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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARIA DEL SOCORRO QUINTERO
PEREZ, BRIANDA ARACELY YANEZ
QUINTERO; C.Y., a Minor, and J.Y., a
Minor,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, UNITED
STATES CUSTOMS AND BORDER
PROTECTION OFFICE OF BORDER
PATROL, JANET NAPOLITANO,
THOMAS S. WINKOWSKI, DAVID
AGUILAR, ALAN BERSIN, KEVIN K.
McALLEENAN, MICHAEL J. FISHER,
PAUL A. BEESON, RICHARD
BARLOW, RODNEY S. SCOTT, CHAD
MICHAEL NELSON, and DORIAN
DIAZ, and DOES 1 – 50

Defendants.

Case No. 13-cv-1417-WQH-BGS

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DORIAN DIAZ'S
MOTION FOR SUMMARY
JUDGMENT**

Judge: Hon. William Q. Hayes
Date: May 8, 2017
Ct. Rm.: 14B (Carter-Keep Courthouse)

[NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT]

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I. INTRODUCTION

1
2 Jose Alfredo Yañez Reyes (“Yañez”) and Jose Ibarra Murietta (“Murietta”) entered
3 the United States through an existing hole in the primary border fence with the intention
4 of finding work in the United States. Just after crossing, Yañez and Murietta were spotted
5 by CBP Agents Chad Nelson (“Nelson”) and Dorian (“Diaz”). Yañez and Murietta ran.

6 Yañez escaped through the same hole from which he and Murietta had come.
7 Nelson and Diaz blocked Murietta from the same escape, forcing him to run eastward
8 along the border fence to find another way to join Yañez on the south side of the primary
9 border fence. Then Murietta tripped. And Nelson and Diaz pounced.

10 Nelson and Diaz beat Murietta relentlessly while Yañez watched helplessly from
11 atop the border fence. Nelson and Diaz claim that, as they were beating Murietta, Yañez
12 threw 1 or 2 rocks and a table leg—none of which caused any injury or stopped the
13 agents’ assault on Murietta. Yañez then threatened to record and publish the incident with
14 his cell phone. This made Diaz angry.

15 Diaz stopped beating Murietta to move into a position where he could “surprise”
16 Yañez if he climbed the fence again. Yañez reappeared—holding *nothing* in either
17 hand—and Diaz followed through with his surprise by shooting Yañez in the head.

18 It is undisputed that the primary border fence on which Yañez was perched “at the
19 moment” Diaz shot Yañez is situated in the United States, and that the actual border
20 between the United States and Mexico is situated some distance south of the primary
21 border fence. Diaz’s subjective awareness of where the actual border lies is irrelevant.

22 Diaz shot Yañez, in part, because he understood that former CBP Chief Michael
23 Fisher (“Fisher”) had ratified and approved the use of deadly force in response to rock
24 throwing. In fact, it was not until 2014, that Fisher modified this position in what was an
25 effort to reduce the use of lethal force by CBP agents in response to rock throwing.

26 While disputes of material fact may exist with regard to whether Yañez was
27 protected by the Fourth Amendment at the time of the incident, the law was clearly
28 established, at the time of the incident, that shooting Yañez while he was in the United

1 States pursuant to the rocking policy advanced by Fisher, was unconstitutional. Finally,
2 whether Diaz's use of force was excessive under the Fourth Amendment is hotly disputed,
3 as there is little agreement between the parties as to the circumstances surrounding Diaz's
4 decision to shoot Yañez. Accordingly, Diaz's Motion for Summary Judgment, (ECF No.
5 177), should be denied.

