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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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11 Rachel Simmons,

No. 1:15-cv-00818-JAM-EPG

12 Plaintiff,

13 v.

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**14 Correctional Officer
Rodriguez, et al.,

15

Defendants.

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17 Plaintiff Rachel Simmons ("Plaintiff") filed this action
18 against Defendants Correctional Officers Rodriguez and Hall
19 ("Defendants") on May 28, 2015 (Doc. #1). Defendants move to
20 dismiss Plaintiff's complaint (Doc. #7). Plaintiff opposes the
21 motion (Doc #15).¹

22

23 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

24 The Court takes the following facts, alleged by Plaintiff,
25 as true for purposes of this motion.

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27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for April 5, 2016.

1 Armando Simmons ("Mr. Simmons"), Plaintiff's late husband,
2 was being housed in Administrative Segregation at Avenal State
3 Prison. Compl. ¶ 3. On May 30, 2013, Mr. Simmons called
4 Defendants to his cell and told them that he had swallowed some
5 drugs and needed medical attention. Id. Defendants laughed at
6 Mr. Simmons. Id. About thirty minutes after Mr. Simmons had
7 first called to the officers, Defendants told Mr. Simmons to take
8 off his clothing. Id. Defendants then removed Mr. Simmons from
9 his cell and put Mr. Simmons in a cage while Defendants searched
10 his cell. Id. Mr. Simmons hollered and twitched on the floor of
11 the cage where he was naked and handcuffed. Id. About forty-
12 five minutes after Mr. Simmons was placed in the cage, nurses
13 came to escort Mr. Simmons out of the facility. Id. Mr. Simmons
14 was taken to Coalinga Regional Medical Center, where he was
15 pronounced dead of an acute methamphetamine overdose. Id.

16 Plaintiff's Complaint named Officer Rodriguez, Officer Hall
17 and Sergeant Luis as defendants (Doc. #1) and includes five
18 causes of action: (1) violation of the Eighth Amendment pursuant
19 to 42 U.S.C. § 1983, (2) wrongful death, (3) negligence,
20 (4) conspiracy, and (5) intentional infliction of emotional
21 distress ("IIED").² Compl. at 5-9. Plaintiff voluntarily
22 dismissed Sergeant Luis from this action without prejudice (Doc.
23 #20). Defendants Rodriguez and Hall's motion to dismiss is now
24 before the Court (Doc. #7).

25
26 ² Plaintiff includes both her conspiracy and IIED claims under
27 the heading "Fourth Cause of Action." Compl. at 9. Conspiracy
28 and IIED are two separate causes of action, and thus the Court
will refer to conspiracy as Plaintiff's fourth cause of action
and IIED as Plaintiff's fifth cause of action.

1 II. OPINION

2 A. Request for Judicial Notice

3 Defendants ask the Court to take judicial notice of the
4 following: (1) the California Victim Compensation and Government
5 Claims Board ("VCGCB") claim file for plaintiff Rachel Simmons
6 (Claim No. G614531, attached to Defendants' Request for Judicial
7 Notice ["RJN"] as Exh. A); (2) the fact that the VCGCB received
8 Plaintiff's claim on November 7, 2013 (Exh. A); (3) the fact
9 that the VCGCB mailed its rejection of Plaintiff's claim to
10 Plaintiff's counsel, Julia Young, on December 20, 2013 (id.);
11 and (4) the fact that Plaintiff's Claim No. G614531 is the only
12 government claim relating to the death of Armando Simmons that
13 Plaintiff presented to the VCGCB before this lawsuit was filed
14 (Declaration of VCGCB custodian of records Katrina de Caro,
15 attached to RJN as Exhibit B). RJN at 2.

16 A court may take judicial notice of a fact that is not
17 reasonably disputed if it "can be accurately and readily
18 determined from sources whose accuracy cannot reasonably be
19 questioned." Fed. R. Evid. 201(b)(2). On a motion to dismiss,
20 courts may consider "matters of public record." Northstar Fin.
21 Advisors Inc. v. Schwab Inv., 779 F.3d 1036, 1042 (9th Cir.
22 2015) (quoting Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038
23 (9th Cir. 2010)). "Matters of public record" include records
24 and reports of administrative agencies. Enciso v. Moon, 2015 WL
25 673269, at *6 n.6 (E.D. Cal. Feb. 17, 2015) (citing United
26 States v. 14.02 Acres of Land More or Less in Fresno Cty., 547
27 F.3d 943, 955 (9th Cir. 2008)).

28 The Court takes judicial notice of Rachel Simmons' VCGCB

1 claim file because it is a matter of public record not subject
2 to reasonable dispute. The Court also takes judicial notice of
3 the facts that Plaintiff's government claim is dated November 7,
4 2013, and the letter rejecting Plaintiff's claim is dated
5 December 20, 2013.

6 A court may also take judicial notice "that an authorized
7 custodian of records for the VCGCB conducted a search of the
8 VCGCB's records" and of the results of that search. Martin v.
9 Hedgpeth, 2014 WL 3884287, at *6 (N.D. Cal. Aug. 7, 2014).

