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County of Los Angeles, Sheriff Leroy D. Baca,
Fernando Luviano, and David Ortega

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL HOLGUIN,

Plaintiff,

vs.

COUNTY OF LOS ANGELES, LOS
ANGELES COUNTY SHERIFF'S
DEPARTMENT, SHERIFF LEE
BACA, DEPUTY RICO, DEPUTY
FERNANDO LUVIANO, DEPUTY
LASCANO, AND DOES 1-10,

Defendants.

Case No. CV 10-08011 GW (PLAx)

Honorable George H. Wu

**DEFENDANTS' NOTICE OF
INTERLOCUTORY APPEAL OF
DENIAL OF QUALIFIED
IMMUNITY**

TO THE HONORABLE COURT, ALL PARTIES, AND TO THEIR
COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendants Los Angeles County Sheriff
Leroy D. Baca and Deputy David Ortega (hereinafter "Defendants") hereby
appeal to the United States Court of Appeals for the Ninth Circuit from the
Tentative Rulings of this Court dated and filed on February 23 (*see* February 23,

2012, Tentative Ruling, a true and correct copy of which is attached hereto as Exhibit "A") and March 26, 2012 (*see* March 26, 2012, Tentative Ruling, a true and correct copy of which is attached hereto as Exhibit "B"), denying the Defendants' request for qualified immunity. Although the Court has not issued a final order yet, Defendants are filing this Notice of Interlocutory Appeal of Denial of Qualified Immunity out of an abundance of caution within thirty days from the Court's final ruling on April 12, 2012, (*see* April 12, 2012, Ruling on Defendants' Motion For Summary Judgment, or in the Alternative, Summary Adjudication, a true and correct copy of which is attached hereto as Exhibit "C"), wherein the Court granted in part and denied in part Defendants' Motion For Summary Judgment, or in the Alternative, Summary Adjudication. Parties in this matter are in the process of drafting a joint proposed order.

This interlocutory appeal is expressly authorized by *Ortiz v. Jordan*, ____ U.S. ____, 131 S.Ct. 884, 891, 178 L.Ed.2d 703 (2011), *citing Mitchell v. Forsyth*, 472 U.S. 511, 525-527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) and *Knox v. Southwest Airlines*, 124 F.3d 1103, 1106-1107 (9th Cir. 1997) on the basis that the Defendants' alleged conduct did not violate Plaintiff's constitutional rights and did not violate clearly established law.

Dated: May 9, 2012

LAWRENCE BEACH ALLEN & CHOI, PC

By /s/ Christopher T. Kim
 Christopher T. Kim
 Attorneys for Defendants
 Sheriff Leroy D. Baca and David
 Ortega

EXHIBIT “A”

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-8011-GW(PLAx)

Date February 23, 2012

Title *Michael Holguin v. County of Los Angeles, et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez

Pat Cuneo

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Virginia Keeny

Nathan A. Oyster

PROCEEDINGS: DEFENDANTS COUNTY OF LOS ANGELES, SHERIFF LEROY D. BACA, FERNANDO LUVIANO, DAVID ORTEGA, AND GIOVANNI RICO'S MOTION FOR SUMMARY JUDGEMENT (filed 12/15/11)

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, the motion is continued to **March 19, 2012 at 8:30 a.m.** Parties may file a three-page brief regarding the points raised in the tentative by March 12, 2012.

Initials of Preparer JG

: 12

Holguin v. County of Los Angeles, et al., Case No. CV-10-8011

Tentative Ruling on Defendants County of Los Angeles, Sheriff Leroy D. Baca, Fernando Luviano, David Ortega, and Giovanni Rico's Motion for Summary Judgment or, in the Alternative, Summary Adjudication

Defendants County of Los Angeles ("COLA"), Sheriff Leroy D. Baca, Fernando Luviano, David Ortega and Giovanni Rico (collectively "Defendants") have moved for summary judgment or, in the alternative, summary adjudication in this prisoner excessive force case¹ brought by Michael Holguin ("Plaintiff"), on 12 separate grounds: 1) that there is no genuine issue of material fact that COLA had a custom, policy, or practice sufficient for *Monell* liability; 2) that Defendants are entitled to judgment as a matter of law on Plaintiff's 42 U.S.C. § 1983 claim because of Plaintiff's failure to state a cognizable claim; 3) that the force used against Plaintiff was reasonable, dooming Plaintiff's section 1983 claim against all Defendants; 4) that COLA is entitled to judgment as a matter of law on Plaintiff's claims under state law in light of the effect of California Government Code section 844.6; 5) that Baca cannot be held vicariously liable; 6) that Baca did not fail to train Luviano and Ortega; 7) that Plaintiff cannot establish that any action taken by Baca was the proximate cause of his injuries; 8) that all individual defendants are entitled to qualified immunity; 9) that Plaintiff's claims under California's Bane Act fail because Plaintiff has not alleged separate conduct causing interference or coercion; 10) that any use of force was reasonable such that there was no battery; 11) that Plaintiff's claim for intentional infliction of emotional distress is barred because Defendants' conduct was not extreme and outrageous and because Plaintiff suffered no severe emotional distress; and 12) that Plaintiff's negligence claims fail because they are not authorized by statute and because no defendant breached any duty to Plaintiff.

Certain of the above issues – issues 2, 3, 4, 5, 8, 10 and 11 – are ready for resolution at this time, in whole or in part. The remainder requires further thought.

¹ The First Amended Complaint, filed in this action on February 9, 2011, contains five claims for relief: 1) a 42 U.S.C. § 1983 claim for violation of civil rights based on excessive force in violation of the Fourth Amendment; 2) a claim under California Civil Code § 52.1; 3) a claim for battery; 4) a claim for intentional infliction of emotional distress; and 5) a claim for negligence. All five claims are brought against all Defendants.

A. Summary Judgment Standards

Summary judgment shall be granted when a movant “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In other words, summary judgment should be entered against a party “who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798-99 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 2902 (2011). The court does not make credibility determinations or weigh conflicting evidence at this stage. See *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir.1987). All evidence must be viewed in the light most favorable to the non-moving party. See *Hrdlicka v. Reniff*, 631 F.3d 1044 (9th Cir. 2011), *cert. denied*, __ S.Ct. __, 2012 WL 538355 (Feb. 21, 2012).

A moving party without the ultimate burden of persuasion may carry its burden of production on summary judgment by negating an essential element of the opposing party’s claim or defense or by “showing” the opposing party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.² See *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

[If] the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.

T.W. Elec., 809 F.2d at 630 (citing, among other cases, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). “Summary judgment may be resisted and

² Although the Ninth Circuit has indicated that the latter of these two methods does not allow the moving party to “require the nonmoving party to produce evidence supporting its claim or defense simply by saying that the nonmoving party has no such evidence,” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105 (9th Cir. 2000), it has also indicated (by way of a parenthetical citation in an *en banc* opinion) that the necessary “showing” can be made by “pointing out through argument...the absence of evidence to support plaintiff’s claim,” *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*en banc*) (quoting *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000)). See also Schwarzer, Tashima, et al., California Practice Guide: Federal Civil Procedure Before Trial (2011) §§ 14:137-137.1, at 14-46 – 47.

must be denied on no other grounds than that the movant has failed to meet its burden of demonstrating the absence of triable issues.” *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993).

B. Plaintiff Has a Cognizable Section 1983 Claim

Defendants’ argument for why Plaintiff does not have a cognizable claim under 42 U.S.C. § 1983 rests upon the fact that the First Amended Complaint relies upon the Fourth Amendment as the source of the excessive force principle, whereas it is the Eighth Amendment that applies to Plaintiff’s situation. As Plaintiff acknowledges, Defendants are correct that the Eighth Amendment applies, *see Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002), but the Court will allow Plaintiff to proceed under that Amendment and its applicable standards (in effect, granting Plaintiff leave to amend in that regard, whether examined under Fed. R. Civ. P. 15 or 16).³

Defendants have obviously been aware that it is the Eighth Amendment, and not the Fourth Amendment, that is implicated on these facts, as they were the ones who raised it in connection with this motion. They were, therefore, not operating under any mistake as to the applicable standards. The same facts are germane to claims under both standards. Defendants have not suggested how they could possibly be prejudiced by allowing Plaintiff to proceed under the correct standard. Nor have they indicated that they raised this issue with Plaintiff at any time before filing their summary judgment motion such that Plaintiff could be charged with an unreasonable delay in seeking to effectively amend his claim.

