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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

DORIAN DIAZ, *et al.,*

Defendants.

Case No.: 13cv1417-WQH (BGS)

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

[NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT]

Defendant Michael Fisher respectfully submits the following Memorandum of Points and Authorities in support of his motion for summary judgment based on qualified immunity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules

Other

I.

INTRODUCTION

This motion is brought on behalf of the prior Chief of the United States Border Patrol, Michael Fisher (hereinafter "Chief Fisher"). Chief Fisher has been sued by the Plaintiffs in this action under a supervisor liability theory, based on a shooting that occurred by Border Patrol Agent Dorian Diaz on June 21, 2011. On that date, Agent Diaz shot and killed Jesus Reyes Yañez ("Yañez"), who along with his cohort, Jose Silvino Ibarra Murietta ("Murietta"), illegally crossed the United States/Mexican border and assaulted Agent Diaz and his partner. The sole cause of action brought against Chief Fisher (and Agent Diaz) is a *Bivens* excessive force claim under the Fourth Amendment to the United States Constitution. While Plaintiffs maintain that Agent Diaz used excessive force in shooting Yañez, they claim Chief Fisher "knew of and acquiesced in an unlawful Rocking Policy" and "failed to conform agents' use of force to the requirements of law, thereby causing Yañez's death." (ECF 165, Plaintiffs' Fourth Amended Complaint ("FAC"), ¶ 7). They further allege that "Defendant Fisher violated Yañez's Fourth Amendment rights by personally developing, authorizing, and conspiring to effect, and permitting and directing their subordinates to implement, the Rocking Policy," (FAC, ¶ 139), and that he "failed to establish adequate disciplinary procedures, investigatory procedures, and training procedures regarding agents' use of lethal force." (FAC, ¶ 139).

Agent Diaz has filed a simultaneous motion for summary judgment on the following four grounds:

(1) Plaintiffs Maria Del Socorro Quintero Perez and her children have no standing to sue under the Fourth Amendment because they were not subject to search or seizure;

(2) Agent Diaz is entitled to qualified immunity as to the claim brought by Maria Del Socorro Quintero Perez and her children because those Plaintiffs have no significant voluntary connections to the United States, and therefore no rights under the Fourth Amendment;

(3) Agent Diaz is entitled to qualified immunity as to the claim brought by Yañez's Estate because Yañez had no significant voluntary connections to the United States, therefore the law was not clearly established in June 2011 that he was entitled to Fourth Amendment protection; and

(4) Agent Diaz is entitled to qualified immunity based on the fact his actions were reasonable under the totality of the circumstances.

(ECF 177). Chief Fisher has filed a Joinder in Agent Diaz's Motion because, if the Court finds Agent Diaz is entitled to qualified immunity on any of the above-referenced grounds, Chief Fisher will likewise be entitled to qualified immunity since his liability is predicated on that of Agent Diaz. (ECF 178, Notice of Joinder).

In the event the Court allows any portion of Plaintiffs' Fourth Amendment claim to survive against Agent Diaz, Chief Fisher brings the instant Motion for Summary Judgment demonstrating that he is entitled to summary judgment for two additional reasons:

(1) there is no causal link between any actions or omissions by Chief Fisher, and Agent Diaz's conduct in using lethal force against Yañez; and

(2) the law was not clearly established in June 2011 such that Chief Fisher would have known he could be liable for Agent Diaz's conduct.

II.

FACTUAL BACKGROUND

In the motion for summary judgment filed by Agent Diaz, he set forth detailed facts and evidence regarding the encounter that took place between himself, his partner (Agent Chad Nelson), Yañez and Murietta on June 21, 2011. Because Chief Fisher has filed a Joinder in that motion, and since his liability stands or falls on Agent Diaz's liability, Chief Fisher has not duplicated the factual background from Agent Diaz's motion for summary judgment here. Rather, Chief Fisher incorporates by reference herein Agent Diaz's factual background (ECF 177). In this motion, Chief Fisher has included additional facts and evidence relating to Plaintiffs' "supervisory liability" theory alleged against him.

A. CHIEF FISHER'S ROLE AS CHIEF OF THE BORDER PATROL

While he was serving as Chief of the Border Patrol, Chief Fisher's role was not to investigate his agents or discipline them. Rather, his role included two overarching responsibilities: (1) completion of CBP's mission, which was to protect the country against those that would do us harm, and (2) to make sure that the agents were safe. (Ex. A, Fisher Depo, 10:4-9; 99:25-100:1-13).

