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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10

11 THE ESTATE OF CECIL ELKINS, JR., et
12 al.,

13 Plaintiffs,

14 v.

15 CALIFORNIA HIGHWAY PATROL, et al,

16 Defendants.

Case No. 1:13-cv-01483-AWI-SAB

FINDINGS AND RECOMMENDATION
RECOMMENDING THAT DEFENDANT'S
MOTION TO DISMISS BE GRANTED

ECF NO. 54

OBJECTIONS DUE WITHIN FOURTEEN
DAYS

17
18 On December 1, 2014, Defendant Hipolito Pelayo filed a motion to dismiss. (ECF No.
19 54.) The motion to dismiss was referred to the undersigned magistrate judge for Findings and
20 Recommendations pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72.
21 (ECF No. 55.)

22 The hearing on the motion to dismiss took place on March 4, 2015. Neli Palma and Peter
23 Meshot appeared telephonically on behalf of Defendants. Nichelle Jones appeared
24 telephonically on behalf of Plaintiffs. For the reasons set forth below, the Court recommends
25 that the motion to dismiss be granted and the Second Amended Complaint be dismissed with
26 leave to amend.

27 During oral argument, the Court informed the parties of its intent to recommend that the
28 Second Amended Complaint be dismissed, with leave to amend. The parties informed the Court

1 that they did not object to this recommendation and, in the interests of expediency, would
2 stipulate to this recommendation and would be amenable to avoiding the fourteen day delay
3 associated with the findings and recommendations objection period. Accordingly, to the extent
4 that the parties wish to move the case along, they may file a stipulation informing the Court that
5 they do not object to these Findings and Recommendations and waive the right to file any
6 objections in the fourteen day objection period.¹

7 **I.**

8 **BACKGROUND**

9 This action was filed on September 12, 2013. (ECF No. 1.) The operative complaint is
10 the Second Amended Complaint filed on November 14, 2014. (ECF No. 50.) Plaintiffs' claims
11 arise from an incident alleged to have occurred on November 13, 2012 in the City of Pixley.
12 Plaintiffs allege that law enforcement officers shot and killed Cecil Elkins, Jr. ("the Decedent")
13 while attempting to arrest him.

14 The claims in this action are brought by Plaintiff Creasha Elkins (the surviving widow of
15 the Decedent), Plaintiff Valiecia Perez (Decedent's daughter), Plaintiff Dylan Elkins (Decedent's
16 son), Plaintiff Devin Elkins (Decedent's son), Plaintiff Tina Terrel (Decedent's mother), and
17 Plaintiff Cecil Elkins (Decedent's father).

18 Plaintiffs allege that Defendant Pelayo and several "Doe" officers from the California
19 Highway Patrol, Tulare County Sheriff's Department, the Tulare County Regional Gang
20 Enforcement Team, the Department of Justice Central Valley Gang Task Force and the Tulare
21 Police Department pursued the Decedent on foot. Plaintiffs further allege that the Decedent was
22 shot in the back by Defendant Pelayo despite the fact that the Decedent was unarmed and posed
23 no reasonable threat to anybody.

24 **II.**

25 **LEGAL STANDARDS FOR MOTIONS TO DISMISS**

26 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on

27 ¹ If the parties wish to agree to such a stipulation, they may file their stipulation and provide a copy to the Court's
28 Courtroom Deputy, Mamie Hernandez.

1 the grounds that a complaint “fail[s] to state a claim upon which relief can be granted.” A
2 complaint must contain “a short and plain statement of the claim showing that the pleader is
3 entitled to relief.” Fed. R. Civ. P. 8(a)(2). “[T]he pleading standard Rule 8 announces does not
4 require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-
5 unlawfully harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell
6 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In assessing the sufficiency of a
7 complaint, all well-pleaded factual allegations must be accepted as true. Iqbal, 556 U.S. at 678-
8 79. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere
9 conclusory statements, do not suffice.” Id. at 678.