C. With One Minor Exception, Disputed Facts Concerning the Force Used and Surrounding Circumstances Preclude Resolution at This Stage of Plaintiff’s Section 1983 and Battery Claims in Defendants’ Favor

Upon review of Plaintiff’s deposition, it is plain that there are disputed issues of fact with respect to whether the force at least Luviano used was appropriate under the prevailing standards.⁴ *See* Plaintiff’s Statement of Genuine Disputes of Material Fact in

³ *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937 (7th Cir. 2011), which Defendants cite in their Reply, actually supports allowing Plaintiff to “amend” here because there is obviously “some evidence...back[ing] [Plaintiff’s claims] up.” *Id.* at 944.

⁴ Of the evidentiary objections Defendants pose to the citations to Plaintiff’s depositions, the Court would sustain only a handful (and, of that handful, a few only in part): objections 27 (insofar as Plaintiff testifies to the fact that “nobody” talked to “anybody,” but not insofar as he testifies that nobody talked to him), 30

Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication, POR⁵ ¶¶ 17-20, 22-27, 29-32, 36-39, and PAF⁶ ¶¶ 4, 10-12, 14-18, 20-21, 23-27, 35, 48, 70, 78-79, 86. This is often true when excessive force cases are examined at the summary judgment stage. *See, e.g., Liston v. County of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir. 1997) (examining under Fourth Amendment). Even under the applicable Eighth Amendment standard, the Court cannot resolve the facts in Defendants' favor. *See Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003) ("In the context of quelling a prison disturbance the question of whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.") (omitting internal quotation marks) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)); *Clement*, 298 F.3d at 903.

Here, if Plaintiff's account of the events that transpired is to be believed – and it is not for the Court, on this motion, to reject that account – Luviano responded to a completely non-threatening situation by, among other things, handcuffing and then hitting, kicking and beating (with a metal flashlight) Plaintiff all over his body, causing serious injury. This would, almost by definition, qualify as malicious and sadistic, done for the purpose of causing harm. *See, e.g., Motley v. Parks*, 432 F.3d 1072, 1088 (9th Cir. 2005) (*en banc*) ("The use of a force against a person who is helpless or has been subdued is constitutionally prohibited."); *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996) ("Because there was no need for force, one can reasonably infer that Koch took these actions not in good faith but for the purpose of causing harm.").

Plaintiff has similarly made out a claim for battery against at least Luviano. "The elements of a battery claim in California are that (1) the defendant intentionally did an

(as to page 97:20-25 of the deposition transcript), 46 (as to pages 192:11-16 and 192:23-193:4), 47 (the entire portion) and 51 (as to page 160:6-15). None of those rulings have any effect on the Court's conclusion that there are triable issues of fact with respect to the use of force.

⁵ "POR" refers to that portion of Plaintiff's Statement of Genuine Disputes of Material Fact in Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication in which Plaintiff responds to Defendants' Undisputed Material Facts.

⁶ "PAF" refers to that portion of Plaintiff's Statement of Genuine Disputes of Material Fact in Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication in which Plaintiff sets forth his Additional Material Facts and Supporting Evidence.

action that resulted in harmful or offensive contact with the plaintiff's person, (2) the plaintiff did not consent to the contact, and (3) the contact caused injury, damage, loss or harm to the plaintiff." *Tekle v. United States*, 511 F.3d 839, 855 (9th Cir. 2007). Defendants direct the Court to *Edson v. City of Anaheim*, 63 Cal.App.4th 1269 (1998), where, on an "issue...of first impression in California," the Court of Appeal considered whether a plaintiff must prove "unreasonable force" as part of a battery cause of action against a police officer. *Id.* at 1272. The court answered the question in the affirmative. *See id.* 1272-75; *see also Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1129 (9th Cir. 2010) ("Under California law, a plaintiff bringing a battery claim against a law enforcement official has the burden of proving the officer used unreasonable force."), *petition for cert. filed*, 80 U.S.L.W. 3004 (U.S. June 20, 2011) (No. 10-1536); *Johnson v. County of Los Angeles*, 340 F.3d 787, 794 (9th Cir. 2003). Even under the *Edson* standard, however, there are triable issues of fact with respect to Luviano's use of force.

Whether Ortega's use of force was permissible under the Eighth Amendment and *Edson* standards, however, is a closer question that the Court will have to consider in further detail before reaching a decision. In addition, Baca, who was not at the scene, *see* POR ¶ 64, could not be liable for battery. *See* Cal. Gov't Code § 820.8.

D. Given the Above-Recited Facts – Viewed in Plaintiff's Favor – Luviano Is Not Entitled to Qualified Immunity at This Stage

A qualified immunity inquiry asks two questions: (1) was there a violation of a constitutional right, and, if so, then (2) was the right at issue 'clearly established' such that it would have been clear to a reasonable officer that his conduct was unlawful in that situation? *See Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). As noted above, when the facts are viewed in Plaintiff's favor, there was a clear violation of Plaintiff's Eighth Amendment right to be free from excessive force. Although Defendants would like the Court to view the facts in their favor, that is not how the analysis proceeds at this stage, as *Martinez* and other Ninth Circuit decisions make clear. *See Martinez*, 323 F.3d at 1184; *Hopkins v. Bonvicino*, 573 F.3d 752, 776 (9th Cir. 2009); *Blankenhorn v. City of Orange*, 485 F.3d 463, 471 (9th Cir. 2007); *Davis v. City of Las Vegas*, 478 F.3d 1048, 1051, 1055 (9th Cir.

2007); *LaLonde v. County of Riverside*, 204 F.3d 947, 963 (9th Cir. 2000) (Trott, J., concurring & dissenting).

The Ninth Circuit has also determined that “the law regarding a prison guard’s use of excessive force was clearly established” no later than 1994.⁷ *Martinez*, 323 F.3d at 1183; *see also Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-37 (9th Cir. 2003) (“In order to find that the law was clearly established...we need not find a prior case with identical, or even ‘materially similar,’ facts. Our task is to determine whether the preexisting law provided the defendants with ‘fair warning’ that their conduct was unlawful.”); *cf. Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (“[I]n an obvious case, these [Fourth Amendment excessive force] standards can ‘clearly establish’ the answer, even without a body of relevant case law.”); *Davis*, 478 F.3d at 1057 (“Any reasonable officer in Officer Miller’s position would have known, in light of the *Graham* factors discussed *supra* and our case law interpreting them, that swinging a handcuffed man into a wall head-first multiple times and then punching him in the face while he lay face-down on the ground, and breaking his neck as a result, was unnecessary and excessive.”); *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003) (concluding that force used was unreasonable and that right to be free of such force was clearly established where suspect posed no safety risk, made no attempt to leave, crimes investigated were nonviolent offenses, and force used included grabbing suspect by the arms, throwing her to the

⁷ In *Skrtich v. Thornton*, 280 F.3d 1295 (11th Cir. 2002), the Eleventh Circuit explained the point in further detail:

The argument that beating a prisoner for noncompliance with a guard’s orders after the prisoner had ceased to disobey or resist turns the “clearly established law” of excessive force on its head and changes the purpose of qualified immunity in excessive force cases from one of protection for the legitimate use of force into a shield for clearly illegal conduct. The law of excessive force in this country is that a prisoner cannot be subjected to gratuitous or disproportionate force that has no object but to inflict pain. This is so whether the prisoner is in a cell, prison yard, police car, in handcuffs on the side of the road, or in any other custodial setting. The use of force must stop when the need for it to maintain or restore discipline no longer exists. Long before the defendants acted, the law was clearly established that correctional officers could not use force maliciously or sadistically for the very purpose of causing harm.

