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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CATHERINE SMITH, individually and as joint successor-in-interest to decedent Cory Bush; and M.B., a minor, individually and as joint successor-in-interest to decedent Cory Bush, through his guardian-ad-litem, Victoria Moseley,

Plaintiffs,

v.

COUNTY OF BUTTE, a municipal corporation; MATT KEELING, individually and in his capacity as a Sergeant for the County of Butte; BRIAN EVANS, individually and in his capacity as a deputy sheriff for the County of Butte; ROBERT ALLEN, individually and in his capacity as a deputy sheriff for the County of Butte; and BENJAMIN CORNELIUS, individually and in his capacity as a deputy sheriff for the County of Butte,

Defendants.

No. 2:15-cv-00988-KJM-CMK

ORDER

On May 18, 2014, Deputy Benjamin Cornelius shot and killed Cory Bush, a young man armed with a pellet rifle. The decedent's mother and minor child now sue the County of Butte and four individual officers for use of excessive force in violation of the U.S. Constitution.

1 Defendants jointly move for summary judgment. ECF No. 23. Plaintiffs oppose, ECF No. 27,
2 and defendants have replied, ECF No. 29. The court heard the motion at hearing on December
3 16, 2016, at which Benjamin Nisenbaum appeared for plaintiffs, and Stephen Horan and William
4 Camy appeared for defendants. Hr’g Mins., ECF No. 30. For the reasons stated below, after
5 careful consideration in this inherently difficult case, the court GRANTS defendants’ motion for
6 summary judgment.

7 I. BACKGROUND

8 A. Factual Background

9 The following facts are undisputed unless otherwise stated. Where a genuine
10 dispute exists, the court draws reasonable inferences in plaintiffs’ favor. *Tolan v. Cotton*,
11 134 S. Ct. 1861, 1868 (2014).

12 On May 18, 2014, Mr. Shannon Moseley of 275 Refuge Avenue, Butte County,
13 called 911 to report that his daughter’s boyfriend, Cory Bush, had “gone off the deep end,” was
14 tearing apart the Moseleys’ house, and was ranting, raving, and yelling. Undisputed Material
15 Facts (“UMF”) 1, 3, 26, ECF No. 23-2. At about 6:55 p.m., Moseley stepped outside to make the
16 call while his daughter stayed in the house “[to try] to control [Bush].” Ex. B, 911 Call Transcript
17 (“911 Tr.”) at 2:12–14, ECF No. 24-1; UMF 1. Moseley explained that Bush instructed him to
18 call the police because he wanted to commit “suicide by cop.” UMF 14; 911 Tr. at 3:26–4:2.
19 Moseley believed Bush was on methamphetamine, UMF 3, 11, 26, was having “a really bad”
20 mental breakdown, 911 Tr. at 14:07–08, and had “just snapped,” 911 Tr. at 6:20–21. Although
21 Moseley believed “[Bush had] got the kids scared pretty bad,” 911 Tr. at 15:16, he also said he
22 did not believe Bush was a threat to them, 911 Tr. at 7:26. Moseley did not want to call 911, but
23 Bush had said, “[I]t’s only gonna get worse This won’t end. I’ll tear this house to
24 smithereens.” 911 Tr. at 9:02, 13:24–25. Moseley also told the dispatcher more than twenty
25 times that Bush had armed himself with a rifle-style pellet rifle that could “pass for a .22.” *See*
26 *generally* 911 Tr. At one point, Mr. Moseley told dispatch there was a dog on the property, but
27 he said it was “chained up, so the officers don’t gotta worry about him.” 911 Tr. at 12:22–23.
28

1 The Butte County Sheriff’s Office dispatched four officers to respond and they are
2 the four individual defendants here: Sergeant Keeling; Deputy Evans, with his K-9 “Duke;”
3 Deputy Allen; and Deputy Cornelius. UMF 6, 10. All officers had received training in crisis
4 intervention and communication with the mentally ill and suicidal. Deputies Evans and Cornelius
5 had received Crisis Intervention Team certified training, which trains on best practices and meets
6 the first responder “National Gold Standard” for police-based interaction with persons affected by
7 mental illness, including those threatening suicide. UMF 86. Before this incident, Sergeant
8 Keeling had received Critical Incident Training for supervisors and training in Tactical
9 Communication and Mental Health; Deputy Cornelius had training in Crisis Intervention Tactics,
10 Suicide Risk Detection and Prevention, Tactical Concepts for Rural Operations, and Tactical
11 Communications; Deputy Evans had training in Crisis Intervention Tactics, Suicide Risk
12 Detection and Prevention, Tactical Communications, and Dealing with Developmentally Disabled
13 Persons; and Deputy Allen had training in Tactical Communications, and Suicide Risk Detection
14 and Prevention. UMF 87. Deputy Evans and his K-9 had together received continuous training,
15 graduated from a five week course, and been certified by an independent evaluator as satisfying
16 police standards for K-9 units. Ex. W, Evans Decl. ¶ 4, ECF No. 24-6.

17 Before responding to Mr. Moseley’s location, the four officers met at the Palermo
18 sub-station to make a plan. UMF 15, 16. They had received highlights from Mr. Moseley’s call
19 to dispatch but not all of the details. The officers had been told Bush was armed with a pellet rifle
20 that could shoot one bullet at a time; it was black and looked like a .22 caliber rifle. UMF 26.
21 During the officers’ planning discussion, Deputy Cornelius told them he knew Bush; he also said
22 the pellet rifle was “high powered” and that a shot from it “would definitely penetrate a skull.”
23 UMF 18. Cornelius’s prior contact with Bush was during an incident in which Bush had been
24 stabbed. Cornelius Depo. at 43–45. The officers decided Cornelius would be the primary
25 communicator with Bush; Deputy Evans was to deploy his K-9 as a less lethal force option, if
26 necessary; and Sergeant Keeling and Deputy Allen were to provide back up. UMF 17, 19–20, 23.
27 All officers were armed with guns, and Deputies Allen and Evans and Sergeant Keeling also each
28 had a Taser, a less lethal electroshock weapon that may be effective up to 14 feet. UMF 21–22,

1 24–25. Cornelius testified at deposition that Tasers were referenced for the first time only when
2 shots were being fired, when Keeling simultaneously shouted for the officers to use their Tasers.
3 (See Cornelius Depo. at 79.) The other officers do not recall discussing other less lethal options,
4 and Tasers in particular, at the substation where they formulated their plan. (See Keeling Depo. at
5 59:8–15; Allen Depo. at 39:13–23; Evans Depo. at 31:17–20.)¹ In sum, the undisputed facts are
6 that while some of the officers carried Tasers, their use was not discussed as a less lethal force
7 option before the encounter with Bush. Instead, the officers planned on relying exclusively on the
8 K-9 as the less lethal force option.

9 Twenty-five minutes into the 911 call, Moseley reported that “[Bush] want[ed] to
10 see it to fruition,” 911 Tr. at 18:04, presumably referring to Bush’s intention to commit suicide by
11 cop. Within a minute and a half of that statement, at about 7:25 p.m., the officers arrived on
12 scene and met Moseley in front of the house. See 911 Tr. at 19:12–13; UMF 30, 32–33. Moseley
13 told the officers Bush had a pellet gun and is “really mentally screwed up.” 911 Tr. at 19:12–18.
14 Moseley was still on the phone with the 911 operator when the officers arrived, and the 911 call
15 partially recorded his statement, time stamped at 26 minutes 43 seconds. *Id.* Moseley then ended
16 the call.