10 **III.**

11 **DISCUSSION**

12 **A. Plaintiffs’ Standing**

13 Defendant Pelayo argues that Plaintiffs improperly alleged that all six plaintiffs have
14 standing as the Decedent’s personal representative and successor in interest. Defendant further
15 argues that the claims for assault, battery, and under Section 1983 (excessive force) are survival
16 actions that can only be brought by the Decedent’s personal representative or successor-in-
17 interest. Defendant further contends that the requisite declaration under California Code of Civil
18 procedure § 377.32 has not been filed by Plaintiffs.

19 Plaintiffs filed a declaration of successor in interest on behalf of Plaintiff Creasha Elkins
20 on December 10, 2014. (ECF No. 59.) This declaration states that no personal representative
21 has been appointed under California law and that Creasha Elkins, Dylan Elkins, and Devin
22 Elkins are the Decedent’s successors-in-interest pursuant to California Code of Civil Procedure §
23 377.11. (Decl. of Successor in Interest ¶ 4.) Although Valiecia Perez is alleged to by the
24 Decedent’s daughter in the complaint, there is no mention of Valiecia Perez in the Declaration of
25 Successor in Interest.

26 In his reply, Defendant notes that there is no declaration establishing Valiecia’s standing
27 as a successor in interest and there is no declaration establishing Tina Terrel or Cecil Elkin’s
28 standing as a successor in interest. The Court also notes that the Second Amended Complaint is

1 ambiguous as to which causes of action are brought by which Plaintiffs. The Second Amended
2 Complaint states that the First Cause of Action is brought “By All Plaintiffs Against All
3 Defendants.” (Second Am. Compl., at pg. 6:16-18.) However, the Second and Third Causes of
4 Action confusingly state that they are brought “by the ESTATE OF CECIL ELKINS JR,
5 deceased, Against All Defendants.” (Second Am. Compl., at pg. 8:9-11.) The Fourth Cause of
6 Action is brought “By Plaintiff CREASHA ELKINS as Successor in Interest to the Estate of
7 CECIL ELKINS, JR.” (Second Am. Compl., at pg. 10:17-20.) Confusingly, the “Seventh Cause
8 of Action,” which is actually the fifth, fails to provide any indication as to which Plaintiffs are
9 applicable.

10 The issue raised in Defendant’s motion to dismiss strikes the court as an issue that is
11 easily resolved via an amended complaint and successor in interest declaration which clearly sets
12 forth which Plaintiffs are bringing which cause of action. It is clear that the Second Amended
13 Complaint suffers from careless typographical errors, such as the boilerplate personal
14 representative/successor-in-interest allegation attached to each individual Plaintiff, the
15 inconsistent, confusing, and ambiguous designations for which Plaintiffs are bringing which
16 cause of action, and even the numbering of the five causes of action. At oral argument, the
17 parties admitted that there was some ambiguity with respect to which Plaintiffs are attached to
18 which causes of action and were amenable to allowing Plaintiff to file an amended complaint
19 which clarifies these issues. Plaintiffs also indicated that Plaintiff Creasha Elkins would be the
20 only individual filing claims as a successor in interest to the estate of Cecil Elkins, Jr.
21 Accordingly, the Court recommends that Defendant’s motion to dismiss be granted, the Second
22 Amended Complaint be dismissed, and Plaintiff be given leave to amend their complaint and
23 their successor-in-interest declaration.

24 IV.

25 CONCLUSION AND RECOMMENDATION

26 For the reasons set forth above, the Court finds that Plaintiffs’ claims should be dismissed
27 with leave to amend to address the deficiencies identified above.

28 Accordingly, it is HEREBY RECOMMENDED that Defendant Pelayo’s motion to

1 dismiss be GRANTED and that Plaintiffs' Second Amended Complaint be DISMISSED with
2 leave to amend.

3 These Findings and Recommendations are submitted to the United States District Judge
4 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
5 Local Rules of Practice for the United States District Court, Eastern District of California.
6 Within fourteen (14) days after being served with a copy, any party may file written objections
7 with the court and serve a copy on all parties. Such a document should be captioned "Objections
8 to Magistrate Judge's Findings and Recommendation." The Court will then review the
9 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
10 failure to file objections within the specified time may waive the right to appeal the District
11 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 IT IS SO ORDERED.

13
14 Dated: **March 4, 2015**


UNITED STATES MAGISTRATE JUDGE