fed.R.Civ.P., Rule 56(e)). In order to make this showing, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

In resolving a motion for summary judgment, the evidence of the opposing party is to be believed. See *Anderson*, 477 U.S. at 255. Moreover, all reasonable inferences that may be drawn from the facts placed before the court must be viewed in a light most favorable to the opposing party. See *Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *In re Oracle*

Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the nonmoving party." *Freeman v. Arpaio*, 125 F.3d 723, 735 (9th Cir. 1997). see also *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) ("[T]his court has often held that in police misconduct cases, summary judgment should only be granted 'sparingly' because such cases often turn on credibility determinations by a jury."). Here, Defendants rely on the interpretations of and inferences drawn from the evidence that favor their theory of the case and that impermissibly require unfettered belief in the Defendant Officers' testimony, while ignoring Mr. Theodore's testimony, in asserting that they are entitled to summary judgment.

1. Consideration of Circumstantial Evidence is Necessary When the Vitally Interested Defendants are the Only Surviving Witnesses to the Incident

Additionally, the Ninth Circuit has explained, "[c]ases in which the victim of alleged excessive force has died 'pose a particularly difficult problem' in assessing whether the police acted reasonably, because 'the witness most likely to contradict [the officers'] story... is unable to testify.'" *Gregory v. Cnty. of Maui*, 523 F.3d 1103, 1107 (9th Cir. 2008) (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). Because of the danger posed by self-serving testimony in such situations, a district court "may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Henrich*, 39 F.3d at 915. Following from these precepts, courts "have denied summary judgment to defendant police officers in cases where 'a jury might find the officers' testimony that they were restrained in their use of force not credible, and draw the inference from the medical and other circumstantial evidence that the plaintiff's injuries were inflicted on him by the officers' use of excessive force.'" *Gregory*, at 1107 (quoting *Santos v. Gates*, 287 F.3d 846, 852 (9th Cir. 2002)).

Defendants urge the Court to consider circumstantial evidence in this matter. Plaintiffs maintain that the danger protected against in *Scott*, *Gregory*, and *Santos*, (i.e., where the victim of excessive force dies as a result of the police encounter or survived but has no memory of the event

leaving only the potentially self-serving testimony of the involved officers) is not present here, because a third party independent witness has provided testimony and the Defendant Officers' testimony is not the only account of the shooting. Clearly, the need for this Court to examine circumstantial evidence is significantly reduced, if not eliminated. Even if this Court considers circumstantial evidence in this matter, Defendants have improperly presented only those facts which tend to support the Defendant Officers version of the incident. Even consideration of the circumstantial evidence that Defendants present by this motion requires making credibility determinations, common sense judgments and decisions on its veracity—all of which are functions of the trier of the fact not this Court.

B. THE DEFENDANT OFFICERS USED UNREASONABLE DEADLY FORCE ON DECEDENT NIETO

Defendants assert that the Defendant Officers reasonably believed that Decedent Nieto was armed with a gun and posed a serious threat to them and that the force they used was reasonable. In so arguing, Defendants ask this Court to impermissibly ignore the sworn testimony of another percipient witness and make credibility determinations on issues that are in dispute in their favor. Of course, all such determinations are the province of the finder of fact and are not allowed to be made by this Court on summary judgment. Defendants' argument for summary judgment as to Plaintiffs' Fourth Amendment claims must be denied.

1. Fourth Amendment Reasonableness Standard

The use of deadly force is a "seizure" subject to Fourth Amendment analysis. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The Supreme Court has established that an officer's use of force, including deadly force, violates a Fourth Amendment right if it is excessive under objective standards of reasonableness. *Scott v. Harris*, 550 U.S. 372, 382–83 (2007); *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007). When determining whether a particular use of force is "reasonable," courts must carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the "countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Garner*, 471 U.S. at 8). The Ninth Circuit applies a three step process to determine reasonableness in use of force cases. *Glenn v. Washington Cnty*., 673 F.3d 864, 871 (9th

Cir. 2011). First, the court must "assess the severity of the intrusion on the individual's Fourth Amendment rights by evaluating 'the type and amount of force inflicted.'" *Id*. (quoting *Espinosa v. City & Cnty. of S.F.*, 598 F.3d 528, 532 (9th Cir. 2010)). Even when an officer may have been justified in using some force, "the amount [of force] actually used may be excessive." *Id*. (quoting *Santos v. Gates*, 287 F.3d at 853).

