DENNIS J. HERRERA, State Bar #139669
City Attorney
CHERYL ADAMS, State Bar #164194
Chief Trial Deputy
MARGARET W. BAUMGARTNER, State Bar #151762
REBECCA BERS, State Bar #287111
Deputy City Attorneys
Fox Plaza
1390 Market Street, 6th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3859 [Baumgartner]
Telephone: (415) 554-4224 [Bers]
Facsimile: (415) 554-3837
E-Mail: margaret.baumgartner@sfgov.org
E-Mail: rebecca.bers@sfgov.org

Attorneys for Defendants
CITY AND COUNTY OF SAN FRANCISCO et al.

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, OFFICER JASON SAWYER, OFFICER RICHARD SCHIFF, OFFICER ROGER MORSE AND OFFICER NATE CHEW, DOES 5-50, individually and in their official capacities as Police Officer for the City and County of San Francisco, inclusive.

Defendants.

Case No. C14-03823-NC

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hearing Date: November 4, 2015
Time: 1:00 p.m.
Place: San Jose Courthouse, 4th Floor, Courtroom 7

Trial Date: February 22, 2016

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INTRODUCTION AND STATEMENT OF FACTS

The Defendant San Francisco Police Officers shot Alejandro Nieto because he pointed a gun at them. Even after being shot, Mr. Nieto continued to point the gun at the officers. The officers continued to fire until Mr. Nieto's hand loosened around the gun. After the officers approached Mr. Nieto and kicked the gun out of his hand, the officers realized that Mr. Nieto's gun was a hand-gun shaped taser. Mr. Nieto died at the scene.

Plaintiffs sued the City and the Defendant officers on behalf of themselves under the 14th Amendment, and on behalf of Mr. Nieto's estate under the 4th Amendment, and for various state court torts. Defendants moved for summary judgment on the grounds that their use of force was reasonable, and that Plaintiffs cannot prove that the officers used force for anything other than to protect themselves and their fellow officers from deadly danger.

Plaintiffs oppose the motion and argue that there is a dispute of fact as to whether the officers saw the gun. Plaintiffs do not challenge the evidence showing that the bullet trajectories corroborate the officers' testimony concerning the Mr. Nieto's actions, and the officers positions when they shot at him. They do not point to any inconsistencies in testimony amongst the officers. Rather, Plaintiffs rely on unsubstantiated and irrelevant arguments regarding the mechanical workings of Mr. Nieto's taser, claiming that their arguments create disputes of material fact. The evidence is not as Plaintiffs purport it to be, and any factual disputes are not genuine or material. The taser data is consistent the officers' direct testimony that Mr. Nieto pulled out a gun and pointed it at them.

Plaintiffs also rely on the partial observations of a third-party witness, Antonio Theodore. But Mr. Theodore's own testimony, and the physical evidence, show that Mr. Theodore observed only a portion of the incident. He observed part of the incident from 75 vertical feet up, and 300 feet away, without his glasses, while looking back and forth between the various locations where officers gathered. (Theodore Depo. 55:10-15, 57:7-59:22, 64:2-13, 99:5-22, Depo. Ex. 1 (attached as Ex. I to Supp. Baumgartner Dec., hereinafter "Theodore Depo.").)

Furthermore the uncontroverted physical evidence shows that the event could not have occurred in the manner that Mr. Theodore testified he observed. The key testimony upon which Plaintiffs' rely is Mr. Theodore's statement that Mr. Nieto never had his hands out of his pockets,

either before or after he was shot. But Mr. Nieto had gunshot wounds his right hand, left wrist and his forearm from directions and at angles that would have been physically impossible if his hands were in his pockets. (Fries 2nd Dec. ¶ 9.) Mr. Theodores' testimony therefore does not support the denial of summary judgment.