17 At this point, given the time of year it was still light outside. UMF 31. The
18 officers positioned themselves at the edge of the property behind a tree and fence post. UMF 35.
19 From that position, at approximately 7:27 p.m., Deputy Cornelius used a public address system to
20 call toward the house several times that the Sheriff’s Office was outside, saying the officers
21 wanted Bush to come out, and they were there to help him. UMF 38, 41. Bush yelled, “I’m
22 coming out,” and emerged from the house holding a pellet rifle. UMF 42. Bush yelled and
23 screamed at the officers as he emerged, and though his yelling was largely unintelligible, he
24 screamed, “Shoot me, shoot me.” UMF 47–48. At the same time he walked quickly towards
25 Deputies Evans and Cornelius, who were about 75 feet away, despite the officers’ repeated orders

26 ¹ The depositions were too large to file electronically, so the parties only electronically
27 filed portions and mailed the remainder. This particular deposition page (Evans Depo. page 31)
28 was contained on a CD labeled Exhibit QQ.

1 to stop, get on the ground, and drop the pellet rifle. UMF 49–51. As he walked, Bush waved the
2 pellet rifle in the air and pointed it in the deputies’ direction, all while continuing to yell and
3 scream at them. *Id.*; Ex. QQ, Evans Depo. at 40:25–41:4, ECF 24-8. In response, Deputy Evans
4 deployed his K-9 and ordered it to bite Bush. UMF 52. As the K-9 approached, Bush threw his
5 pellet rifle to the ground and raised his hands. Ex. QQ, Cornelius Depo. at 109:18–21, ECF No.
6 24-8; Ex. QQ, Moseley Depo. at 83:10–11, ECF No. 24-8.

7 The parties dispute what happened next. Plaintiffs contend Bush threw his pellet
8 rifle so hard it broke open and a spring fell out, rendering the rifle inoperable, and that the officers
9 were close enough to see the spring fall out. *See* Ex. QQ, Menzes² Depo. at 24:10–12, 28:19–20,
10 50:22–51:05, ECF No. 24-8. Defendants contend no officer saw the rifle break open in any way,
11 Ex. QQ, Allen Depo. at 86:13–18, ECF No. 24-8, and they provide evidence that the California
12 Department of Justice test-fired the rifle after the incident and determined it was operational,
13 UMF 82; Ex. QQ, Wallace Depo. at 38:21–23, ECF No. 24-8. What is not genuinely in dispute,
14 however, is that when Bush appeared to surrender, Deputies Cornelius and Evans left their
15 positions of cover and moved quickly towards him. *See* Cornelius Depo. at 116:12–119:4; Evans
16 Depo. at 50:15–51:01, 63:12–64:15. Then, before the officers reached Bush, the K-9
17 unexpectedly veered away from Bush and the officers and towards the pit-bull chained to a tree in
18 the front yard. UMF 55.

19 With the K-9 ignoring the officers’ commands, Bush retrieved his pellet rifle from
20 the ground. Cornelius Depo. at 119:01–04; Menzes Depo. at 28:25–29:10. Deputy Allen states
21 Bush was standing upright, then bent over, picked the rifle up, struck it over his knee repeatedly,
22 then pointed it at Cornelius. Allen Depo. at 85:8–17, 86:7–12. Deputy Cornelius and Sergeant
23 Keeling do not specify if Bush was standing, but both say he bent over to pick up the rifle,
24 repeatedly banged it over his knee, and then pointed it at Deputy Cornelius. Cornelius Depo. at
25 122:3–15; Keeling Depo. at 120:1–7, 122:3–15. Menzes describes Bush as “crouched” after
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27 ² Daniel Menzes is the oldest son by a prior marriage of Victoria Moseley, Bush’s
28 girlfriend.

1 picking the rifle back up, but he also says he could not see Bush for the few critical seconds
2 leading up to the shooting because the officers were in a position that obstructed his view.
3 Menzes Depo. at 28:25–29:10, 32:2–4, 41:1–12. Deputies Cornelius and Evans repeatedly yelled
4 for Bush to drop his weapon and keep his hands up, but Bush ignored their orders. UMF 50, 58;
5 Cornelius Depo. at 119:15–18. Instead, Bush screamed at the officers, “Shoot me, [expletive]. I
6 want to die, shoot me.” Menzes Depo. at 7:5–7, 29:20–24. Deputies Cornelius and Evans had no
7 cover, Cornelius Depo. at 127:12–14, and Sergeant Keeling yelled to Deputy Evans to use his
8 Taser on Bush, UMF 56, 61. The parties agreed at the motion hearing that Deputies Cornelius
9 and Evans were approximately 17 feet from Bush when Sergeant Keeling yelled the Taser
10 command.

11 The parties dispute what happened when Sergeant Keeling yelled “Taser.”
12 Defendants say that Bush, after hearing the Taser command, immediately lifted his pellet rifle and
13 pointed it directly at Deputy Cornelius. Cornelius Depo. at 121:22–23. Plaintiffs present
14 testimony that Bush never pointed the pellet rifle at any of the deputies. Menzes Depo. at 41:1–
15 12; Moseley Depo. at 79:5–80:8. Nevertheless, the parties agree Deputy Cornelius fired three
16 rounds, all of which struck Bush, and Bush died as a result of the gunshot wounds. UMF 63, 65.
17 The shots occurred 28 minutes and 8 seconds after Mr. Moseley called 911. 911 Tr. at 20:19–20.
18 More significantly, Deputy Cornelius fired his shots at Bush less than one minute from the time
19 he had called to Bush to come out of the house. *See* UMF 41 (call to house at 7:27:31 p.m.), 64
20 (Keeling radioed “shots fired” at 7:28:06 p.m.). Plaintiffs concede no emergency life-saving
21 services of any kind could have saved Bush. UMF 65.

22 Bush’s pellet rifle, a Daisy Powerline 1000, is pictured below:



1 Ex. J, Defense Forensic Expert Lance Martini Report at 27 (“Martini Expert Report”), ECF No.
2 24-4. As defendants’ counsel agreed at hearing, Bush’s pellet rifle is a single shot weapon that
3 must be pumped at least once before being operable. *See* 911 Tr. at 5:2–3; Menzes Depo. at
4 21:8–11. Consistent with Deputy Cornelius’s report to his colleagues in their pre-planning
5 meeting, the parties agree that pellet rifles can pose a risk of serious physical injury or death, that
6 air gun deaths are documented in the forensic and medical disciplines, and a warning engraved on
7 the barrel of Bush’s pellet rifle reads: “Warning: misuse or careless use may cause serious injury
8 or death.” UMF 80–81.

