



1 their argument escalated into whether Victor did enough to support the family. Though they  
2 had been married for eight years, she told him that his refusal was why their relationship was  
3 not likely to work out. (See Docket no. 49-5, Cline Decl. Ex. C, Tr. of Interview with Shakina  
4 Ortega at 3.) Victor kicked toward Shakina's face, his bare feet connected with her mouth,  
5 and she began bleeding. (*Id.*) After a scuffle, Victor began to hug Shakina and apologize  
6 to her, crying and declaring that what he did was an accident. (*Id.* at 4.) Shakina called  
7 9-1-1 and requested emergency assistance. (Docket no. 49-7, Cline Decl. Ex. E,  
8 Emergency Tr.)

9         Although the parties dispute whether Victor's actions were accidental or purposeful,  
10 they agree that he fled the family's apartment when police responded to the call.  
11 (*Compare* Mot. at 3 *with* Opp'n Br. at 6-7.) Officers Jonathan McCarthy and Godfrey  
12 Maynard arrived at the scene in separate vehicles in time to see Victor fleeing; Officer  
13 Maynard reported Victor's direction while Officer McCarthy began immediate pursuit.  
14 (Docket no. 49-10, McCarthy Decl. ¶¶ 7-13; Docket no. 66-6, Denning Decl. Ex. D.) A chase  
15 ensued through the housing complex, and Officer McCarthy caught up to Victor in a narrow,  
16 deserted corridor or breezeway. (Docket no. 49-10, McCarthy Decl. ¶¶ 14-16; Docket no.  
17 66-6, Denning Decl. Ex. B., Investigator's Rep. at 8-10.) According to Officer McCarthy, he  
18 attempted to detain Victor, but a fight began in which Officer McCarthy used a "leg sweep"  
19 maneuver to bring Victor to the ground. (Docket no. 49-10, McCarthy Decl. ¶¶ 19-20.)  
20 Officer McCarthy's leg sweep was complicated by the fact that his secondary weapon was  
21 affixed to the leg he used by an elastic band known as an ankle holster; after Victor fell,  
22 Officer McCarthy fell on top of him, and his secondary weapon came loose to the ground.  
23 (*Id.* ¶ 20-21; *accord* Docket no. 66-6, Denning Decl. Ex. D., McCarthy Deposition at 66.)

24         Accounts of the next few seconds, up to Officer McCarthy's decision to shoot Victor,  
25 diverge. Originally, SDPD's investigation concluded that Victor took control of Officer  
26 McCarthy's secondary weapon and threatened him with it. (Docket no. 49-6, Cline Decl. Ex.  
27 D, SDPD Investigator's Rep. at 2; *see also id.* Ex. K, Homicide Team 5 Scene Briefing Tr.  
28 ("Officer McCarthy's spare weapon that's on his ankle holster . . . fell to the ground. The

1 suspect saw this, picked up the gun and raised it towards Officer McCarthy. Officer  
2 McCarthy drew his own weapon and fired two rounds.”.) Later, SDPD Sergeant Joe Howie  
3 issued a report concluding that Victor tried *but failed* to take Officer McCarthy’s gun, noting  
4 scrape marks on the side of the weapon which indicated that it slid on the cement walkway  
5 where the altercation occurred without being picked up. (Docket no. 49-6, Cline Decl. Ex.  
6 D, at 7.) Forensic analysis of the secondary weapon did not show any of Victor’s DNA on  
7 the gun. (Docket no. 66-10, Ex. WW at 61-62.)<sup>1</sup> Officer McCarthy’s declaration in support  
8 of Defendants’ motion for summary judgment states that Victor reached for the gun with his  
9 right hand, briefly touched it, but never grasped it. (Docket no. 49-10 at 4.) Whereas some  
10 evidence indicates that Officer McCarthy was able to handcuff Victor’s left hand while on top  
11 of him after they fell, (Docket no. 66-6, Denning Decl. Ex. C, Howie Investigation, at 44),<sup>2</sup>  
12 other evidence indicates that he did not do so until Victor had been shot and paramedics  
13 arrived, (Docket no. 49-6, Cline Decl. Ex. D, McCarthy Depo. at 6). Still other evidence  
14 indicates that it may have been Victor’s right hand – the hand he is supposed to have used  
15 to reach for the gun – that was cuffed. (Docket no. 66-8, Denning Decl. Ex. U, Decl. of  
16 Jason Crisostomo ¶ 4 (“Once the paramedics arrived, they pulled the body out of the alley  
17 corridor . . . . I saw blood on the man’s face and a handcuff on his right wrist.”).)

18 Only Officer McCarthy survived to bear eyewitness to the last, crucial moments. He  
19 testifies that he broke apart from Victor to move the secondary weapon a safe distance  
20 away, that he drew his primary weapon while turning to face Victor, and that he saw Victor

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22 <sup>1</sup> Defendants object to Plaintiffs’ use of the forensic report on authenticity and hearsay  
23 grounds. Defendants produced the report as part of SDPD’s homicide file. (Docket no. 66-1  
24 ¶ 56.) Its authenticity is clear, see Fed. R. Evid. 901(b)(7), and it falls under the “public  
25 records” hearsay exception, see Fed. R. Evid. 803(8)(A)(iii). The Court overrules the  
26 objection.

27 <sup>2</sup> Defendants make the same evidentiary objections to Plaintiffs’ use of Sgt. Howie’s  
28 investigation report and interview of Officer McCarthy. The document is also part of SDPD’s  
homicide file. (Docket no. 66-1 ¶ 10.) It consists purely of statements by SDPD officers who  
are either party-opponents themselves (e.g., McCarthy) or representatives of party opponent  
SDPD. Its authenticity is clear, see Fed. R. Evid. 901(b)(7), and the statements it contains  
are either not hearsay as party-opponent admissions, Fed. R. Evid. 801(d)(2), or excepted  
from being hearsay as public records, Fed. R. Evid. 803(8)(A)(iii). The objection is overruled.