ARGUMENT

I. TO DEFEAT SUMMARY JUDGMENT, PLAINTIFFS MUST SHOW A DISPUTE OF FACT THAT IS BOTH MATERIAL AND GENUINE

The question before the court here is "whether the officers' testimony could reasonably be rejected at trial." *Martinez v. County of Los Angeles*, 47 Cal.App.4th 334 (1996) (citing *Plakas v. Drinski*, 19 F.3d 1143, 1146 (7th Cir. 1994) and *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (stating standard for summary judgment on fatal shooting case). When physical or other reliable evidence proves that a testimony from a witness cannot be accurate, the Court may grant summary judgment despite the contradictory testimony. *Scott v. Harris*, 550 U.S. 372, 380 (2007); see also *Witt v. W.Va. State Police*, 633 F.3d 272, 276-77 (4th Cir. 2011) ("when documentary evidence 'blatantly contradict[s] a plaintiff's account 'so that no reasonable jury could believe it,' a court should not credit the plaintiff's version on summary judgment").

As the Court stated in *Linnell v. Carrabba's Italian Grill, LLC*, 833 F.Supp.2d 1235, 1239 n.2 (D.Nev. 2011), citing *Scott v. Harris*, "when taking all inferences in favor of the non-moving party to a motion for summary judgment, the existence of incontrovertible or very reliable evidence to the contrary can overcome the presumption in favor of the non-moving party's version of facts." For example, a court on summary judgment can disregard a plaintiff's testimony that he did not have weakness in his legs when the medical records show otherwise. *Linnell*, 833 F.Supp.2d at 1239 n.2. Similarly, in an excessive force case the court may grant summary judgment even when witnesses testify that a plaintiff did not resist police officers if a video tape shows otherwise. *Scott*, 550 U.S. at 380.

Thus, the mere existence of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be "no *genuine* issue of material fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted). A "genuine" dispute

exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Scott*, 550 U.S. at 380. In other words, the Court cannot end its inquiry if there is a dispute of fact, the Court must look to other evidence to determine if based on the totality of the evidence a reasonable jury could find for the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986) (discredited testimony is not a sufficient basis for opposing a summary judgment motion).

II. NO REASONABLE JURY COULD FIND THAT MR. NIETO KEPT HIS HANDS IN HIS POCKETS DURING HIS ENTIRE ENCOUNTER WITH THE POLICE

All of the officers testified that they shot at Mr. Nieto because they saw a gun in his hands pointed in their direction. Plaintiffs do not even attempt to argue that an officer is prohibited from using deadly force if the officers' testimony is accurate. Thus, the only facts that are material are what the officers observed, the reasonable conclusions that they drew from what they observed, and what they did in response.

Plaintiffs attempt to create a genuine dispute of material fact by presenting the testimony of one third party witness, Antonio Theodore, to challenge the officers' testimony regarding what they saw from their vantage point. Plaintiffs state that Mr. Theodore had the same vantage point as the officers. He did not. He was far away, and vertically higher up a hillside. (Theodore Depo. 99:16-22, Depo. Ex. 1.)

Mr. Theodore testified, somewhat equivocally, that he never saw Mr. Nieto take his hands out of his pockets during his encounter with the police, even when he went prone on the ground. (Theodore Depo. 64:2-16 ("I cannot recall his hands, like, all the way out of his pocket. Honestly, it was just so fast. It was just too fast by me back and forth watching the officers.")) But the indisputable forensic evidence, including the medical reports, contemporaneous statements by the officer and the available physical evidence all demonstrate that Mr. Nieto's hands were out of his pockets. See *Scott v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994) (courts should consider medical reports, contemporaneous statements by the officer and the available physical evidence in evaluating

summary judgment in fatal shooting case). Therefore, Mr. Theodore's vague, qualified testimony does not raise a reasonable inference that the officers did not see Mr. Nieto point his gun at them.[1]

A. The Forensic Evidence Shows That Mr. Nieto Did not Have his Hands in His Pockets During his Entire Encounter With the Police

All of the officers in their contemporaneous statements testified that Mr. Nieto took out his gun and pointed it at the officers. Fearing that Mr. Nieto was shooting at them, or about to shoot them, the officers fired back.

