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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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7 SUKHWINDER KAUR, individually
8 and as the successor in
9 interest for the Decedent
10 PARMINDER SINGH SHERGILL;
11 KULBINDER KAUR SOHOTA;
12 SARABJIT SINGH SHERGILL,

Plaintiffs,

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v.

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13 CITY OF LODI; CITY OF LODI
14 POLICE DEPARTMENT; MARK
15 HELMS, in his individual
16 capacity as the Chief of
17 Police for the City of Lodi;
18 SCOTT BRATTON, in his
19 individual capacity as a City
20 of Lodi Police Officer; ADAM
21 LOCKIE, in his individual
22 capacity as a City of Lodi
23 Police Officer,

Defendants.

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No. 2:14-cv-00828-GEB-AC

**ORDER DENYING OFFICER
DEFENDANTS' MOTION TO DISMISS
THE SECOND CLAIM OF THE THIRD
AMENDED COMPLAINT**

Defendants Scott Bratton and Adam Lockie (the "Officer Defendants") seek dismissal with prejudice of Plaintiff Sukhwinder Kaur's Fourth Amendment provocation claim under Federal Rule of Civil Procedure ("Rule") 12(b)(6), arguing Plaintiff failed to "allege facts which plausibly state that the Decedent [Parminder Singh Shergill ('Parminder')] was seized prior to the [Officer Defendants'] use of deadly force." (Mem. P.&A. Supp. Officer Defs.' Mot. Dismiss TAC ("Mot.") 2:6-10, ECF

1 No. 89-1.)

2 **I. LEGAL STANDARD**

3 "To survive a motion to dismiss, a complaint must
4 contain sufficient factual matter, accepted as true, to state a
5 claim to relief that is plausible on its face." Caviness v.
6 Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir.
7 2010) (quoting Ashcroft v. Iqbal, 556 U.S. 662 (2009)). "A claim
8 has facial plausibility when the plaintiff pleads factual content
9 that allows the court to draw the reasonable inference that the
10 defendant is liable for the misconduct alleged." Iqbal, 556 U.S.
11 at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556
12 (2007)). "Determining whether a complaint states a plausible
13 claim for relief . . . [is] a context-specific task that requires
14 the . . . court to draw on its judicial experience and common
15 sense." Id. at 679.

16 "For purposes of a motion to dismiss, we accept all
17 well-pleaded allegations of material fact as true and construe
18 them in the light most favorable to the nonmoving party."
19 Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 783 (9th
20 Cir. 2012). "[Further,] the court need not accept as true
21 conclusory allegations, nor make unwarranted deductions or
22 unreasonable inferences." In re Gilead Sciences Secs. Litig., 536
23 F.3d 1049, 1057 (9th Cir. 2008) (citation omitted).

24 **II. FACTUAL ALLEGATIONS**

25 The following factual allegations in the Third Amended
26 Complaint ("TAC") concern the dismissal motion.

27 Parminder was a veteran receiving treatment for post-
28 traumatic stress disorder and schizophrenia, which manifested as

1 periodic "depression and agitation[.]" (TAC 2:2-5, ¶ 5.) He
2 "experienced the symptoms of his mental illness periodically
3 since 2003. When manifesting symptoms of his mental illness,
4 P[arminder] would become depressed and anxious, but he never
5 exhibited any violent tendencies or threatened violence to
6 himself or others." (TAC ¶ 16.) "During his episodes of manifest
7 mental illness, P[arminder] appeared not to comprehend what was
8 being said to him or to be capable of responding appropriately."
9 (TAC ¶ 16.)

10 "On January 25, 2014, P[arminder] manifested the
11 symptoms of his mental illness." (TAC ¶ 19.) His family "called
12 9-1-1 to request assistance in transporting [him] to the
13 Veteran's Clinic[.]" explaining to the 9-1-1 dispatcher "that
14 P[arminder] was disabled, manifesting symptoms of his mental
15 illness, acting 'crazy' and needed to be transported" to the
16 Clinic. (TAC ¶¶ 20-21.)