Second, the court must evaluate the government's interest in the use of force under the totality of the circumstances. *Glenn, supra*, 673 F.3d at 871 (citing *Graham*, 490 U.S. at 396). In *Graham*, the Supreme Court noted that courts should consider such factors as (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officer or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. The most important of these factors is whether the suspect posed an immediate threat to the officer's safety or the safety of others. *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc). In addition to the *Graham* factors, the Ninth Circuit has considered the availability of alternative methods of responding to the situation and whether warnings were given prior to the use of force. *Smith*, 394 F.3d at 701; *Deorle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001).

Finally, the court must "balance the gravity of the intrusion on the individual against the government's need for that intrusion." *Glenn*, 673 F.3d at 871 (quoting *Miller v. Clark Cnty*., 340 F.3d 959, 964 (9th Cir. 2003)). In applying this test, the court must keep in mind the perspective of a reasonable officer on the scene and recognize that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–97. The Supreme Court has cautioned against use of the "20/20 vision of hindsight" in evaluating the circumstances facing the officer at the time of the shooting. *Id*. at 396. However, Courts have also cautioned that "the prohibition against evaluating officers' actions 'with 20/20 vision of hindsight' cuts both ways" and that in evaluating those circumstances facing an officer, they cannot rely on evidence that the officers were not then aware. *Glenn*, 673 F.3d at 873, fn. 8. "[A] simple statement by an officer that he fears for his safety or the safety [of] others is not enough; there must be objective factors to justify such a concern." *Deorle*, 272 F.3d at 1281.

2. Analysis

Here, virtually every fact that Defendants claim support the Defendant Officers' use of deadly force is contradicted by an independent eyewitness to the shooting. Defendant Officers Schiff and Sawyer claim that Decedent Nieto walked toward them with purpose; rebuffed their command to show his hands by aggressively saying "show me *your* hands;" pulled what appeared to be gun and pointed it at them. However, Mr. Theodore observed Decedent Nieto walking casually, only heard the officers say "stop" and then immediately open fire on him while his hands were still in his pockets before he had an opportunity to say or do anything. These defendants also claim that after the initial shots, Decedent Nieto went to the ground in a tactical position to make himself a smaller target and continued to point his weapon at them. However, Mr. Theodore observed Decedent Nieto fall to his knees, heard another shot, then decedent fell on his face with his hands still in his pockets and underneath him, obviously mortally wounded. Defendants Morse and Chew claim that they heard gunshots and observed Decedent Nieto on the ground pointing what appeared to be a gun at their fellow officers and then at them causing them to shoot until he lowered his head and loosened his grip on the weapon. However, Mr. Theodore testified that decedent was laying prone on his face obviously mortally wounded by the time any other officer approached and joined in the shooting.

Quantum of Force: The quantum of force used by the Defendant Officers is undisputed, as they shot at Decedent Nieto 48 times—a clear use of deadly force.

Government Interest: An officer's use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). "Certain principles are clearly established ... that implement the fundamental rules regarding the use of deadly force. Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in serious threat of injury to persons." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997). Viewed in the light favorable to Plaintiffs, the Defendant Officers shot Decedent Nieto solely because of reports that he was armed and not because he threatened them or because they reasonably feared for their safety, as decedent's

hands were in his pockets during the entire encounter and he never had the chance to utter a verbal threat.

Failure to Give a Warning: "In situations where any force used is capable of causing serious injury or death, there is a requirement that, whenever feasible, the deputy must first warn the suspect that force will be used if there is not compliance." *Deorle*, 272 F.3d at 1281. It is undisputed that the Defendant Officers did not warn Decedent Nieto that they would shoot him. Viewed in the light favorable to Plaintiffs there was ample opportunity for them to warn decedent, as he was casually walking in the park, totally unaware and caught off-guard by the police presence, with his hands in his pockets. Clearly, there was sufficient time for the Defendant Officers to issue a warning.

Severity of crime at issue: The Defendant Officers responded to a call that someone had a gun. The call did not report any violence or threats of violence. On its face, this is not a particularly severe crime. Although there is no question possession of a weapon is an important consideration, it is not dispositive. This Court must consider "the totality of the facts and circumstances in the particular case"; otherwise, that a person was armed would always end the inquiry. *Glenn*, 673 F.3d at 872 (citing *Blanford v. Sacramento County*, 406 F.3d 1110, 1115 (9th Cir.2005)).

