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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARIA DEL SOCORRO QUINTERO PEREZ, BRIANDA ARACELY YAÑEZ QUINTERO, CAMELIA ITZAYANA YAÑEZ QUINTERO, and J.Y., a minor,

Plaintiffs,

vs.

DORIAN DIAZ, *et al.*,

Defendants.

Case No.: 13cv1417-WQH (BGS)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MICHAEL FISHER'S MOTION FOR SUMMARY JUDGMENT

DATE: May 8, 2017
CTRM: 14B (Annex)
JUDGE: Hon. William Q. Hayes

Defendant Michael Fisher respectfully submits the following Reply Memorandum of Points and Authorities in support of his motion for summary judgment based on qualified immunity. For the convenience of the Court, Defendant has simultaneously submitted a Reply Separate Statement of Facts, which lists Defendant's moving facts and evidence, Plaintiffs' opposition evidence, and the reasons why Defendant's moving facts are still undisputed. (See ECF 183-1).

# I.

## PLAINTIFFS HAVE FAILED TO CITE ANY CLEARLY ESTABLISHED LAW IN 2011 THAT RENDERS CHIEF FISHER LIABLE FOR AGENT DIAZ'S USE OF LETHAL FORCE

### A. SUPERVISORY LIABILITY UNDER THE FOURTH AMENDMENT

The only cause of action against Chief Fisher in this case is a Fourth Amendment excessive force claim based on supervisory liability. Therefore, the standard for liability against Chief Fisher must be analyzed with respect to a Fourth Amendment reasonableness standard, not under an Eighth Amendment deliberate indifference standard as Plaintiffs suggest. *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020 (2014); *Graham v. Connor*, 490 U.S. 386, 394-95 (1989); *Estate of Angel Lopez v. Torres*, 2016 U.S. Dist. LEXIS 13744, *12 (S.D. Cal. Feb. 4, 2016). Plaintiffs contend that Defendant somehow ignores this Court's prior Order dated May 1, 2015 (ECF 77) with regard to whether the law was clearly established as to Chief Fisher's liability. However, the instant motion for summary judgment raises different issues from those raised in Defendant's prior motions to dismiss. In its prior Order on the motion to dismiss, this Court held "Defendant Fisher is not entitled to qualified immunity on the ground that ***the applicable mental state*** for supervisory liability in the Fourth Amendment context was not clearly established at the time of Yañez's death." (ECF 77, p. 38:23-25). In the present motion, Chief Fisher contends he is entitled to qualified immunity because the law was not clearly established that he could be liable as a supervisor ***under the particular circumstances of this case***, where he had no knowledge of a pattern and practice of excessive force, where there is no evidence of a pattern and practice of excessive force, where Chief Fisher played no role in drafting or revising CBP's Use of Force policy, and where Chief Fisher played no role in investigating lethal force cases or disciplining agents. (ECF 179-1, Fisher's Moving brief, pp. 7- 14). Plaintiffs have failed to raise a material triable issue of fact with respect to any of those circumstances. Although the Court previously found Plaintiffs' Fourth Amendment claim against Chief Fisher should survive the pleading stage in light of the inference that may be drawn from his 2014 Memorandum sent to personnel, we are now at the summary judgment

stage and Chief Fisher's qualified immunity must be analyzed again in light of the actual evidence (or lack thereof) existing before Yañez's shooting in 2011.

This Court never came to a conclusion in its prior orders whether *Starr v. Baca*, 652 F.3d 1202 (9th Cir. July 25, 2011), could be considered as clearly established law in light of the fact it was decided after Yañez's shooting on June 21, 2011. Rather, the Court merely cited to *Starr* and other post-2011 cases as "*instructive* in their analysis of whether allegations are sufficient to infer supervisory knowledge of a pattern and practice of unconstitutional activity." (ECF 77, p. 22, fn 5) (emphasis added). Furthermore, the Court cited to *Chavez v. United States*, 683 F.3d 1102 (9th Cir. 2012), as the post-incident standard for supervisory liability in the Ninth Circuit, and the standard at the time of the Court's 2015 Order, but never held the *Chavez* decision (from 2012) was in effect at the time of Yañez's shooting in 2011. (ECF 77, p. 33:17-19). On the contrary, the Court correctly pointed out that "to determine whether a right was clearly established, a court turns to Supreme Court and Ninth Circuit law existing at the time of the alleged act." *Id.* at p. 32:12-15 (citations omitted). The Court proceeded to explain that although Fourth Amendment excessive force law was clearly established in 2011, "at the time of Yañez's death, **there were no Supreme Court or Ninth Circuit cases available that applied *Iqbal* to a Fourth Amendment excessive force claim asserted against supervisors.**" (ECF 77, p. 37:20-22) (emphasis added). For this reason alone, Chief Fisher could not have been on notice that after the Supreme Court rendered its 2009 decision in *Iqbal* stating "purpose rather than knowledge is required to impose *Bivens* liability" (556 U.S. at 677), he could be personally liable under the Fourth Amendment for Agent Diaz's actions based merely on "knowledge and acquiescence."