17 When the Officer Defendants arrived, the family told
18 them that Parminder was not home, but "may be in the area" since
19 he "routinely walked to the [p]ark in the morning[.]" (TAC ¶¶ 25-
20 26.) After the family requested assistance, the Officer
21 Defendants told the family "that there was nothing they could do
22 because P[arminder] was not home and had not threatened violence
23 to himself or others." (TAC ¶ 26.) They would, however, "try to
24 talk with him" if they saw him. (TAC ¶ 27.)

25 Next, the Officer Defendants drove to the park. (TAC
26 ¶ 27.) There, they "saw P[arminder] . . . walking through the
27 [p]ark and attempted to detain and question him." (TAC ¶ 29.)
28 "When the [Officer Defendants] initially confronted P[arminder],

1 he walked away from the officers, crossed the street . . . , and
2 began to walk . . . towards his Family Home. He did not respond
3 to [the Officer Defendants'] verbal directions . . . and
4 continued to walk despite [their] attempts to get him to stop by
5 following him and yelling at him." (TAC ¶ 31.) The Officer
6 Defendants "drew their police-issued firearms and trained them on
7 P[arminder], as he was facing away from [them] and continued to
8 walk towards his Family Home." (TAC ¶ 38.)

9 The Officer Defendants "continued to pursue P[arminder]
10 in an aggressive manner, . . . by shouting commands, closely
11 following, and brandishing firearms trained on P[arminder]. Due
12 to the [Officer Defendants' actions], P[arminder] became
13 increasingly upset and afraid, exacerbating the symptoms of his
14 mental illness and post-traumatic stress disorder." (TAC ¶ 39.)

15 When "approximately six house-lengths separate[d]
16 P[arminder] from his Family Home" the Officer Defendants "yelled
17 at P[arminder] to 'Stop!'" (TAC ¶ 42-43.) The Officer Defendants'
18 actions "caused P[arminder] to believe that he was not free to
19 continue his movement towards his Family Home. P[arminder]
20 submitted to the show of authority and responded to [the Officer
21 Defendants] commands by turning around to face them." (TAC ¶ 44.)

22 "As P[arminder] turned to face [them], he held his
23 hands in the air and stated 'Don't shoot!'" (TAC ¶ 45.) "Before
24 P[arminder] could complete the 180° turn to face [the Officer
25 Defendants], [they] both opened fire on [him]." (TAC ¶ 46.)

26 III. DISCUSSION

27 The Officer Defendants contend the allegations do not
28 contain an essential element of a Fourth Amendment provocation

1 claim; specifically, Plaintiff fails to allege the Officer
2 Defendants "intentionally or recklessly provoke[d] a violent
3 confrontation" that amounted to "an independent Fourth Amendment
4 violation" (Mot. 7:5-12 (quoting Billington v. Smith, 292
5 F.3d 1177, 1189 (9th Cir. 2002)).)

6 The Officer Defendants summarize their argument as
7 follows: "nothing more is alleged than an attempted seizure by
8 the Officer[Defendant]s, a transient pause by [Parminder], and
9 then the use of deadly force before [Parminder] could even turn
10 around." (Mot. 10:20-23.) The Officer Defendants further argue
11 "[a]ny momentary hesitation or compliance does not constitute a
12 seizure" (Mot. 10:17-18.) Overall, the Officer Defendants
13 contend Plaintiff fails to allege the Officer Defendants touched
14 Parminder or Parminder submitted to a show of authority, before
15 the use of deadly force, and therefore Plaintiff "still fails to
16 allege facts which plausibly state that a preshooting Fourth
17 Amendment seizure occurred." (Mot. 11:9-11.)

