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13 **UNITED STATES DISTRICT COURT**

14 **EASTERN DISTRICT OF CALIFORNIA**

15 KHOUA VANG; and TED RICHARDS,
16 JR., individually and as Co-Successors-in-
Interest to Decedent DARELL
RICHARDS,

17 Plaintiffs,

18 v.

19 CITY OF SACRAMENTO, a municipal
20 corporation; and DOES 1-50, inclusive,
21 individually and in their official capacity as
agents for the Sacramento Police
Department,

22 Defendants.
23

Case No.: 2:19-CV-00374-JAM-JDP

**REPLY OF DEFENDANTS' CITY OF
SACRAMENTO, SAMEER SOOD, TODD
EDGERTON AND PATRICK COX'S TO
PLAINTIFFS' OPPOSITION TO
RENEWED MOTION FOR JUDGMENT
AS A MATTER OF LAW**

Date: February 14, 2023
Time: 1:30 p.m.
Courtroom: 6
Judge: Hon. John A Mendez
Magistrate: Hon. Jeremy D. Peterson

Complaint Filed: March 4, 2019
Trial Date: October 11, 2022

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1 **INTRODUCTION**

2 A post-trial motion for judgment as a matter of law is an evidence based motion.
3 Defendants’ arguments for judgment as a matter of law were well supported by uncontroverted
4 trial evidence. Plaintiffs’ arguments in opposition are not.

5 Plaintiffs’ principal argument in opposition is the evidence interpreted in plaintiffs’
6 favor establishes Darell Richards was not pointing his gun at officers when he was shot by
7 Officer Cox and Sergeant Edgerton but was surrendering. The fatal flaw with plaintiffs’
8 argument is the absence of any trial evidence, direct or circumstantial, for this Court to
9 interpret in plaintiffs’ favor to reach the conclusion plaintiffs suggest. Indeed, many of
10 plaintiffs’ assertions of evidence are without citation, many of the citations are unresponsive of
11 the asserted proposition, and plaintiffs have not provided the Court with the trial exhibits cited
12 in the opposition. It is not this Court’s job to search the record for evidence supporting
13 plaintiffs’ position and this Court should ignore any assertion not adorned with a supporting
14 record citation.

15 The evidence allows one reasonable conclusion: Richards was pointing his gun at or in
16 the direction of Officer Tiner when Officer Cox and Sergeant Edgerton shot Richards. That
17 conclusions mandates judgment as a matter of law on all claims asserted by plaintiffs against
18 Officer Cox, Sergeant Edgerton, Lieutenant Sood and the City.

19 **ARGUMENT**

20 **A. Qualified Immunity Requires This Court To Enter Judgment as a Matter of Law**
21 **For Officer Cox, Sergeant Edgerton and Lieutenant Sood on Plaintiffs' Claims**
22 **Under 42 U.S.C. Section 1983**

23 **1. Fourth Amendment Claims Against Officer Cox And Sergeant Edgerton**

24 *a. No reasonable jury could conclude Officer Cox’s and Sergeant Edgerton ‘s use of*
25 *deadly force violated the Fourth Amendment because no reasonable jury could*
26 *conclude Richards did not pose an imminent risk of serious harm or death*

27 Plaintiffs don’t dispute Richards committed a serious crime, had a gun, fled from
28 police, repeatedly ignored commands, and needed to be apprehended because he posed a risk.

Plaintiffs do dispute the immediate risk of harm Richards posed. In contrast to all
evidence establishing Richards was pointing his gun at or in the direction of Officer Tiner,

1 plaintiffs argue Richards was shot because he was “surrendering” with his “hands up” while in
2 a “fetal position” or while “ducking or turning away” from officers. *See* Doc. 158, pp. 7:13-15,
3 13:11-15, 15:22-23, 16:15-16.

4 No evidence supports plaintiffs’ arguments.

5 Plaintiffs cite this Court to no evidence allowing a reasonable jury to conclude
6 anything other than Richards was shot while pointing his gun at or in the direction of Officer
7 Tiner.¹ And, notably, plaintiffs do not contest Richards holding a gun in his hand when shot.

8 As outlined in the moving papers, unconverted forensic evidence established Richards
9 was holding his gun in his left hand with outstretched arms when shot, and all the witnessing
10 officers testified Richards was pointing his gun at or in the direction of Officer Tiner.