1 rising off the ground to lunge toward him. (Docket no. 49-10 at 4-5.) Believing that Victor  
2 was now attempting to grab his *primary* weapon, Officer McCarthy fired two rounds. (*Id.* at  
3 5.) Victor’s autopsy shows that the first bullet hit Victor in the abdomen and the second one  
4 hit him in the back of the neck. (Docket no. 66-8, Denning Decl. Ex. X, at 24.) Officer  
5 McCarthy stated that Victor was either one foot away from the primary weapon in his hand,  
6 (see Docket no. 66-6, Ex. C, at 50.), or one to two feet away, (see Docket no. 49-10,  
7 McCarthy Decl., ¶ 28.) In contrast, Plaintiffs’ forensic expert examined Victor’s autopsy  
8 report, noted that there was no evidence of gunpowder residue or stippling on Victor’s  
9 clothing or body (including Victor’s entry wounds), and concluded that Victor could not have  
10 been grabbing at the gun if he were so close. (Docket no. 66-7, Ex. H to Denning Decl.,  
11 Turvey Expert Rep. and Supplement, Exs. 1 and 2.)<sup>3</sup> In other words, Plaintiffs offer evidence  
12 that Victor was either not reaching for Officer McCarthy’s gun, or that he must have been  
13 over three feet away, or both. (*See id.*)

14         Although Officer McCarthy and Victor were alone in the walkway, bystanders were  
15 close enough to hear some of the exchange. The bystanders reported sounds of a struggle,  
16 a loud thump like people falling to the ground, metal clinking, one voice (McCarthy’s) saying  
17 “Get down on the ground” and another voice responding, “Are you kidding me?” and “Get  
18 the f\*\*k off of me, I’m gonna sue you!” – followed finally by the two gunshots. (*Accord*  
19 Docket no. 66-7, Ex. P at 103-04 *with id.* Ex. Q at 111; *id.* Ex. R at 115 *with id.* Ex. S at 123;

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24         <sup>3</sup> Defendants object to Turvey’s declaration, report, and supplemental report as  
25 inauthentic and hearsay. It’s hard to imagine why Denning’s declaration identifying each  
26 document as “a true and correct copy” of what it purports to be should not be enough to  
27 authenticate them. (See Docket no. 66-1 ¶ 15.) Dr. Turvey’s declaration in turn  
28 authenticates his reports, as well. (Docket no. 66-7, Ex. H, at 1.) Even if the report is  
hearsay, Rule 56(c) only allows an objection “that the material cited to support or dispute a  
fact cannot be presented in a form that would be admissible in evidence.” Fed. R. Civ. P.  
56(c). The Court may overlook the hearsay status of an expert report on the grounds that  
the expert would be able testify to the contents of the report at trial. *See Celotex*, 477 U.S.  
at 324 (stating that a party need not produce evidence in a form that would be admissible  
at trial in order to avoid summary judgment). The Court overrules the objection.

1 see also Docket no. 66-8, Ex. T at 2-3; *id.* Ex. U at 6-7.)<sup>4</sup> One ear-witness specifically  
2 reported hearing the sound of one or two footsteps followed by two gunshots. (Docket no.  
3 66-6, Ex. P, at 104.) Another noted that he believed Victor's "tone of voice was one of  
4 compliance and disbelief, not confrontational or violent." (Docket no. 66-8, Ex. U ¶ 6.)<sup>5</sup>

## 5 **II. Legal Standards**

6 Summary judgment is appropriate where "there is no genuine issue as to any material  
7 fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P.  
8 56(c). It is the moving party's burden to show there is no factual issue for trial. *Celotex Corp.*  
9 *v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its burden, the burden shifts  
10 to the non-moving party to show there is a genuine issue for trial. *Id.* at 331. The Court may  
11 grant summary judgment as to some material facts. Fed. R. Civ. P. 56(g).

12 The Court considers the record as a whole and draws all reasonable inferences in the  
13 light most favorable to the non-moving party. *Fairbank v. Wunderman Cato Johnson*, 212  
14 F.3d 528, 531 (9th Cir. 2000). The Court does not make credibility determinations or weigh  
15 conflicting evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Rather, the  
16 Court determines whether the record "presents a sufficient disagreement to require

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17  
18 <sup>4</sup> Defendants object to Plaintiffs' use of ear-witness testimony taken down in official  
19 reports – Plaintiffs' exhibits P, R, T, and V – as inauthentic and hearsay. Defendants  
20 produced the reports as part of SDPD's homicide file, (Docket no. 66-1 ¶¶ 23, 25, 27, & 29),  
21 and the Court sees little reason to doubt that the exhibits are what they claim to be, see Fed.  
22 R. Evid. 901(b)(7). Their status as hearsay is trickier. It is true that "[i]n general, statements  
23 by third parties who are not government employees (or otherwise under a legal duty to  
24 report) may not be admitted pursuant to the public records exception but must satisfy some  
25 other exception in order to be admitted." *United States v. Morales*, 720 F.3d 1194, 1202 (9th  
26 Cir. 2013); see also *United States v. Pazzint*, 703 F.2d 420, 424 (9th Cir. 1983) (holding that  
27 "entries in a police report which result from the officer's own observations and knowledge  
28 may be admitted but that statements made by third persons under no business duty to report  
may not" be admitted under the business records exception.). But this is a civil matter, and  
the Court may admit "factual findings from a legally authorized investigation." Fed. R. Evid.  
803(8)(A)(iii). The statements may also be admitted under the "recorded recollection"  
exception. Fed. R. Evid. 803(5). In any event, Plaintiffs can presumably present the  
declarants' testimony in an admissible form at trial, for instance by calling them as witnesses,  
so their potential hearsay status does not limit their helpfulness at the summary judgment  
stage. See *Celotex*, 477 U.S. at 324; Fed. R. Civ. P. 56(c). The objection is overruled.

<sup>5</sup> Defendants object to this evidence as inadmissible opinion of a lay witness. But the  
witness here is not testifying as an expert; the given testimony is rationally based on his  
perception, helpful for understanding his testimony, and not based on scientific, technical,  
or other specialized knowledge. Fed. R. Evid. 701.