The Supreme Court has made it clear in *Hudson* that the same standard applies to all prison excessive force claims. Any reasonable official understands the contour of this right.

Id. at 1304-05 (omitting internal citations).

ground and twisting her arms while handcuffing her); *Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001) (“Every police officer should know that it is objectively unreasonable to shoot—even with lead shot wrapped in a cloth case—an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.”).

In addition, unlike the situation in *Marquez v. Gutierrez*, 322 F.3d 689, 692-93 (9th Cir. 2003), there is no room for a reasonable officer to believe in the lawfulness of Luviano’s conduct under the facts Plaintiff proffers. For that reason, qualified immunity would be denied at least as to him.⁸ The case is obviously better in that regard for Ortega, however, insofar as, even under Plaintiff’s version of the facts, he arrived at the scene at a time when both Plaintiff and Luviano were already on the floor. *See* PAF ¶¶ 18-20. Even as to Ortega, however, the level of force he applied *may* make qualified immunity inappropriate. *See id.* ¶¶ 21, 23-24. Therefore, the Court will consider that question in further detail before reaching a conclusion on the issue.

E. There are Triable Issues of Fact on Plaintiff’s Intentional Infliction of Emotional Distress Claim, at Least as to Luviano

As with the Section 1983 and battery claims, there are triable issues of fact with respect to both the extreme and outrageous nature of Luviano’s actions *vis a vis* Plaintiff and Plaintiff’s resulting emotional distress.⁹ *See* POR ¶ 41; *Berkley v. Dowds*, 152 Cal.App.4th 518, 533 (2007) (indicating that a claim for intentional infliction of emotional distress consists of three elements: 1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of

⁸ Because a section 1983 claim against Luviano would proceed, at a minimum, the Court could not decline supplemental jurisdiction over Plaintiff’s state law claims, a request Defendants make for the first time in their Reply brief.

⁹ *Wong v. Tai Jing*, 189 Cal.App.4th 1354 (2010), upon which Defendants rely with respect to the emotional distress question, was not a summary judgment decision. Given his testimony, it is not clear that Plaintiff’s distress is of the same limited nature and degree as that which was at issue in *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 622 (9th Cir. 2003), which was a summary judgment decision. *See also Fletcher v. W. Nat’l Life Ins. Co.*, 10 Cal.App.3d 376, 397 (1970) (“[T]he requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry.”).

causing, emotional distress; 2) the suffering of severe or extreme emotional distress; and 3) actually and proximate causation of the injuries by the outrageous conduct); *Tekle*, 511 F.3d at 855. However, for similar reasons as expressed above, whether or not Ortega can be charged with extreme and outrageous conduct is a much closer question. The Court will therefore consider that issue in more detail before reaching a final conclusion.

Finally, because, again, he was not present at the incident, Baca cannot be liable on Plaintiff's intentional infliction claim. *See* Cal. Gov't Code § 820.8.

F. Conclusion (on the Issues Ready for Decision)

Given the above analysis, the Court will allow Plaintiff to pursue an Eighth Amendment-based section 1983 claim. It will deny the motion insofar as it seeks resolution, in Luviano's favor, on the section 1983 claim, qualified immunity, and the battery and intentional infliction of emotional distress claims. It will grant the motion in Baca's favor on Plaintiff's battery and intentional infliction of emotional distress claims.¹⁰ In addition, because the parties have consented (or Plaintiff has conceded the point), the Court will also: 1) dismiss the Los Angeles County Sheriff's Department as a separate defendant; 2) dismiss Rico entirely (*see* Plaintiff's Opposition Brief at 15 n.15¹¹); and 3) dismiss COLA with respect to Plaintiff's state law claims, in light of California Government Code § 844.6(a)(2).

The Court will consider the remaining issues further before issuing a final ruling on the instant motion.

¹⁰ The Court might also grant the motion in Baca's favor on Plaintiff's Civil Code section 52.1 claim based on the fact that he was not present at the scene. However, Defendants raised this point for the first time in their Reply brief. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). The Court would therefore ask Plaintiff whether he has any position to take on this point or whether he would instead concede that Baca is not a proper defendant on that claim.

¹¹ Plaintiff indicates that he had agreed to dismiss Rico in exchange for a mutual waiver and that such a dismissal would be filed in advance of the summary judgment hearing. It does not appear that the parties have filed such a voluntary dismissal. Before it dismisses Rico, the Court would question the parties about this issue.

EXHIBIT “B”

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-8011-GW(PLAx)

Date March 26, 2012

Title *Michael Holguin v. County of Los Angeles, et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez

Pat Cuneo

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Virginia Keeny

Nathan A. Oyster

PROCEEDINGS: DEFENDANTS COUNTY OF LOS ANGELES, SHERIFF LEROY D. BACA, FERNANDO LUVIANO, DAVID ORTEGA, AND GIOVANNI RICO'S MOTION FOR SUMMARY JUDGMENT (filed 12/15/11)

The Court's Tentative Ruling is circulated and attached hereto. Parties will file simultaneous supplemental briefs by April 2, 2012. The motion is continued to **April 12, 2012 at 8:30 a.m.**

: 05

Initials of Preparer JG

Holguin v. County of Los Angeles, et al. Case No. CV-10-8011

Further Tentative Ruling on Motion for Summary Judgment or, in the Alternative,
Summary Adjudication

I. Background

On December 15, 2011, defendants County of Los Angeles (“COLA”), Sheriff Leroy D. Baca, and Sheriff’s Deputies Fernando Luviano, David Ortega and Giovanni Rico (collectively “Defendants”) moved for summary judgment or, in the alternative, on 12 separate grounds for summary adjudication in this prisoner excessive force case¹ brought by Michael Holguin (“Plaintiff”). On February 23, 2012, the Court issued a ruling resolving several of the grounds identified for summary resolution. *See* Docket No. 89.² Remaining for consideration are the Defendants’ following contentions (numbered as they were in Plaintiff’s original Notice of Motion): 1) that there is no genuine issue of material fact that COLA had a custom, policy, or practice sufficient for *Monell* liability; 6) that Baca did not fail to train Luviano and Ortega; 7) that Plaintiff cannot establish that any action taken by Baca was the proximate cause of his injuries; 8) that all individual defendants are entitled to qualified immunity; 9) that Plaintiff’s claims under California’s Bane Act fail because Plaintiff has not alleged separate conduct causing interference or coercion; and 12) that Plaintiff’s negligence claims fail because they are not authorized by statute and because no defendant breached any duty to Plaintiff. In addition, the Court will now resolve whether the force Ortega used in connection with the underlying incident was reasonable, such that he could not be liable under either a 42 U.S.C. § 1983 claim or a battery claim, and whether there are triable issues of fact with respect to his liability on the intentional infliction of emotional distress claim, all open issues that remain from three other grounds for relief raised in Defendants’ motion that were resolved as to other defendants in the Court’s February 23

¹ The First Amended Complaint, filed in this action on February 9, 2011, contains five claims for relief: 1) a 42 U.S.C. § 1983 claim for violation of civil rights based on excessive force in violation of the Fourth Amendment; 2) a claim under California Civil Code § 52.1; 3) a claim for battery; 4) a claim for intentional infliction of emotional distress; and 5) a claim for negligence. All five claims are brought against all Defendants.

² Among other things, Rico was dismissed as a result of that hearing. *See* Docket No. 89, at 8.

ruling, but not as to Ortega.

II. Analysis

A. Summary Judgment Standards

Summary judgment shall be granted when a movant “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In other words, summary judgment should be entered against a party “who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798-99 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 2902 (2011). The court does not make credibility determinations or weigh conflicting evidence at this stage. See *T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir.1987). All evidence must be viewed in the light most favorable to the non-moving party. See *Hrdlicka v. Reniff*, 631 F.3d 1044 (9th Cir. 2011), *cert. denied*, __ S.Ct. __, 2012 WL 538355 (U.S. Feb. 21, 2012).