9 B. Procedural Background

10 On May 6, 2015, plaintiffs filed a complaint making nine claims as successors-in-
11 interest to decedent Cory Bush: (1) violations of Bush’s Fourth Amendment right to be free from
12 unreasonable seizures under 42 U.S.C. § 1983; (2) violations of plaintiffs’ right to familial
13 relationship guaranteed by the Fourteenth Amendment under 42 U.S.C. § 1983; (3) a *Monell*³
14 claim against Butte County; (4) assault and battery; (5) negligence; (6) intentional infliction of
15 emotional distress; (7) negligent infliction of emotional distress; (8) wrongful death;
16 (9) and violations of the Bane Act under California Civil Code section 52.1. ECF No. 1. On
17 November 15, 2016, after the close of discovery, defendants filed the pending motion for
18 summary judgment on all claims. Defs.’ Mot. for Summ. J. (“MSJ”), ECF No. 23. As noted,
19 plaintiffs oppose, Pls.’ Opp’n, ECF No. 27, and defendants filed a reply, Defs.’ Reply, ECF
20 No. 29.

21 II. LEGAL STANDARD

22 A court will grant summary judgment “if . . . there is no genuine dispute as to any
23 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
24 The “threshold inquiry” is whether “there are any genuine factual issues that properly can be
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27 _____
28 ³ *Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978).

1 resolved only by a finder of fact because they may reasonably be resolved in favor of either
2 party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).⁴

3 The moving party bears the initial burden of showing the district court “that there
4 is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*,
5 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving party, which “must establish
6 that there is a genuine issue of material fact” *Matsushita Elec. Indus. Co. v. Zenith Radio*
7 *Corp.*, 475 U.S. 574, 585 (1986). In carrying their burdens, both parties must “cit[e] to particular
8 parts of materials in the record . . . ; or show [] that the materials cited do not establish the
9 absence or presence of a genuine dispute, or that an adverse party cannot produce admissible
10 evidence to support the fact.” Fed. R. Civ. P. 56(c)(1); *see also Matsushita*, 475 U.S. at 586
11 (“[the nonmoving party] must do more than simply show that there is some metaphysical doubt as
12 to the material facts”). Moreover, “the requirement is that there be no genuine issue of material
13 fact Only disputes over facts that might affect the outcome of the suit under the governing
14 law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 247–48
15 (emphasis in original).

16 In deciding a motion for summary judgment, the court draws all inferences and
17 views all evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at
18 587–88; *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). “Where the record taken as a
19 whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine
20 issue for trial.’” *Matsushita*, 475 U.S. at 587 (quoting *First Nat’l Bank of Ariz. v. Cities Serv.*
21 *Co.*, 391 U.S. 253, 289 (1968)).

22 A court may consider evidence as long as it is “admissible at trial.” *Fraser v.*
23 *Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). “Admissibility at trial” depends not on the
24 evidence’s form, but on its content. *Block v. City of L.A.*, 253 F.3d 410, 418–19 (9th Cir. 2001)

25
26 ⁴ Rule 56 was amended, effective December 1, 2010. However, it is appropriate to rely on
27 cases decided before the amendment took effect, as “[t]he standard for granting summary
28 judgment remains unchanged.” Fed. R. Civ. P. 56, Notes of Advisory Comm. on 2010
amendments.

1 (citing *Celotex Corp.*, 477 U.S. at 324). The party seeking admission of evidence “bears the
2 burden of proof of admissibility.” *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1004 (9th Cir.
3 2002). If the opposing party objects to the proposed evidence, the party seeking admission must
4 direct the district court to “authenticating documents, deposition testimony bearing on attribution,
5 hearsay exceptions and exemptions, or other evidentiary principles under which the evidence in
6 question could be deemed admissible” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385–86
7 (9th Cir. 2010). However, courts are sometimes “much more lenient” with the affidavits and
8 documents of the party opposing summary judgment. *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240,
9 1243 (9th Cir. 1979).

10 III. DISCUSSION

11 A. Violation of 42 U.S.C. § 1983 – Unlawful Seizure

12 Plaintiffs direct their first claim of unlawful seizure based on unreasonable and
13 excessive force leading to death in violation of the Fourth Amendment against Sergeant Keeling
14 and Deputies Evans, Allen, and Cornelius. Defendants argue they are entitled to qualified
15 immunity on this claim because the officers’ actions were reasonable and they did not violate
16 clearly established law. Defs.’ MSJ at 13–25.

17 The doctrine of qualified immunity balances “the need to hold [officers]
18 accountable when they exercise power irresponsibly and the need to shield [officers] from
19 harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v.*
20 *Callahan*, 555 U.S. 223, 231 (2009). To achieve this balance, qualified immunity shields officers
21 “from liability for civil damages insofar as their conduct does not violate clearly established
22 statutory or constitutional rights of which a reasonable person would have known.” *Mattos v.*
23 *Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (quoting *Pearson*, 555 U.S. at 231). Qualified
24 immunity is not “a mere defense to liability,” but rather “an *immunity from suit*,” and “it is
25 effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S.
26 511, 512 (1985) (emphasis in original); *accord Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019
27 (2014). Therefore, the court “should make a ruling on immunity ‘early in the proceedings’.”
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1 *Santos v. Gates*, 287 F.3d 846, 856 (9th Cir. 2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 200
2 (2001)).

3 In evaluating whether to grant qualified immunity, the court considers:
4 “(1) whether, taking the facts in the light most favorable to the nonmoving party, the officers’
5 conduct violated a constitutional right, and (2) whether the right was clearly established at the
6 time of the alleged misconduct.” *Glenn v. Washington Cty.*, 673 F.3d 864, 870 (9th Cir. 2011)
7 (citing *Saucier*, 533 U.S. at 200–01). The court may “exercise [its] sound discretion in deciding
8 which of the two prongs of the qualified immunity analysis [to] address[] first.” *Bryan v.*
9 *MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010) (citing *Pearson*, 555 U.S. at 236). If the court
10 finds either the officers did not violate a constitutional right or the right was not clearly
11 established, “then the officers cannot be held liable for damages.” *Glenn*, 673 F.3d at 870 (citing
12 *Pearson*, 555 U.S. at 236). The court elects to begin its qualified immunity analysis in this case
13 by evaluating whether the officers’ use of force was excessive.

14 1. Unlawful Seizure Based on Deadly Force

15 The use of deadly force is understood in constitutional law as a seizure subject to
16 the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). In evaluating a Fourth
17 Amendment claim of seizure based on the use of excessive force, the court asks “whether the
18 officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting
19 them.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). “The calculus of reasonableness must
20 embody allowance for the fact that police officers are often forced to make split-second
21 judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount
22 of force that is necessary in a particular situation.” *Graham*, 490 U.S. at 396–97. Reasonableness
23 “must [therefore] be judged from the perspective of a reasonable officer on the scene, rather than
24 with the 20/20 vision of hindsight.” *Id.* at 396 (citation omitted).

