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

FLOYD HILLS NELSON,)	Case No. CV 11-5407-PSG (JPR)
)	
Plaintiff,)	
)	ORDER ACCEPTING FINDINGS AND
v.)	RECOMMENDATIONS OF U.S.
)	MAGISTRATE JUDGE
CITY OF LOS ANGELES et al.,)	
)	
Defendants.)	
)	

The Court has reviewed de novo the Third Amended Complaint, the pleadings and records on file, and the Report and Recommendation of U.S. Magistrate Judge, which recommends that Plaintiff's request for judicial notice be granted in part and denied in part and that Defendants' motion for summary judgment be denied as to the excessive-force claims against Defendants Jeffrey Nolte and Gustavo Ramirez and granted with respect to his remaining claims. See 28 U.S.C. § 636. On May 14, 2018, Defendants filed objections to the R. & R. Plaintiff has not filed any objections, nor did he respond to Defendants' objections.

Defendants first contend that the Court should not take judicial notice of transcripts from Plaintiff's criminal trial

1 containing Nolte's and Ramirez's testimony or of civil-case
2 rulings involving them. (Objs. at 2.) Specifically, they argue
3 that their reply brief in support of their summary-judgment
4 motion did challenge the accuracy of the court documents –
5 contrary to the Magistrate Judge's representation (see R. & R. at
6 6) – which "contain[] facts that were 'subject to reasonable
7 dispute.'" (Id. (quoting Fed. R. Evid. 201(b)).) But the reply
8 brief claims only that the criminal-trial testimony "lacks any
9 certification and/or authentication from a court reporter and may
10 possibly be incomplete," and the civil-case rulings were
11 "irrelevant (and prejudicial)." (See Reply at 2.) It does not
12 contend that Nolte and Ramirez did not give the testimony in the
13 transcripts or that the civil-case decisions Plaintiff submitted
14 were inauthentic. In fact, it acknowledges that "there are
15 absolutely no misstatements or contradictions with what is in the
16 trial testimony to what is stated in [Nolte's and Ramirez's]
17 declarations." (Id. at 4 n.2.)

18 The Court may take judicial notice of and consider
19 "documents on file in federal or state courts." Harris v. Cnty.
20 of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012) (citation
21 omitted). Defendants nowhere assert that the court documents
22 contain errors or fabrications or are anything other than what
23 Plaintiff claims them to be. The Magistrate Judge specifically
24 recommended that the documents be judicially noticed only to the
25 extent they supported Plaintiff's claim that "there remain
26 genuine issues of disputed material fact as to the circumstances
27 of the shooting," and not for the truth of the matters asserted
28 in them. (R. & R. at 7; see also Objs. at 2.) In any event,

1 because, as Defendants claim (see Reply at 4 n.2), the trial-
2 testimony excerpts Plaintiff included in his request for judicial
3 notice were consistent with Defendants' declarations, they did
4 not affect the Magistrate Judge's analysis. Indeed, the R. & R.
5 does not even cite the trial transcripts in its discussion of
6 Defendants' motion. Disputed issues of material fact would
7 remain based solely on Defendants' declarations. Accordingly,
8 Defendants' first objection is without merit.

9 Defendants also object to the Magistrate Judge's analysis
10 under Graham v. Connor, 490 U.S. 386, 396 (1989), of the factors
11 supporting the excessive-force claims. They contend that they
12 "never acknowledged or conceded that the shooting lasted up to 60
13 seconds" and in fact argued that Plaintiff's allegations in the
14 TAC showed that "he conceded" it happened in a "matter of
15 seconds." (Objs. at 2-3.) The relevant portions of the TAC
16 allege that Plaintiff and former coplaintiff Alonzo Harris
17 "rais[ed] their empty hands" "[a]pproximately 30-60 seconds"
18 after the first volley of gunfire (TAC ¶¶ 33-34) and "[a]t no
19 time prior to and/or during the approximate 30-60 second
20 intervals" between the first and second volleys of gunfire did
21 Defendants Herron or Friedrich attempt to intercede (id. ¶ 38).
22 Defendants' summary-judgment motion quotes those paragraphs for
23 the proposition that the shooting happened "in a matter of
24 seconds." (Mot. Summ. J. at 11-12.) Further, they admit later
25 in their objections that there were two distinct volleys of
26 gunfire. (Objs. at 3.) Their protest that they did not intend
27 to concede the 30- to 60-second time frame is thus not well
28 taken.

1 Defendants next dispute the Magistrate Judge's conclusion
2 that "[i]f indeed 30 to 60 seconds elapsed without Plaintiff or
3 Harris attempting to resist arrest or flee," and if Plaintiff was
4 shot "after raising his hands in surrender while Harris did
5 nothing to defy or threaten the officers," no immediate threat
6 justifying the use of deadly force may have existed. (See Objs.
7 at 3; see also R. & R. at 24.) They base their objection on
8 "Plaintiff's overall lack of evidentiary support" for his account
9 of his and Harris's actions. (See Objs. at 3.) Although neither
10 the TAC nor Plaintiff's opposition was signed under penalty of
11 perjury, the declaration he submitted with his opposition was.
12 In it he contends that he was shot 30 to 60 seconds after the
13 first round of gunfire, while his "hands were raised and empty in
14 the traditional position of surrender," and that neither he nor
15 Harris had done anything to threaten the officers. (Pl.'s Decl.
16 ¶¶ 12-16, 19-20, 22-23 ("30-30 second time lapse").)