1 submission to a jury or whether it is so one-sided that one party must prevail as a matter of  
2 law.” *Id.* at 251–52.

### 3 **III. Discussion**

4 Plaintiff’s First Amended Complaint asserts six causes of action against each of the  
5 three named defendants: 1) violation of civil rights under 42 U.S.C. § 1983; 2) discrimination  
6 and other violation of civil rights under Cal. Civ. Code § 51.7; 3) violation of civil rights under  
7 Cal. Civ. Code § 52.1; 4) assault and battery under Cal. Gov. Code § 815.2; 5) wrongful  
8 death; and 6) negligence. (Docket no. 17-1, First Amended Complaint (“FAC”).) Defendants  
9 move for summary judgment on all six claims. Plaintiffs voluntarily dismiss their Section  
10 1983 claim against SDPD but otherwise oppose summary judgment.

#### 11 **A. Plaintiffs’ Claims under 42 U.S.C. § 1983**

12 Section 1983 provides plaintiffs with a cause of action when a person acting under  
13 the color of state law deprives them of any federal constitutional right. 42 U.S.C. § 1983.  
14 Here, Plaintiffs assert that Officer McCarthy’s use of deadly force was excessive under the  
15 Fourth and Fourteenth Amendments, and that the City of San Diego implemented  
16 unconstitutional policies or customs in violation of *Monell v. Dep’t of Soc. Servs.*, 436 U.S.  
17 658 (1978).<sup>6</sup> The Court addresses Defendants’ grounds for summary judgment as to each  
18 claim in turn.<sup>7</sup>

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21 \_\_\_\_\_  
22 <sup>6</sup> Defendants dubiously argue that Plaintiffs have not asserted an excessive force  
23 claim against Officer McCarthy. (See Mot. at 10 n.7.) But in what Defendants call an  
24 abundance of caution, they move for summary judgment that Officer McCarthy is entitled to  
25 qualified immunity for his actions. Defendants’ caution, while not precisely abundant, is  
certainly warranted. Plaintiffs explicitly sue Officer McCarthy under excessive force and  
deliberate indifference theories. (FAC ¶¶14, 20.)

26 <sup>7</sup> Plaintiffs’ First Amended Complaint also asserts that Defendants violated Shakina’s,  
27 Tamia’s, and Jacob’s constitutional rights. (See, e.g., FAC ¶ 24 (alleging that Shakina “was  
28 taken against her will to the hospital and detained there for several hours” without telling her  
of her husband’s death); *id.* ¶24 (asserting that Victor’s wife and children were deprived of  
a constitutionally protected liberty interest in their husband and father, respectively).  
Because Defendants do not move for summary judgment on these claims, the Court does  
not address them further.

## 1                   **1. Excessive Force under the Fourth Amendment and Qualified Immunity**

2           Defendants move for summary judgment on the grounds that Officer McCarthy did  
3 not use excessive force in attempting to stop Victor and defend himself, and further that he  
4 has qualified immunity from liability. (Mot. at 10-18.) Under the Fourth Amendment, law  
5 enforcement may use “objectively reasonable” force to carry out seizures, and objective  
6 reasonableness is determined by an assessment of the totality of the circumstances.  
7 *Graham v. Connor*, 490 U.S. 386, 397 (1989). An officer’s use of deadly force is reasonable  
8 only if “the officer has probable cause to believe that the suspect poses a significant threat  
9 of death or serious physical injury to the officer or others.” *Tennessee v. Garner*, 471 U.S.  
10 1, 3 (1985). Because this inquiry is inherently fact specific, the “determination whether the  
11 force used to effect an arrest was reasonable under the Fourth Amendment should only be  
12 taken from the jury in rare cases.” *Headwaters Forest Def. v. County of Humboldt*, 240 F.3d  
13 1185, 1205-06 (9th Cir. 2000), *judgment vacated on other grounds*, 534 U.S. 801, (2001);  
14 *see also Torres v. City of Madera*, 648 F.3d 1119, 1125 (9th Cir. 2011) (summary judgment  
15 “in excessive force cases should be granted sparingly”); *Liston v. County of Riverside*, 120  
16 F.3d 965, 976 n.10 (9th Cir. 1997) (finding that excessive force is “ordinarily a question of  
17 fact for the jury”); *Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994) (“[W]hether a particular  
18 use of force was reasonable is rarely determinable as a matter of law.”).

19           In the deadly force context, courts are not permitted to “simply accept what may be  
20 a self-serving account by the police officer.” *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.  
21 1994). “Because the person most likely to rebut the officers’ version of events—the one  
22 killed—can’t testify, ‘[t]he judge must carefully examine all the evidence in the record . . . to  
23 determine whether the officer’s story is internally consistent and consistent with other known  
24 facts.” *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014) (quoting *Scott*, 39 F.3d  
25 at 915). Where the officer’s story would justify his use of deadly force, the proper inquiry is  
26 whether any reasonable jury could find it more likely than not that the officer’s story is false.  
27 *See id.*

28 *///*



1 be entitled to qualified immunity because “officers of reasonable competence could disagree”  
2 whether they may use deadly force on a suspect posing no physical threat. *Cf. Malley v.*  
3 *Briggs*, 475 U.S. 334, 341 (1986). Rather, the issue is whether Plaintiffs have made out a  
4 violation of a constitutional right.

### 5 **B. Violation of the Fourth Amendment**

6 Could any reasonable jury find it more likely than not that Victor *didn't* reach for Officer  
7 McCarthy's weapon? Defendants' motion for summary judgment relies on the testimony of  
8 Officer McCarthy to support their claim that Victor reached for the officer's weapon from one  
9 or two feet away. In opposing summary judgment, Plaintiffs dispute those facts.