6 II. DISPUTED FACTS

7 A. Whether Diaz Was Justified In Killing Yañez is Disputed

8 Diaz assert several purportedly undisputed facts regarding Murietta's and Yañez's
9 entry into the United States and alleged assault on Nelson and Diaz, along with a host of
10 purportedly undisputed facts regarding Diaz's decision to shoot Yañez. (*See* ECF No.
11 177-2, Diaz SOF, Nos. 1-75.) Plaintiffs object to and dispute most of these purported
12 facts. (*See* Pls.' Resp. to Diaz SOF, Nos. 1-75.) Key disputes in this regard include:

- 13 • Once Diaz and Nelson encountered Murietta and Yañez on the day of the
14 incident, Murietta and Yañez wanted only to escape back into Mexico. (Pls.'
15 Resp. to Diaz SOF, Nos. 2, 57.)
- 16 • Once Murietta slid back down the pole, there was no confrontation between
17 Murietta, Nelson, and Yañez at the grates. Yañez did not swing any table leg
18 through the grate at Nelson. Rather, Murietta began immediately running
19 eastbound, and Yañez ran parallel to Murietta on the other side of the primary
20 border fence. (Pls.' Resp. to Diaz SOF, Nos. 23-26.)
- 21 • Murietta did not throw "sewage dirt" (or any dirt) at Nelson. (Pls.' Resp. to
22 Diaz SOF, Nos. 31, 35, 53.)
- 23 • Yañez and Murietta were not aggressive or combative; Diaz and Nelson were
24 overly aggressive and assaultive. (Pls.' Resp. to Diaz SOF, Nos. 33, 34, 36, 42,
25 46-49, 53,
- 26 • Yañez did not throw rocks or a table leg *at* Nelson or Diaz. It is unclear,
27 however, whether Yañez threw any objects near the agents to distract or
28 dissuade them from beating Murietta. Indeed, had Yañez thrown any objects *at*

1 the agents, he would have hit Murietta. (Pls.' Resp. to Diaz SOF, Nos. 37-40,
2 43, 45, 47, 50, 52

- 3 • Diaz decided to kill Yañez *before* Yañez reappeared on the fence for the last
4 time. (Pls.' Resp. to Diaz SOF, Nos. 59-65.)
- 5 • Diaz and Nelson had less-lethal means of addressing any threat by Yañez,
6 including backing up and using OC/pepper spray. (Pls.' Resp. to Diaz SOF,
7 Nos. 66-71.)
- 8 • Yañez was shot in the United States, and where he died is irrelevant. (Pls.'
9 Resp. to Diaz SOF, No. 72.)

10 **B. Whether The Incident Was Adequately Investigated is Disputed**

11 Diaz goes to great lengths to discuss the post-incident investigations of Diaz's
12 killing. (*See* Diaz SOF, Nos. 76-91). Plaintiffs object to and dispute most of these
13 purported facts. (*See* Pls.' Resp. to Diaz SOF, Nos. 76-91.) The Key dispute in this
14 regard is that, to the extent the post-incident investigation is relevant to any of the
15 remaining claims and defenses in this action, none of the investigations conducted into
16 this incident were thorough or adequate. (*See* Pls. Resp. to Diaz SOF, Nos. 76, 81-85, 88-
17 91.)

18 **C. Whether Murietta or Yañez “Were on Methamphetamine” is Disputed**

19 There is no admissible evidence that Yañez was “on Methamphetamine” at the time
20 of the incident. (*See* Pls. Resp. to Diaz SOF, Nos. 103-104, 106.)

21 **D. Murietta’s Criminal History and Post-incident Prosecution Are Inadmissible**

22 Diaz goes into great detail regarding Murietta’s criminal history and post-incident
23 prosecution without establishing the admissibility of these details and, in particular,
24 without demonstrating how any of this information is relevant to whether Diaz’s killing of
25 Yañez was justified. (*See* Pls. Resp. to Diaz SOF, Nos. 92-102.)

26 **E. Plaintiffs Did Not Admit That Yañez Had No Substantial Connections to the** 27 **United States**

28 Contrary, to Diaz’s assertion, the factual issue of whether Yañez had such a

1 connection to the United States, for purposes of the Fourth Amendment analysis discussed
2 below, is disputed. (*See* Pls. Resp. to Diaz SOF, Nos. 129-131.)