Mr. Nieto had a large "graze" gunshot wound on the front of his right hand. (Hart Dec. Ex. B pg. 11.) He also had a through-and-through gunshot wound with the bullet entry on the outside of his left wrist and the exit wound on the inside of his forearm, just slightly up from his wrist. (Hart Dec. Ex. B pg. 11.)

Further, the bullet trajectory analysis shows that if Mr. Nieto had his hands in his pockets, the bullets for the two wounds on his hands and wrists, and the wound in his forearm, would have to have come directly from his side toward the hill (wound M and L), or from the ground just in front of him (wound N). (Fries 2nd Dec. ¶¶ 6-7.) Additionally, the wound in Mr. Nieto's upper forearm (wound K) would have had to come from the ground directly below his arm. (Fries 2nd. Dec. ¶ 8.) The bullets would also have created other wounds to his body, in the area of his abdomen. (Fries 2nd Dec. ¶¶ 6-8.) No wounds existed in those places. (Hart 2nd Dec. ¶ 6.)

Furthermore, no holes existed anywhere near Nieto's jacket pockets. (Hart 2nd Dec. ¶ 3-5.) The ME did not find any fabric fibers in either of these wounds. (Hart Dec. Ex. B.) It is not physically possible to create the bullets wounds identified by the Medical Examiner as K, L, M and N if, as Mr. Theodore testified, Mr. Nieto never took his hands out of his pockets. (Fries 2nd Dec. ¶ 9.)

Moreover, it is not possible to explain the taser data if at no time during his interaction with the police did Mr. Nieto ever take his hands out of his pockets. Mr. Snow and Mr. Isgitt confirm that Mr. Nieto was in the possession of a taser just moments before the shooting, and Nieto had the holster attached to his hip when he died. (Snow Depo. 33:1-34:13; Isgitt Depo. 13:5-7; Hart Dec. Ex. B

[1] Mr. Theodore also testified that he never saw an officer kick an object out of Mr. Nieto's hands. Not only is that fact not material to the use of force, but Mr. Theodore was walking away at the time the officers approached Mr. Nieto. (Theodore Depo. 60:11-24.)

pg. 1.)[2] This eliminates any possible inference that the officers planted the taser on Mr. Nieto after the shooting. Mr. Chiles' analysis of the taser microprocessor shows that the trigger was pulled three times at the exact time of the shooting. (Chiles Depo. Ex. 6; Baumgartner Dec. Exs. M and N.) Mr. Nieto could not have pulled the trigger with his hands in his pockets. And, there was no one near Mr. Nieto, so no one else could have pulled the trigger for him.

No other evidence supports any inference that the officers did not see his gun pointed at them. Therefore, under *Scott v. Harris*, the court should find that Mr. Theodore's testimony does not create a "genuine" dispute of fact on this issue. And, in addition to this incontrovertible scientific evidence, other evidence shows the unreliability of Mr. Theodores' testimony as set forth below.

B. Mr. Theodore Did Not See the Entire Police Encounter

Not only is Mr. Theodore's testimony physically impossible, he qualifies his own testimony. Mr. Theodore watched the event from a considerable distance away.[3] Mr. Theodore first noticed the police officers and stopped to watch when he stood "maybe a hundred, 75 feet," vertically up a steep hill and about 100 -120 meters (about 300 feet) from the entrance to the park. (Theodore Depo. 99:5-21; 55:10-15.) He saw the police car stop about 65 meters (more than 200 feet) from the entrance. (Theodore Depo. 57:7-59:2.) Mr. Nieto was about 100 feet beyond the police cars, so Mr. Nieto was about 300 feet away during the shooting. (Theodore Depo. Ex. 1 (map); Schiff Depo. 44:9-11.) During Mr. Theodore's observations, he would look "both directions," meaning towards the officers and cars at the entrance to the park, and those going up the hill. (Theodore Depo. 57:22-23; see also 64:2-13 ("It was just too fast by me back and forth watching the officers.")