10 Importantly, Plaintiffs have submitted evidence that would give a reasonable jury  
11 pause. Their forensic expert examined Victor's autopsy report and noted that there was no  
12 evidence of gunpowder residue or stippling on Victor's body (including Victor's entry wounds)  
13 or clothing. The expert concluded that Victor could not have been grabbing at the gun if he  
14 was as close as Officer McCarthy said he was, directly contradicting Officer McCarthy's  
15 stated basis for using deadly force. (Docket no. 66-7, Ex. H to Denning Decl., Turvey Expert  
16 Rep. and Supplement, Exs. 1 and 2.) Given the proximity of the parties, the narrowness of  
17 the corridor, and the officer's own testimony, a reasonable jury may doubt that Victor could  
18 have been reaching for Officer McCarthy's gun when it fired, without receiving any gunshot  
19 residue on his hands, clothing, or wounds.

20 In reaching that conclusion, the jury might take notice of inconsistencies in Officer  
21 McCarthy's testimony. In the transcript of Sergeant Howie's investigation the same morning  
22 as the shooting, he asked Officer McCarthy about the secondary weapon – “[D]id he ever  
23 grab it at all?” – and Officer McCarthy responded definitively: “No.” (Docket no. 66-6, Ex. C,  
24 at 50.) But in his later declaration, McCarthy's story changed: “The suspect used his free  
25 arm to grab for my back-up weapon. I immediately reached forward and blocked the  
26 suspect's hand. He was able to briefly touch the gun, but my action prevented him from  
27 getting a firm grasp.” (Docket no. 49-10, McCarthy Decl., ¶24.) There is a further potential  
28 inconsistency around Officer McCarthy's use of a non-lethal taser. McCarthy testified that

1 after he fell on top of Victor, there was a moment when (a) he had Victor's left hand behind  
2 Victor's back, (b) he had his taser drawn, and (c) Victor made an effort to grab the loose  
3 secondary gun. (Docket no. 66-6, Denning Decl. Ex. C., at 11-12.) But McCarthy also said  
4 he switched from physical to lethal force (i.e., holstering the taser) precisely when he saw  
5 Victor going for the loose gun, because that action specifically made McCarthy think, "He  
6 [Victor] wants to kill me." (*Id.* at 17-18.) In other words, McCarthy's testimony has him  
7 completing the following actions with only two hands: holding Victor down, drawing a taser  
8 with one hand, struggling to handcuff Victor (presumably with his other hand), successfully  
9 cuffing Victor's one hand while Victor's other one got free, and moving to holster his taser  
10 *after* seeing Victor reach for the secondary weapon – somehow, McCarthy knocked the  
11 secondary weapon out of Victor's reach while one hand was restraining Victor and the other  
12 was holstering a taser. (*See id.*) One might suggest that Officer McCarthy moved to knock  
13 the secondary weapon aside so quickly that it was practically as Victor reached for it, but this  
14 is contradicted by his specific testimony that he decided to reholster the taser and switch to  
15 deadly force *after* seeing Victor go for the secondary weapon within his reach. In any event,  
16 this is the moment where Officer McCarthy is supposed to be using one hand to handcuff  
17 Victor and another hand to manage his taser. Officer McCarthy's later declaration in support  
18 of Defendants' motion for summary judgment attempts to clarify the series of events, but in  
19 doing so conspicuously fails to mention the taser at all. (*See* Docket no. 49-10.)

20 At this stage, the Court does not weigh the evidence or resolve issues of credibility.  
21 *Anderson*, 477 U.S. at 255. If a jury believed Plaintiffs' evidence and rejected Defendants'  
22 evidence, it could find that events did not unfold as McCarthy testified. In light of the  
23 evidence contradicting McCarthy's account of events – including some of his own  
24 statements – summary judgment on qualified immunity against Plaintiffs' Fourth Amendment  
25 Section 1983 claim is not warranted. The motion is **DENIED**.

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1                   **2. Excessive Force under the Fourteenth Amendment and Qualified**  
2                   **Immunity**

3           Plaintiffs also assert that Defendant McCarthy violated Victor's Fourteenth  
4 Amendment right, and Defendants move for summary judgment that Officer McCarthy is  
5 entitled to qualified immunity for this claim as well. (Mot. at 10-11.)

6           The Fourteenth Amendment's Due Process Clause creates a right to be free from  
7 "executive abuse of power . . . which shocks the conscience." *County of Sacramento v.*  
8 *Lewis*, 523 U.S. 833, 846 (1998). "In determining whether excessive force shocks the  
9 conscience, the court must first ask whether the circumstances are such that actual  
10 deliberation by the officer is practical." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir.  
11 2010) (internal quotations and alterations omitted). If the officer in question was faced with  
12 a time frame where actual deliberation was practical, a plaintiff may establish a Fourteenth  
13 Amendment violation by showing that the officer "acted with deliberate indifference." *Porter*  
14 *v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). Otherwise, if the officer "faced an evolving  
15 set of circumstances that took place over a short time period necessitating 'fast action,'" a  
16 plaintiff must make a higher showing that the officer "acted with a purpose to harm" the  
17 plaintiff. *Id.* at 1139 (quoting *Lewis*, 523 U.S. at 853). "[T]he overarching test under either  
18 is whether the officer's conduct 'shocks the conscience.'" *Id.* The Court conducts the same  
19 two-step inquiry for qualified immunity. See *Wilkinson*, 610 F.3d at 555; see also *Estate of*  
20 *Kosakoff v. City of San Diego*, 460 Fed. Appx. 652, 654-55 (9th Cir. 2011).

21           There is no doubt that case law clearly establishes Victor's Fourteenth Amendment  
22 right to be free from an officer's use of force that would shock the conscience, and the  
23 parties do not argue otherwise. Instead, Officer McCarthy's qualified immunity comes down  
24 to the other step of the inquiry: whether Plaintiffs make out a Fourteenth Amendment  
25 violation. See *Pearson*, 555 U.S. at 232. The parties also dispute whether the events  
26 leading up to Victor's death allowed for Officer McCarthy to engage in actual deliberation,  
27 and as a result they do not agree on whether the "deliberate indifference" or "purpose to  
28 harm" standard applies.