11 Accordingly, any discrepancy in officer testimony regarding which hand Richards used to hold
12 his gun in the immediacy of the moment they had to observe him is immaterial given the
13 absence of any evidence contradicting the officers’ consistent testimony that Richards was
14 pointing the gun at or in the direction of Officer Tiner. *See Thomas v. Cannon*, 289 F.Supp.3d
15 1182, 1194 (W.D. Wash. 2018).

16 Officer Tiner not firing is insufficient evidence for a jury to conclude Richards was not
17 pointing his gun at Officer Tiner. It would be one thing if Officer Tiner stood there and did
18 nothing. But that’s not what happened. Officer Tiner dove out of the way because he thought
19 Richards got the “drop” on him and he was going to get shot. No reasonable jury could
20 conclude Officer Tiner did this because Richards was surrendering with his hands up or laying
21 on the ground in a fetal position. Thus, Officer Tiner not firing supports concluding Richards
22 was pointing his gun at Officer Tiner.

23 ///

25 ¹ Several times plaintiffs refer to Richards as a “mentally-ill man in crisis.” Plaintiffs cite to
26 no evidence establishing Richards was mentally ill, much less in crisis. Ignoring that,
27 plaintiffs cite no evidence establishing *Officer Cox or Sergeant Edgerton* knew Richards was
28 “mentally ill.” *See Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019) (“Only
information known to the officer at the time the conduct occurred is relevant.”). Nonetheless,
the reasonable force analysis is the same whether or not Richards had a “mental illness.”
Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010).

1 Critically, plaintiffs presented no forensic evidence (e.g., trajectory analysis)
2 supporting their position. Plaintiffs presented no forensic evidence establishing Richards'
3 bullet wounds were consistent with him being shot while his hands were up. Plaintiffs
4 presented no forensic evidence consistent with Richards laying on the ground in a fetal
5 position when shot. And a post-shooting picture of Richards laying on his right side does not
6 in any way establish his pre-shooting position. And plaintiffs presented no forensic evidence
7 consistent with Richards being shot while ducking or turning away. Even if there was this
8 evidence, it would not matter. Being shot while ducking or turning away is not inconsistent
9 with Richards pointing his gun at officers. Likewise, bullet wounds on Richards' left side say
10 nothing more than where the officers were in relationship to Richards when shooting and does
11 not support concluding Richards' hands were up or he was otherwise not pointing his gun at
12 officers.

13 *b. Plaintiffs fail to show clearly established law put Officer Cox and Sergeant Edgerton*
14 *on notice that their use of deadly force under the facts of this case violated the Fourth*
Amendment

15 Plaintiffs cite to no controlling precedent holding the use of deadly force in response to
16 a gun being pointed at an officer violates the Fourth Amendment.

17 **2 Fourth Amendment Supervisor Liability Claim Against Lieutenant Sood**

18 *a. No reasonable jury could conclude Lieutenant Sood violated the Fourth Amendment*
19 *based on the evidence presented at trial*

20 Plaintiffs fail to address Lieutenant Sood's argument that the supervisor liability claim
21 against him fails for an absence of any evidence on causation. *See* Doc. 155-1, p. 23:1-26
22 (arguing absence of evidence on causation). Plaintiffs thus concede no causation evidence
23 exists. *See Shree Shiva, LLC v. City of Redding*, 2022 U.S. Dist. LEXIS 27551, at *3 (E.D.
24 Cal. Feb. 14, 2022) ("Plaintiff, by failing to address this argument in opposition, concedes this
25 point.") (Mendez, J.).

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1 *b. Plaintiffs fail to show clearly established law put Lieutenant Sood on notice that his*
2 *conduct as established by the evidence at trial violated the Fourth Amendment*

3 Plaintiffs fail to cite to any controlling authority establishing the alleged failures by
4 Lieutenant Sood violated the Fourth Amendment.

5 **3. Fourteenth Amendment Loss Of Familial Association Claim Against Officer Cox**
6 **and Sergeant Edgerton**

7 *a. No reasonably jury could conclude Officer Cox or Sergeant Edgerton violated the*
8 *Fourteenth Amendment because no reasonable jury could conclude they violated the*
9 *Fourth Amendment*

10 Because no reasonable jury could find Officer Cox or Sergeant Edgerton violated the
11 Fourth Amendment, plaintiffs' Fourteenth Amendment claim is foreclosed. *Gausvik v. Perez*,
12 392 F.3d 1006, 1008 (9th Cir. 2004); *see also Ochoa v. City of Mesa*, 26 F.4th 1050, 1056-57
13 (9th Cir. 2022) (“[T]he Fourteenth Amendment standard applicable to a claim by a relative
14 demands more of such a plaintiff than a Fourth Amendment claim by the victim of an officer's
15 actions”).