Also, Mr. Theodore had been prescribed glasses, which he was not wearing on the day of the incident. (Theodore Depo. 17:14-18; 18:15-17.) He had not had his eyes checked for three years.

Mr. Theodore's testimony also shows that he did not observe the entire interaction between Officers Schiff and Sawyer, and Officers Chew and Morse. It appears that Mr. Theodore may have

[2] When Defendants filed their initial motion, they did not have final copies of the deposition transcripts. Therefore, these depo pages may differ from the initial motion. For this reply brief, all of the depo citations are to the pages attached to the Supplemental Baumgartner Declaration.

[3] Plaintiffs misstate Mr. Theodore's location from where he observed Mr. Nieto in their opposition brief. Plaintiffs state that Mr. Theodore was 20 feet away from Mr. Nieto during the shooting. (Opp. Brief pg. 6 line 24-25.) He was not.

observed part of what occurred, and made assumptions concerning the rest of it. Mr. Theodore saw only one police car go up the path towards Mr. Nieto, and only two police officers get out and engage with Mr. Nieto. (Theodore Depo. 58:8-59:9.) But all of the physical evidence, including the photos and the firearms analysis (and the testimony of the officers) show that not one, but two marked police cars went up the path and stopped, and four police officers got out and shot at Mr. Nieto. (Proia Dec. Ex. B; Olkiewicz Dec. Ex. A.)

It appears that from the point in time when Mr. Theodore began to watch from his distant vantage point, Mr. Theodore observed only the second police car, the one with Officers Morse and Chew. Mr. Theodore described one of the officers as 6'3" to 6'4." (Theodore Depo. 60:25-61:9.) Officer Morse is about 6'2" and is taller than the other officers. (Morse Dec. ¶ 3-4.) Mr. Theodore also testified that he saw an officer with the rifle run up the path. Only Officers Chew and Morse passed an officer with a rifle who was running up the hill. (Chew Depo. 17:22-18:5.) Mr. Theodore testified that the officers he saw were standing up while they were shooting, but Officer Schiff and Sgt. Sawyer were both kneeling behind their car doors, in positions of cover. (Sawyer Depo. 39:11-23.) On the other hand, Officer Chew took a few steps to his right when he got out of the car, and Officer Morse walked around the car. (Chew Depo. 36:5-21; Morse Depo. 56:9-20.)

Mr. Theodore's incomplete and inaccurate memory is not surprising. He never identified himself as a witness the night of the incident and did not give a formal statement about the matter until his deposition, more than a year later. (Theodore Depo. 25:10-12.) During that time, Mr. Theodore spoke to many people, and reviewed audio and video, and read numerous media reports regarding the incident. (Theodore Depo. 19:22-20:7; 34:22-35:8; 67:9-23.) Thus, his statement does not have the same reliability as the contemporaneous statements of the officers.

No jury could reasonably reject the physical, scientifically indisputable evidence, and the four, contemporaneous statements of the officers to find that Mr. Nieto kept his hands in his pockets and the police therefore fired at him for no reason. The undisputed scientific evidence, including the bullet trajectories and the photos of the scene, all are completely consistent with the officers' testimony about what they saw and what they did. The testimony of Messrs. Snow, Isgitt and Fritz regarding Mr. Nieto's behavior immediately preceding the incident also corroborates the officers' testimony about

what they observed, and the reasons that they shot Nieto. The officers had good reason to believe that what Mr. Nieto held was a real gun because the taser did not have yellow blast doors on the front to differentiate it from a firearm, but did have a laser that the officers could see, and it emitted light flashes similar to muzzle flash.[4] The officers' contemporaneous statements all comport with the physical evidence. No reasonable jury could reject the entirety of this evidence, and find that Mr. Nieto never took his hands out of his pockets during his encounter with the police. Defendants are therefore entitled to summary judgment.