1 The Court need not determine which of these standards applies here, because a  
2 reasonable jury could conclude that Officer McCarthy violated the Fourteenth Amendment  
3 under the more stringent purpose-to-harm standard. Under the purpose to harm standard,  
4 a plaintiff must show that an officer's purpose was "to cause harm unrelated to the legitimate  
5 object of arrest." *Lewis*, 523 U.S. at 836. According to the Ninth Circuit, it is precisely "the  
6 intent to inflict force beyond that which is required by a legitimate law enforcement objective  
7 that 'shocks the conscience' and gives rise to liability under § 1983 . . . ." *Porter*, 546 F.3d  
8 at 1140. Under *Porter*, a jury may also consider the manner in which an officer needlessly  
9 caused a confrontation to escalate when determining whether the officer acted with a  
10 purpose to harm. *Id.* at 1141-42.

11 Though the relevant facts leading up to the confrontation between McCarthy and  
12 Victor are in dispute, the Court must presume the facts to be to be those offered by the  
13 non-moving party. See *Saucier*, 533 U.S. at 201. If, as some evidence suggests, Victor did  
14 not reach for Officer McCarthy's weapons, did not resist arrest, and spoke in a way that  
15 suggested non-violent compliance and disbelief (e.g., "Are you kidding me?" and "I'm gonna  
16 sue you!"), a jury may believe that Officer McCarthy acted with an impermissible intent to  
17 harm Victor rather than to protect himself.

18 Because Plaintiffs have made out a violation of Victor's clearly established Fourteenth  
19 Amendment right, the Court **DENIES** Defendants' motion for summary judgment on qualified  
20 immunity.

### 21 3. Plaintiff's *Monell* Claim

22 Section 1983 provides for liability against a municipality only if an unconstitutional  
23 action "implements or executes a policy statement, ordinance, regulation, or decision  
24 officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690. Under  
25 a *Monell* claim,

26 a local government body can be held liable under § 1983 for policies of  
27 inaction as well as policies of action. A policy of action is one in which the  
28 government body itself violates someone's constitutional rights, or instructs its  
employees to do so; a policy of inaction is based on a government body's  
failure to implement procedural safeguards to prevent constitutional violations.

1 *Jackson v. Barnes*, 749 F.3d 755, 763 (9th Cir. 2014). The parties agree that Plaintiffs are  
2 pursuing an inaction theory premised on the idea that San Diego failed to supervise, train,  
3 and discipline officers adequately; maintained inadequate procedures; and ratified officers'  
4 misconduct through their inaction. (*Accord* Mot. at 7 with Opp'n Br. at 17 & n.7; see also  
5 FAC ¶¶ 25(a)–(h)).

6 In inaction cases, a municipal defendant may be liable only where the “policy amounts  
7 to deliberate indifference to the plaintiff’s constitutional right.” *Tsao v. Desert Palace, Inc.*,  
8 698 F.3d 1128, 1143 (9th Cir. 2012). This requires showing that the defendant “was on  
9 actual or constructive notice that its omission would likely result in a constitutional violation.”  
10 *Id.* at 1145; see also *Edgerly v. City and Cnty. of San Francisco*, 599 F.3d 946, 960 (9th Cir.  
11 2010) (“[L]iability attaches only where the entity’s policies evince a deliberate indifference to  
12 the constitutional right and are the *moving force behind the constitutional violation.*”) (internal  
13 quotations omitted) (emphasis added).

14 The parties contest the adequacy of SDPD’s policies for inspecting and maintaining  
15 secondary weapon holster quality. Plaintiffs argue that SDPD’s poor procedures and lax  
16 supervision allowed Officer McCarthy to wear an unsanctioned and dangerously flimsy ankle  
17 holster, which in turn allowed his secondary weapon to come loose during the struggle with  
18 Victor, creating the situation where Officer McCarthy would eventually shoot Victor. (Opp’n  
19 Br. at 18.) Defendants move for summary judgment that their policies were adequate and  
20 were not responsible for Victor’s death. (Mot. at 7-9.)

21 The real issue here is causation: even if SDPD’s policies were careless and  
22 ineffectual, the municipality would not be liable under *Monell* unless its inaction would likely  
23 cause a constitutional violation. Plaintiffs present evidence that SDPD’s weapon holster  
24 policies may be inconsistent, overly permissive, not carefully overseen, and poorly enforced.  
25 (*E.g.*, Docket no. 66-9, Denning Decl. Ex. EE, Clark Rep.; Docket no. 66-10, Denning Decl.  
26 Ex. OO, Clark Depo.) But their evidence as to causation pales in comparison. Plaintiffs  
27 concede that they lack evidence of any other instance where SDPD’s weapon holster  
28 policies may have caused potential constitutional violations. (Opp’n Br. at 17 n.7.) Because

1 the time for fact discovery has closed, (see Docket no. 32, Amended Sched. Ord.), the  
2 record does not support a conclusion that these policies make any constitutional violation  
3 *likely*. See *Tsao*, 698 F.3d at 1145.

4       Instead of coming forward with direct evidence of causation, Plaintiffs say that  
5 McCarthy's testimony should be enough. In their view, McCarthy concedes that his ankle  
6 holster's failure caused Victor's death because he says it was the weapon coming loose  
7 which spurred his decision to switch to deadly force. (Opp'n Br. at 18 (citing Denning Decl.  
8 Ex. C., Howie Investigation, and Ex. D, McCarthy Depo.)) This is not a fair characterization  
9 of the evidence. McCarthy's testimony was that it was Victor's decision to *reach* for the  
10 secondary weapon on the ground that made him believe Victor wanted to kill him. (Docket  
11 no. 66-6, Denning Decl. Ex. C., Howie Investigation at 17-18; *id.* Ex. D, McCarthy Depo. at  
12 72-73.) Even drawing all factual inferences favorably for Plaintiffs, they provide no evidence  
13 that the flimsiness of McCarthy's ankle holster, and the policies which allowed it to be that  
14 way, were "the moving force behind the constitutional violation." *Edgerly*, 599 F.3d at 960.