25 To determine the reasonableness of the officers’ actions here, the court must
26 “assess the severity of the intrusion on the individual’s Fourth Amendment rights by evaluating
27 ‘the type and amount of force inflicted.’” *Glenn*, 673 F.3d at 871 (quoting *Espinosa v. City &*
28 *Cty. of S.F.*, 598 F.3d 528, 537 (9th Cir. 2010)). Even in cases “where some force is justified, the

1 amount actually used may be excessive.” *Santos*, 287 F.3d at 853 (citation omitted). The court
2 must also consider the government’s interest in the use of force and then balance that interest
3 against “the severity of the intrusion on the individual’s Fourth Amendment rights.” *Newmaker*
4 *v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016) (citing *Graham*, 490 U.S. at 396), *accord*
5 *Glenn*, 673 F.3d at 871. To evaluate the government’s interest, the court considers “the totality of
6 the circumstances.” *Garner*, 471 U.S. at 9. Relevant factors include “(1) the severity of the
7 crime; (2) whether the suspect posed an immediate threat to the officers’ or public’s safety; and
8 (3) whether the suspect was resisting arrest or attempting to escape.” *Espinosa*, 598 F.3d at 537
9 (citing *Graham*, 490 U.S. at 396). Of these factors, the most important is “whether the suspect
10 posed an immediate threat to the safety of the officers or others.” *A. K. H by & through Landeros*
11 *v. City of Tustin*, 837 F.3d 1005, 1011 (9th Cir. 2016) (quoting *Mattos*, 661 F.3d at 441). But
12 these factors are not exhaustive, and “[o]ther relevant factors may include the availability of less
13 intrusive force, whether proper warnings were given, and whether it should have been apparent to
14 the officer that the subject of the force used was mentally disturbed.” *Hughes v. Kisela*, 841 F.3d
15 1081, 1085 (9th Cir. 2016).

16 The Ninth Circuit cautions that summary judgment should be granted “sparingly”
17 in excessive force cases because they “nearly always requires [the fact finder] to sift through
18 disputed factual contentions, and to draw inferences therefrom.” *Glenn*, 673 F.3d at 871
19 (brackets and quotation omitted). “[P]olice misconduct cases almost always turn on a jury’s
20 credibility determinations.” *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052,
21 1056 (9th Cir. 2003). At the same time, the Ninth Circuit has on multiple occasions affirmed
22 grants of summary judgment for officers in excessive force death cases, depending on the facts of
23 the case. *See, e.g., Lal v. California*, 746 F.3d 1112 (9th Cir. 2014) (no excessive force in fatally
24 shooting suspect holding football-sized rock over his head while advancing on officers; officers
25 reasonably feared serious physical harm, repeatedly warned suspect to drop rock, had just chased
26 him at high-speed, and heard him declare suicidal intent); *Gregory v. Cty. of Maui*, 523 F.3d 1103
27 (9th Cir. 2008) (no excessive where officers forced trespassing suspect to ground and he suffered
28 heart attack; suspect had just assaulted someone, was acting “bizarre,” was reportedly on drugs,

1 and had threatened officers with pen); *Marquez v. City of Phoenix*, 693 F.3d 1167 (9th Cir. 2012)
2 (no excessive force where officers stun-gunned a suspect to death after he kicked one officer in
3 the groin, refused to heed commands, and barricaded himself in room with an injured adult and
4 distressed child nearby), *as amended on denial of reh’g* (Oct. 4, 2012); *Reynolds v. Cty. of San*
5 *Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996) (finding use of deadly force reasonable where suspect
6 was armed, erratic, had just swung knife at officer, with other people nearby), *overruled on other*
7 *grounds by Acri v. Varian Assocs., Inc.*, 114 F.3d 999 (9th Cir. 1997); *Scott v. Henrich*, 39 F.3d
8 912, 916 (9th Cir. 1994) (officers "clearly" reasonable, even though not using least intrusive
9 response, when after hearing suspect was acting “crazy” and firing shots, they took up arms,
10 knocked on his door, identified themselves as police, and fatally shot him when he appeared with
11 gun).

12 According to plaintiffs, the officers unreasonably: (1) developed and executed a
13 plan to approach Bush; (2) used deadly force in shooting Bush; and (3) failed to provide Bush
14 with medical aid in the course of seizing him. The court analyzes these allegations separately.

15 a) The Plan

16 Plaintiffs allege the plan the officers developed at the sub-station “was counter-
17 intuitive[,] ill-fated[,] and the source of all subsequent follies and unreasonable acts.” Pls.’ Opp’n
18 at 11. According to plaintiffs, flaws in the plan included the identification of improper tactics for
19 dealing with a mentally ill individual, a failure to gather additional information from family
20 members in advance, and the choice of a K-9 as the first-used less-lethal option. *See id.* at 11–12.
21 As discussed below, the court finds no reasonable jury could find the officers’ plan was
22 unreasonable.

23 It is undisputed that the officers did not suspect Cory Bush of having committed a
24 crime. He was reportedly having a mental breakdown, might have been on drugs, had never
25 threatened anyone, and by all accounts he wished to commit “suicide by cop.” However, courts
26 “refuse[] to create two tracks of excessive force analysis, one for the mentally ill and one for
27 serious criminals.” *Hughes*, 841 F.3d at 1086 (quoting *Bryan*, 630 F.3d at 829). That is not to
28

1 say officers should be blind to a suspect’s mental illness. Officers should typically use less
2 forceful tactics

3 when dealing with an emotionally disturbed individual who is
4 creating a disturbance or resisting arrest, as opposed to a dangerous
5 criminal . . . because when dealing with a disturbed individual,
6 “increasing the use of force may exacerbate the situation,” unlike
when dealing with a criminal, where increased force is more likely
to “bring a dangerous situation to a swift end.”

7 *Glenn*, 673 F.3d at 877 (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001)).

8 But even when the suspect is mentally ill, the inquiry ultimately centers on the reasonableness of
9 the officers’ actions. *See id.* at 871.

10 Based on the information the officers had when they responded to Mr. Moseley’s
11 911 call, “[a] reasonable jury could conclude . . . there were sufficient indications of mental
12 illness to diminish the governmental interest.” *See Hughes*, 841 F.3d at 1086. As noted above,
13 the most important factor in assessing the governmental interest is whether the suspect posed an
14 immediate threat to the officers’ or public’s safety. *See, e.g., Miller v. Clark Cty.*, 340 F.3d 959,
15 964 (9th Cir. 2003). In this case, before the officers contacted Bush, they knew he was mentally
16 disturbed and acting erratically, possibly high on methamphetamine, and had been “tearing up”
17 the 911 caller’s residence. *See* UMF 26. They also knew Bush was roaming the house with a
18 pellet rifle that could cause serious physical injury or death. *See* UMF 18, 80–81. They knew
19 there were other people in the house, including two toddlers. UMF 26. While Mr. Moseley said
20 the children were scared, he reported he did not think Bush was a threat to anyone in the house
21 and he had not wanted to call 911; he stepped out of the house to make the call, leaving his
22 daughter and the children in the house. 911 Tr. at 2:14–16, 9:02, 13:23–25. Under these
23 circumstances, the court finds no reasonable jury would find the officers’ belief that Bush was a
24 possible threat to public safety unreasonable. *See Lal*, 746 F.3d at 1118 (officers’ decision to
25 engage with suicidal suspect was reasonable when suspect was a potential threat to public safety).