But even if the law was clearly established in June 2011, Chief Fisher is entitled to qualified immunity in any event because the circumstances of his particular involvement do not support such knowledge, nor do they support the existence of a pattern and practice at all. And, Plaintiffs' evidence submitted in opposition fails to meet the Ninth Circuit's additional requirement that there be "a sufficient causal connection between the

supervisor's wrongful conduct and the [subordinate's] constitutional violation." *Estate of Angel Lopez v. Torres*, 2016 U.S. Dist. LEXIS 13744, *12 (S.D. Cal. Feb. 4, 2016), *quoting Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). Thus, the critical question here is whether it was reasonably foreseeable to Chief Fisher that the actions of *other* Border Patrol agents in lethal force rocking cases, prior to 2011, would lead Agent Diaz to violate Yañez's constitutional rights. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 966 (9th Cir. 2004) (*citing Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1044 (9th Cir. 1994).

What this means is that now that discovery has closed, and in order to avoid summary judgment, Plaintiffs' opposition had to set forth ***actual admissible evidence*** demonstrating that ***prior to*** June 21, 2011, (1) Chief Fisher had knowledge of a pattern and practice of unconstitutional conduct by Border Patrol agents with respect to rockings, (2) that despite this knowledge, Chief Fisher failed to do anything about it, (3) Chief Fisher's failure to do anything about the pattern and practice is what actually caused Agent Diaz to shoot Yañez, and (4) it would be clear to a reasonable supervisor that Chief Fisher's conduct was unlawful in the situation he confronted. Plaintiffs have been unable to set forth one single fact in opposition that supports any of those requirements for supervisory liability. Chief Fisher is therefore entitled to qualified immunity at this stage, regardless of the Court's prior orders on motions to dismiss, and regardless of whether the knowledge and acquiescence standard is applied to this 2011 incident.

## B. PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY PATTERN

### 1. Plaintiffs' Post-June 2011 Evidence is Irrelevant

Plaintiffs attach two news articles to their opposition, both of which were written after Yañez's shooting, in an attempt to show Chief Fisher knew of an unconstitutional pattern and practice of excessive force or condoned a policy that allowed same. It is well established that news articles used in opposition to summary judgment, or at trial, constitute "classic, inadmissible hearsay." *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991) (holding that the reporting of a party's statements in several newspaper articles was

hearsay); *In re Seagate Tech. II Sec. Litig.*, 1995 U.S. Dist. LEXIS 2052, *14, Fed. Sec. L. Rep. (CCH) P98,530 (N.D. Cal. Feb. 8, 1995) (newspaper articles not properly considered on motion for summary judgment); *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005) ("the plaintiffs provide only newspaper articles -- classic, inadmissible hearsay"). Defendant asks that these articles be stricken from the record as inadmissible hearsay.

But even if the news articles are considered by the Court, they in no way establish even one case of excessive force, let alone a pattern and practice, or Chief Fisher's knowledge of any unconstitutional conduct. Plaintiffs cite to their Exhibit 5 (a November 5, 2013 Associated Press Article), but that hearsay news article was written over two years after Yañez's shooting and is irrelevant. And, nothing in the article establishes that CBP had a "Rocking Policy" such that lethal force could be used anytime a rock is thrown, and the article itself confirms that "under current policy, agents can use deadly force *if they have a reasonable belief that their lives or the lives of others are in danger*." (Ps' Ex. 5).

Likewise, Plaintiffs cite to their Exhibit 6 (October 18, 2012 Reuters Article), but that hearsay news article is irrelevant because it was written over a year after Yañez's shooting, and nowhere does the article mention a "Rocking Policy," nor does it mention Chief Fisher, nor is there any evidence Chief Fisher read this article.