17 Defendants claim that Plaintiff's declaration is "conclusory
18 and not based on his personal knowledge" in that it speculates on
19 what Defendants were thinking and what they could have perceived
20 at the time of the shooting. (See Objs. at 3; see also Reply at
21 5 n.3.) But Plaintiff's statements that he was shot while
22 peacefully surrendering and that neither he nor Harris, whom he
23 was sitting next to, had done anything to create a threat after
24 the first volley of gunfire were necessarily based on his
25 personal recollection of the incident and his observations of
26 Harris. As the Magistrate Judge noted, Defendants' Reply did not
27 address Plaintiff's claims as to what Harris was doing between
28 volleys of gunfire or how or when he surrendered, either through

1 argument or with evidence (see R. & R. at 23 n.10),¹ and they
2 are inconsistent among themselves as to how many shots were
3 fired, by whom, when, and why (see id. at 23). Nolte claims to
4 have seen Harris turn and point his gun at Friedrich and Herron
5 after the first round of gunfire, creating a second distinct
6 threat (see Nolte Decl. ¶¶ 5-6; Objs. at 3), but none of the
7 other Defendants perceived two distinct threats or saw Harris
8 holding or reaching for a gun or otherwise doing anything
9 threatening during the encounter (see Ramirez Decl. ¶ 5 (threat
10 created by Plaintiff holding gun), Herron Decl. ¶ 4 (threat
11 created when Plaintiff made movements "as if he were reaching for
12 a gun"), Friedrich Decl. ¶ 4 ("did not perceive a threat of death
13 or serious bodily injury")). Nor is the fact that Plaintiff's
14 statements about his and Harris's conduct – made under penalty of
15 perjury – were self-serving a basis for ignoring them. See Sec.
16 & Exch. Comm'n v. Phan, 500 F.3d 895, 909-10 (9th Cir. 2007)
17 (uncorroborated declarations of declarant's own personal actions
18 and conversations on material issue not to be disregarded on
19 summary judgment as "self-serving").

20 The Court's function at the summary-judgment stage is not to
21 weigh the evidence or determine the truth of the matter but
22 rather, after drawing all inferences in the light most favorable
23 to the nonmoving party, to evaluate whether any genuine issue
24

25 ¹ The portions of Plaintiff's deposition submitted by
26 Defendants include sworn testimony that when the first shots were
27 fired, he did not have a gun and Harris had his hands on the
28 steering wheel and was not holding or pointing a gun at anyone.
(See Pl.'s Dep. at 49:4-25 (Mot. Summ. J., Ex. 2 at 39:4-25).)
The excerpted portions do not cover what happened after the first
volley of gunfire.


1 remains to be tried. See Tolan v. Cotton, 134 S. Ct. 1861, 1866
2 (2014) (per curiam) (citing Anderson v. Liberty Lobby, Inc., 477
3 U.S. 242, 249 (1986)); Bonivert v. City of Clarkston, 883 F.3d
4 865, 880 (9th Cir. 2018) (at summary-judgment stage, court should
5 not weigh “conflicting evidence with respect to disputed material
6 facts” (citation and alteration omitted)). If, as his
7 Declaration contends, Plaintiff was shot 30 or more seconds after
8 the first volley of gunfire while raising his empty hands in
9 surrender, and if neither he nor Harris did anything that could
10 be perceived as a threat in the interim, Nolte and Ramirez are
11 not entitled to summary judgment on the excessive-force claims.
12 See Galvan v. City of La Habra, No. SACV 12-2103 JGB (RNBx), 2014
13 WL 1370747, at *16-18 (C.D. Cal. Apr. 8, 2014) (citing cases)
14 (denying summary judgment when plaintiff swore in deposition that
15 he was shot by arresting officer after putting his empty hands
16 up); cf. Vos v. City of Newport Beach, __ F.3d __, 2018 WL
17 2771049, at *5, *8 (9th Cir. June 11, 2018) (citing Kisela v.
18 Hughes, 138 S. Ct. 1148, 1153-54 (2018) (per curiam)) (affirming
19 summary judgment on qualified-immunity grounds for officers who
20 shot “erratic individual” who made eight-second charge at them
21 “with something in his upraised hand” after having “cut someone
22 with scissors,” “simulated having a firearm,” and “asked officers
23 to shoot him”).² Defendants’ objections amount to a request that
24 the Court decide disputed issues of material fact in their favor
25 on summary judgment, something it cannot do.

27
28 ² Defendants’ objections do not specifically address
qualified immunity.

1 Having reviewed de novo those portions of the R. & R. to
2 which Defendants objected, the Court accepts the findings and
3 recommendations of the Magistrate Judge in it as well as the
4 findings and conclusions in her discovery orders of August 15 and
5 October 23, 2017.

6 IT THEREFORE IS ORDERED that Plaintiff's request for
7 judicial notice is granted in part and denied in part and that
8 Defendants' motion for summary judgment is granted as to
9 Plaintiff's failure-to-intervene and municipal-liability claims
10 and the excessive-force claim against Defendant Herron and denied
11 as to the excessive-force claims against Defendants Nolte and
12 Ramirez.

13
14 DATED: July 9, 2018



PHILIP S. GUTIERREZ
U.S. DISTRICT JUDGE