26 A reasonable jury also could not find the plan the officers devised in response to
27 this potential threat was unreasonable. It was objectively reasonable to assign Deputy Cornelius
28 to be the primary communicator with Bush, UMF 19, given his prior contact with Bush, UMF 17,

1 and training in Crisis Intervention Tactics and Suicide Risk Detection and Prevention, UMF 87.
2 It was reasonable for the officers to carry their weapons, considering Bush was armed with a
3 potentially deadly pellet rifle. *Garcia v. United States*, 826 F.2d 806, 812 (9th Cir. 1987) (finding
4 officers' use of deadly weapons reasonable where suspect approached within three to five feet of
5 an officer with arms raised above his head, a rock in one hand and stick in the other); *cf. Lal*, 746
6 F.3d at 1117 (finding officers' use of deadly force reasonable where they were confronted with a
7 person holding a rock over his head, in part, because officers explored less lethal methods of
8 dealing with suspect, including the engagement of a K-9 unit). It also was reasonable for the
9 officers to plan to use Deputy Evans's trained K-9 as a less lethal force option, should the need
10 arise. *Cf. Smith v. City of Hemet*, 394 F.3d 689, 707 (9th Cir. 2005) (declining to decide
11 categorically whether the use of police dogs constitutes deadly force). As noted above, Deputy
12 Evans and his K-9 had together received continuous training, graduated from a five week course,
13 and been certified by an independent evaluator as satisfying police standards for K-9 units.
14 Ex. W, Evans Decl. ¶ 4, ECF No. 24-6. There is no evidence in the record regarding the K-9's
15 prior deployments, and so no indication of any problems arising from its use.

16 The court also finds subsequent events would not lead a reasonable jury to
17 conclude the officers should have reconsidered their plan. When the officers arrived outside the
18 residence, they stopped on the road to speak with Mr. Moseley about his 911 call, and confirmed
19 Bush, Bush's girlfriend Victoria Moseley, and children were still inside the house. UMF 33.
20 Plaintiffs contend the officers acted unreasonably by failing to take the time to gather "valuable"
21 information from family members, that the pellet rifle was cracked, inoperable, and unloaded.
22 Pls.' Opp'n at 11. The Ninth Circuit, however, has "placed important limitations on [] line[s] of
23 argument" "based merely on bad tactics that result in a deadly confrontation that could have been
24 avoided." *George v. Morris*, 736 F.3d 829, 839 n.14 (9th Cir. 2013) (quoting *Billington v.*
25 *Smith*, 292 F.3d 1177, 1188 (9th Cir. 2002)). Beyond being the type of 20/20 hindsight the case
26 law counsels against considering, a reasonable officer is not required to accept the veracity of
27 such a statement in a "tense, uncertain, and rapidly evolving" situation. *See Graham*, 490 U.S. at
28 396-97. Moreover, the pellet rifle's inoperability at the time Bush was shot is not sufficiently

1 clear from the record for plaintiffs' characterization to defeat summary judgment. *Compare*
2 *Menzes Depo.* at 24:10–12, 28:19–20 (stating the pellet rifle was not operable), *with Wallace*
3 *Depo.* at 37:21–38:7 (testing the pellet rifle preserved after the incident and finding it operable).
4 When the officers met Mr. Moseley on the road, he had been out of Bush's presence for several
5 minutes; he could not know whether the pellet rifle was unloaded and inoperable at the time. In
6 any event, the officers were in no position to verify any information about the rifle.

7 b) The Approach

8 After the officers formed their plan, their choice to approach the property was
9 objectively reasonable. Contrary to plaintiffs' argument that the officers acted unreasonably by
10 not "approach[ing Bush] using calm tones, giv[ing him] ample space, and using time as an ally,"
11 *Pls.' Opp'n* at 11, the undisputed record shows the officers did not rush to meet Bush half-cocked.
12 Instead, they took cover at a distance and one of them asked Bush to come out of the house. *See*
13 *UMF* 35, 38.

14 In many ways, the situation here parallels that faced by officers in the Ninth
15 Circuit's *Gregory* case. In *Gregory*, officers responded to a location where a suspect was acting
16 in a "bizarre manner" and "possibly [] under the influence of drugs." 523 F.3d at 1106–07.
17 When the officers arrived, they found the suspect "holding a pen with its point facing towards
18 them." *Id.* at 1106. The court found this pen was a deadly weapon that could "inflict lethal
19 force" under the circumstances. *Id.* at 1107 (citing *United States v. Bankston*, 121 F.3d 1411,
20 1412 n.1 (11th Cir. 1997)). The officers in *Gregory* "did not immediately engage in a physical
21 confrontation" with the suspect, but instead "first asked him to drop the pen." *Id.* Similarly, the
22 officers in this case did not immediately engage with Bush; instead, they moved to the edge of the
23 property and positioned themselves behind a tree and fence post where they attempted to make
24 voice contact. *UMF* 35, 38. The officers in *Gregory* only physically engaged after the suspect
25 repeatedly and expressly disobeyed their orders. *Gregory*, 523 F.3d at 1107. Likewise, in this
26 case the officers repeatedly attempted to deescalate the situation by ordering Bush, who began
27 walking towards them, to stop, get on the ground, and drop the pellet rifle. *UMF* 44, 49–51. The
28

1 weapon here, a pellet gun, is more threatening than the pen in *Gregory*. Thus, under no
2 objectively reasonable reading of the record did the officers in this case force a confrontation.

3 Plaintiff's estate in *Gregory* argued, as do plaintiffs here, the officers acted
4 unreasonably by not accommodating the suspect's mental condition. *Gregory*, 523 F.3d at 1108.
5 The Ninth Circuit, in affirming the district court's grant of summary judgment for the officers,
6 disagreed. The Circuit observed that "first confronting [the suspect] verbally, and only then
7 attempting to disarm and to restrain him"—was objectively reasonable. *Id.* at 1108. As with the
8 officers in *Gregory*, the officers here had reason to believe Bush was a threat to themselves and
9 others. *See id.* at 1108–09. The officers also were objectively reasonable in believing Bush—
10 who was acting erratically, potentially high on methamphetamine, armed with a pellet rifle, and
11 had just been "tearing up" a house with children inside—was a threat to public safety. *See*
12 *Marquez*, 693 F.3d at 1175 (Although "the government has less interest in using force" when
13 police are summoned "to protect a mentally ill offender from himself," "the government has an
14 increased interest in the use of force" "if the officer warned the [suspect] that he would employ
15 force [and] the suspect [still] refused to comply."). As such, the officers' attempt to communicate
16 with Bush, from a distance while taking cover, while assessing and seeking to deescalate the
17 situation, was objectively reasonable.

18 c) Use of the K-9

19 When the officers arrived, as noted, they stood at the edge of Mr. Moseley's
20 property to try to give Bush space. *See* UMF 35. From a position of cover, Deputy Cornelius
21 yelled towards the house that the Sheriff's Office was outside, the officers wanted Bush to come
22 out, and they were there to help. UMF 38. In response, Bush emerged holding the pellet rifle.
23 UMF 42. At that point the officers did not attempt to engage with Bush; rather, they repeatedly
24 told Bush to drop the pellet rifle, but Bush did not comply. UMF 50. Bush then advanced
25 quickly towards the officers, all the while yelling and screaming, and swinging the rifle up and
26 down. UMF 43, 47, 49, 51, 52; Menzes Depo. at 15:20–25. Again, no reasonable jury would
27 find Bush did not force the confrontation. *See Lal*, 746 F.3d at 1118 (officers' use of deadly force
28 reasonable where officers were "patient" and "tried to talk [the suspect] into surrendering," but

1 suspect forced confrontation by holding large rock threateningly over his head). The officers
2 were not required to retreat at this point, especially with an unpredictable suspect waving a pellet
3 rifle and moving in their direction. *See Fisher v. City of San Jose*, 558 F.3d 1069, 1080 (9th Cir.
4 2009) (en banc) (“telling police in the middle of the standoff that they must withdraw or what
5 tactics are permissible does not strike us as a reasonable role for a judicial officer under the
6 Fourth Amendment.”); *Lal*, 746 F.3d at 1117 (officers not required to retreat from suicidal
7 individual who was walking alongside the road, creating a potential risk to the public).