III. MR. THEODORES' TESTIMONY DOES NOT CREATE ANY GENUINE DISPUTE OF MATERIAL FACT

A. Mr. Theodore's Testimony That He Did Not Hear Any Words Other Than Stop Does not, Under the Circumstances, Raise a Reasonable Inference That Neither the Officers Nor Mr. Nieto Said Anything Else

Officers Schiff and Sawyer both testified that they told Mr. Nieto to show his hands, and that he responded by staying "no, show me your hands!" Plaintiffs argue that because the third party witness, Mr. Theodore, heard only the words "stop," that the officers failed to give a required warning. But Mr. Theodore admitted that he could not hear from his distant vantage point what the officers and Mr. Nieto were saying. (Theodore Depo. 68:15-23 ("I could not really hear from there.")) Mr. Theodore also did not, for example, hear the words yelled by the officers and that were caught on the radio recording ("Shots fired!", "Red!" and "Covering!"). He heard a "loud" word, "Stop!" but he could not even tell if other officers were speaking. (Theodore Depo. 104:20-105:5.) He acknowledged that he was "a bit away" and that if the officers' voices were caught on the radio, "If that's the case, then that be. . . . As I said, there was siren, airplane passing at times, highway noise, gunshots." (Theodore Depo. 108:10-25.)

Mr. Theodore's testimony that he heard the word "Stop" does not create a genuine dispute of material fact.

[4] The fact that Mr. Theodore did not see a laser or muzzle flashes can easily be explained by his position high up on the hill.

B. Plaintiffs' Argument That Plaintiff Appeared From a Distance to be "Obviously Mortally Wounded" Lacks Evidentiary Support

At least three times in their opposition brief, Plaintiffs claim that Mr. Nieto was "obviously mortally wounded." (Opp. Brief pg. 8 line 11-12, pg. 17 lines 13 and 17, pg. 21 line 17.) They cite to Mr. Theodore's deposition for this assertion. But Mr. Theodore never said anything of the sort. Mr. Theodore testified only that "the first four shots was the fatal ones [sic]." (Theodore Depo. pg. 64:11-12.) But he also testified that Mr. Nieto went to the ground after he heard a third shot, and was quite surprised to learn about the number of gun shots because it was "very much different" from what he remembered. (Theodore Depo. pg. 58:20-59:2; 30:17-31:5.) More critically, Mr. Theodore never described how Mr. Nieto looked after he went to the ground.

Not only did Mr. Theodore never testify he believed Mr. Nieto was "obviously mortally wounded" he lacks the knowledge or expertise that would provide a foundation for an opinion. The Court should therefore not consider this purported fact.

IV. THE THIRD PARTY WITNESS TESTIMONY REGARDING NIETO'S ERRATIC BEHAVIOR JUST PRIOR TO THE SHOOTING DOES NOT RAISE AN INFERENCE THAT THE OFFICERS WERE MISTAKEN ABOUT WHAT THEY OBSERVED

Defendants presented on summary judgment evidence from the third parties who observed Mr. Nieto's erratic behavior just prior to the incident to show that the circumstantial evidence did not contradict the officers' testimony. The testimony of Mr. Isgitt and Mr. Snow both corroborate that Nieto was acting erratically. The witnesses observed Mr. Nieto "shadowboxing," acting as though he was talking to someone who was not there, and acting "disturbed in some way, upset or manic." (Isgitt Depo. 15:6-10; 33:8-16; Snow Depo. 23:6-15.)