16 *b. No reasonably jury could conclude Officer Cox or Sergeant Edgerton violated the*
17 *Fourteenth Amendment under the applicable purpose to harm standard because the*
18 *evidence conclusively establishes the absence of conduct unrelated to a legitimate law*
19 *enforcement objective*

20 Plaintiffs argue the deliberate indifference standard rather than purpose to harm
21 standard applies because there was “plenty of time to deliberate prior” to using deadly force
22 because “defendants were alerted to the position of [Richards].” Doc. 158, p. 19. Plaintiffs’
23 argument is legally and factually wrong.

24 The implication plaintiffs make – defendants knew where Richards was hiding – is
25 factually inaccurate. “Defendants” had set up a perimeter in the area where Richards was last
26 seen but were conducting yard-to-yard searches because they did not know where within the
27 perimeter Richards might be hiding.

28 Legally, the issue is whether deliberation time existed at the moment the risk
necessitating deadly force presented itself. Prior deliberation time is not what is examined.
Ochoa makes this clear. In *Ochoa*, a lot happened over an extended period of time before the

1 shooting. *See* 26 F.4th at 1054-55. Despite pre-shooting time allowing officers to make
2 various decisions and despite knowing where the suspect was located, the appellate court
3 found the purpose to harm standard applied because the suspect’s conduct immediately
4 preceding the need for deadly force gave the officers a “split-second” to “react instantly,
5 without hesitation” in the “urgency of that moment.” *Id.* at 1057; *see also Hayes v. Cty. of San*
6 *Diego*, 736 F.3d 1223, 1230 (9th Cir. 2013) (“Appellant argues that the deputies could have
7 potentially avoided the incident by obtaining more information about Hayes or requesting a
8 psychiatric emergency response team ... before entering the house, but that option expired
9 when the deputies entered the house. The decision to employ deadly force in reaction to seeing
10 the knife was sudden and did not include deliberation.”).

11 Immediately upon discovering Richards, Officer Cox and Sergeant Edgerton made
12 instantaneous decisions on whether he posed a significant threat warranting deadly force; there
13 was no deliberation time. Thus, *Ochoa* and *Hayes* confirm the purpose to harm standard
14 applies.

15 To the extent the cases plaintiffs cite, *Nunez v. City of San Jose*, 381 F.Supp.3d 1192
16 (N.D. 2019) or *Nieto v. City & Cty. of S.F.*, 2015 U.S. Dist. LEXIS 154733 (N.D. Cal. Nov.
17 16, 2015), can be read to support consideration of time preceding the encountering of
18 Richards, they must give way to *Ochoa* and *Hayes* and are otherwise factually inapposite. *See*
19 *O’Neil v. City & Cty. of S.F.* 2021 U.S. Dist. LEXIS 129510, at *39-41 (N.D. Cal. July 12,
20 2021) (distinguishing *Nunez* and *Nieto* and concluding: “[A]s discussed above in the context of
21 Plaintiff’s Fourth Amendment claim, a jury might conclude that Samayoa lacked reasonable
22 grounds to consider O’Neil a threat to Samayoa as he approached or to the public if he
23 escaped. But even viewing the record in the light most favorable to Plaintiff, Samayoa had
24 less than a second to make that determination, and decide whether to shoot, give chase on foot,
25 or let O’Neil run away. He ‘did not have time to deliberate’ in making that decision”).

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1 c. *Plaintiffs fail to show clearly established law put Officer Cox and Sergeant Edgerton*
2 *on notice that their use of deadly force under the circumstances of this case violated*
3 *the Fourth Amendment*

4 Arguing the law was clearly established, plaintiffs point to *Nunez*, 381 F.Supp.3d 1192
5 and *Nieto*, 2015 U.S. Dist. LEXIS 154733 (N.D. Cal. Nov. 16, 2015). But district court cases
6 cannot constitute clearly established law for purposes of the qualified immunity analysis. *S. B.*
7 *v. Cty. of San Diego*, 864 F.3d 1010, 1016 (9th Cir. 2017) (“Plaintiffs argue that two district
8 court decisions ... provided clear warning to Moses. However, “district court decisions —
9 unlike those from the courts of appeals — do not necessarily settle constitutional standards or
10 prevent repeated claims of qualified immunity.””) (quoting *Hamby v. Hammond*, 821 F.3d
11 1085, 1095 (9th Cir. 2016) (quoting *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011))).