8 With an armed man moving quickly towards them, waving a pellet rifle and
9 yelling, it was reasonable for the officers to take some kind of action. No reasonable jury would
10 find the action they took, deploying the K-9, was objectively unreasonable under the tense,
11 extremely rapidly evolving circumstances. It is undisputed that when Bush saw the K-9
12 advancing towards him, he threw the pellet rifle on the ground and appeared to surrender. UMF
13 53; Cornelius Depo. at 109:18–24. With the pellet rifle on the ground, the officers reasonably
14 perceived the threat as diminished and left their positions of cover to subdue Bush and maintain
15 control of the K-9. *Cf. Henrich*, 39 F.3d at 915 (“Officers [] need not avail themselves of the
16 least intrusive means of responding to an exigent situation; they need only act [reasonably].”). As
17 such, the use of a K-9 here was objectively reasonable.

18 d) The Shooting

19 Turning to the shooting itself, Deputy Cornelius’s use of deadly force can be
20 deemed objectively reasonable only if he had probable cause to believe that Bush posed a threat
21 of serious physical harm to himself or others. *Brosseau v. Haugen*, 543 U.S. 194, 197–98 (2004)
22 (quoting *Garner*, 471 U.S. at 11); *Price v. Sery*, 513 F.3d 962, 968 (9th Cir. 2008). “That
23 requires [the court] to consider exactly what was happening when the shot was fired.” *Gonzalez*
24 *v. City of Anaheim*, 747 F.3d 789, 794 (9th Cir. 2014). In this case, it is undisputed that Bush had
25 picked up the pellet rifle and was holding it again when Deputy Cornelius shot him. Cornelius
26 Depo. at 121:22–23; Menzes Depo. at 38:8–15 (“I’m pretty sure [Bush] got his hands on [the
27 rifle] ... again. I remember him getting his hands down there . . . he leaned pretty far over, it
28 looked like a support – he grabbed it and it looked like . . . he was supporting himself that way for

1 a second, but they shot him before I could see if it was actually in his possession.”) It is well-
2 established that it is unreasonable for officers to “kill suspects who do not pose an immediate
3 threat to their safety or to the safety of others simply because they are armed.” *Harris v.*
4 *Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997); *see also Curnow By & Through Curnow v.*
5 *Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991) (officers acted unreasonably when they shot
6 suspect who possessed a gun but was not facing them and was not pointing gun at them when
7 they shot); *Hayes v. Cty. of San Diego*, 736 F.3d 1223, 1234–35 (9th Cir. 2013) (officers acted
8 unreasonably when they shot suspect holding knife who was moving towards them but not
9 charging or pointing knife at them, where officers never told him to stop or saw him acting
10 threateningly). On the other hand, officers have probable cause to use deadly force when the
11 suspect is acting erratically and threatens them with a weapon. *City of Hemet*, 394 F.3d at 704
12 (“[W]here a suspect threatens an officer with a weapon such as a gun or a knife, the officer is
13 justified in using deadly force.”); *Reynolds*, 84 F.3d at 1168 (deadly force reasonable where
14 erratic suspect swung knife at officer); *Henrich*, 39 F.3d at 914 (deadly force objectively
15 reasonable where suspect points gun at officers).

16 Plaintiffs contend Deputy Cornelius’s use of deadly force here was unreasonable
17 because (1) the officers knew the pellet rifle was inoperable after Bush threw it to the ground and
18 it broke open; and (2) even after he picked it up again, Bush never pointed the pellet rifle at the
19 officers. Pls.’ Opp’n at 13–15. The court considers these arguments in turn.

20 (1) Whether the Pellet Rifle was Operable

21 Relying exclusively on the testimony of eyewitness Daniel Menzes, Victoria
22 Moseley’s oldest son by a prior marriage, plaintiffs argue the officers were on notice the pellet
23 rifle was inoperable because when Bush threw it to the ground, the pellet rifle broke open, and the
24 officers were close enough to see a spring fall out. Pls.’ Opp’n at 13. This argument is
25 insufficient to defeat summary judgment for two reasons.

26 First, the physical evidence of record flatly contradicts Menzes’s testimony. As
27 the Supreme Court has explained,

28

1 The mere existence of some alleged factual dispute between the
2 parties will not defeat an otherwise properly supported motion for
3 summary judgment; the requirement is that there be no genuine
4 issue of material fact. When opposing parties tell two different
5 stories, one of which is blatantly contradicted by the record, so that
6 no reasonable jury could believe it, a court should not adopt that
7 version of the facts for purposes of ruling on a motion for summary
8 judgment.

9 *Scott v. Harris*, 550 U.S. 372, 380 (2007) (brackets, citations, and quotations omitted).

10 Defendants’ forensic expert, Martini, analyzed the spring that plaintiffs’ private
11 investigator “located and collected from the ground by a private investigator and subsequently
12 submitted as evidence by Plaintiff.” Martini Expert Report at 13. Martini consulted with a
13 representative from the manufacturer of Bush’s pellet rifle, who “confirm[ed] that the
14 configuration and dimensions of [plaintiffs’] spring excludes the possibility that it came from the
15 incident Powerline 1000 air rifle or any Daisy Powerline 1000 rifle as manufactured.” *Id.*
16 Additionally, a criminalist in the California Department of Justice Laboratory test-fired Bush’s
17 pellet rifle after the incident and found it operable. Wallace Depo. at 37:21–38:7.

18 Plaintiffs attempt to dispute the objective physical evidence with the eyewitness of
19 Menzes, who contends the officers were close enough to see a spring fall out of Bush’s pellet
20 rifle. Menzes makes repeated assertions that he saw a spring fall out, while also saying the
21 officers blocked his view of Bush at the time of the shooting. Menzes Depo. at 41:1–12. Menzes
22 was standing with Mr. Moseley behind a fence, beyond the yard, *see* Menzes Depo. at Ex. 17,
23 when he says he saw the spring fall out. It is undisputed the spring plaintiffs’ investigator found,
24 measuring one inch long by 5/16 inch wide, did not match the type of spring that was a
25 component of the pellet rifle Bush held. Martini Expert Report at 13. Plaintiffs’ other
26 eyewitness, Victoria Moseley, testified the pellet rifle had lost a spring weeks before the incident.
27 Moseley Depo. at 71:11–16. No evidence in the record supports the conclusion that any officer
28 saw anything fall out of Bush’s pellet rifle. No reasonable jury, therefore, could conclude any
officer saw a spring fall from the pellet rifle, disarming it. *See Scott*, 550 U.S. at 380; *Gregory*,
523 F.3d at 1108; *Skylstad v. Reynolds*, 248 F. Appx. 808, 811 (9th Cir. 2007) (no genuine
dispute when witnesses’ declarations “directly contradict[ed]” by medical records).