Even consideration of the Defendant Officers' presentation of circumstantial evidence, does not support their motion for summary judgment. Defendants' citation to Decedent Nieto's mental health history is not relevant—as it is too remote in time and he did not have any reports of mental health issues since then. Decedent's remote mental health history is not properly considered in the reasonableness analysis of the Defendant Officers' conduct, because they were not aware of this information at the time of the incident. *Glenn*, 673 F.3d at 873. Defendants assert that Decedent Nieto was behaving erratically moments prior to the shooting. However, Decedent Nieto's behavior with Evan Snow is entirely reasonable, as decedent was being aggressively pursued by Snow's large dog, while he was unleashed and Snow was not paying attention. Only Timothy Isgit observed erratic behavior, as Justin Fritz who was standing right next to Isgit and did not observe erratic behavior. When viewed in the light favorable to Plaintiffs, a finder of fact could well determine that Isgit observed decedent jumping up on a bench to avoid an aggressive unsupervised Siberian Husky and then expressing his frustration to the dog's owner and determine that this is entirely rational behavior.

The Defendant Officers claim that decedent pointed what appeared to be a firearm at them. However, Evan Snow, a layperson not a trained professional like the Defendant Officers, could tell that the weapon was a taser or stun gun. The Defendant Officers claim to have seen a red laser and muzzle flashes coming from the taser. However, Bryan Chiles testified that decedent's taser was in the off position (so unless someone within the chain of custody tampered with the taser) such that it would not have emitted the laser. Bryan Chiles also testified that muzzle flashes only occur when the taser is in drive-stun mode, not when deploying darts. The so-called circumstantial evidence upon which the Defendants rely at the very least presents a credibility question of whether the Defendant Officers actually saw what they purport to have seen, because when viewed in the light favorable to Plaintiffs, the evidence suggests that Decedent's taser physically could not have performed as the officers claim.

Based on the foregoing, the Defendant Officers unreasonably used deadly force on Alex Nieto because the Defendant Officers nor any innocents were not threatened by or in danger from the decedent, he did not point a weapon or threaten the Defendant Officers in any way, the Defendant Officers were not informed that he had committed any violence, and they did not provide him any warnings prior to shooting him. Defendants' argument on this point must fail.

3. The Defendant Officers are not Entitled to Qualified Immunity

The doctrine of qualified immunity protects a government official from liability for civil damages except where the official violates a constitutional right that "'was "clearly established" at the time of the challenged conduct.'" *Wood v. Moss*, —— U.S. ——, 134 S.Ct. 2056, 188 L.Ed.2d 1039 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. ——, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011)). The qualified immunity inquiry has two prongs: (1) whether the officer's conduct violated a constitutional right and (2) whether "the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood her conduct to be unlawful in the situation." *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011) (quoting *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001)). The court has discretion to consider the two factors in either order. See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). At summary judgment, resolution of the qualified immunity defense turns whether the undisputed facts and the inferences to be drawn therefrom, viewed in the light most favorable to the non-moving party, show a violation of clearly

established federal constitutional rights. See *Tolan v. Cotton*, —— U.S. ——, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014). In cases alleging unreasonable searches or seizures, courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Saucier, supra*, at 201. Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions. See *Brosseau v. Hagen*, 534 U.S. 194, 195, 198 (2004) (inquiring as to whether conduct violated clearly established law "'in light of the specific context of the case'" and construing "facts ... in a light most favorable to" the nonmovant).

The second prong of the qualified immunity analysis requires the court to decide whether it would have been clear to a reasonable officer in the Defendant Officers' position that their use of deadly force was unlawful in the situation they faced. The question of whether a defendant is entitled to qualified immunity is a question of law for the court. *Torres*, 548 F.3d at 1210. However, the court only resolves that question of law if all material facts are undisputed and, taken in the light most favorable to the plaintiff, the facts show the defendant did not violate clearly established federal constitutional rights. *Id.* At all times relevant to this action, it was clearly established that the use of deadly force was reasonable only if an officer "'has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Long v. City and Cnty of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007) (quoting *Scott v. Henrich*, 39 F.3d at 194, in turn quoting *Tennessee v. Garner*, 471 U.S. at 3 (1985)). Here, there are two diametrically different versions of the subject-incident—one that the Defendant Officers, without warning, shot at a man 48 times who had his hands in his pockets during the entire encounter, and two, they defended themselves by shooting at a man who was pointing what reasonably appeared to be a gun at them. As such, the same questions of fact and credibility questions that preclude summary judgment on the merits of Plaintiffs' Fourth Amendment claims preclude a finding that the Defendant Officers are entitled to qualified immunity on these claims.

