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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

HERIBERTO RODRIGUEZ, et al.

Plaintiffs,

vs.

COUNTY OF LOS ANGELES, et al.

Defendants.

Case No.: CV-10-6342 CBM (AJWx)

**DEFENDANT HERNAN
DELGADO'S MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW**

Final PTC: August 19, 2013

Trial: September 17, 2013

TO THE HONORABLE CONSUELO B. MARSHALL, UNITED STATES
DISTRICT COURT JUDGE, AND TO PLAINTIFFS AND THEIR ATTORNEYS
OF RECORD:

PLEASE TAKE NOTICE THAT Defendant, HERNAN DELGADO
("Delgado" or "the named Defendant") hereby submits the following
Memorandum of Contentions of Fact and Law, pursuant to Local Rule 16-4:

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1 **1. STATEMENT OF FACTS AND SUMMARY OF CLAIMS AND**
2 **DEFENSES**

3 **A. Alleged Facts**

4 Plaintiffs claim their civil rights were violated during a serial cell extraction
5 that took place on August 25, 2008 at the Los Angeles County Men's Central Jail.
6 Delgado participated in only one of the five plaintiff extractions (Carlos Flores).

7 Flores was housed on module 3300, Baker row, cell four. He is a multiple-
8 convicted felon and admitted associate of the Southsiders prison gang. Flores
9 acknowledged throwing pieces of broken porcelain at deputies as they prepared for
10 the extraction of Baker row. One of the pieces hit a sergeant or captain.

11 The LASD supervisor of this extraction team, Sgt. Matthew Ohnemus, gave
12 Flores numerous orders to submit to handcuffing before deputies entered the cell.
13 Consistent with the Southsiders gang's rules and requirements, Flores did not
14 submit. Flores acknowledged that had he done so he would have been subject to
15 retaliation by fellow Southside gang members.

16 Like the other inmates, Flores stood his jail mattress up vertically and hid
17 behind it in the corner of the cell. Deputy personnel used a variety of tactics to get
18 Flores to submit to handcuffing before they entered the cell, such as 40 mm
19 projectiles and sting balls. Delgado did not deploy or participate in any of these
20 tactics. Flores continued to refuse to come out, so deputies entered the cell.

21 Upon entering Flores' cell, additional orders were given for him to give up.
22 However, he refused. Deputy personnel (*not* including Delgado) took Flores to the
23 ground when Flores refused to give up. While on the ground, Flores assaulted the
24 deputies by trying to push up off the ground and flailing his elbows back towards
25 the deputies while kicking back at them. Because of Flores' assaultive/high-risk
26 behavior, Delgado struck Flores 5-6 times on his back with a closed fist. Delgado
27 did not use anything other than a closed fist to strike Flores and did not strike
28 Flores anywhere other than his back.

Flores continued to fight and resist the deputies' efforts to subdue him and kept his hands tucked underneath his body while on the ground. When it became clear that the orders given to Flores to submit were being ignored, Sgt. Ohnemus directed Delgado to tase Flores. Delgado followed his Sergeant's order and applied the taser in the "drive stun" mode¹ to Flores' right shoulder. The taser application was effective and Flores stopped his assaultive behavior and was handcuffed. He was then taken out of his cell and given medical treatment. Delgado did not participate in taking Flores out of the cell and did not have any role in the videotaping of the extraction.

B. Summary of Key Evidence in Opposition to Plaintiff's Claims

Defendant's key evidence in defense of the case will be Delgado's testimony, testimony of other team members that extracted Flores, including Sgt. Ohnemus, as well as expert witnesses Commander (Ret.) Gil Jurado and Dr. Martin Shoji.

C. Summary Statement of Counterclaims and Affirmative Defenses and Key Evidence in Support

1. Second Affirmative Defense - Comparative Fault

(a) Factual Basis:

The damages alleged by Plaintiff in the Second Amended Complaint were not caused by the fault, carelessness, negligence or wrongful conduct on the part of the named Defendant, but if any such fault, carelessness, or negligence is found to exist, any recovery or award of damages must be diminished in proportion to the amount of fault attributable to Plaintiffs.

(b) Elements:

In actions for injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but

¹ The "drive stun" application of the taser entails applying the prongs directly onto the suspect, as opposed to use of the "dart mode", which involves firing small darts attached by wires to the taser.

1 the damages awarded shall be diminished in proportion to the amount of
2 negligence attributable to the person recovery. *Li v. Yellow Cab Co.*, 532 P.2d
3 1226, 1243 (Cal. 1975).