1 Cornelius was not required to wait for him to do so before responding with deadly force. *See*
2 *George*, 736 F.3d at 838 (“If a person is armed . . . a furtive movement, harrowing gesture, or
3 serious verbal threat might create an immediate threat.”). Here, Victoria Moseley testified Bush
4 was holding the pellet rifle in his right hand by the barrel when Deputy Cornelius shot him.
5 Moseley Depo. at 79:5–80:8. Defendants have “point[ed] to no videotape, audio recording, or
6 similarly dispositive evidence that ‘blatantly contradicts’ or ‘utterly discredits’ [her] side of the
7 story.” *See George*, 736 F.3d at 836 (quoting *Scott*, 550 U.S. at 380). Because the parties dispute
8 this fact, the question, then, is whether this dispute is material. For the following reasons, the
9 court finds it is not.

10 After Bush threw down the pellet rifle, it was objectively reasonable for the
11 officers to perceive Bush as a diminished threat and leave their positions of cover. Then, when
12 the K-9 unexpectedly veered away from Bush and Bush retrieved the pellet rifle off the ground,
13 UMF 55, it was reasonable for the officers to perceive Bush as a threat to their physical safety for
14 multiple reasons. First, Bush repeatedly ignored the officers’ renewed orders that he stop, get on
15 the ground, and drop the pellet rifle. The Ninth Circuit generally accepts that officers reasonably
16 perceive a heightened risk of serious physical harm when a suspect disobeys the officers’ orders
17 in a way that signals active resistance. *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1020
18 (9th Cir. 2015) (noting significance disobedience of officer commands plays in an excessive force
19 analysis); *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1104 (9th Cir. 2013) (same); *cf. Young v.*
20 *Cty. of L.A.*, 655 F.3d 1156, 1168 (9th Cir. 2011) (refusing to take a knee did not telegraph danger
21 when criminal act was misdemeanor trespass); *see also Woodward v. Town of Battleboro*, No. 02-
22 35, 2006 WL 36906, at *7 (D. Vt. Jan. 5, 2006) (suspect disobeyed orders to drop his knife);
23 *Hayes v. City of Dearborn*, No. 04-71826, 2005 WL 3501413, at *4 (E.D. Mich. Dec. 21, 2005)
24 (suspect attempted to injure officers with vehicle and disobeyed orders to stop); *Billingsley v. City*
25 *of Omaha*, 277 F.3d 990, 993–94 (8th Cir. 2002) (suspect did not halt after being ordered to stop
26 multiple times); *Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997) (suspect disobeyed orders to
27 get on ground); *Anderson v. Russell*, 247 F.3d 125, 130 (4th Cir. 2001) (suspect lowered his
28 hands in disobedience of officer’s order).

1 Second, the officers at that point had no cover. Cornelius Depo. at 127:12–14.
2 With the officers standing exposed in the middle of a yard directly in front of a suspect holding a
3 pellet rifle, no reasonable jury could find the officers’ belief they could not safely retreat
4 unreasonable. *Cf. Mace v. City of Palestine*, 333 F.3d 621, 624–25 (5th Cir. 2003) (officers’ use
5 of deadly force was reasonable where “close quarters of a mobile home park . . . limited the
6 officers’ ability to retreat”).

7 Third, the officers at that point had no less lethal force option immediately
8 available. *Cf. Hughes*, 841 F.3d at 1087 (officers are required to consider whether less intrusive
9 force alternatives are available). Their planned less lethal force option, the K-9, had unexpectedly
10 veered away, and the officers had no immediate access to another less-lethal option. Sergeant
11 Keeling’s less lethal beanbag shotgun was in his patrol car. UMF 92. Deputy Cornelius and
12 Deputy Evans had their guns in their hands, with their Tasers holstered; if they had drawn their
13 Tasers, they were standing approximately 17 feet from Bush, and the parties agree Tasers are
14 effective only up to 14 feet, UMF 22. Even if the officers could have avoided using deadly force
15 had they preplanned a range of alternative less lethal force options, no reasonable jury could find
16 their actions were unreasonable. Plaintiffs cannot “establish a Fourth Amendment violation based
17 merely on bad tactics that result in a deadly confrontation that could have been avoided.”
18 *Billington*, 292 F.3d at 1190.

19 Fourth, adding to the officers’ perception of danger, Bush was agitated, screaming
20 at them, and appeared high on something. *See Loch v. City of Litchfield*, 837 F. Supp. 2d 1032,
21 1040 (D. Minn. 2011), *aff’d*, 689 F.3d 961 (8th Cir. 2012) (“Adding to the perceived danger . . . is
22 the fact that [the suspect] was intoxicated and agitated.”). In light of Bush’s behavior, “there was
23 no reason for the officers to believe that [Bush] would act rationally.” *See Lal*, 746 F.3d at 1118–
24 19.

25 Fifth, it is undisputed that Bush repeatedly banged the pellet rifle over his knee
26 before Deputy Cornelius shot him. UMF 60. Combined with Bush’s other erratic behavior, an
27 officer could reasonably perceive Bush’s unpredictable movements as a safety risk. *See Cruz v.*
28 *City of Anaheim*, 765 F.3d 1076, 1078–79 (9th Cir. 2014) (reasoning police would be justified in

1 shooting suspect behaving “dangerous[ly] and erratic[ally]” who reached for his waistband).
2 Deputy Cornelius’s situation was precarious, and again, the Fourth Amendment did not require
3 him “to delay [his] fire until [Bush] turn[ed] his weapon on [him].” *See George*, 736 F.3d at 838.
4 That Bush “may have been intent on committing ‘suicide by cop’ does not negate the fact that he
5 threatened the officers with such immediate serious harm that shooting him was a reasonable
6 response.” *See Lal*, 746 F.3d at 1119. Deputy Cornelius was “justified in responding to” Bush’s
7 threatening behavior “by opening fire.” *See Cruz*, 765 F.3d at 1078–79.

8 With no cover and faced with an unpredictable suspect who was ignoring orders
9 and banging a pellet rifle over his knee, Deputy Cornelius’s use of deadly force was reasonable.
10 The other officers’ actions, including those of Deputy Cornelius’s supervisor, Sergeant Keeling,
11 also were reasonable. *See Wilson v. Town of Mendon*, 294 F.3d 1, 6 (1st Cir. 2002) (“If . . . the
12 officer has inflicted no constitutional harm, neither the municipality nor the supervisor can be
13 held liable.”) (citing *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986)). Accordingly, the court
14 finds no reasonable jury could find the officers’ use of deadly force was unreasonable.

15 e) The Emergency Care

16 Defendants also move for summary judgment on plaintiffs’ allegation that the
17 officers failed to provide reasonable medical aid in the course of seizing Bush. Defs.’ MSJ at 24.
18 Plaintiffs do not address this claim in their opposition. It is undisputed that Deputies Cornelius
19 and Evans attempted to resuscitate Bush, but no emergency life-saving services of any kind could
20 have saved him. UMF 65. The court finds no reasonable jury could find the officers did not
21 provide reasonable medical aid.