A moving party without the ultimate burden of persuasion may carry its burden of production on summary judgment by negating an essential element of the opposing party’s claim or defense or by “showing” the opposing party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.³ See *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

[If] the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that

³ Although the Ninth Circuit has indicated that the latter of these two methods does not allow the moving party to “require the nonmoving party to produce evidence supporting its claim or defense simply by saying that the nonmoving party has no such evidence,” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105 (9th Cir. 2000), it has also indicated (by way of a parenthetical citation in an *en banc* opinion) that the necessary “showing” can be made by “pointing out through argument...the absence of evidence to support plaintiff’s claim,” *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*en banc*) (quoting *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000)). See also Schwarzer, Tashima, et al., *California Practice Guide: Federal Civil Procedure Before Trial* (2011) §§ 14:137-137.1, at 14-46 – 47.

there is a genuine issue for trial.

T.W. Elec., 809 F.2d at 630 (citing, among other cases, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). “Summary judgment may be resisted and must be denied on no other grounds than that the movant has failed to meet its burden of demonstrating the absence of triable issues.” *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993).

To set the parameters of the substantive analysis which follows, the Court briefly addresses Defendants’ evidentiary objections.⁴

B. Evidentiary Objections

All of Defendants’ evidentiary objections would be overruled other than the following:

27. Sustain insofar as Plaintiff testifies to the fact that “nobody” talked to “anybody,” but not insofar as he testifies that nobody talked to him.

30. Sustain as to page 97:20-25 of the deposition transcript.

46. Sustain as to pages 192:11-16 and 192:23-193:4.

47. Sustain in full the entire portion.

51. Sustain as to 160:6-15.

52. Sustain as to 94:20-95:7.

53. Sustain.

157. Sustain as to 107:19-108:4.

164. Sustain.

172. Sustain.

203. Sustain.

212. Sustain.

229. Sustain.

C. COLA’s Monell Liability

In light of the above rulings on Defendants’ evidentiary objections (for purposes of this summary judgment only), there is sufficient evidence supporting triable issues of fact with respect to multiple potential avenues for *Monell* liability against COLA. *See*

⁴ The Court rules only on separately-filed *evidentiary* objections, not on objections to factual statements or characterizations within the parties’ respective supporting and opposing separate statements of fact.

Plaintiff's Statement of Genuine Disputes of Material Fact in Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication, POR⁵ ¶¶ 48-50, 52-53, 57-61, PAF⁶ ¶¶ 56, 62-63, 69, 72, 75-79, 83, 92-94, 97-101, 121-22, 124-25, 128, 130, 133, 138-41, 144-47, 153, 159, 164-65, 169-70, 172, 176-77, 179, 184-85, 206, 208, 210, 212-13, 217, 223-25, 228, 238-43, 246, 248-55, 259-60, 262-67, 270-71, 282-85, 289, and USPAF⁷ ¶¶ 1-5, 8-9, 12-16, 18, 20-22, 24. Just as an example, Plaintiff has evidence that 1) COLA has a policy or custom of paying insufficient attention to evidence of deputies' records of violent behavior, both on and off the job, and 2) COLA has failed to train its deputies in connection with the (apparently relatively common) use of a flashlight as a weapon and the use of force in general against handcuffed prisoners.⁸ See *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404, 407 (1997); *City of Canton v. Harris*, 489 U.S. 378, 387, 390 n.10 (1989) (providing as an example of the "obvious" need "for more or different training" the fact that a city knows "to a moral certainty that their police officers will be required to arrest fleeing felons" and that it "has armed its officers with firearms, in part to allow them to accomplish this task," meaning that "the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights) (internal citation omitted); *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) ("Failure to train may amount to a policy of 'deliberate indifference,' if the need to train was obvious and the failure to do so made a violation of constitutional rights likely."); *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1234 n.8 (9th Cir. 2011) ("[E]vidence of inaction – specifically, failure to investigate and discipline employees in the face of widespread constitutional violations –

⁵ "POR" refers to that portion of Plaintiff's Statement of Genuine Disputes of Material Fact in Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication in which Plaintiff responds to Defendants' Undisputed Material Facts.

⁶ "PAF" refers to that portion of Plaintiff's Statement of Genuine Disputes of Material Fact in Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication in which Plaintiff sets forth his Additional Material Facts and Supporting Evidence.

⁷ "USPAF refers to Plaintiff's Additional Statement of Genuine Disputes of Material Fact and Confidential Materials in Support Thereof, filed under seal.

⁸ Defendants argue that they need not have trained guards in these respects because the wrongfulness of such conduct would be obvious. If, indeed, the wrongfulness was obvious to any guard, one would not expect repeated implementation of such practices.

can support an inference that an unconstitutional custom or practice has been unofficially adopted by a municipality.”) (emphasis omitted). Set in the context of the almost-pervasive reports of guard-on-inmate violence emanating from Los Angeles County’s Men’s Central Jail as described in the evidence Plaintiff has adduced, COLA’s failure to address these issues could give rise to its liability here, even under an Eighth Amendment standard.

This is by no means a suggestion that these are the *only* routes to *Monell* liability Plaintiff has begun to pave by way of this proceeding. Their presence, however, is certainly sufficient to deny Defendants’ argument that the Court can resolve the issue of *Monell* liability in COLA’s favor at this stage.

D. Disputed Facts Concerning the Force Used and Surrounding Circumstances Preclude Resolution at This Stage of Plaintiff’s Section 1983, Battery and Intentional Infliction Claims in Ortega’s Favor

Even under the applicable Eighth Amendment standard, the Court cannot resolve the facts conclusively in Ortega’s favor. See *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003) (“In the context of quelling a prison disturbance the question of whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”) (omitting internal quotation marks) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)); *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002). While it is true that no party disputes that Ortega arrived upon the scene only *after* Luviano and Plaintiff were already engaged, see POR ¶¶ 20-21 and PAF ¶ 19, there are disputed facts that require resolution by a factfinder about what Ortega knew or did not know about the situation and Plaintiff’s condition prior to Ortega’s use of force, in addition to both the nature and duration of Ortega’s application of force. See POR ¶¶ 35-36; PAF ¶¶ 20-21, 23-24, 27. Depending upon how the factfinder resolves those questions, it may determine that Ortega’s conduct violated the Eighth Amendment standard. See, e.g., *Motley v. Parks*, 432 F.3d 1072, 1088 (9th Cir. 2005) (*en banc*) (“The use of a force against a person who is helpless or has been subdued is constitutionally prohibited.”); *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996) (“Because there was no need for force, one can reasonably infer that Koch

took these actions not in good faith but for the purpose of causing harm.”).

These observations equally preclude a resolution, at the summary judgment stage, of Plaintiff’s battery claim in Ortega’s favor. As the Court noted previously, “[t]he elements of a battery claim in California are that (1) the defendant intentionally did an action that resulted in harmful or offensive contact with the plaintiff’s person, (2) the plaintiff did not consent to the contact, and (3) the contact caused injury, damage, loss or harm to the plaintiff.” *Tekle v. United States*, 511 F.3d 839, 855 (9th Cir. 2007). In addition, a plaintiff attempting to make out a battery claim against a police officer must prove “unreasonable force.” *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272-75 (1998); *see also Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1129 (9th Cir. 2010) (“Under California law, a plaintiff bringing a battery claim against a law enforcement official has the burden of proving the officer used unreasonable force.”), *petition for cert. filed*, 80 U.S.L.W. 3004 (U.S. June 20, 2011) (No. 10-1536); *Johnson v. County of Los Angeles*, 340 F.3d 787, 794 (9th Cir. 2003). The disputed issues of fact require that a factfinder address whether Ortega’s use of force was reasonable.