This Court must reject Defendants' argument on this point.

C. PLAINTIFFS' PROPERLY ALLEGE FOURTEENTH AMENDMENT CLAIMS

Plaintiffs assert Fourteenth Amendment substantive due process claims because they were deprived of their liberty interest in the companionship and society of Alex Nieto, their son, through

official conduct. *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). "[O]nly official conduct that 'shocks the conscience' is cognizable as a due process violation." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008) (citation omitted). In determining whether excessive force shocks the conscience, the court must first ask "whether the circumstances are such that actual deliberation [by the officer] is practical." *Id*. at 1137(quoting *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372 (9th Cir. 1998) (internal quotation marks omitted)). Where actual deliberation is practical, then an officer's "deliberate indifference" may suffice to shock the conscience. *Id*. On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives. *Id*. at 1140.

Here it is undisputed that the Defendant Officers shot at Decedent Nieto a total of 48 times, and that he suffered 15 bullet wounds causing him to die. Mr. Theodore testified the Decedent's hands were in his pockets during the entire encounter, and that the first four shots he sustained, which caused him to fall to the ground, obviously killed him. Mr. Theodore also testified that these initial deadly shots occurred before Defendants Morse or Chew even began shooting and that all officers continued to shoot decedent as he was face down on the ground with his hands underneath him and obviously mortally wounded. When viewed in the light favorable to Plaintiffs, a jury can easily determine that such atrocious and callous behavior "shocks the conscience" and is unrelated to a legitimate law enforcement objective.

Defendants' argument on this point must fail.

D. STATE STATUTORY IMMUNITIES DO NOT APPLY TO THE DEFENDANT OFFICERS' CONDUCT

Defendants urge the Court to grant summary judgment on Plaintiffs' state law claims—including negligence, because the Defendant Officers are privileged to use excessive force under state law and because their homicide of Decedent Nieto was justifiable. Defendants are mistaken.

California Government Code § 820.2 provides: "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion

be abused." However, courts have premised their conclusion that an officer has acted within his discretion on the determination that the officer's conduct was objectively reasonable. *Reynolds v. County of San Diego*, 858 F.Supp. 1064, 1075 (1994). In *Reynolds*, the court found that an officer who had been acquitted of the homicide of a burglary suspect in the underlying criminal proceeding was immune from liability for state law claims in the civil proceeding as his actions were objectively reasonable. *Id*. Here, no such determination has been made and Plaintiffs' have presented evidence that, when viewed in light favorable to Plaintiffs, show the Defendant Officers' conduct was objectively unreasonable. Moreover, Defendants ignore settled case law establishing that section 820.2 does not embrace discretionary acts that otherwise involve unreasonable conduct. See *Blankenhorn v. City of Orange*, 485 F.3d 463, 487 (9th Cir. 2007) (defendant officers, relying on section 820.2, were not entitled to summary judgment on state law claims where there were genuine issues of material fact on the reasonableness of the officers' use of force); *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002) (en banc) ("California denies immunity to officers who use excessive force in arresting a suspect.") (citation omitted); *Nelson v. City of Davis*, 709 F.Supp.2d 978, (2010) (Discretionary immunity "does not protect tactical choices found to be unreasonable.... Nor does [it] provide protection against allegations that police officers used excessive force.") (citation omitted); *Martinez v. County of Los Angeles*, 47 Cal.App. 4th 334, 349 (1996) (a police officer is entitled to immunity under section 820.2 if circumstances reasonably created fear of death or serious bodily harm to the officer or another); *Scruggs v. Haynes*, 252 Cal.App.2d 256, 266 (1967) (discretionary act immunity did not apply where officer used unreasonable, excessive, unwarranted, and unnecessary force to effect an arrest).

Defendants' argument on this point must fail.

CONCLUSION

This case is fraught with material questions of fact; particularly, whether Decedent Nieto threatened to harm the Defendant Officers and whether they reasonably perceived him to be armed with a firearm. In order to grant Defendants' motion, this Court has to make factual determinations in favor of the Defendants which is not proper on summary judgment. In light of the foregoing, this Court should deny Defendants' motion for summary judgment.

Dated: October 14, 2015

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/s/
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