B. CHIEF FISHER HAD NO INVESTIGATIVE AUTHORITY AT CBP

Chief Fisher did not review investigative reports regarding lethal force cases (or any cases for that matter) from OIG, or FBI, or whatever outside agency investigated CBP matters. (Ex. A, Fisher Depo, 23:1-32:3; 33:3-34:14; 39:15-41:6; 94:23-95:20; 96:4-97:18; Fisher Decl., ¶ 4). It would have been a conflict of interest for CBP to investigate its own agents' conduct in using lethal force, so those investigations were left to other agencies. (Fisher Decl., ¶ 4).

C. CHIEF FISHER DID NOT PLAY A ROLE IN MAKING OR CHANGING CBP'S USE OF FORCE POLICY

CBP's October 2010 Use of Force Policy Handbook, Chapter 4, outlines CBP's Use of Force Policy in effect in June 2011. (Ex. F to Diaz MSJ, ECF 177-10). That policy follows the constitutional standard for lethal force as set out by the Supreme Court in *Graham v. Connor,* 490 U.S. 386 (1989). CBP has never had a "Rocking Policy," or any written or unwritten policy that suggests that agents can use lethal force against a rock thrower, regardless of the level of threat posed. (Fisher Decl., ¶ 5). Rather, CBP's policy states that an agent can use lethal force only when the agent believes himself or someone else is in imminent threat of death or serious bodily injury. (Ex. F to Diaz MSJ, ECF 177-10). And that is exactly what Agent Diaz understood the policy to state. (Diaz Decl., ¶ 7).

Chief Fisher did not have authority to change existing CBP policy regarding lethal force. Rather, the Commissioner of CBP implements all Use of Force Policy and while Chief Fisher can clarify or reiterate the policy, he cannot change it. (Ex. A, Fisher Depo, 16:3-20:20; 36:20-39:9; 41:7-43:14; Fisher Decl., ¶ 6; Ex. F to Diaz MSJ, ECF 177-10).

D. CHIEF FISHER DID NOT PLAY A ROLE IN DISCIPLINING AGENTS USING LETHAL FORCE

Chief Fisher did not play any role in disciplining agents because such tasks were performed by CBP's Disciplinary Review Committee, and/or the Office of Professional Responsibility. (Ex. A, Fisher Depo, 34:15-36:18; Fisher Decl., ¶ 3).

E. CHIEF FISHER HAS NEVER MET NOR SPOKEN TO AGENT DIAZ

As demonstrated by the motion simultaneously filed by Agent Diaz, the two defendants in this case have never met. (Diaz Decl., ¶ 8; Fisher Decl., ¶ 2). Other than one Memo issued by Chief Fisher to "All Personnel" almost three years after the shooting of Yañez, Agent Diaz has never received a Memorandum or other communication by Chief Fisher. (Diaz Decl., ¶ 8; Fisher Decl., ¶ 4). Agent Diaz has no information whatsoever to suggest Chief Fisher had disciplinary authority over any agents, and he has no knowledge as to whether any agents have or have not been disciplined in response to force used in relation to rock throwing. (Diaz Decl., ¶ 8-9). And, Agent Diaz has no knowledge that Chief Fisher plays a role in the training of Border Patrol agents, nor has he ever taken into account whether Chief Fisher trains or disciplines agents. (Diaz Decl., ¶ 8-9).

III.

LEGAL STANDARD ON SUMMARY JUDGMENT

A motion for summary judgment may be granted when the moving party demonstrates there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). A defendant may carry his burden on summary judgment either by offering evidence to negate an essential element of plaintiffs' claim, or by simply pointing out that the plaintiffs' evidence is insufficient to establish an essential element of their claim. *Celotex*, 477 U.S. at 323-24, 331. Once the defendant carries his burden, the burden shifts to the plaintiff to produce evidentiary materials demonstrating the existence of a genuine issue of material fact. *Celotex*, 477 U.S. at 324; *Coverdell v. Dep't of Soc. & Health Services*, 834 F.2d 758, 769 (9th Cir. 1987). A plaintiff may carry his or her burden to show a genuine issue of material fact only by offering "significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). "A mere scintilla of evidence will not do . . . ." *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

IV.

