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3 **UNITED STATES DISTRICT COURT**  
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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6 **CYNTHIA SOLTERO, Individually and as**  
7 **Successors in Interests of VINCENT**  
8 **MATTHEW YZAGUIRRE, DECEASED,**

9 **Plaintiff,**

10 **v.**

11 **CITY OF BAKERSFIELD, TIMOTHY**  
12 **BERCHTOLD, JASON FELGENHAUER, and**  
13 **DOES 2 through 10, inclusive,**

14 **Defendants.**

15 **1:12-CV-01791-LJO-JLT**

16 **ORDER DENYING MOTION FOR**  
17 **JUDICIAL DETERMINATION**  
18 **PURSUANT TO CALIFORNIA CODE**  
19 **OF CIVIL PROCEDURE section 382**  
20 **(DOC. 35) AND REQUIRING FILING**  
21 **AND RE-NOTICE OF MOTION**  
22 **PURSUANT TO CCP section 377.61**

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Cynthia Soltero is the birth mother of decedent Matthew Vincent Yzaguirre, who died on May 14, 2010, allegedly as a result of gunshot wounds inflicted by Bakersfield Police Department Officers. On October 20, 2011, Ms. Soltero initiated the instant litigation in the Superior Court for the County of Kern, alleging the following causes of action: 1) Violation of California Civil Code § 52.1; (2) Wrongful Death Pursuant to California Code of Civil Procedure § 377.60; (3) Assault; (4) Battery; (5) Intentional Infliction of Emotional Distress; (6) Negligence; and (7) Negligent Hiring, Training and Supervision. See Doc. 2 at 2. On October 9, 2012, the Superior Court granted Plaintiff's motion to file an amended complaint to add causes of action under 42 U.S.C. §§ 1981, 1983, and 1985. *Id.* at 3. Defendants removed to this Court. Doc. 1.

Plaintiff filed a Third Amended Complaint against the City of Bakersfield, Timothy Berchtold, Jason Felgenhauer, and Robert Yzaguirre on June 23, 2014, which is now the operative pleading in the action. Doc. 23. The City of Bakersfield, Timothy Berchtold, and Jason Felgenhauer filed their answer on June 23, 2014. Doc. 24. To date, nominal defendant Robert Yzaguirre, Decedent's biological father,

1 has neither filed an Answer nor made any attempt to appear in the action.

2 On December 8, 2014, Counsel for Defendants filed a “Motion for Judicial Determination  
3 Pursuant to California Code of Civil Procedure § 382,” requesting that this Court enter an order finding  
4 that: (1) all the proper parties have been named in this case; (2) nominal defendant Robert Yzaguirre had  
5 notice of the death of his son, Matthew Vincent Yzaguirre since at least May 18, 2010; (3) nominal  
6 Defendant Robert Yzaguirre had notice of this lawsuit; (4) despite this notice and despite the efforts of  
7 the parties, Robert Yzaguirre has refused to participate in this litigation; (5) Robert Yzaguirre’s claims  
8 are otherwise barred by the applicable statute of limitations; (6) given Robert Yzaguirre’s failure to  
9 participate in this lawsuit and the legal bar to his claims, the parties are left with no option but to settle  
10 and dismiss this matter with a complete legal waiver from Mr. Yzaguirre. Doc. 35.

11 California Code of Civil Procedure § 382 provides:

12 If the consent of any one who should have been joined as plaintiff cannot  
13 be obtained, he may be made a defendant, the reason thereof being stated  
14 in the complaint; and when the question is one of a common or general  
15 interest, of many persons, or when the parties are numerous, and it is  
16 impracticable to bring them all before the court, one or more may sue or  
17 defend for the benefit of all.

18 Cal. Code Civ. Pro. § 382 (“§ 382”). A reading of the motion, along with all papers included with the  
19 filing, results in the conclusion that what is being sought is a total end to this case, foreclosing anyone  
20 from ever again making a claim against anyone having to do with the death that is the subject of this  
21 suit. One clear problem is that Cal. Code Civ. Pro. Section 382 does not provide for the Advisory  
22 Opinion that is being sought.

23 To obtain the Order that all parties clearly seek, the parties may do one of two things:

- 24 1. Obtain a written, signed waiver by the natural father of the decedent who is housed at the  
25 Soledad Prison; or
- 26 2. File and Notice (including to the father) a Motion Seeking Court Apportionment of the  
Settlement Proceeds Among the Heirs pursuant to Cal. Code Civ. Pro. Section 377.61. (see also  
Corder v Corder, 41 Cal. 4<sup>th</sup> 644, 660 (2007)).

1 a. Concurrent with this motion should be a Motion to Set Aside the Default of the natural  
2 father (the nominal defendant), so that he is a part of the Court's decision to dispose of  
3 this case completely.

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5 IT IS SO ORDERED.

6 Dated: December 9, 2014

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE

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