Lastly, Plaintiffs cite to their Exhibit 4, a February 2013 report from the Police Executive Research Forum (PERF), but that report constitutes hearsay and inadmissible opinion testimony by lay people. It is also irrelevant because it was issued two years after Yañez's shooting. Nothing in the PERF report, which is based on a cursory review of only some documents relating to 67 use of force cases, establishes that a pattern and practice of excessive force was used by CBP agents in response to rockings.

**2. Plaintiffs' Expert Evidence Fails to Raise a Triable Issue of Fact**

In advance of their theory that Chief Fisher was somehow "on notice" of an unconstitutional pattern and practice of Border Patrol agents needlessly killing individuals who throw rocks, Plaintiffs rely on the report of their expert, Thomas Frazier. (Ps' Ex. 7).

But the evidence relied upon by Frazier does not support Plaintiffs' position or the existence of any unconstitutional pattern at all. On the contrary, Frazier cites evidence indicating there were 2,094 rocking assaults on Border Patrol agents from June 1, 2008 to June 1, 2011. (Ps' Ex. 7, p. 15:15-18). During this three-year time period, Frazier identifies only 24 instances of shots being fired in response to rockings. (Ps' Ex. 7, p. 23:5 - p. 39:5). Assuming the truth of Frazier's statistics, shootings occurred in *just over one percent* of the occasions where Border Patrol agents were assaulted with rocks.

Even more telling, Frazier indicates that in only one of the 24 cases involving firearms was there a finding of excessive force. (Ps' Ex. 7, p. 33:21 - p. 34:19, November 16, 2010). Because Frazier can point to only **one** instance prior to June 2011 that resulted in any administrative or judicial finding of unconstitutional force, out of 2,094 rocking assaults committed on Border Patrol agents during the same period, Plaintiffs' own evidence submitted in opposition supports summary judgment in favor of Chief Fisher.

The incidents described in Frazier's report also indicate that during the period June 1, 2008 through June 1, 2011, Chief Fisher typically received "notice" of lethal force cases through a Significant Incident Report, email or letter. (Ps' Ex. 7, p. 23:5 - p. 34:19). But none of the evidence cited by Frazier shows that Fisher investigated any of those incidents, or received detailed reports about them after receiving the initial Significant Incident Report. On the contrary, Chief Fisher testified that Significant Incident Reports issued within hours of an event "would just be basically who, what, when, where, and why. It would be a very quick statement of what had transpired." (D's Ex. A, Fisher Depo, 25:13-15, ECF 179-7, p. 7). Therefore, it is still undisputed that Chief Fisher did not review the files related to rocking cases listed in Plaintiffs' Fourth Amended Complaint, or the files mentioned in Frazier's expert report. The evidence conclusively demonstrates that the only investigative file Chief Fisher actually reviewed while he was Chief was the one associated with this case after he was sued as a defendant. (Ds' Ex. A, Fisher Depo, 95:6-8; 95:11-20; 96:21-25, ECF 179-7, pp. 6-14).

To the extent Plaintiffs attempt to raise a material issue of fact on the non-existence of a "Rocking Policy" by citing to Frazier's vague references to inadmissible hearsay by James Tomsheck (the prior head of CBP's Internal Affairs who was fired by the Commissioner of CBP in 2014), those attempts fail because Plaintiffs have not attached the actual testimony by Tomsheck for the Court to read and consider. Similarly, while Frazier's report contains vague references to emails that Chief Fisher may have received, those emails are not attached (nor are they in the record), so neither the Court nor counsel is aware of what Frazier is referring to in that regard. In short, Plaintiffs' expert evidence completely negates a pattern and practice of unconstitutional excessive force because by their expert's own cited statistics, Border Patrol agents responded with deadly force in approximately one percent of the rocking incidents that occurred during the three year period before Yañez's shooting, and in only one instance was a finding of excessive force made.

Plaintiffs argue that there does not have to be a "finding" of excessive force in order for Chief Fisher to have been on notice of a pattern and practice. (Oppo P&As, p. 7:14-20). But Plaintiffs provide no authority to support that argument, and clearly a pattern and practice cannot be established merely by counsels' own opinion (or that of their expert) regarding whether excessive force was used in a particular instance. If that were the case, Defendants would have to set forth the entirety of all files related to each lethal force case in order to show the jury the particular circumstances of each case, and why no finding of excessive force was made by the various governmental agencies who investigated each incident. This would require a "trial within a trial" as to each case in order to avoid prejudice to the Defendants by the admission of Plaintiffs' counsels' self-serving opinions about excessive force. Without actual findings of excessive force by either the local law enforcement agency who investigates each matter, the Department of Justice, the FBI, the Office of Inspector General, the Office of Professional Responsibility, the District Attorney's Office, the U.S. Attorney's Office, a judge or a jury, it is nonsensical for Plaintiffs to claim that Chief Fisher (or any supervisor for that matter) would be on notice

of a pattern and practice of unconstitutional force.