THERE IS NO CAUSAL LINK BETWEEN ANY ACTIONS BY CHIEF FISHER AND AGENT DIAZ'S USE OF LETHAL FORCE

Plaintiffs' Fourth Amendment claim against Chief Fisher fails because Plaintiffs cannot establish causation. A *Bivens* plaintiff "must demonstrate" causation. *Egervary v. Young*, 366 F.3d 238, 246 (3rd Cir. 2004) ("tort law causation must govern our analysis of this *Bivens* claim"); see *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008), *citing Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981) ("the plaintiff must...demonstrate that the defendant's conduct was the actionable cause of the claimed injury" in a § 1983 case). Plaintiff must show both actual causation (cause-in-fact) and proximate cause. *Arnold*, 637 13 F.2d at 1355.

Cause-in-fact is determined by the substantial factor test in federal civil rights cases. *See Egervary*, 366 F.3d at 246 (*Bivens* case); *Allen v. Scribner*, 812 F.2d 426, 434 (9th Cir. 1987) (*Bivens* case); *Black v. Sheraton Corp. of America*, 564 F.2d 531, 538 (D.C. Cir. 1977) (*Bivens* case); *Burton v. Waller*, 502 F.2d 1261, 1282 (5th Cir. 1974) (§ 1983 excessive force case). The substantial factor test "subsumes" but-for causation. *Viner v. Sweet*, 30 Cal.4th 1232, 1239-40 (2003); *see* Restatement (Second) Torts § 432(1) ("the actor's...conduct is not a substantial factor...if the harm would have been sustained even if the actor had not been [culpable]").

> The substantial factor standard...has been embraced as a clearer rule of causation [than the "but-for" test] - one which subsumes the "but-for" test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact.

Sementilli v. Trinidad Corp., 155 F.3d 1130, 1136 (9th Cir. 1998) (Nelson, J., concurring), *quoting Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 969 (1997).

Plaintiffs' inability to link any but-for causation between Chief Fisher and Agent Diaz warrants summary judgment. A Rule 56 motion need not be based on evidence offered by defendant, "[b]ecause plaintiffs bear the ultimate burden of proof on causation, [defendant] had only to point to the absence of a genuine issue of material fact; it wasn't

required to produce any evidence at all." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (defendant may carry his burden on summary judgment by simply pointing out that the plaintiffs' evidence is insufficient to establish an essential element of his claim).

No genuine issue of material fact exists with regard to the fact that nothing Chief Fisher did, or failed to do, would have changed Agent Diaz's decision to use lethal force on June 21, 2011. (Diaz Decl., ¶ 8). These two individuals had never met, nor spoken to each other prior to June 2011. (Diaz Decl., ¶ 8). Agent Diaz did not understand Chief Fisher to play any role in investigating, training, or disciplining agents regarding the appropriate use of force to use when being assaulted with rocks. (Diaz Decl., ¶¶ 8-9). And, Chief Fisher did not have those roles. (Fisher Decl., ¶ 3-4). Rather, Agent Diaz understood that he could only use lethal force against a rock thrower (or against someone throwing any type of object, including a nail-studded table leg) if he believed himself or someone else to be in imminent threat of death or serious bodily injury. (Diaz Decl., ¶ 7).

Furthermore, at the time he shot Yañez, Agent Diaz was unaware of the circumstances of any other cases in which a Border Patrol agent has used lethal force in response to a rock thrower. (Diaz Decl., ¶ 9). At no time did he attend any training wherein a specific case was discussed involving lethal force used against a rock thrower. (Diaz Decl., ¶ 9). He had no knowledge one way or the other whether any Border Patrol agents have been disciplined, or investigated, in relation to using lethal force against someone allegedly throwing rocks. (Diaz Decl., ¶ 9). Agent Diaz has never reviewed, nor would he have access to, any investigative or disciplinary materials relating to any other cases wherein a Border Patrol agent may have used lethal force against an alleged rock thrower. (Diaz Decl., ¶ 9).

Since there is no causal link between Agent Diaz's use of force on June 21, 2011 and any actions or omissions on the part of Chief Fisher, that latter is entitled to summary judgment regardless of the outcome of Agent Diaz's motion.