The same would be true with respect to Plaintiff’s claim for intentional infliction of emotional distress. If the factfinder concludes that the facts are sufficient for Plaintiff to prevail under an Eighth Amendment standard, the Court would be hard-pressed to conclude that the facts could not also support a conclusion that Ortega’s conduct was sufficiently extreme and outrageous. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 487 n.17 (9th Cir. 2007); *see also Berkley v. Dowds*, 152 Cal.App.4th 518, 533 (2007) (indicating that a claim for intentional infliction of emotional distress consists of three elements: 1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; 2) the suffering of severe or extreme emotional distress; and 3) actually and proximate causation of the injuries by the outrageous conduct); *Tekle*, 511 F.3d at 855. The Court already concluded that there were triable issues of fact with respect to whether Plaintiff suffered sufficiently severe or extreme emotional distress. *See* POR ¶ 41; Docket No. 89, at 7.

E. Ortega Is Not Entitled to Qualified Immunity at This Stage

A qualified immunity inquiry asks two questions: (1) was there a violation of a

constitutional right, and, if so, then (2) was the right at issue ‘clearly established’ such that it would have been clear to a reasonable officer that his conduct was unlawful in that situation? *See Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *overruled on other grounds by Pearson v. Callahan*, 239 S.Ct. 808 (2009). As noted above, with the facts viewed in Plaintiff’s favor, a violation of Plaintiff’s Eighth Amendment rights occurred. In addition, as the Court already determined on February 23, “the law regarding a prison guard’s use of excessive force was clearly established” no later than 1994. *Martinez*, 323 F.3d at 1183; *see also* Docket No. 89, at 6.

The question as to Ortega in particular, however, is whether there was room for a reasonable officer to believe in the lawfulness of Ortega’s conduct even under the facts viewed in a manner most favorable to Plaintiff. *See Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (“[W] assume [the defendant] ‘correctly perceived all of the relevant facts’ and ask whether an officer could have reasonably believed at the time that the force actually used was lawful under the circumstances.”), *cert. denied sub nom.*, *Noriega v. Torres*, 132 S.Ct. 1032 (2012); *Bryan v. MacPherson*, 630 F.3d 805, 832 (9th Cir. 2010) (“If an officer’s use of force was ‘premised on a reasonable belief that such force was lawful,’ the officer will be granted immunity from suit, notwithstanding the fact excessive force was deployed.”) (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001)); *Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th Cir. 2003) (indicating that court must inquire “whether it would be objectively reasonable for the officer to believe that the amount of force employed was required by the situation he confronted”); *Marquez v. Gutierrez*, 322 F.3d 689, 692-93 (9th Cir. 2003); *see also Messerschmidt v. Millender*, 132 S.Ct. 1235, 1244-45 (2012). As the Court already noted in the February 23 hearing, even under Plaintiff’s version of the facts, Ortega arrived at the scene at a time when both Plaintiff and Luviano were already on the floor. *See* PAF ¶¶ 19-20. Nevertheless, qualified immunity is not available to Ortega at this stage because the factual disputes necessitating factfinder resolution preclude even a determination, as a matter of law, that Ortega could have been reasonably mistaken about the facts leading to his actions or reasonably mistaken that the nature and duration of force (which is itself uncertain at this stage) he applied to the situation was necessary under the circumstances as he perceived them. *See Watts v. McKinney*, 394 F.3d 710,

711-12 (9th Cir. 2005) (affirming denial of qualified immunity at summary judgment stage, under Eighth Amendment standard, where plaintiff filed declaration indicating that he had been, without warning, kicked in his penis and several times in his back while he was lying on the cell floor with handcuffs on and his hands behind his back – “To suppose that any reasonable person, let alone a trained prison officer, would not know that kicking a helpless prisoner’s genitals was cruel and unusual conduct is beyond belief.”); *Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003); *Martinez*, 323 F.3d at 1184-85; *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002) (refraining from passing on qualified immunity question because “[u]ntil the jury makes those decisions [concerning disputed facts and the inferences it draws therefrom], we cannot know, for example, how much force was used, and, thus, whether a reasonable officer could have mistakenly believed that the use of that degree of force was lawful”); *Thomas v. Gomez*, 143 F.3d 1246, 1248-49 (9th Cir. 1998); *see also Espinosa v. City & Cnty. of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 1089 (2012). All facts drawn in Plaintiff’s favor cannot lead to a conclusion as a matter of law that Ortega acted safely within the confines of the Constitution. *See Scott v. Harris*, 550 U.S. 372, 281 n.8 (2007).⁹

F. Baca Will Remain a Defendant in His Individual Capacity

Baca can be liable for Plaintiff’s injuries based upon either his “‘own culpable action or inaction in the training, supervision, or control of his subordinates,’ ‘his acquiescence in the constitutional deprivations of which the complaint is made,’ or ‘conduct that showed a reckless or callous indifference to the rights of others.’” *Starr v. Baca*, 652 F.3d 1202, 1205-06 (9th Cir. 2011) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991)), *petition for cert. filed*, 80 U.S.L.W. 3462 (U.S. Dec. 30, 2011) (No. 11-834); *see also id.* at 1206-08. Although *Starr* involved inmate-on-inmate harm and this case involves deputy-on-inmate harm, this case is essentially *Starr* at the summary judgment stage. Plaintiff has presented evidence of repeated and relatively frequent incidents of deputy-on-inmate violence, insufficient/ineffective measures put in

⁹ Even if the Court were to conclude that Ortega was entitled to qualified immunity on Plaintiff’s section 1983 claim, resolution of the qualified immunity question would not necessarily resolve any question of whether Ortega was liable for battery or intentional infliction of emotional distress. *See, e.g., Liberal v. Estrada*, 632 F.3d 1064, 1090 (9th Cir. 2011) (Tashima, J., concurring in part and dissenting in part).

place to attempt to stem the flow of that violence, and suggestions for how to quell the situation going, at best, unaddressed or, at worst, ignored.

In light of the evidence Plaintiff has submitted, perhaps most of the responsibility for the failure to respond to this issue would lie at the feet of Undersheriff Paul Tanaka. See PAF ¶¶ 230-35, 238-40, 242-43, 246, 248-55, 259-60, 263, 266-67, 282-85. However, Tanaka's account of the situation could possibly point to Baca's decided disinterest in learning anything at all about the use of force in COLA's jails. See *id.* ¶¶ 235-36, 238, 241, 262, 264, 274; see also *id.* ¶¶ 152, 155, 228. Given that evidence, the Court cannot absolve Baca of liability at this stage, at least not while the *Starr* decision is the law of this Circuit.

Similarly, given the long-established rules governing supervisory liability for Constitutional violations, qualified immunity as to Baca is inappropriate. At some point in time, the repeated refusal or failure to take up an issue that may be leading to direct physical harm to those who are entrusted to one's care at least borders on the necessary mental state for an Eighth Amendment violation (assuming that is the appropriate standard for supervisory, as opposed to direct participant, liability¹⁰). See generally *Jeffers v. Gomez*, 267 F.3d 895, 911, 915-16 (9th Cir. 2001) (indicating that mental state is relevant to qualified immunity where it is an element of the alleged constitutional violation).