Moreover, even if expert Frazier had set forth admissible evidence, case law is clear that an expert's after-the-fact opinion which disagrees as to whether an officer's actions were reasonable does not avoid summary judgment on qualified immunity. In *Reynolds v. County of San Diego*, 858 F. Supp. 1064 (S.D. Cal 1994) (*modified on other grounds*, 84 F. 3d 1162 (9th Cir. 1996)), plaintiffs retained experts who contended the officer "could have taken other actions in his confrontation with [the decedent]," and that "by talking softly to the suspect or waiting for a backup, [the officer] might have avoided putting himself in a situation where [the suspect] posed a serious threat of physical injury." *Id*. at 1072. The Ninth Circuit rejected those allegations holding:

> "this position ignores the Supreme Court's holding in *Hunter v. Bryant*, 112 S. Ct. at 536-37. There, the Court held that the fact that experts disagreed with the officer's actions did not render the officer's actions 'unreasonable.' Rather, the Court held the question is not "whether another reasonable, or more reasonable, interpretation of events can be constructed...after the fact....the fact that an expert disagrees with the officer's actions does not preclude a finding that the officer is entitled to immunity."

*Reynolds*, at 1072-73. The Court in *Reynolds* granted summary judgment in favor of the officer despite the expert testimony proffered by the plaintiffs in opposition.[1] Based on this Ninth Circuit authority, Plaintiffs' submission of expert reports containing irrelevant hearsay and inadmissible opinion testimony does not raise a triable issue of fact precluding summary judgment as to Chief Fisher. *Id. See also Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or

[1] Plaintiffs suggest summary judgment should be denied because a jury should decide whether the Defendants are entitled to qualified immunity. But qualified immunity is a matter for the Court to decide, not the jury. In *Hunter v. Bryant*, 112 S. Ct. 534 (U.S. 1991), the Ninth Circuit denied qualified immunity to Secret Service agents sued under *Bivens* holding that summary judgment "is proper only if there is only one reasonable conclusion a jury could reach." The Supreme Court rejected that notion and reversed, reasoning "[T]his statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. **Immunity ordinarily should be decided by the court long before trial.** [Citations omitted]. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Id.* at 536-37 (emphasis added).

otherwise render the opinion unreasonable, it cannot support a jury's verdict").

In sum, neither Plaintiffs' 2012-2013 hearsay news articles, the 2013 PERF report, or inadmissible expert reports raise a material issue of fact suggesting supervisory liability should apply to Chief Fisher under the Fourth Amendment, under the circumstances of this case. This Court has already rejected the same argument Plaintiffs made against prior Defendants Napolitano and Bersin, wherein Plaintiffs argued those Defendants' "receipt of emails" or their "statements made at Congressional hearings" somehow put them on notice of a pattern and practice of excessive force within CBP. In granting qualified immunity to Napolitano and Bersin at the motion to dismiss stage, this Court found:

> The allegation that Defendants Napolitano and Bersin received a mass email each time a Border Patrol agent used force does not permit the "reasonable inference" that these Defendants were able to appreciate a pattern of excessive force specific to alleged rock-throwing incidents that would require them to take corrective action. *Moss*, 572 F.3d at 969. Similarly, Defendant Napolitano's statement at a Congressional hearing -- that "we" review each instance of deadly force to determine whether discipline is warranted -- does not permit the "reasonable inference" that she personally investigated each instance of deadly force such that she would recognize that there was a pattern or practice of excessive force in response to rock-throwing....The Court concludes that the SAC "fail[s] to nudge the *possible* to the *plausible*" in demonstrating Defendant Napolitano and Bersin's knowledge of a pattern or practice of excessive force in response to rock throwing, and are therefore liable for culpable action or inaction that caused Yañez's death."

(ECF 77, p. 29:16-25, 30:6-9). The Court should now apply qualified immunity to Chief Fisher under the same reasoning.