15       It does not violate anyone's constitutional rights to have a police officer's secondary  
16 weapon come loose while the officer is effecting an arrest. Plaintiffs wisely refrain from  
17 continuing the logical chain that would connect flimsy holders with officers shooting suspects.  
18 Presumably, it would go something like this: more weapons coming loose during arrests in  
19 turn causes more suspects to reach for those weapons, placing more officers in danger and  
20 resulting in more suspects being shot. There are two problems with this train of thought.  
21 First, Plaintiffs' evidence is that Victor did *not* reach for the weapon, and so it cannot be said  
22 that the alleged policy caused *his* constitution violation as required in a *Monell* analysis. See  
23 *Hayes v. County of San Diego*, 736 F.3d 1223, 1231 (9th Cir. 2013) (holding that a *Monell*  
24 claim must be made on the same basis as the underlying constitutional violation). Second,  
25 it is *not* a constitutional violation for officers to use deadly force where a suspect resists  
26 arrest and reaches for the officer's weapon. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985);  
27 *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

28 ///

1 None of the alleged policies or practices *caused* Officer McCarthy to shoot Victor.  
2 Defendants' motion for summary judgment as to Plaintiffs' *Monell* claim is **GRANTED**.

3 **B. California Civil Code § 51.7**

4 California's Ralph Civil Rights Act, Cal. Civil Code § 51.7, creates a "right to be free  
5 from any violence, or intimidation by threat of violence, committed against their persons or  
6 property" because of their race or other protected characteristic. Plaintiffs' second cause of  
7 action maintains that Officer McCarthy shot Victor "as a result of his racial prejudice against  
8 him because he was a Latino male" in violation of § 51.7. (FAC ¶¶ 38-44.) An essential  
9 element of a Ralph Act claim is that the protected characteristic be "a motivating reason for  
10 the defendant's conduct." *Austin B. v. Escondido Union School Dist.*, 149 Cal. App. 4th 860,  
11 881 (2007) (citing Judicial Council of California Civil Jury Instructions ("CACI") § 3063).

12 Plaintiffs agree that they must produce evidence of McCarthy's racial motivations to  
13 survive summary judgment, and admit that they have not. (Opp'n Br. at 22:10-18.) Instead,  
14 they argue that they were prevented from presenting facts essential their opposition due to  
15 an unresolved discovery dispute; evidently, when Defendants produced Officer McCarthy's  
16 pre-employment screening records, they redacted information that may have described his  
17 biases. (Docket no. 66-5, Amended Denning Decl. ¶3.) As a result, Plaintiffs ask for a  
18 deferral of summary judgment under Fed. R. Civ. P. 56(d). (See Opp'n Br. at 22.) The  
19 discovery dispute at issue was resolved on May 9, 2014, when Magistrate Judge Adler  
20 ordered the parties "to conduct further research to locate specific federal authority regarding  
21 the discoverability of pre-employment screening documents of law enforcement officers in  
22 federal civil rights actions, and to exchange such authority with the opposing party  
23 Defendants produced." (Docket no. 57 at 2.) If the meet-and-confer was inadequate to  
24 solve their dispute, Judge Adler continued, "the parties shall file a new joint motion in which  
25 each party thoroughly sets forth its argument with citations to specific, governing authority"  
26 missing from their previous motion. (*Id.*) Although Plaintiffs informed the Court on June 6,  
27 2014 that they "anticipate the need to file another motion in Judge Adler's department" on

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1 this issue, (Docket no. 66-5 ¶ 5), they have not done so in the intervening five months, and  
2 the deadline for fact discovery has long passed, (Docket no. 32, Amended Sched. Ord.).

3 Plaintiffs have failed to show any cause for their delay or failure to comply with Judge  
4 Adler's prescribed course of action. In addition, there is no indication that such information  
5 would even be helpful in proving Plaintiffs' claim, since the record does not support an  
6 inference that McCarthy even learned of Victor's race prior to his decision to shoot Victor.  
7 The only evidence Plaintiffs cite for McCarthy's supposed knowledge of Victor's race is  
8 Shakina's 9-1-1 call describing Victor as Hispanic, (Opp'n Br. at 22 (citing Docket no. 66-6,  
9 Ex. B)), but McCarthy denies ever hearing the 9-1-1 call, (Docket no. 66-6, McCarthy Depo.  
10 at 62 ("At the time he was running away from me, I didn't know anything about him except  
11 that he was a fleeing felon.")). McCarthy further testified that he did not know Victor's name,  
12 and thought Victor was white. (*Id.* at 63.) The Court sees no evidence that would support  
13 even an inference of racial motive by Officer McCarthy, and **GRANTS** Defendants' motion  
14 for summary judgment on Plaintiff's Ralph Civil Rights Act claim.

### 15 **C. California Civil Code § 52.1**

16 California's Bane Act provides a private cause of action against anyone who  
17 "interferes by threats, intimidation, or coercion, or attempts to interfere by threats,  
18 intimidation, or coercion, with the exercise or enjoyment by an individual or individuals of  
19 rights secured by the Constitution or laws of the United States, or laws and rights secured  
20 by the Constitution or laws of California." Cal. Civil Code § 52.1(a). Section 52.1 requires  
21 "an attempted or completed act of interference with a legal right, accompanied by a form of  
22 coercion." *Jones v. Kmart Corp.*, 17 Cal.4th 329 (1998). "[U]nder section 52.1, plaintiffs  
23 need not allege that defendants acted with discriminatory animus or intent, so long as those  
24 acts were accompanied by the requisite threats, intimidation, or coercion." *Venegas v.*  
25 *County of Los Angeles*, 32 Cal. 4th 820, 843 (2004). "[T]he elements of the excessive force  
26 claim under § 52.1 are the same as under § 1983." *Cameron v. Craig*, 713 F.3d 1012, 1022  
27 (9th Cir. 2013).