V.

CHIEF FISHER IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED THAT HE COULD BE LIABLE UNDER THE CIRCUMSTANCES OF THIS CASE

A. THE TWO-PART QUALIFIED IMMUNITY ANALYSIS

The defense of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A court will grant a government actor qualified immunity if the actor's conduct satisfies either prong of the two-step test for qualified immunity outlined by the Supreme Court in *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Qualified immunity will protect a government actor if (a) his or her conduct does not violate a federal constitutional right, or (b) the constitutional right was not clearly established on the date of the alleged violation. *Id.* This two-step sequence can be taken in any order at the discretion of the court. *Pearson v. Callahan*, 555 U.S. 223, 241 (2009).

B. CHIEF FISHER HAD NO KNOWLEDGE OF A PATTERN OR PRACTICE OF EXCESSIVE FORCE, NOR DID HE ACQUIESCE IN SAME

As the Supreme Court made clear in *Iqbal*, claims against government officials must contain factual allegations plausibly suggesting their direct involvement in a constitutional violation. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). In *Iqbal*, the plaintiff alleged that former-Attorney General John Ashcroft and former-FBI Director Robert Mueller adopted an unconstitutional policy in the wake of the September 11 terrorist attacks that subjected the plaintiff to harsh conditions of confinement because of his race, religion, or national origin. *Iqbal*, 556 U.S. at 666. According to the complaint, Ashcroft was the "principal architect" of the policy, and Mueller was "instrumental in [its] adoption, promulgation, and implementation." *Id.* at 669. The complaint further alleged that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed" to the policy, and that the plaintiff's detention was "under the direction" of Mueller. *Id.* Plaintiffs' allegations against Chief Fisher are strikingly similar to those made against Ashcroft and Mueller.

In evaluating these claims, the Supreme Court held that a supervisor's mere "knowledge and acquiescence" in a subordinate's unconstitutional conduct are insufficient to plausibly state a claim for relief. *Id.* at 677. As the Court explained, "[b]ecause vicarious liability is inapplicable to *Bivens* . . . suits, a plaintiff must plead that each Government-official defendant, *through the official's own individual actions*, has violated the Constitution." *Id.* at 676 (emphasis added). The Court rejected allegations that (1) the defendants "knew of, condoned, and willfully and maliciously agreed" to subject the plaintiff to constitutional violations, (2) Ashcroft was the "principal architect" of the policy," and (3) Mueller was "instrumental in [its] adoption, promulgation, and implementation" as conclusory, a formulaic recitation of the elements of a discrimination claim, and not entitled to an assumption of truth. *Id.* at 680-81.

In ruling on the motion to dismiss Plaintiffs' First Amended Complaint, and permitting suit to continue past the pleading stage as to Chief Fisher, this Court relied on the knowledge-and-acquiescence standard announced in *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011).[1] *See* ECF 46, at 17-19. But the *Starr* decision was not issued until July 25, 2011, four weeks after the alleged shooting incident here, and did not purport to address the governing standard for supervisory liability in all constitutional contexts, but only the Eighth Amendment conditions-of-confinement context. *Starr*, 652 F.3d at 1207.[2] Since

[1] The Ninth Circuit in *Starr* further confirmed the Supreme Court's language in *Iqbal* by stating "[a] defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) **a sufficient causal connection** between the supervisor's wrongful conduct and the constitutional violation.'" (Citation omitted). "[A] plaintiff must show the supervisor breached a duty to plaintiff **which was the proximate cause of the injury**." *Starr* at 1207 (emphasis added).

[2] On February 11, 2011, the Ninth Circuit issued its original opinion in *Starr v. Baca*, 633 F.3d 1191 (9th Cir. 2011), but then withdrew that opinion. It is well established that a withdrawn opinion "may not be cited as precedent by or to this court or any district court of the Ninth Circuit." *See Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014); *Islamic Shura Council of S. Cal. v. FBI*, 757 F.3d 870 (9th Cir. 2014). Moreover, the original *Starr* opinion expressly limited its holding to deliberate-indifference claims: "We therefore conclude that, where the applicable constitutional standard is deliberate indifference, a plaintiff may state claim for supervisory liability based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by others." *Starr*, 652 F.3d at 1207. "Deliberate indifference" is not the applicable constitutional standard for Fourth

Chief Fisher is now moving for summary judgment based on the fact the law was not clearly established at the time of Yañez's shooting, the *Starr* decision should not be considered on the clearly established prong.