Defendants also ask, in particular, for a ruling that Baca cannot be liable under a failure-to-train theory. The evidence concerning Baca's inaction in the face of persistent reports of guard-on-inmate violence is not tied directly to any knowledge (or, essentially, willful blindness) about glaring deficiencies in specific areas of training, such as training in connection with the use of flashlights as weapons and the use of force against handcuffed inmates. Nevertheless, it is not entirely clear that a failure-to-train theory can

¹⁰ In *Blyden v. Mancusi*, 186 F.3d 252 (2d Cir. 1999), the Second Circuit ruled that a district court had correctly employed a "deliberate indifference" standard to a question of supervisory inaction-based liability whereas the Eighth Amendment standard applied to those who were accused of directly causing the unlawful condition or event. See *id.* at 264-65. Specifically, the court reasoned that "[t]he sadistic and malicious standard articulated in *Hudson* makes little sense...in the context of supervisory liability under Section 1983 based on, *inter alia*, failing to remedy a known wrong or being 'grossly negligent in managing subordinates who caused the unlawful condition or event.'" *Id.* at 264 (quoting *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994)).

be separated out from the “inaction”-based evidence involving Baca, because part of the evidence concerning his inaction would consist of his apparent (if Plaintiff’s evidence is to be believed) complete disinterest in the level and frequency of guard-on-inmate violence occurring in Men’s Central Jail. Had Baca inquired as to that type of information, he might have learned of violent patterns involving flashlights and handcuffed inmates. While Baca will remain a defendant in this action no matter how the Court resolves this particular question, given the above-mentioned considerations the Court would ask the parties to discuss this failure-to-train aspect of the case against Baca.¹¹

G. Defendants Have Not Persuasively Demonstrated That Plaintiff’s Civil Code § 52.1 Claim is Flawed

Section 52.1 of the California Civil Code, in pertinent part, prohibits any person from “interfer[ing, or attempting to interfere,] by threats, intimidation, or coercion,...with the exercise or enjoyment by any individual...of rights secured by the Constitution or laws of the United States....” Cal. Civ. Code § 52.1(a). Any individual whose exercise or enjoyment of such rights has been interfered with in such manner is entitled to bring a civil action for damages on account of such action. *See id.* § 52.1(b); *see also Lu v. Powell*, 621 F.3d 944, 950 (9th Cir. 2010).

The parties’ primary dispute concerning this claim centers around the issue of whether the “threat,” “intimidation,” or “coercion” required for section 52.1 liability must be *separate* from the underlying Constitutional violation itself even where the underlying Constitutional violation, as in this case, necessarily involves some measure of at least intimidation or coercion. Defendants believe that it must, whereas Plaintiff disagrees.¹²

¹¹ As the Court noted in its February 23 ruling, *see* Docket No. 89, at 8 n.10, the Court could conceivably grant the motion in Baca’s favor on Plaintiff’s Civil Code section 52.1 claim based on the fact that he was not present at the scene. However, Defendants raised this point for the first time in their Reply brief. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). Unless Plaintiff concedes the point at oral argument, therefore, the Court might be hard-pressed to rule in that fashion on this motion.

¹² Although there would have been support for it under Ninth Circuit authority, Defendants do not raise the argument that Plaintiff’s section 52.1 claim is flawed because it does not allege that the threat/intimidation/coercion was on account of Plaintiff’s membership in a protected class. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1206-07 (9th Cir. 1998) (reading section 52.1 as requiring that interference be on account of plaintiff’s race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute because it must be read in conjunction with Civil Code section 51.7). In 2004, the California Supreme Court in effect rejected *Nelson’s* reading of section 52.1’s

In his Opposition, Plaintiff also asserts that the act of force used against him was an act separate from the Constitutional violation itself because it was a response to his exercise of his right to complain about not receiving showers – in other words, a First Amendment right to file prison grievances.

With respect to the first issue – whether the threat, intimidation or coercion must be separate from the underlying Constitutional violation – the parties have largely focused on conflicting federal district court decisions throughout the briefing. However, one of the leading *California Supreme Court* cases on the reach of section 52.1 would appear to suggest that Defendants' view is *incorrect*. If the threat, intimidation or coercion must be separate from the Constitutional violation itself, Defendants would have to explain *Venegas v. County of Los Angeles*, 32 Cal.4th 820 (2004). There, the Supreme Court ruled that the plaintiffs had sufficiently stated a claim under section 52.1, which the Court acknowledged imposed a requirement of threats, intimidation, or coercion, in a straight-forward case raising a claim of an unreasonable search and seizure. *See id.* at 827-28, 841-43.

It is true that *Venegas* did not directly concern the issue at hand here. However, it is equally true that the decision specifically concluded that the plaintiffs in that case had stated a proper claim under section 52.1. Thus, if *Venegas* were the only authoritative California precedent bearing on this question, the Court might have been inclined to agree with Plaintiff, thereby obviating the need to consider his First Amendment grievance theory.¹³

However, after briefing was complete on this motion, the California Court of Appeal adopted the Defendants' view of a threat/intimidation/coercion requirement

requirements, explicitly disagreeing with the California Court of Appeal decision – *Boccatto v. City of Hermosa Beach*, 29 Cal.App.4th 1797 (1994) – *Nelson* had relied upon in reaching its conclusion and noting that the California legislature had taken action subsequent to *Boccatto* rejecting *Boccatto's* approach. *See Venegas v. County of Los Angeles*, 32 Cal.4th 820, 841-43 (2004); *see also Shoyoye v. County of Los Angeles*, 203 Cal.App.4th 947, ___, 137 Cal.Rptr.3d 839, 847 (2012). The Ninth Circuit has not commented on *Nelson's* post-*Venegas* vitality in a published decision, but in a 2008 unpublished decision it noted that *Venegas* had rejected *Boccatto's* approach to interpreting the requirements of section 52.1. *See Moreno v. Town of Los Gatos*, 267 Fed. Appx. 665 (9th Cir. Feb. 21, 2008).

¹³ A threatening, intimidating, or coercive act separate from the Constitutional violation itself makes some sense when a private actor is involved who could not themselves violate the Constitution (because they were not a state actor). *See, e.g., Jones v. Kmart Corp.*, 17 Cal.4th 329, 334 (1998). This case does not raise a private actor situation, however.

independent from the underlying Constitutional violation in *Shoyoye v. County of Los Angeles*, 203 Cal.App.4th 947, 137 Cal.Rptr.3d 839 (2012). There, the court presented the following question for decision – “where coercion is inherent in the constitutional violation alleged, as it is in an unreasonably prolonged detention, is the statutory requirement satisfied or does the statute require a showing of coercion independent from the coercion inherent in the wrongful detention itself?” *Id.*, 137 Cal.Rptr.3d at 847. As noted, it answered that question in favor of a requirement that the “wrongful” act be independent of the violation itself. *See id.* at 849-50.

Shoyoye’s effort at distinguishing *Venegas* on this point, however, is not entirely convincing. It concluded that *Venegas* was different because the case that the California Supreme Court confronted posed facts which indicated (under the *Shoyoye* court’s reading of them) that the situation had, at some point in time, transitioned from a situation where probable cause had existed to one where “the officers’ conduct became intentionally coercive and wrongful, i.e., a knowing and blameworthy interference with the plaintiffs’ constitutional rights.” *Id.* at 850. Whether or not the underlying acts in *Venegas* were intentional, however, does nothing to *separate* those acts from the predicate Constitutional violation itself. Even if it somehow did, this case would fit within *Shoyoye*’s reading of *Venegas*, because Plaintiff has pled (and sufficiently evidenced to survive summary judgment, at least as to some defendants) that the deputies committed an Eighth Amendment violation, i.e. acted maliciously and sadistically. For at least this reason, the Court might have some doubt whether it should – or the California Supreme Court would, *see Hayes v. County of San Diego*, 658 F.3d 867, 870 (9th Cir. 2011) – follow *Shoyoye*’s lead. If the Court determines *Shoyoye* should not be followed, Defendants would be left having to explain why the federal district court decisions they cite¹⁴ would be more persuasive than the at-least-implicit answer to this question the California Supreme Court appears to have adopted in *Venegas*.

Assuming that Defendants can overcome *Venegas* and persuade the Court that some independent threat, intimidation or coercion must be present, they are correct that

¹⁴ No published Ninth Circuit decision has addressed *Venegas* insofar as it relates to this issue. One unpublished decision could be interpreted as adopting the implicit approach in that case, however, though even there the facts are insufficiently presented to enable such a conclusion. *See Moreno v. Town of Los Gatos*, 267 Fed. Appx. 665 (9th Cir. Feb. 21, 2008).