18 Plaintiff counters at least one independent Fourth
19 Amendment violation occurred when the Officer Defendants
20 commanded Parminder to stop, and in response to their command, he
21 stopped and turned to face them. (Pl.'s Opp'n to Mot. ("Opp'n")
22 14:12-14, 14:20-22, 16:8-9, ECF No. 95.) Plaintiff further
23 disputes whether Parminder's conduct during this time constituted
24 a "transient pause" and contends a seizure "can occur immediately
25 prior to the use of deadly force" (Opp'n 16:16-19
26 (citation omitted).)

27 "Where a police officer 'intentionally or recklessly
28 provokes a violent confrontation, if the provocation is an

1 independent Fourth Amendment violation, he may be held liable for
2 his otherwise defensive use of deadly force.'" Espinosa v. City &
3 Cnty. of San Francisco, 598 F.3d 528, 538 (9th Cir. 2010)
4 (quoting Billington, 292 F.3d at 1189). "If an officer
5 intentionally or recklessly violates a suspect's constitutional
6 rights, then the violation may be a provocation creating a
7 situation in which force was necessary and such force would have
8 been legal but for the initial violation." Id. at 538-39 (citing
9 Billington, 292 F.3d at 1189). Here, the issue raised is whether
10 Plaintiff alleges in her Complaint that Parminder was seized,
11 before he was subjected to excessive force, by his submission to
12 the Officer Defendants' command that he cease moving away from
13 them.

14 "[A] person has been 'seized' within the meaning of the
15 Fourth Amendment only if, in view of all of the circumstances
16 surrounding the incident, a reasonable person would have believed
17 that he was not free to leave." United States v. Mendenhall, 446
18 U.S. 544, 554 (1980). "This determination is a necessary, but not
19 a sufficient, condition for seizure." United States v. McClendon,
20 713 F.3d 1211, 1215 (9th Cir. 2013) (internal quotation marks and
21 citation omitted). Moreover, "[a] police officer may make a
22 seizure by a show of authority and without the use of physical
23 force, but there is no seizure without actual submission;
24 otherwise, there is at most an attempted seizure, so far as the
25 Fourth Amendment is concerned." Brendlin v. California, 551 U.S.
26 249, 254 (2007).

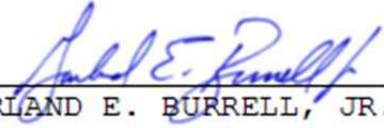
27 Plaintiff alleges the Officer Defendants "yelled at
28 P[arminder] to 'Stop!'" (Compl. ¶ 43.) Plaintiff further alleges

1 their "persistent harassment, stalking, shouting of commands, and
2 brandishing of their firearms trained on P[arminder] eventually
3 caused [him] to believe that he was not free to continue his
4 movement towards his Family Home." (Compl. ¶ 44, 77.)

5 It can be reasonably inferred from the TAC that
6 Parminder did not continue his movement towards his Family Home,
7 i.e., he stopped. "Stopping when a police officer yells 'stop' is
8 a submission to authority, and constitutes a seizure under the
9 Fourth Amendment." Slama v. City of Madera, No. 1:08-CV-810 AWI
10 GSA, 2012 WL 2457722, at *5 n.8 (E.D. Cal. June 26, 2012) (citing
11 California v. Hodari D., 499 U.S. 621, 626-27 (1991); United
12 States v. Smith, 633 F.3d 889, 892 (9th Cir. 2011)). "[S]o long
13 as the plaintiff alleges facts to support a theory that is not
14 facially implausible, the court's skepticism is best reserved for
15 later stages of the proceedings when the plaintiff's case can be
16 [evaluated] on evidentiary grounds." In re Gilead, 536 F.3d at
17 1057.

18 Therefore, Plaintiff has alleged facts which plausibly
19 state Parminder submitted to authority and was seized before the
20 Officer Defendants' use of deadly force. Accordingly, the Officer
21 Defendants' motion to dismiss Plaintiff's Fourth Amendment
22 provocation claim (Second Claim) is DENIED.

23 Dated: September 15, 2015

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27 GARIAND E. BURRELL, JR.
28 Senior United States District Judge