Further illustrating that the issue remained open long after the shooting incident here, the Ninth Circuit stated as late as 2013 that whether "knowledge and acquiescence" sufficed post-*Iqbal* in the Fourth Amendment context "has been debated," but refused to resolve the issue because the plaintiffs in that case could not satisfy the more lenient, pre-*Iqbal* standard for supervisory liability. *See Moss v. U.S. Secret Service*, 711 F.3d 941, 967 n.6 (9th Cir. 2013), *reversed by Wood v. Moss*, 134 S. Ct. 2056 (2014). The Supreme Court has long held that where judges openly debate a constitutional question, "it is unfair to subject [individuals] to money damages for picking the losing side of the controversy." *See Wilson v. Layne*, 526 U.S. 603, 618 (1999).

Although the Ninth Circuit established its post-*Iqbal* standard for supervisory liability in the Fourth Amendment excessive force context in *Chavez v. United States,* 683 F.3d 1102 (9th Cir. 2012), that decision was not decided until June 20, 2012, one year after Agent Diaz's shooting of Yañez. *Id*. Therefore, like *Starr*, the *Chavez* decision likewise cannot contribute to the analysis of whether the law was clearly established for Chief Fisher in June 2011. And even if *Chavez* could be considered, Plaintiffs here will be unable to meet its standard for supervisory liability which held "a supervisor faces liability under the Fourth Amendment only where it would be clear to a reasonable supervisor that his conduct was unlawful in the situation he confronted." *Id*. at 1110.

A decision by the Third Circuit in *Argueta v. ICE*, 643 F.3d 60 (2011), is particularly instructive with respect to the liability Plaintiffs are attempting to attach to Chief Fisher. In that case, the plaintiffs, like here, sued several high-ranking officials within DHS and Immigration and Customs Enforcement ("ICE"), alleging they were victims of unlawful and abusive raids in New Jersey. *Id.* at 62. As the court explained, "the typical 'notice'

Amendment excessive force claims. *See Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (*en banc*).

case seems to involve a prior incident or incidents of misconduct by a specific employee or a group of employees, specific notice of such misconduct to their superiors, and then continued instances of misconduct by the same employee or employees." *Id.* at 74. Wholly different and entirely insufficient, the court found, is the "knowledge and acquiescence" case involving "reports of subordinate misconduct in one state followed by misconduct by totally different subordinates in a completely different state." *Id.*at 75. This Court should likewise reject Plaintiffs' attempt here to allege "knowledge and acquiescence" by citing sporadic shooting incidents by different subordinates across several states over the course of ten years without any specific allegation as how Chief Fisher was made aware of the underlying conduct. *See Blantz*, 727 F.3d at 927; *Chavez*, 683 F.3d at 1110; *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012); *Al-Kidd v. Ashcroft*, 580 F.3d 949, 979 (9th Cir. 2009). Citing the Ninth Circuit's opinion in *Al-Kidd*, the Third Circuit in *Argueta* further noted that it could not overlook the fact that many of the named defendants in that case included high-ranking federal officials within the DHS hierarchy, all charged with supervising the enforcement of federal immigration law throughout the country and overseeing an agency with more than 15,000 employees and a budget of more than $3.1 billion. 643 F.3d at 75-77. Based on those facts, the court rejected plaintiffs' blanket allegation that the named defendants had any direct involvement in the alleged conduct as facially implausible. *Id.* at 75; *see also Blantz*, 727 F.3d at 927.

Here, the evidence set forth in this motion demonstrates that Chief Fisher did not have investigative authority over any use of force cases within CBP, lethal or otherwise. Furthermore, Plaintiffs cite in their FAC to a series of other incidents in support of their allegation that Chief Fisher "knew that these killings reflected a pattern and practice of Border Patrol agents treating the throwing of rocks at them as per se lethal force." (FAC, p. 18-20). But Chief Fisher did not review those files, or any documents involving cases in which there has been a judicial or other official finding of unconstitutional force, so they cannot form the basis for any "knowledge or acquiescence of excessive force" on the part of Chief Fisher. (Fisher Decl., ¶ 4; Ex. A, Fisher Depo, 23:1-32:3; 33:3-34:14; 39:15-41:6;

94:23-95:20; 96:4-97:18). Were Plaintiffs permitted to argue at trial that the incidents reflected in such files demonstrate excessive force by Border Patrol agents, in their opinion, there would need to be a "trial within a trial" as to each case.