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1 Defendants here argue that, to sustain a Bane Act claim past summary judgment,  
2 “[t]he act of interference with a constitutional right must itself be deliberate or spiteful,” and  
3 “[t]he statute requires a showing of coercion independent from the coercion inherent in the  
4 wrongful detention itself.” (Mot. at 21 (quoting *Shoyoye v. County of Los Angeles*, 203 Cal.  
5 App. 4th 947, 959 (2012).) In *Shoyoye*, a clerical error resulted in the unlawful detention of  
6 a prisoner that had been ordered released, and the California Appeals Court rejected the  
7 prisoner’s Bane Act claim because “[t]he apparent purpose of the statute is not to provide  
8 relief for an overdetention brought about by human error” but rather by “intentional conduct.”  
9 *Shoyoye*, 203 Cal. App. 4th at 959. Plaintiffs attempt to distinguish *Shoyoye* on the ground  
10 that it should only prevent Bane Act claims based on clerical errors. (Opp’n Br. at 22-23.)  
11 After *Shoyoye* was decided, the same court decided *Bender v. County of Los Angeles*, which  
12 noted a wide split among state and federal courts about whether the *Shoyoye* ruling applied  
13 to all Bane Act claims. *Bender v. County of Los Angeles*, 217 Cal. App. 4th 968, 978 (2013).  
14 But the *Bender* court avoided resolving the question of whether a Bane Act claim based on  
15 excessive force also requires an intentional violation of some right *other* than the underlying  
16 constitutional violation, when an arrest is otherwise lawful; this is because the *Bender* court  
17 faced an arrest that was both unlawful to begin with (i.e., not based on probable cause), and  
18 used excessive force (there, the arresting officer beat the arrestee after handcuffing him).  
19 *Id.* at 978. The *Bender* decision was clear, though, that “not every wrongful detention is a  
20 violation of the Bane Act. Nor, some federal cases say, is every case of excessive force in  
21 the effectuation of an otherwise lawful arrest a violation of the Bane Act.” *Id.* at 981. The  
22 federal cases that *Bender* approved of were those that rejected Bane Act claims based on  
23 excessive force during or after arrests that were otherwise lawful, where plaintiffs made no  
24 showing of coercion separate from their underlying excessive force claims. *Id.* at 980 (citing  
25 *Luong v. City & County of San Francisco*, No. C11-5661-MEJ, 2012 U.S. Dist. LEXIS 165190  
26 ((N.D. Cal., Nov. 19, 2012); *Hunter v. City & County of San Francisco*, No. 11-4911-JSC,

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1 2012 U.S. Dist. Lexis 146492 (N.D. Cal., Oct. 10, 2012)).<sup>8</sup> See also *Chaudhry v. City of Los*  
2 *Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014) (holding that a successful claim for excessive  
3 force under the Fourth Amendment provides the basis for, but is not coextensive with, a  
4 successful claim under § 52.1).

5 Here, the parties do not dispute that Officer McCarthy had probable cause to stop  
6 Victor, or that the decision to arrest him was lawful. Plaintiffs have made no showing of  
7 coercion separate from their underlying Fourth and Fourteenth Amendment claims. Though  
8 they have raised genuine factual disputes over whether Officer McCarthy used excessive  
9 force in effecting Victor's arrest or abused his power in a way that shocks the conscience,  
10 they have not shown (nor attempted to show) that Officer McCarthy interfered with Victor's  
11 exercise or enjoyment of *separate* rights covered by the Bane Act. The Court **GRANTS**  
12 Defendants' motion for summary judgment on Plaintiffs' Bane Act claim.

#### 13 **D. Assault and Battery**

14 Defendants also move for summary judgment on Plaintiffs' claim of assault and  
15 battery. Under California law, a plaintiff bringing a battery claim against a law enforcement  
16 official has the burden of proving the officer used unreasonable force. See *Edson v. City of*  
17 *Anaheim*, 63 Cal. App. 4th 1269 (1998); see also *Saman v. Robbins*, 173 F.3d 1150, 1157  
18 n.6 (9th Cir. 1999) ("A prima facie case for battery is not established under California law  
19 unless the plaintiff proves that an officer used unreasonable force against him to make a  
20 lawful arrest or detention."). California law regards "Section 1983 . . . as the federal  
21 counterpart of state battery or wrongful death actions." *Yount v. City of Sacramento*, 43 Cal.  
22 4th 885, 902 (2008) ("[W]e cannot think of a reason to distinguish between section 1983 and  
23 a state tort claim arising from the same alleged misconduct. . . ."); *Susag v. City of Lake*  
24 *Forest*, 94 Cal. App. 4th 1401, 1412-13 (2002) ("[I]t appears unsound to distinguish between  
25 section 1983 and state law claims arising from the same alleged misconduct.")

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27 <sup>8</sup> The Court declines Plaintiffs' invitation to limit *Shoyoye* only to cases where the  
28 constitutional violation was caused by unintentional or clerical error. *Bender's* approval of  
*Luong* and *Hunter* shows that the California Appeals Court would not so drastically limit  
*Shoyoye* to its facts.

1           Because the Court has already determined that Plaintiffs' excessive force claim  
2 survives summary judgment, their assault and battery claim is also viable. See *Nelson v.*  
3 *City of Davis*, 709 F. Supp. 2d 978, 992 (E.D. Cal. 2010), *aff'd*, 685 F.3d 867 (9th Cir. 2012)  
4 ("Because the same standards apply to both state law assault and battery and [s]ection 1983  
5 claims premised on constitutionally prohibited excessive force, the fact that Plaintiff's 1983  
6 claims under the Fourth Amendment survive summary judgment also mandates that the  
7 assault and battery claims similarly survive.") A genuine dispute of material fact remains as  
8 to whether Officer McCarthy used unreasonable force. The Court **DENIES** Defendants'  
9 motion for summary judgment on this ground.