3 III. LEGAL STANDARD

4 Summary judgment is appropriate if the “pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with the affidavits, if any, show that there
6 is no genuine issue as to any material fact and that the moving party is entitled to
7 judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is material when it affects the
8 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman*
9 *v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). The materiality of a fact is thus determined
10 by the substantive law governing the claim or defense. When ruling on a summary
11 judgment motion, the Court must examine all the evidence in the light most favorable to
12 the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The Court
13 cannot engage in credibility determinations, weighing of evidence, or drawing of
14 legitimate inferences from the facts; these functions are for the jury. *Anderson*, 477 U.S.
15 at 255.

16 IV. ARGUMENT

17 A. Plaintiffs Have Sued for Violation of Yañez’s Fourth Amendment Rights, Not 18 Their Own

19 Diaz argues Plaintiffs have “alleged their own individual claims under the Fourth
20 Amendment.” (ECF No. 177-1 at 25-30.) Plaintiffs have not, however, alleged such a
21 claim. Rather, Plaintiffs have asserted a Fourth Amendment claim *on behalf of* Yañez’s
22 estate. (ECF No. 165, Fourth Am. Compl. ¶ 1.) This is permitted pursuant to California
23 Code of Civil Procedure section 377.30, which applies in federal civil rights proceedings
24 through operation of 42 U.S.C. § 1988. *Smith v. City of Fontana*, 818 F.2d 1411, 1416
25 (9th Cir. 1987) (holding that Fourth Amendment claim survived death pursuant to section
26 377.30).

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B. Diaz Is Not Entitled to Qualified Immunity Because Disputes of Material Fact Exist with Regard to Whether Diaz Violated Yañez’s Clearly Established Rights

1. Disputes of Material Fact Exist with Regard to Whether Yañez Was Protected by The Fourth Amendment

“Aliens stopped at the border have a constitutional right to be free from false imprisonment and the use of excessive force by law enforcement personnel.” *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 620 (5th Cir. 2006). “The crucial distinction is ‘that certain constitutional protections available to persons *inside the United States* are unavailable to aliens outside our geographic borders.’” *Id.* at 622 (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)). Here, of course, it is undisputed that Yañez was “seized” inside the United States, and Diaz’s personal beliefs regarding the location of the international border are irrelevant to this determination. This should, therefore, be sufficient to establish that Yañez was protected by the Fourth Amendment at the time Diaz shot him.

In support of his argument that Yañez was not protected by the Fourth Amendment, Diaz cites *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015), the latter of which is currently under review by the Supreme Court.¹ (ECF No. 177-1 at 19-23.)

While Plaintiffs concede that *Verdugo-Urquidez* sets forth one test for determining whether the Fourth Amendment applies to a non-citizen (namely, the substantial connections test), disputes of material fact exist with regard to application of this test.

Diaz argues “Yañez himself had no significant voluntary connections to the United

¹ Diaz also cites to *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995), *United States v. Meza-Rodriguez*, 798 F.3d 663 (7th Cir. 2015), and *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009), in support his proposition that Yañez was not entitled to Fourth Amendment protection. Each of these cases are distinguishable. In *Barona* and *Emmanuel*, the issue was whether a wiretap placed in a foreign country violated the Fourth Amendment. The issue in *Meza-Rodriguez* was whether the Second Amendment applied, not the Fourth Amendment. These cases, therefore, have inapposite to the issues presented by Diaz’s Motion.

1 States” at the time Diaz killed Yañez. (ECF No. 177-1 at 23.) In making this argument,
2 Diaz admits that Yañez was in the United States when Diaz shot Yañez. (*Id.* at 23-24.)
3 Diaz attempts to minimize, however, Yañez’s contacts with the United States by focusing
4 on the brevity of the incident. (*Id.* at 23.) In doing so, Diaz ignores the most substantial
5 connection that Yañez had with the United States, which is that a United States law-
6 enforcement officer made a decision to end Yañez’s life *while Yañez was physically*
7 *located in the United States.*

8 A reasonable juror could conclude that Diaz’s decision to end Yañez’s life while
9 Yañez was physically located in the United States is the type of substantial connection
10 giving rise to Fourth Amendment protection, and Diaz cites no authority to the contrary.