The incidents referenced in the FAC which Plaintiffs claim demonstrate a pattern of excessive force in response to rockings involve contested litigation that, to the extent resolved, resulted in different outcomes. Two of those cases resulted in judgments in favor of the United States and its agents, one involved a judgment in favor of the plaintiff, another concluded by settlement (without any judgment or findings), and another was dismissed due to the plaintiffs' inability to prove they were the children of the decedent. The other cases involve ongoing litigation, and no findings have been made with respect to those cases. Absent a judicial finding, or other official determination concerning the appropriateness of the force used in those incidents, they are irrelevant and have no probative value to Chief Fisher's "knowledge of a pattern of alleged excessive force." The details regarding the specific cases referenced in Plaintiffs' FAC are as follows:[3]

1. Incident Involving Carlos La Madrid (FAC, ¶ 70.j.)

After a bench trial on the merits, judgment was rendered in favor of the United States. No excessive force was used when Border Patrol agent shot and killed Carlos La Madrid in response to rocks thrown at the agent. (*See* Ex. B, Findings of Fact and Conclusions of Law dated April 25, 2016, *Guadalupe Guerrero v. USA*, USDC for the District of Arizona, Case No. CV-12-00370-TUC-JAS)).

2. Incident Involving Guillermo Martinez Rodriguez (FAC, ¶ 71.b.)

Summary judgment granted in favor of the Border Patrol agent on qualified immunity grounds based on a finding that he acted in self-defense in response to a rock thrown. (Ex. C, Order Denying Motion to Dismiss, and Granting Summary Judgment Motion dated August 3, 2009, *Rodriguez v. USA*, USDC for the Southern District of California, Case No. 06CV2753-W (JMA)).

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[3] Defendant has asked that the Court take judicial notice of these cases simultaneously herewith. See Request for Judicial Notice.

3. Incident Involving Jose Alejandro Ortiz-Castillo (FAC, ¶ 70.d.)

This case was dismissed during trial for lack of standing because the minor plaintiffs could not establish they were the children of the decedent. (See Ex. D, Court's Decision in *Mena v. United States*, 2012 WL 6047039 (W.D. Texas, December 5, 2012)).

4. Incident Involving Ricardo Olivares Martinez (FAC, ¶ 70.a.)

Judgment was entered in an FTCA trial in favor of plaintiff due to a finding that a Border Patrol agent's force was not justified. (See Ex. E, Order in *Olivares-Martinez v. USA* dated March 4, 2009, USDC for the District of Arizona, Case No. CV04-512-TUC-RCC)).

5. Incident Involving Francisco Dominguez (FAC, ¶ 70.e.)

This case was settled. (See Ex. F, Notice of Settlement in *Dominguez, vs. Corbett*, dated September 2, 2011, USDC for the District of Arizona, Case No. CV-08-648TUC-DCB (BPV)).

6. Incident Involving Sergio Hernandez (FAC, ¶ 70.h.)

After an *en banc* decision upholding summary judgment for the Border Patrol agent on qualified immunity grounds involving unsettled constitutional issues, a petition for writ of certiorari was filed. (See Ex. G, en banc Decision in *Hernandez v. United States, et al.*, 785 F.3d 117 (5th Cir. 2015), cert. granted, 137 S. Ct. 291 (2016)). The agent's actions also withstood the scrutiny of various investigating law enforcement agencies. As noted in one of the concurring opinions in *Hernandez*, "Numerous federal agencies, including the FBI, the Department of Homeland Security's Office of the Inspector General, the Justice Department's Civil Rights Division, and the United States Attorney's Office, investigated this incident and declined to indict Agent Mesa or grant extradition to Mexico under 18 U.S.C. § 3184." *Hernandez*, 758 F.3d at 132 (Jones, J., Smith, J., Clement, J., Owen, J, concurring).