Plaintiffs argue about the meaning of that testimony. But the specific facts concerning Mr. Nieto's actions, and potentially alternative explanations for such actions, are not material to the determination the Court must make here. For example, Mr. Nieto's reasons for pointing his gun at Mr. Snow and his dog, whether it is because of a dog barking or because he was having a psychotic break, is not material to the ultimate determination of whether the officers used excessive force. His actions, no matter the reason, are consistent with Mr. Nieto's behavior a few minutes later of pointing his gun at the officers, thus corroborating the officers' testimony.

V. THE TASER EVIDENCE CORROBORATES THE OFFICERS' TESTIMONY THAT MR. NIETO POINTED HIS TASER AT THEM

A. From A Distance, the Taser Looks Like a Firearm

The officers believed that Mr. Nieto was about to shoot them. All of the officers testified that what they saw in Mr. Nieto's hand, and that object he pointed at them, appeared to them to be a real gun. On close inspection, tasers look different from the handguns carried by the officers. But Plaintiffs' "submission" that an officer should have known from 100 feet away that what Nieto was pointing at them was a taser is pure speculation, and contrary to the actual evidence. (Opp Brief pg. 10:18-19.) When Mr. Nieto pointed his gun at Mr. Snow from a much closer distance, Mr. Snow said that "I believed with no uncertainty that it was a gun." (Snow Depo. 33:1-11.)

Furthermore, the yellow markings on the taser are not visible from the front, when the gun is pointing at the officers. (See Chiles Depo. Ex. 12.) Mr. Snow could not see those markings when Mr. Nieto pointed it at him. (Snow Depo. 33:12-13.) Thus, nothing would inform the officers that the black handgun pointed at them was not a firearm that could potentially kill them.

B. An Analysis of the Actual Clock Drift From Nieto's Taser Places the Three Trigger Pulls at the Exact Time of the Shooting, and Plaintiffs' Data Does Not Raise Any Inferences to the Contrary

Defendants submitted evidence that the taser data confirmed three trigger pulls at the exact times that shots are heard on the recorded radio transmissions. Plaintiffs argue that the Court should disregard this evidence because Mr. Chiles "recalculated" the data. But Mr. Chiles "recalculated" the data to make it accurate. The first time he calculated the time data he failed to account for the passage of time from the shooting on March 21, 2014 to the time of testing in June 2014. (Chiles Depo. Ex. 6.) When he reviewed has calculations and then confirmed through testing that the time drift from Nieto's model of taser is constant over time, he went back and performed the calculations to calculate the time stamp as it would have been on March 21, 2014. (Chiles Depo. Ex. 6.)

Plaintiffs misstate Mr. Chiles testimony regarding "average" clock drift. Plaintiffs imply that Mr. Chiles agrees that his calculations are subject to debate because of a study done by a "mastermind." But Mr. Chiles had no knowledge of a study that showed an average clock drift of 8-10 minutes, it was never shown to him, and Plaintiffs never presented such a study as evidence. (Chiles Depo. 110:1-10 ("I was not aware of their study.")) Furthermore, Mr. Chiles never relied on

averages. He calculated the time drift data that he specifically measured from the actual taser at issue. (Chiles Depo. 121:14-20.) He calculated averages so that he could determine if the time drift from Mr. Nieto's taser was far outside the norm. It was not. (Chiles Depo. 37:3-11, Ex. 6.)

C. Chiles' Testimony Does Not Otherwise Create an Inference That the Officers Could Not Observe What They Observed

Defendants presented evidence regarding the functioning of Mr. Nieto's taser to show corroboration of the officers' testimony regarding a red laser and muzzle flashes. Mr. Chiles confirmed that Mr. Nieto's taser had an operating red laser light, and that if the trigger is pulled after the darts are deployed, that an electrical flash arcs across the front of the laser. (Chiles Depo. 52:4-10.)