4 (c) **Key Evidence:**

5 Testimony of Plaintiffs and Defendants.

6 **2. Fourth Affirmative Defense – Failure to Mitigate Damages**

7 (a) **Factual Basis:**

8 Plaintiffs have failed to mitigate their damages.

9 (b) **Elements:**

10 The plaintiffs have a duty to use reasonable efforts to mitigate
11 damages. *See* Ninth Circuit Model Jury Instructions: Civil §5.3 (2007)

12 (c) **Key Evidence:**

13 Testimony of the Plaintiffs and Dr. Kent Shoji.

14 **3. Seventh Affirmative Defense – California Govt. Code §820.2,**
15 **et. seq.**

16 (a) **Factual Basis:**

17 Any and all acts of the named Defendant which allegedly
18 caused the injury at the time and place set forth in the Second Amended Complaint
19 were in the exercise of discretion vested in him and therefore there is no liability
20 pursuant to California *Government Code* §820.2, et. seq.

21 (b) **Elements:**

22 Except as otherwise provided by statute, a public employee is
23 not liable for an injury resulting from his act or omission where the act or omission
24 was the result of the exercise of the discretion vested in him, whether or not such
25 discretion is abused. California *Government Code* §820.2, et. seq.

26 (c) **Key Evidence:**

27 Testimony of the named Defendant and police practices/use of
28 force expert witnesses.

1 **4. Twelfth Affirmative Defense – Qualified Immunity**

2 **(a) Factual Basis:**

3 The named Defendant claims protection for his actions under
4 the theory of qualified immunity.

5 **(b) Elements:**

6 By virtue of the Eleventh Amendment of the United States
7 Constitution, states and state employees acting in their official capacities are not
8 subject to suit under 42 USC § 1983 and 1985. *Will v. Michigan Department of*
9 *State Police*, 491 U.S. 58, 71 (1989); *Saucier v. Katz*, 533 U.S. 194 (2001);
10 *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1020 (9th Cir 2009).

11 **(c) Key Evidence:**

12 Testimony of the named Defendant and police practices/use of
13 force expert witnesses.

14 **5. Fourteenth Affirmative Defense – Sheriff’s Deputies Are**
15 **Immune State Officials**

16 **(a) Factual Basis:**

17 Sheriff’s deputies are immune state officials if state laws and
18 judicial interpretations establish that their acts were on behalf of the state when
19 enforcing its laws and protecting the public welfare.

20 **(b) Elements:**

21 Sheriff’s deputies are immune state officials if state laws and
22 judicial interpretations establish that their acts were on behalf of the state when
23 enforcing its laws and protecting the public welfare. *McMillan v. Monroe County,*
24 *Alabama*, 520 U.S. 781, 791-792 (1997); *Saucier v. Katz*, 533 U.S. 194 (2001);
25 *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1020 (9th Cir. 2009).

26 **(c) Key Evidence:**

27 Testimony of the named Defendant and police practices/use of
28 force expert witnesses.

1 **D. Identification of Anticipated Evidentiary Issues**

2 There are a number of anticipated evidentiary issues. Plaintiffs filed six
3 motions in limine and Defendants filed 13 motions that fully address these issues.

4 **E. Identification of Any Issues Of Law**

5 One possible issue of law will be whether “threats, intimidation, or
6 coercion” that is separate and distinct from the alleged underlying constitutional
7 violation, pursuant to California *Civil Code* §52.1.

8 Additionally, the individual Defendants who used force at the direction of
9 their Sergeant (including Delgado) are appealing the Court’s denial of summary
10 judgment/adjudication on the grounds of qualified immunity. Plaintiffs have filed
11 a motion for clarification, pursuant to *Chuman v. Wright*.

12 **2. BIFURCATION OF ISSUES**

13 Defendants seek to bifurcate the *Monell* claim from the claims against the
14 individual deputies (see Defendants’ motion in limine no. 1).

15 **3. JURY TRIAL**

16 Defendant has requested a trial by jury in his answer.

17 **4. ATTORNEYS’ FEES**

18 Defendant is not making a claim for attorney’s fees. Plaintiffs claim they
19 are entitled to attorneys fees, pursuant to their California *Civil Code* §52.1 claim.
20 Defendants claim any applicable fees are governed by the Prison Reform Litigation
21 Act.

22 **5. ABANDONMENT OF ISSUES**

23 Defendant has abandoned the affirmative defenses not listed herein.
24

25 Dated: July 29, 2013

SEKI, NISHIMURA & WATASE, LLP

26 By: /s/

27 J. EDWIN RATHBUN, JR.

28 Attorneys for Defendant Hernan Delgado