#### 10           **E. Wrongful Death**

11           Defendants move for summary judgment on Plaintiffs' wrongful death claim on the  
12 grounds that Cal. Gov't Code § 820.2 immunizes public officers like McCarthy from suit for  
13 all discretionary acts other than excessive or unreasonable use of force. (Mot. at 23.) Under  
14 § 820.2, "a public employee is not liable for an injury resulting from his act or omission where  
15 the act or omission was the result of the exercise of the discretion vested in him, whether or  
16 not such discretion be abused." Cal. Gov't Code § 820.2. But "a police officer does not have  
17 discretionary immunity from liability for the use of unreasonable force in making an arrest."  
18 *Scruggs v. Haynes*, 252 Cal. App. 2d 256, 267 (1967). Because Defendants are not entitled  
19 to summary judgment that Defendant McCarthy's acts were reasonable under the  
20 circumstances, the Court **DENIES** the motion.

#### 21           **F. Negligence**

22           "[I]n order to prove facts sufficient to support a finding of negligence, a plaintiff must  
23 show that [the] defendant had a duty to use due care, that he breached that duty, and that  
24 the breach was the proximate or legal cause of the resulting injury." *Nally v. Grace*  
25 *Community Church*, 47 Cal.3d 278, 292 (1988). As to the "duty" element, peace officers  
26 have a duty to act reasonably when using deadly force. *Munoz v. Olin*, 24 Cal.3d 629, 634  
27 (1979). The reasonableness of an officer's conduct is determined in light of the totality of

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1 circumstances. *Grudt v. City of Los Angeles*, 2 Cal. 3d 575 (1970). According to the  
2 California Supreme Court,

3       [.]law enforcement personnel's tactical conduct and decisions preceding the  
4       use of deadly force are relevant considerations under California law in  
5       determining whether the use of deadly force gives rise to negligence liability.  
6       Such liability can arise, for example, if the tactical conduct and decisions show,  
7       as part of the totality of circumstances, that the use of deadly force was  
8       unreasonable.

9 *Hayes v. County of San Diego*, 57 Cal. 4th 622, 639 (2013). For a negligence claim based  
10 on an officer's actions preceding the use of deadly force, the pre-shooting conduct must  
11 cause the victim's death. *Id.* at 637. "California has definitively adopted the substantial  
12 factor test of the Restatement Second of Torts for cause-in-fact determinations . . . . Under  
13 that standard, a cause in fact is something that is a substantial factor in bringing about the  
14 injury." *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 968-69 (1997).

15       Defendants move for summary judgment on Plaintiffs' negligence claim on the  
16 grounds that Officer McCarthy's actions were reasonable, and that there is no evidence that  
17 any unreasonable behavior caused Victor's death. (Mot. at 24; Docket no. 68, Reply Br. at  
18 10.) Specifically, Plaintiffs argue that Officer McCarthy's tactical errors leading up to his  
19 confrontation with Victor create a genuine dispute of material fact that he acted unreasonably  
20 at some point before his decision to shoot Victor.<sup>9</sup> (Opp'n Br. at 24-25 (citing *Hayes*, 57 Cal.  
21 4th at 629-30).) But in California, as in most jurisdictions, negligence requires a much higher  
22 showing—any unreasonable actions must cause the victim's injury or, in this case, death.  
23 *Hayes*, 57 Cal. 4th at 637.

24       No reasonable jury could find that Officer McCarthy's pre-shooting negligence caused  
25 Victor's death. Under California law, "the actor's negligent conduct is not a substantial factor  
26 in bringing about harm to another if the harm would have been sustained even if the actor  
27 had not been negligent." *Viner v. Sweet*, 30 Cal. 4th 1232, 1240 (2003). The undisputed

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28       <sup>9</sup> In their opposition to summary judgment, Plaintiffs abandon all negligence theories  
except the one that McCarthy is negligent based on his pre-shooting conduct. (Opp'n Br.  
at 24-25.) *Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008) ("We have previously held  
that a plaintiff has 'abandoned . . . claims by not raising them in opposition to [the  
defendant's] motion for summary judgment.") (quoting *Jenkins v. Cnty. of Riverside*, 398  
F.3d 1093, 1095 n.4 (9th Cir. 2005)) (alteration in original).

1 evidence about McCarthy's pre-shooting conduct is that he responded to Shakina's request  
2 for emergency assistance, heard Officer Maynard's report that the suspect was fleeing in a  
3 certain direction, began immediate pursuit, caught up to Victor in the narrow breezeway, and  
4 attempted to arrest him. The arrest included his tactical decision to perform a leg-sweep  
5 maneuver, as well as his decision to move his secondary weapon further away from Victor  
6 after noticing that it was loose. Even if one or more of these pre-shooting actions may have  
7 been unreasonable in light of the circumstances – and the Court does not believe any of  
8 them were – there is no evidence that, had McCarthy acted more reasonably in arresting  
9 Victor prior to any need for deadly force arising, Victor's death would have been avoided.  
10 The Court **GRANTS** summary judgment against Plaintiffs' claim of pre-shooting negligence.

#### 11 **IV. Ruling on Objections to Evidence**

12 Under Fed. R. Civ. P. 56(c)(2), a party may object as to the admissibility of evidence  
13 presented. Defendants have filed extensive objections to the evidence on which Plaintiffs  
14 rely in opposing summary judgment (Docket no. 68), to which Plaintiffs filed a response.  
15 (Docket no. 80.) Most of the objections are moot, because the Court does not rely on all the  
16 evidence objected to. The remaining objections were addressed and overruled as they  
17 arose. In no event did Defendants properly object "that the material cited to support or  
18 dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R.  
19 Civ. P. 56(c). The objections are therefore **OVERRULED**.

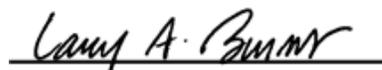
#### 20 **V. Conclusion and Order**

21 For the reasons set forth above, the Court **GRANTS** Defendants' motion for summary  
22 judgment on Plaintiffs' § 51.7, § 52.1, and negligence claims. The Court **DENIES** summary  
23 judgment on Plaintiffs' Section 1983, assault and battery, and wrongful death claims.

24 The Court previously vacated the pretrial conference, and now **RESCHEDULES** it for  
25 **Monday, February 9, 2015 at 12:00 p.m.**

26 **IT IS SO ORDERED.**

27 DATED: November 13, 2014



28 **HONORABLE LARRY ALAN BURNS**  
United States District Judge