Plaintiff may not rely upon a First Amendment theory in opposing the summary judgment motion as to this claim. Plaintiff's claim under section 52.1 is plainly premised upon an alleged excessive force incident. See First Amended Complaint ¶ 31. Unlike the situation with Plaintiff's summary judgment-related effort to shift his section 1983 case from the Fourth Amendment to the Eighth Amendment, see Docket No. 89, at 3, a change in his section 52.1 claim from excessive force to a First Amendment right to file prison grievances would fundamentally shift the nature, focus and scope of that claim. Plaintiff may not employ such a maneuver in opposing summary judgment. See, e.g., *Fossen v. Blue Cross & Blue Shield of Mont., Inc.*, 660 F.3d 1102, 1115 (9th Cir. 2011); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291-94 (9th Cir. 2000).

In sum, the Court's ruling on this motion as it relates to Plaintiff's California Civil Code section 52.1 claim depends upon how it resolves the question of whether an independent threatening, intimidating or coercive act is required for such a claim. This will require it to assess whether it believes the California Supreme Court, having issued *Venegas*, would nevertheless follow the California Court of Appeal's decision in *Shoyoye*.

H. Defendants Have Not Persuasively Demonstrated That Plaintiff's Negligence Claim is Flawed

Defendants argue that Plaintiff has not identified, and they did not owe, any applicable duty of care and that Luviano and Ortega could not be liable for negligence because of the statutory immunity afforded by California Government Code § 820.2.¹⁵ Defendants also pointed out that it is undisputed that Baca was not at the scene, and cited *Taylor v. Buff*, 172 Cal.App.3d 384, 388-89 (1985), as support for an argument that the type of activity he would have undertaken (or failed to undertake) in this case would fit squarely within the immunity afforded by section 820.2. Plaintiff's only response with respect to the negligence issue was that the issues of breach and causation are ordinarily for the jury, and that he has sufficient evidence to make out a triable issue of fact with respect to both of those elements. However, as noted above, Defendants did not move for

¹⁵ The Court's February 23 ruling granted summary judgment in COLA's favor on all state law claims and dismissed Rico as a defendant in general. See Docket No. 89, at 8. As a result, the parties' negligence-based arguments now concern only Baca, Luviano and Ortega.

summary judgment on the issues of breach and causation. They moved with respect to the absence of a duty and, even if a duty (and breach and causation) existed, immunity pursuant to Government Code section 820.2.¹⁶ Nevertheless, Defendants still must sustain their burden as the moving party, and the Court itself must resolve challenges based upon issues of law irrespective of whether the non-moving party has sufficiently argued the point.

First, contrary to Defendants' suggestion, Plaintiff has unquestionably identified the duty of care he asserts applies to this situation. As to the individual defendants, Plaintiff alleged that they "did not exercise ordinary care to ensure that plaintiff would not suffer excessive force while in their custody." FAC ¶ 38. Such a duty of care is recognized under California law, at least in the context of a police officer's alleged use of excessive force. *See Young v. County of Los Angeles*, 655 F.3d 1156, 1170 (9th Cir. 2011) (citing, as an example, *Munoz v. City of Union City*, 120 Cal.App.4th 1077, 1108-09 (2004)); *see also Giraldo v. Cal. Dep't of Corr. & Rehab.*, 168 Cal.App.4th 231, 250-51 (2008) (recognizing jailer's duty of care to prisoner, because of existence of "special relationship," in connection with threat of "sexual abuse in the prison environment"). The California Court of Appeal only recently (if only implicitly) appears to have recognized it in the prison context as well. *See Haney v. Castillo*, F062080, 2012 WL 890671 (Cal. Ct. App. Mar. 15, 2012).¹⁷ Given these authorities, unless and until Defendants can direct the Court to some authority actually explicitly precluding the existence of a duty of care in the circumstances present in this action, the Court will not rule in their favor on this basis. *See also* Cal. Gov't Code § 844.6(d) (providing that *nothing* in section 844.6 – which, among other things, provides immunity to a *public*

¹⁶ In their Reply, in addition to reiterating the arguments they initially advanced (and to which Plaintiff did not respond), Defendants also argued that Luviano and Ortega acted reasonably and therefore did not breach any duty, even assuming Plaintiff was able to identify such a duty. Insofar as that argument was raised for the first time in a Reply brief, the Court could not credit it for purposes of ruling in any defendant's favor as to Plaintiff's negligence claim. Moreover, as addressed further above and in the Court's February 23 ruling, there are triable issues of fact with respect to whether Luviano and/or Ortega acted reasonably.

¹⁷ It is unclear whether the *Haney* decision is unpublished because of a concerted decision that it should not be published (and, therefore, non-precedential) or simply because it was issued only one week ago. On Westlaw, it was discovered as the result of a search in a database purportedly consisting of only published California Supreme Court and California Court of Appeal decisions. Whether or not it is published, the Court need not rely solely on that decision to conclude that Defendants' duty-based arguments come up short on this motion.

entity for “[a]n injury to any prisoner” – exonerates any *public employee* from “liability for injury proximately caused by his negligent or wrongful act or omission”); 5 Witkin, Summary of California Law: Torts (10th ed.) § 361, at 574 (“Where no immunity applies, the public officer is liable, as in other cases, to the same extent as a private individual, for negligent or intentional conduct that results in injury.”).

Of course, the duty of care question would be irrelevant if Defendants could demonstrate that Government Code section 820.2 immunizes their conduct. California Government Code section 820.2 provides that “a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.” Cal. Gov’t Code § 820.2. However, “not all acts requiring a public employee to choose among alternatives entail the use of ‘discretion’ within the meaning of section 820.2.” *Barner v. Leeds*, 24 Cal.4th 676, 684-85 (2000); *see also AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 639 (9th Cir. 2012). Thus, “operational, or ministerial, decisions” are not protected by section 820.2 immunity because “there is no basis for immunizing lower level decisions that merely implement a basic policy already formulated.” *Barner*, 24 Cal.4th at 685; *AE*, 666 F.3d at 639; *see also Martinez v. City of Los Angeles*, 141 F.3d 1373, 1379 (9th Cir. 1998); *cf. Liberal v. Estrada*, 632 F.3d 1064, 1084 (9th Cir. 2011) (affirming lower court’s rejection of section 820.2 immunity in connection with alleged false imprisonment traffic stop, reasoning that “[a] ‘workable definition’ of immune discretionary acts draws the line between ‘planning’ and ‘operational’ functions of government” and “[a] police officer’s decision to detain or arrest a suspect is ‘not a basic policy decision, but only an operational decision by the police purporting to apply the law’”) (quoting *Caldwell v. Montoya*, 10 Cal.4th 972, 981 (1995) and *Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 1051 (2007))¹⁸; *Blankenhorn*, 485 F.3d 463 (9th Cir. 2007) (“[I]t has long been established that this provision does not apply to officers who use unreasonable force in making an arrest.”). Luviano and Ortega, therefore, would not be able to take advantage of section 820.2 immunity in connection with their actions.

¹⁸ But *see Blankenhorn v. City of Orange*, 485 F.3d 463, 487 (9th Cir. 2007) (“[Section 820.2] applies to police officers’ discretionary decisions made during arrests.”).

Even with respect to “[q]uasi-legislative policy decisions,” a government defendant bears “the burden of establishing that they are entitled to immunity for an actual policy decision made by an employee who ‘consciously balance[ed] risks and advantages...’” *AE*, 666 F.3d at 639 (quoting *Johnson v. State*, 69 Cal.2d 782, 795 n.8 (1968)). “The fact that an employee normally engages in ‘discretionary activity’ is irrelevant if, in a given case, the employee did not render a considered decision.” *Id.* (quoting *Johnson*). Thus, while Baca might be entitled to section 820.2 immunity under *Taylor*, he has not made the necessary factual showing yet.