10 Thus, the Court takes judicial notice of the fact that Ms. de
11 Caro conducted a search of the VCGCB records and found only
12 Rachel Simmons' Claim No. G614531 and no other claims related to
13 the May 2013 death of Mr. Simmons.

14 B. Evidentiary Objections

15 Defendants object to the declaration of Rachel Simmons
16 attached to Plaintiff's opposition memorandum (Doc. #23).
17 Defendants object to the sentence in which Plaintiff states that
18 she is Mr. Simmons' successor in interest on the grounds that a
19 lay witness cannot offer legal conclusions and that California
20 Code of Civil Procedure ("CCP") section 377.32 requires facts to
21 support such a statement. Defendants' Objections (Doc. #23) at
22 1. Section 377.32 requires "facts in support thereof" to
23 accompany a declaration that states that the declarant is the
24 decedent's successor in interest. Cal. Civ. Proc. Code
25 § 377.32(a)(5). "[D]ecedent's successor in interest" means the
26 beneficiary of the decedent's estate or other successor in
27 interest who succeeds to a cause of action." Id. § 377.11.
28 Plaintiff attached her marriage certificate and Mr. Simmons'

1 death certificate to her declaration, but the marriage and death
2 certificates alone do not prove that Plaintiff is Mr. Simmons'
3 successor in interest. Neither Plaintiff's declaration nor any
4 documents attached indicate whether Mr. Simmons had any other
5 family members who may be the beneficiary of Mr. Simmons'
6 estate. Plaintiff has failed to prove that she—to the exclusion
7 of any other individuals—is Mr. Simmons' "successor in
8 interest." Thus, the Court strikes paragraph 3 of the
9 declaration of Rachel Simmons.

10 Defendants also argue that the Court should strike
11 Plaintiff's declaration in its entirety because the declaration
12 does not contain several elements required by CCP section
13 377.32. Defendants' Objections at 2. Defendants are correct
14 that Plaintiff fails to include in her declaration some
15 statements and pieces of information required by section 377.32.
16 See Cal. Civ. Proc. Code § 377.32. Defendants do not, however,
17 cite any authority, and the Court is aware of none, which
18 requires the Court to strike a declaration in its entirety
19 simply because it lacks certain information. The Court does not
20 consider Plaintiff's declaration sufficient to establish that
21 she is Mr. Simmons' successor in interest. But while
22 insufficient as a 377.32 affidavit, the declaration does not
23 violate any evidentiary rules. Thus, the Court denies
24 Defendants' motion to strike Plaintiff's declaration in full and
25 strikes only paragraph 3.

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1 C. Analysis

2 1. First Cause of Action: Eighth Amendment Violation
3 Pursuant to 42 U.S.C. § 1983

4 Plaintiff brings her § 1983 claim on behalf of herself and
5 her late husband, Mr. Simmons. Plaintiff alleges that
6 Defendants deprived "plaintiff decedent" of his Eighth Amendment
7 right against cruel and unusual punishment by failing to provide
8 Mr. Simmons with medical treatment. Compl. ¶¶ 18-22. Plaintiff
9 also alleges that Defendants violated "plaintiff's right to a
10 familiar relationship with decedent, without due process of
11 law." Id. ¶ 22.

12 In a § 1983 action, "[t]he party seeking to bring a
13 survival action bears the burden of demonstrating that a
14 particular state's law authorizes a survival action and that the
15 plaintiff meets that state's requirements for bringing a
16 survival action." Moreland v. Las Vegas Metro. Police Dep't,
17 159 F.3d 365, 369 (9th Cir. 1998). Under California's survival
18 statute, "violations of personal civil rights may be brought by
19 decedent's . . . successor in interest." Chang Heum Lee v. Cty.
20 of Kern, 2007 WL 3341593, at *2 (E.D. Cal. Nov. 8, 2007). "The
21 person who seeks to commence an action . . . as the decedent's
22 successor in interest . . . shall execute and file an affidavit
23 or a declaration under penalty of perjury." Cal. Civ. Proc.
24 Code § 377.32. Section 377.32 requires the declaration to
25 include several specific statements and pieces of information.
26 Id. For example, the declaration must state that "[n]o
27 proceeding is now pending in California for administration of
28 the decedent's estate." Id.

1 Plaintiff filed a declaration stating that she is the
2 surviving spouse of Mr. Simmons. Declaration of Rachel Simmons
3 "Simmons Decl." ¶ 2. Defendants argue that Plaintiff's
4 declaration is insufficient to establish that she is Mr.
5 Simmons' successor in interest because her declaration does not
6 include several of the elements required by section 377.32.
7 Memorandum of Points and Authorities in Support of Motion to
8 Dismiss ("Mot.") at 4. Defendants are correct: Plaintiff's
9 declaration lacks several elements required by CCP section
10 377.32 and facts to support the statement that she is decedent's
11 successor in interest. Plaintiff has failed to establish that
12 she is Mr. Simmons' successor in interest, and she therefore
13 cannot bring a § 1983 survivor action. Nevertheless, Plaintiff
14 may be able to submit a sufficient section 377.32 affidavit, so
15 Plaintiff's first cause of action is dismissed with leave to
16 amend. See Eminence Capital, LLC v. Aspeon Inc., 316 F.3d 1048,
17 1052 (9th Cir. 2003) ("Dismissal with prejudice and without
18 leave to amend is not appropriate unless it is clear . . . that
19 the complaint could not be saved by amendment.").