## II.

## PLAINTIFFS' EVIDENCE FAILS TO ESTABLISH CAUSATION

Even had Plaintiffs' opposition been able to demonstrate a CBP pattern and practice of unconstitutional force in response to rockings, and that Chief Fisher had knowledge of same, summary judgment would still be warranted because they have failed to raise a triable issue of fact suggesting a causal link exists between Chief Fisher's actions or omissions and Agent Diaz's use of lethal force. Plaintiffs have set forth no evidence demonstrating that prior to June 2011, Chief Fisher wrote, changed or implemented *anything* with respect to CBP's Use of Force Policy, let alone relating to an unconstitutional "Rocking Policy." Rather, they admit that Defendant's Exhibit F (to Diaz's Motion) "was

CBP's Use of Force Policy in effect at the time of the incident." (*See* SSUF 4). Nothing in that October 2010 policy even mentions rocks. (*See* SSUF 4, 5, 6, 7, 11, 14, 21); *see also Al-Kidd v. Ashcroft*, 580 F.3d 949, 978-79 (9th Cir. 2009), *reversed on other grounds by* 131 S. Ct. 2074 (2011) (rejecting conclusory allegations that defendants "promulgated and approved the unlawful policy which caused al-Kidd to be subjected to prolonged, excessive, punitive, harsh, and unreasonable detention or post-release conditions").

Plaintiffs have also set forth no evidence demonstrating that prior to June 2011 (or even after), Chief Fisher had investigative authority over lethal force cases or that he reviewed the relevant documents issued in investigations conducted by other agencies. Defendants' moving evidence on this point remains undisputed. (*See* SSUF 2, 3, 14, 20). As this Court previously held with respect to Defendants Napolitano and Bersin, the mere fact that Chief Fisher would get mass emails or brief reports the morning after a lethal force incident "does not permit the 'reasonable inference' that [he] personally investigated each instance of deadly force such that [he] would recognize that there was a pattern or practice of excessive force in response to rock-throwing." (ECF 77, p. 29:22-24). And as explained above, Plaintiffs have failed to demonstrate there was such a pattern and practice in any event since their own expert could only find one instance prior to 2011, out of 2,094 rocking assaults, that resulted in a finding of unconstitutional force. (Ps' Ex. 7, p. 33:21 - p. 34:19).

Furthermore, Plaintiffs have set forth no evidence whatsoever demonstrating that prior to June 2011 (or even after), Chief Fisher was responsible for training Border Patrol agents with respect to lethal force used in response to rockings, or that Agent Diaz ever understood him to have such a role. Defendants' moving evidence on this point remains undisputed. (See SSUF 11, 14, 17). As this Court has already ruled in this case, "the fact that there were ten rock-throwing deaths along the United States-Mexico Border over an eight year period does not plausibly demonstrate an 'obvious' need for rock-throwing-specific use of force training." (ECF 77, p. 26:13-17). *See also Moss v. United States Secret Service*, 711 F.3d 941, 968 (9th Cir. 2013) (rejecting blanket allegation that "the use of overwhelming and constitutionally excessive force against [Plaintiffs] was the result of

inadequate and improper training, supervision, instruction and discipline" without any explanation as to what specific training/discipline was received and why it was deficient).

Finally, even if there were evidence Chief Fisher knew certain lethal force cases involved excessive force, to deny summary judgment, this Court would have to find CBP's Use of Force policy was unconstitutional and that said policy was the driving force behind Agent Diaz's actions. This principle was applied in *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001), wherein the Ninth Circuit held that that despite the evidence establishing that the supervisor *had knowledge* of a high rate of violence, plaintiff was still required to present evidence establishing how the supervisor's actions caused or contributed to plaintiff's injuries as "[t]he absence of even a minimum proof threshold to establish a causal relationship was utterly at odds with the doctrine of qualified immunity." *Id*. at 914. "The uncontroverted evidence in this case simply does not support the conclusion that CDC's policy regarding the use of force in a prison riot context was constitutionally unsound -- Nor did the district court rely on any evidence that CDC's policies, or [the supervisor's] actions in implementing them, were the moving force behind any constitutional violation in this case." *Id.* at 915. Similarly, in *Rizzo v. Goode*, 423 U.S. 362 (1976), the Supreme Court rejected the plaintiffs' theory that there was any causal link between certain instances of police misconduct and an agency-wide policy, or any supervisor's approval of the alleged misconduct. *Id*. at 371. Similarly here, Plaintiffs have presented no evidence that either CBP's Use of Force Policy, or any actions or inactions on the part of Chief Fisher with respect to CBP's Use of Force policy, actually ***caused or contributed*** to Agent Diaz's use of lethal force on June 21, 2011. Defendants' facts demonstrating a complete lack of causal connection remain undisputed. (*See* SSUF 6, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19).

DATED: May 1, 2017

Respectfully submitted,

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