III. Conclusion

Other than with respect to *possible* exceptions for: 1) Plaintiff’s Civil Code section 52.1 claim insofar as it relates to Baca, *see* Footnote 11, *supra*, 2) Plaintiff’s section 52.1 claim insofar as it relates to *all* defendants if the Court follows *Shoyoye*, and 3) Baca’s liability on a “failure to train” theory, the Court would deny those portions of Defendants’ summary judgment motion that remain following its earlier ruling issued February 23, 2012.

EXHIBIT “C”

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-8011-GW(PLAx) Date April 12, 2012

Title *Michael Holguin v. County of Los Angeles, et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez

Pat Cuneo

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Virginia Keeny - by telephone

Nathan A. Oyster - by telephone

PROCEEDINGS: DEFENDANTS COUNTY OF LOS ANGELES, SHERIFF LEROY D. BACA, FERNANDO LUVIANO, DAVID ORTEGA, AND GIOVANNI RICO'S MOTION FOR SUMMARY JUDGMENT (filed 12/15/11)

Court hears further argument. The Court's Ruling after supplemental briefing as to Motion for Summary Judgment, or in the Alternative, Summary Adjudication is attached hereto. Defendants' motion is **GRANTED IN PART and DENIED IN PART.**

The stipulation to continue the hearing date filed on April 6, 2012, is deemed **MOOT.**

Initials of Preparer JG

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Holguin v. County of Los Angeles, et al., Case No. CV-10-8011

Ruling after supplemental briefing as to Motion for Summary Judgment or, in the Alternative, Summary Adjudication

The parties have now submitted supplemental briefing in connection with the viability of plaintiff Michael Holguin's claim pursuant to California Civil Code section 52.1. Section 52.1 of the California Civil Code, in pertinent part, prohibits any person from "interfer[ing, or attempting to interfere,] by threats, intimidation, or coercion, ... with the exercise or enjoyment by any individual ... of rights secured by the Constitution or laws of the United States" Cal. Civ. Code § 52.1(a). Reference is made to pages 10 through 13 of the Court's tentative ruling issued on March 26, 2012 (which are hereby incorporated into this ruling), for purposes of a full understanding of the issue with that claim. See Docket No. 94.

Employing the criteria for determining whether the California Court of Appeal's decision in *Shoyoye v. County of Los Angeles*, 203 Cal.App.4th 947 (2012), should be followed on this question, see, e.g., *Hayes v. County of San Diego*, 658 F.3d 867, 870 (9th Cir. 2011),¹ the Court concludes that it should not. As expressed in its March 26, 2012 tentative ruling, the Court finds the *Shoyoye* decision's attempt to distinguish the California Supreme Court's decision in *Venegas v. County of Los Angeles*, 32 Cal.4th 820 (2004), to be unpersuasive. As such, *Venegas* remains "convincing evidence," *Hayes*, 658 F.3d at 870, that Plaintiff's section 52.1 claim remains viable.² Even if *Venegas*

¹ "In deciding an issue of state law, when 'there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it.'" 658 F.3d at 870 (quoting *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007)).

² For that reason, the Court need not address Plaintiff's alternative argument that it should reconsider its tentative view that Plaintiff should be allowed to employ an alleged First Amendment violation as the "separate" conduct allowing a section 52.1 claim. To be clear, however, the Court would *not* change its view in that regard. Although Plaintiff asserts it is "clear" from his First Amended Complaint ("FAC") that he intended to employ a First Amendment basis for his section 52.1 claim, the opposite is true. Plaintiff points to references to his "ask[ing] why he could not shower" (which was simply presented as part of a narrative description of events leading to his beating, and not emphasized in any way, at least as part of Plaintiff's allegations) and (highlighted, in this context, for the first time in connection with this, supplemental, briefing) *post*-incident taunting on the way to the hospital, see FAC ¶¶ 15, 21, as providing sufficient notice of the First Amendment hook, Plaintiff gave every indication in his actual claim under

were distinguishable along the lines drawn by *Shoyoye*, this case would fit within *Venegas*, not *Shoyoye*, under the terms of that distinction, because of Plaintiff's allegation (and evidence, as discussed at length in the Court's March 26, 2012 tentative ruling, in connection with the Court's analysis of Plaintiff's other claims) supporting the view that the Defendants acted with some measure of intent in the events leading to this case.

The Court similarly believes that Defendants' attempt to distinguish *Venegas* for reasons *not* identified by the California Court of Appeal in *Shoyoye* is equally unpersuasive. Although Defendants believe there were acts separate from the Constitutional violations in *Venegas*, they point only to the conduct underlying the very same Constitutional violations – an unreasonable search and seizure.³ Moreover, since the Court is already disinclined to follow a path that the California Court of Appeal has already begun to blaze for distinguishing *Venegas*, it is even less likely to follow a path perceived to be present in *Venegas* that not even the Court of Appeal has recognized.

While the Court again acknowledges that *Venegas* did not decide the precise issue underlying a section 52.1 claim that the parties address here, the Court is persuaded that there are insufficient reasons to believe that the California Supreme Court would now decide that its section 52.1 analysis in *Venegas* was, in effect, unnecessary because of a requirement for a section 52.1 claim that is not present on the face of that legislation. The federal district court decisions Defendants cite – *Barsamian v. City of Kingsburg*,

section 52.1, that only Fourth Amendment conduct (which was actually Eighth Amendment conduct) formed the basis for the claim. *See id.* ¶ 31 (“The United States Constitution, Amendment IV, and the California Constitution, Article I, guarantee the right of persons to be free from excessive force. Defendants, by engaging in the wrongful conduct alleged herein, denied this right to plaintiff”) (emphasis added). Unlike normal pleading practice, Plaintiff (who is – and was, when the FAC was filed – represented by counsel) did *not* incorporate all preceding paragraphs of his FAC into his section 52.1 claim. Furthermore, because the right to be free from excessive force was the only right sufficiently pled as at issue in connection with the claim, the taunting conduct which occurred *after* the incident in question could not serve as the necessary threat, intimidation or coercion occurring in connection with the Constitutional violation.

³ If what Defendants mean to argue is that the unconstitutional seizure is the separate act supporting the unconstitutional search, and *vice versa*, the California Supreme Court ruled that plaintiffs (i.e., *both* David Venegas and his wife, Beatriz) had sufficiently stated section 52.1 claims. David Venegas was under arrest and *not* at the scene when his house was searched, and had specifically declined to give the officers in question permission to search the house. *See Venegas*, 32 Cal.4th at 827. Consequently, any acts that occurred once the officers and Beatriz Venegas were at the Venegas residence could not have served as a threat or act of intimidation or coercion *vis a vis* David Venegas and his arrest/seizure. As such, the only conduct supporting the threat, intimidation or coercion element of David Venegas's section 52.1 claim would have been the arrest/seizure itself.

597 F.Supp.2d 1054, 1064 (E.D. Cal. 2009), *Rodriguez v. City of Fresno*, No. CV F 09-CV-1176 AWI MJS, 2011 U.S. Dist. LEXIS 51945, *33-37 (E.D. Cal. May 16, 2011), and *Justin v. City & County of San Francisco*, No. C05-4812 MEJ, 2008 U.S. Dist. LEXIS 36468, *23-26 (N.D. Cal. May 5, 2008) (James, Mag. J.) – are no more persuasive in explaining *Venegas* (if they even cite or discuss it – *Justin* does not at all) than are *Shoyoye* or Defendants’ arguments herein. As a result, the Court denies Defendants’ summary judgment motion insofar as it concerns the viability of Plaintiff’s section 52.1 claim in general.⁴

Additionally, the Court would inquire of the parties as to whether the prior tentative ruling left open questions concerning whether or not Baca should remain open to liability on the section 52.1 claim or on a failure to train theory. Those issues were not addressed in the supplemental briefing.

⁴ The Court declines to rely upon Plaintiff’s statutory interpretation and/or legislative history-related arguments for why there should be no “separate act” requirement for a section 52.1 claim because it finds those arguments unpersuasive insofar as Plaintiff has presented them.