11 The Supreme Court has provided other tests to determine the government’s ability
12 to deprive non-citizens of life or liberty. In *Boumediene v. Bush*, for example, 553 U.S.
13 723 (2008), the Supreme Court explained three factors should be considered in
14 determining whether a non-citizen’s rights: (1) the citizenship and status of the detainee
15 and the adequacy of the process through which that status determination was made; (2) the
16 nature of the sites where apprehension and then detention took place; and (3) the practical
17 obstacles inherent in resolving the prisoner’s entitlement to constitutional rights. *See id.* at
18 766; *see also Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (applying
19 *Boumediene* test to shooting of Mexican national by CBP agent at border).

20 Under *Boumediene*, it is undisputed that there was no process by which Diaz
21 determined Yañez’s actual citizenship before shooting Yañez. At most, Diaz observed
22 Yañez for a few minutes. There are, however, disputes of fact with regard to the nature of
23 the site where Diaz killed Yañez, as set forth above. There are also, as set forth above,
24 disputes with regard to what obstacles, if any, Diaz faced in deciding whether to kill
25 Yañez before Diaz had actually determined what Yañez’s rights were.

26 In sum, the Court should deny Diaz’s Motion in this regard, because it is undisputed
27 that Yañez was in the United States when Diaz shot him. With regard to the *Verdugo-*
28 *Urquidez* and *Boumediene* tests, however, disputes of material fact preclude the Court

1 from concluding, as a matter of law, that Yañez was *not* protected by the Fourth
2 Amendment at the time Diaz shot him.

3 **2. Yañez’s Right to Be Free From Excessive Force Under the Fourth**
4 **Amendment While in The United States Was Clearly Established At the**
5 **Time of the Incident**

6 The law has been clearly established since 2001 that “[t]he crucial distinction [in
7 deciding whether the Fourth Amendment applies to a non-citizen] is ‘that certain
8 constitutional protections available to persons *inside the United States* are unavailable to
9 aliens outside our geographic borders.’” *Id.* at 622 (citing *Zadvydas v. Davis*, 533 U.S.
10 678, 693 (2001)). Thus, regardless of whether Diaz knows exactly where the international
11 border lies, Diaz was on notice—at the time of the incident—that a non-citizen *within the*
12 *United States* is protected by the Fourth Amendment’s prohibition against the use of
13 excessive force.

14 **3. Disputes of Fact Exist as to Whether Diaz’s Use of Force Was Excessive**
15 **Under the Fourth Amendment**

16 Finally, Diaz argues that—once past the issue of whether the Fourth Amendment
17 applies—he is still entitled to qualified immunity on the issue of whether his use of force
18 was excessive under the Fourth Amendment because his “actions were objectively
19 reasonable taking into account the totality of the circumstances.” (ECF No. 177-1 at 38-
20 39.)

21 In making this argument, Diaz ignores the numerous disputes of fact with regard to
22 “the totality of the circumstances,” as set forth above. Diaz further ignores established
23 case law holding that summary judgment is rarely, if ever, appropriate on the issue of
24 excessive force under the Fourth Amendment. *See Santos v. Gates*, 287 F.3d 846, 853
25 (9th Cir. 2002) (“Because the reasonableness standard ‘nearly always requires a jury to
26 sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth
27 Circuit has] held on many occasions that summary judgment or judgment as a matter of
28 law in excessive force cases should be granted sparingly.’”).

V. CONCLUSION

For the foregoing reasons, the Court should deny Diaz’s Motion for Summary Judgment, (ECF No. 177).

Dated: April 24, 2017

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By: s/Brody McBride

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Attorneys for Plaintiffs

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