Plaintiffs first try to create a dispute regarding these facts by stating that when Mr. Chiles received the taser, the safety switch was in the on position, meaning the taser would not operate. Plaintiffs use this fact in an attempt to create an inference that Mr. Nieto never turned his taser on. But Plaintiffs present no evidence to suggest that the police department would ever store a gun with the safety in the off, or operable, position. They also provide no authority for arguing that turning a safety switch on a gun to on in order to store or ship the taser would be "tampering." Thus, no reasonable inference can be drawn that Mr. Nieto did not operate the taser at the scene because of the position of the safety switch when received by Mr. Chiles months later.

Plaintiffs also try to imply that the officers could not have seen a muzzle flash because the taser only emits such a flash in the "drive-stun" mode. But the drive-stun mode is how the taser operates whenever the darts have already been shot out of the taser and the gunman pulls the trigger. (Chiles Depo. 37:3-11; 71:17-24.) That is exactly what occurred here – after Mr. Nieto shot out the darts, he pulled the trigger twice more, creating the muzzle flash observed by some of the officers.

Plaintiffs also misconstrue Mr. Chiles' and the other evidence concerning the yellow blast doors. Plaintiffs states, without explanation, that "neither of the blast doors were recovered from the scene, which undermines the Defendants' version of events." (Opp Brief. 12:27-28.) But a few minutes before, when Mr. Snow saw the taser, it did not have the blast doors attached. (Snow Depo. 33:1-13.) Mr. Chiles testified that it was easy for the user to remove the blast doors. (Chiles Depo.

21:13-25.) And, although the wires *could* fall out if the user shook the taser after the blast doors were removed, the darts most likely would not. (Chiles Depo. 27:16-25.)

VI. THE OFFICERS MAY BE ENTITLED TO QUALIFIED IMMUNITY

If the Court believes that Plaintiffs presented enough evidence to create a genuine dispute of fact as to whether the officers saw Mr. Nieto's taser, Defendants agree that there also would be a dispute of fact as to whether Defendants would be entitled to qualified immunity. If, on the other hand, the Court finds Plaintiffs have failed in their burden with regard to the taser, other disputes of fact may not preclude qualified immunity. See, e.g. *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005) (finding that it was reasonable for officers to believe that the suspect posed a threat of immediate and serious injury, despite multiple reasonable mistakes of fact).

VII. PLAINTIFFS HAVE NO EVIDENCE TO SHOW THAT THE OFFICERS SHOT NIETO FOR ANY ILLEGITIMATE REASON

Defendants moved for summary judgment on Plaintiffs' 14th Amendment claims on the grounds that Plaintiffs lack evidence that Defendants shot Mr. Nieto for the purpose of harming him. Plaintiffs argue that somehow the number of shots fired by the officers precludes summary judgment on this issue. But nothing about what the officers observed supports a reasonable inference that the number of shots fired was intended to harm. Rather, the officers testified that they continued to shoot at Mr. Nieto because he continued to point his gun at them. They stopped shooting when his head finally went down. Therefore, Plaintiffs cannot prevail on this claim.

VIII. PLAINTIFFS FAIL TO ADDRESS DEFENDANTS' ARGUMENTS REGARDING PLAINTIFFS' STATE TORT CLAIMS

Defendants moved for summary judgment on Plaintiffs' state tort claims on the grounds that California Penal Code § 835a provides a privilege to use reasonable force, and that Penal Code § 196 provides a privilege to use deadly force. Plaintiffs' opposition argues only about the applicability of Government Code § 820.6, an argument that Defendants did not make. Because Plaintiffs did not address Defendants' arguments, any argument should be deemed waived.

CONCLUSION

For the forgoing reasons, the Court should grant Defendants motion for summary judgment.

Dated: October 21, 2015

DENNIS J. HERRERA
City Attorney
CHERYL ADAMS
Chief Trial Deputy
MARGARET W. BAUMGARTNER
REBECCA BERS
Deputy City Attorneys

By: */s/ Margaret W. Baumgartner*
MARGARET W. BAUMGARTNER

Attorneys for Defendants
CITY AND COUNTY OF SAN FRANCISCO et al.