12 Even if district court decisions could be considered in the clearly established analysis,
13 *Nunez* was decided after the shooting in this case. *S.B.*, 864 F.3d at 1015 (“we decide if the
14 alleged violation of Brown's Fourth Amendment right against excessive force ‘was clearly
15 established *at the time of the officer's alleged misconduct*’”) (emphasis added). *Nunez* is also
16 factually different that this case, as is *Nieto*.

17 **B. This Court Should Enter Judgment as a Matter of Law on Plaintiffs' Bane Act**
18 **Claim Against Officer Cox, Sergeant Edgerton, and the City and Wrongful Death**
19 **- Negligence Claims Against Officer Cox, Sergeant Edgerton, Lieutenant Sood**
20 **and the City**

21 **1. Bane Act**

22 Plaintiffs do not dispute the proposition that their Bane Act fails if their Fourth
23 Amendment claim fails. Plaintiffs’ argument against judgment as a matter of law on this claim
24 is the same as their Fourth Amendment argument: “Plaintiff can prove Defendants shot and
25 killed a suicidal man attempting to surrender to police in reckless disregard for Darell’s [sic]
26 right to be free from excessive force.” Doc. 158, p. 25:11-13. Plaintiffs’ argument fails for the
27 reasons already discussed; that is, the absence of any evidence indicating Richards was
28 surrendering or doing anything other than pointing his gun at Officer Tiner.

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1 **2. Wrongful Death - Negligence**

2 a. *Lieutenant Sood: Plaintiffs gave up their direct negligence claim and vicarious*
3 *liability does not exist against him*

4 Plaintiffs do not address Lieutenant Sood’s argument that they gave up their direct
5 negligence claim against him and were pursuing vicarious liability only for which he could not
6 be liable because he was not an employer. *See* Doc. 155.1, pp. 12:7-9, 30:8-13, 32:24-27.
7 (discussing issue). Plaintiffs accordingly concede the arguments’ validity. *See Shree Shiva,*
8 2022 U.S. Dist. LEXIS 27551, at *3.

9 b. *Officer Cox/Sergeant Edgerton: Use of deadly force was objectively reasonable under*
10 *the facts of this case and no pre-shooting tactical decisions made by either render the*
reasonable use of force unreasonable²

11 Plaintiffs fault Officer Cox and Sergeant Edgerton for their preshooting tactical
12 decisions. Plaintiffs point to a failure “to request additional lighting to the backyard; using call
13 outs to summon Darell from his hiding spot; requesting a crisis negotiator to the scene; using
14 family as a resource to contact or call Darell on his cell phone.” Doc. 158, p. 24:3-8.
15 Plaintiffs, however, ignore the undisputed evidence establishing Officer Cox and Sergeant
16 Edgerton were not responsible for deciding what tactics to use to apprehend Richards.
17 Plaintiffs also ignore these tactical criticisms are precisely the type the court in *Villalobos v.*
18 *City of Santa Maria*, 85 Cal.App.5th 383, 391-92 (2022) found would not transform a
19 reasonable use of deadly force into an unreasonable one.

20 **C. This Court Should Enter Judgment as a Matter of Law on Plaintiffs' Punitive**
21 **Damage Claims Because Plaintiffs Presented No Evidence Of Conduct Necessary**
For Punitive Damages

22 Plaintiffs again rely on their flawed argument that a reasonable jury could conclude
23 Officer Cox and Sergeant Edgerton “killed a mentally ill man trying to surrender.” Doc. 158,
24 p. 25:15-16.

25 ///

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27 _____
28 ² The absence of negligence liability forecloses vicarious liability against the City.