20 2. Second, Third, and Fifth Causes of Action: State
21 Law Claims

22 Plaintiff's second, third, and fifth causes of action are
23 for wrongful death, negligence, and IIED, respectively. Compl.
24 at 7-9. Plaintiff brings her wrongful death claim under CCP
25 section 377.60. Id. ¶ 25. Section 377.60 states that a
26 "decedent's surviving spouse" may assert "[a] cause of action for
27 the wrongful death of [the decedent] caused by the wrongful act
28 or neglect of another." Cal. Civ. Proc. Code § 377.60.

1 Plaintiff's negligence and IIED claims also arise under
2 California state law. See Fid. Nat. Title Co. v. U.S. Small Bus.
3 Admin., 2014 WL 1883939, at *7 (E.D. Cal. May 12, 2014)
4 ("[N]egligence is a state law claim."); Ware v. McDonald, 2013 WL
5 1499437, at *3 (E.D. Cal. Apr. 10, 2013) ("[I]ntentional
6 infliction of emotional distress is a state law claim.").
7 Additionally, for each state law claim, Plaintiff must comply
8 with the California Government Tort Claims Act ("CTCA"). See
9 Bremer v. Cty. of Contra Costa, 2015 WL 5158488, at *4 (N.D. Cal.
10 Sept. 2, 2015) (dismissing wrongful death claim brought under CCP
11 § 377.60 for failure to allege compliance with the CTCA); Elliot
12 v. Raddy, 2013 WL 1281804, at *13 (E.D. Cal. Mar. 27, 2013)
13 ("[A] state negligence claim is subject to compliance with the
14 claim presentation requirements of the California Government Tort
15 Claims Act."); Dowell v. Contra Costa Cty., 928 F. Supp. 2d 1137,
16 1151 (N.D. Cal. 2013) (stating that IIED claims are subject to
17 the CTCA).

18 The CTCA requires that any tort claim against a public
19 entity or its employees be presented to the VCGCB no more than
20 six months after the cause of action accrues. Lemire v.
21 Schwarzenegger, 2010 WL 430818, at *5 (E.D. Cal. Jan. 28, 2010).
22 If the VCGCB rejects the claim, the plaintiff has "six months
23 from the date the rejection [is] mailed to file a lawsuit
24 regarding the claim." Wade v. Fresno Police Dep't, 2010 WL
25 2353525, at *5 (E.D. Cal. Jun. 9, 2010) (citing Cal. Gov't Code
26 § 945.6(a)(1)).

27 Defendants argue that Plaintiff's state law claims are
28 barred by the limitations period imposed by California Government

1 Code section 945.6. Mot. at 3. Plaintiff argues that her claims
2 are not time-barred because she submitted her claim to the VCGCB
3 within six months of the death of Mr. Simmons. Opp. at 1.
4 Plaintiff did indeed comply with the requirement to submit a
5 government claim to the VCGCB within six months of the accrual of
6 the cause of action. See Cal. Gov't Code § 911.2(a). But, that
7 six-month timeline is not at issue here. The issue is whether
8 Plaintiff complied with the timeline imposed by section
9 945.6(a)(1), which requires that a plaintiff file a lawsuit
10 within six months of receiving a notice of rejection from the
11 state agency. See id. § 945.6(a)(1).


12 Here, Plaintiff's attorney received a written notice from
13 the VCGCB on December 20, 2013 stating that it had rejected
14 Plaintiff's claim. Exh. A to RJN. The notice explicitly stated
15 that Plaintiff had six months to file a court action on her
16 rejected claim. Id. (citing Cal. Gov't Code § 945.6). Plaintiff
17 did not file this action until May 28, 2015, almost a year and a
18 half after she received the notice rejecting her claim. Thus,
19 Plaintiff failed to comply with the CTCA. Plaintiff's second,
20 third, and fifth causes of action are therefore dismissed with
21 prejudice. See Mohsin v. Cal. Dep't of Water Res., 2015 WL
22 7282904, at *9 (E.D. Cal. Nov. 18, 2015) ("[F]ailure to file a
23 claim within the statute of limitations provided by the CGCA is
24 grounds for dismissal with prejudice."); Taylor v. City of E.
25 Palo Alto, 2012 WL 5511024, at *1 (Cal. Ct. App. Nov. 14, 2012)
26 (affirming trial court's dismissal with prejudice of claims which
27 were untimely under section 945.6).

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1 Plaintiff's amended complaint, if any, must be filed within
2 twenty (20) days of the date of this order. Defendants'
3 responsive pleading is due within twenty (20) days thereafter:

4 IT IS SO ORDERED.

5 Dated: May 4, 2016

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8 JOHN A. MENDEZ,
9 UNITED STATES DISTRICT JUDGE
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