7. Incident Involving Guillermo Arevalo Pedraza (FAC, ¶ 71.b.)

This district court litigation is stayed pending a resolution of the petition for writ of certiorari in *Hernandez*. (See Ex. H, Order in *Gallegos v. USA, et al.*, dated August 18, 2015, USDC for the Southern Dist. of Texas, Case No. 14CV00136)).

Since Chief Fisher never reviewed the investigative materials relating to these incidents, and since they clearly do not contain any findings suggesting any "pattern or practice of unconstitutional force," Plaintiffs will be unable to establish any knowledge on the part of Chief Fisher that such an unconstitutional pattern existed. For this reason, Chief Fisher is entitled to qualified immunity.

C. CHIEF FISHER'S MARCH 2014 MEMO TO ALL PERSONNEL DOES NOT RAISE A TRIABLE ISSUE OF FACT AS TO HIS LIABILITY

At the motion to dismiss stage, the Court found that a memo Chief Fisher issued to all CBP personnel almost three years after Agent Diaz's shooting "permits the inference that Defendant Fisher knew of and was responsible for the alleged Rocking Policy." (ECF 46, P. 19). But now that the parties have conducted extensive discovery in this case, Plaintiffs will be unable to show that any memos (or any guidance in any form) were issued by Chief Fisher to Agent Diaz prior to June 21, 2011 with regard to rockings or use of force in general. (Fisher Decl., ¶ 6; Diaz Decl., ¶ 8). And, the memo that Chief Fisher wrote in March 2014 merely clarified existing policy, it did not change it. [4]

As the Supreme Court has reiterated time and time again, qualified immunity affords government officials some breathing room in making reasonable judgments about open legal questions, and where judges disagree about a legal question, qualified immunity is

[4] In his deposition, Chief Fisher explained in detail the purpose for issuing his March 7, 2014 Memorandum to all personnel, specifically that "there were a lot of stories about the border patrol's use of force policies and the information, quite frankly, in my estimation was inaccurate....what I wanted to do was write a document that -- for a couple of audiences....to go into a little bit of detail and explain, basically, what our use of force policy was....and...I thought it was important that [the agents] heard from me as their chief." (Ex. A, Fisher Depo, 44:11-46:25; 47:10-48:9; 49:19-50:13).

deserved. *See, e.g.*, *Ashcroft v. al-Kidd,* 131 S. Ct. 2077, 2085 (2011); *Wilson v. Layne*, 526 U.S. at 618. Plaintiff cannot escape the Supreme Court's unequivocal holding in *Iqbal* requiring that Plaintiffs show "each government-official defendant, through the official's own individual actions, has violated the constitution." *Iqbal*, 556 U.S. at 676. Plaintiff also cannot escape clear Ninth Circuit authority holding that "a supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1988); *Avalos vs. Baca,* 596 F.3d 583, 587 (9th Cir. 2010); *Jones v. Williams*, 297 F.3d 930, 936-937 (9th Cir. 2002); *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Wilson v. McDonald*, No. 2:10-cv-0721-JAM-JFM (PC), 2010 WL 2106454, at *2 (E.D. Cal. 2010); *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980). As Judge Stephen Trott aptly stated in his dissenting opinion in *Starr*, "[to] attach personal legal liability to the leaders of [ ] organizations, however, requires much more than, 'Well, she must have known and must have been deliberately indifferent, because after all, it happened on her watch.'" *Starr*, at 1219. Because it was not clearly established in June 2011 that "knowledge and acquiescence" could suffice for Chief Fisher to be liable as a supervisor in the Fourth Amendment excessive force context, that standard simply cannot govern for purposes of assessing Chief Fisher's qualified immunity here. And even if the "knowledge and acquiescence" standard did apply, the undisputed facts presented in this motion demonstrate that Chief Fisher had no knowledge of an unconstitutional pattern or practice within CBP with respect to rockings.

VI.

CONCLUSION

For the foregoing reasons, Chief Fisher is entitled to summary judgment first and foremost, because Agent Diaz is entitled to summary judgment and supervisory liability is predicated on the success of the underlying claim. But even if the Court is not inclined to grant Agent Diaz's motion for summary judgment, Chief Fisher should be dismissed based on the fact there is no causation between the two defendants' conduct, and the law was not

clearly established in June 2011 that Chief Fisher could be liable for Agent Diaz's excessive force.

DATED: March 31, 2017

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