1 Plaintiffs also cite *Atienza v. Hall*, 2021 U.S. Dist. LEXIS 146165 (N.D. Cal. Aug. 4,
2 2021) for the proposition that judgment as a matter of law on a punitive damage claim is
3 inappropriate because it is merely a damage claim. Although the court did conclude the
4 punitive damage claim was a “theor[y] of recovery” “that cannot be substantively challenged”
5 on summary judgment, *id.* at *21, to the extent the court denied summary judgment for some
6 reason other than disputed facts regarding the requisite level of conduct, the conclusion would
7 be incorrect. See *Johnson Indus. Sales, Inc. v. Strema Sales Corp.*, 224 F. App’x 709, 711 (9th
8 Cir. 2007) (“The district court did not err in granting TRW’s motion for summary judgment as
9 to punitive damages.”); *Brennan v. Johnson*, 2022 U.S. Dist. LEXIS 214585, at *47 (C.D.
10 Cal. Nov. 18, 2022) (“the court finds that summary judgment for Defendants on Plaintiff’s
11 request for punitive damages is appropriate”) And courts often grant judgment as a matter of
12 law on punitive damage claims. See e.g., *Specter v. Tex. Turbine Conversions, Inc.*, 2020 U.S.
13 Dist. LEXIS 243004, at *16 (D. Alaska Dec. 28, 2020); *Results ByIQ LLC v. NetCapital.com*
14 *LLC*, 2013 U.S. Dist. LEXIS 130119, at *15 (N.D. Cal. Sep. 11, 2013).

15 CONCLUSION

16 This is not a motion for judgment as a matter of law made after an adverse jury verdict.
17 Quite the opposite. Plaintiffs were unable to convince a jury that the evidence presented was
18 sufficient to warrant a finding of liability – under any theory – against Officer Cox, Sergeant
19 Edgerton or Lieutenant Sood. Plaintiffs point to zero evidence establishing the jury erred in
20 declining to find plaintiffs had met their burden of proof. For all the reasons discussed in the
21 moving papers and this reply, this Court should grant defendants’ motion for judgment as a
22 matter of law.

23
24 Dated: February 6, 2023

Dean Gazzo Roistacher LLP

25
26 By: /s/ Lee H. Roistacher

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11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**

13 KHOUA VANG; and TED RICHARDS,
14 JR., individually and as Co-Successors-in-
15 Interest to Decedent DARELL
16 RICHARDS,

17 Plaintiffs,

18 v.

19 CITY OF SACRAMENTO, a municipal
20 corporation; and DOES 1-50, inclusive,
21 individually and in their official capacity as
22 agents for the Sacramento Police
23 Department,

24 Defendants.

Case No.: 2:19-CV-00374-JAM-JDP

CERTIFICATE OF SERVICE

Courtroom: 6
Judge: Hon. John A Mendez
Magistrate: Hon. Jeremy D. Peterson

Complaint Filed: March 4, 2019
Trial Date: None set

25 I, Maria E. Kilcrease, declare:

26 That I am and was at the time of service of the papers herein referred to, over the age of
27 18 years, and not a party to the action; and I am employed in the County of San Diego, California,
28 in which county the within-mentioned mailing occurred. My business address is 440 Stevens
Avenue, Suite 100, Solana Beach, California 92075 and my electronic address is
mkilcrease@deangazzo.com.

On February 6, 2023, I served the following document described as:

**REPLY OF DEFENDANTS' CITY OF SACRAMENTO, SAMEER SOOD,
TODD EDGERTON AND PATRICK COX'S TOPLAINTIFFS' OPPOSITION
TORENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW**

on all interested parties in this action addressed as follows:

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Attorneys for the City of Sacramento, Patrick Cox, Todd Edgerton, and Sameer Sood

X BY ELECTRONIC SERVICE: On the date stated above, I served the documents via CM/ECF described above on designated recipients through electronic transmission of said documents; a certified receipt is issued to filing party acknowledging receipt by CM/ECF's system. Once CM/ECF has served all designated recipients, proof of electronic service is returned to the filing party.

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____ BY FACSIMILE: By use of a facsimile machine, telephone number (858) 492-0486, at approximately ____ a.m./p.m. on _____, I served a copy of the documents described above on all designated recipients. The facsimile machine I used complied with California Rules of Court, Rule 2033(3) and no error was reported by the machine.

BY E-MAIL: On the date stated above, I caused to be served the document via Email described above on designated recipients.

BY MAIL: By placing an envelope for collection and mailing following our ordinary business practices. I am readily familiar with the office's practice of collecting and processing of documents for mailing. Under that practice it would be deposited with the United States Postal Service on the same day in a sealed envelope with first-class postage prepaid at Solana Beach, California in the ordinary course of a business day.

____ BY OVERNIGHT DELIVERY: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 6, 2023.

By: Maria E. Kilcrease
Maria E. Kilcrease