22 2. Clearly Established Law

23 Even if the court were to find the officers unlawfully seized Bush with excessive
24 force, it would conclude the officers are entitled to qualified immunity because the officers did
25 not violate clearly established law. For an officer to violate clearly established law, the law’s
26 contours must have been “sufficiently definite that any reasonable official in his shoes would
27 have understood that he was violating it, meaning that existing precedent placed the statutory or
28 constitutional question beyond debate.” *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774

1 (2015) (brackets, ellipsis, and quotations omitted). “This exacting standard gives government
2 officials breathing room to make reasonable but mistaken judgments by protecting all but the
3 plainly incompetent or those who knowingly violate the law.” *Id.* (brackets and quotations
4 omitted). Qualified immunity affords officers the benefit of the doubt in close calls, since
5 “offic[ers] should not err always on the side of caution because they fear being sued.” *Hunter v.*
6 *Bryant*, 502 U.S. 224, 229 (1991) (quotation omitted).

7 The court must “not [] define clearly established law at a high level of generality,”
8 and the “inquiry must be undertaken in light of the specific context of the case.” *Mullenix v.*
9 *Luna*, 136 S. Ct. 305, 308 (2015) (quotations omitted). The dispositive inquiry is whether it
10 would be clear to every reasonable officer that the conduct was unlawful in the situation he
11 confronted. *See Taylor v. Banks*, 135 S. Ct. 2042, 2044 (2015); *Reichle v. Howards*, 132 S. Ct.
12 2088, 2093 (2012). Such specificity is especially important in the Fourth Amendment context
13 because “it is sometimes difficult for an officer to determine how the relevant legal doctrine . . .
14 will apply to the factual situation the officer confronts.” *Mullenix*, 136 S. Ct. at 308 (brackets and
15 quotation omitted).

16 At trial, it would be plaintiffs’ burden to prove an allegedly violated right was
17 clearly established at the time of the violation. *Clairmont v. Sound Mental Health*, 632 F.3d
18 1091, 1109 (9th Cir. 2011); *Maraziti v. First Interstate Bank of Cal.*, 953 F.2d 520, 523 (9th Cir.
19 1992). In opposition to summary judgment, however, plaintiffs attempt to turn the burden on its
20 head by arguing defendants have failed to cite authority that would entitle defendants to qualified
21 immunity. *See* Pls.’ Opp’n at 12–13 (arguing defendants fail to provide a case holding it was
22 reasonable to use deadly force when the officers knew Bush carried a pellet rifle). But the
23 “qualified immunity defense protects officers as the rule rather than the exception.” *Loch*, 837 F.
24 Supp. 2d at 1042 (citing cases). Relying in part on *Garner*, 471 U.S. at 3, plaintiffs merely argue
25 “it was clearly established that the use of deadly force was reasonable only if an officer has
26 probable cause to believe that the suspect poses a significant threat of death or serious physical
27 injury to the officer or others.” Pls.’ Opp’n at 14. However, for this court to find Deputy
28 Cornelius violated clearly established law, the court must “identify a case where an officer acting

1 under similar circumstances as [Deputy Cornelius] was held to have violated the Fourth
2 Amendment.” See *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curium). As the Supreme
3 Court has cautioned, *Garner* and its progeny “lay out excessive-force principles at only a general
4 level,” and “do not by themselves create clearly established law outside an obvious case.” *Id.*
5 (citations and quotations omitted).

6 This is not a case where it is obvious there was a violation of clearly established
7 law under *Garner*. As previously stated, Bush was acting erratically, refusing the officers’
8 orders, and banging a pellet rifle against his knee. Even if the court were to find Deputy
9 Cornelius’s use of force unreasonable, plaintiffs do not cite and the court is not aware of any case
10 that would have put the deputy on notice he could not use deadly force “in light of the specific
11 context of [this] case.” See *Mullenix*, 136 S. Ct. at 308. In *Hayes*, 736 F.3d at 1234, the Ninth
12 Circuit did hold an officer’s use of deadly force against a man holding a knife was unreasonable.
13 But in *Hayes*, the man was not warned to stop or “given an indication [] his actions were
14 perceived as a threat,” was not charging the officer, was not acting erratically, and had threatened
15 no one. *Hayes* would not have put Deputy Cornelius on notice because Bush was acting
16 erratically and was repeatedly told to stop, drop his weapon, and get on the ground.

17 In *Lal*, cited above, the Ninth Circuit found reasonable officers’ use of deadly
18 force against a suspect intent on committing suicide by cop. 746 F.3d at 1118–19. The officers
19 in *Lal* encountered a suspect who forced a confrontation, ignored the officers’ directions,
20 advanced on them, and threatened the officers with a weapon in the form of a large rock to
21 provoke a response. *Id.* The parallels between *Lal* and the instant case weigh strongly against
22 finding Deputy Cornelius and the other officers violated clearly established law.

23 Considering how quickly events unfolded and the totality of the circumstances, an
24 officer in this case cannot be said to have to been “plainly incompetent” for believing his life was
25 in immediate danger. See *Sheehan*, 135 S. Ct. at 1774. The court therefore GRANTS
26 defendants’ motion for summary judgment as to this claim.

1 B. Violation of 42 U.S.C. § 1983 – Fourteenth Amendment Due Process

2 Defendants also move for summary judgment on plaintiffs’ due process claim.

3 Under the Fourteenth Amendment, Bush’s mother and child as plaintiffs have a constitutionally
4 protected liberty interest in Bush’s “companionship and society.” *Porter v. Osborn*, 546 F.3d
5 1131, 1136 (9th Cir. 2008); *Hayes*, 736 F.3d at 1229–31. A cognizable violation of due process
6 occurs when officers’ conduct “shocks the conscience” in depriving plaintiffs of that liberty
7 interest. *Porter*, 546 F.3d at 1136 (citing *Cty of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).
8 “Conscience-shocking actions are those taken with (1) ‘deliberate indifference’ or (2) a ‘purpose
9 to harm . . . unrelated to legitimate law enforcement objectives.’” *A.D. v. Cal. Highway Patrol*,
10 712 F.3d 446, 453 (9th Cir. 2013) (quoting *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir.
11 2010)). However, deliberate indifference only shocks the conscience “where actual deliberation
12 is practical.” *Hayes*, 736 F.3d at 1230. “[I]n circumstances where an officer cannot practically
13 deliberate, such as where a law enforcement officer makes a snap judgment because of an
14 escalating situation, his conduct may only be found to shock the conscience if he acts with a
15 purpose to harm unrelated to legitimate law enforcement objectives.” *A.D.*, 712 F.3d at 453.

16 In this case, the decision to use deadly force against Bush reflects a split-second
17 judgment – literally – based on the rapidly unfolding events after the K-9 unexpectedly veered
18 away from Bush, with Bush then retrieving the pellet rifle from the ground. The parties agree
19 everything happened “extremely fast.” *See, e.g.*, Moseley Depo. at 105:7–12; Evans Depo. at
20 67:4–5. The decision to react with deadly force after Bush retrieved the pellet rifle from the
21 ground was sudden and did not allow time for deliberation. *See Hayes*, 736 F.3d at 1230
22 (collecting cases). Accordingly, the court applies the “purpose to harm” standard. *See id.*

23 There is no evidence in the record that any deputy acted with a purpose to harm
24 unrelated to the legitimate law-enforcement objectives of defending himself and protecting
25 others. *See id.* at 1230–31; *Wilkinson*, 610 F.3d at 554–55. The court GRANTS defendants’
26 motion for summary judgment as to plaintiffs’ Fourteenth Amendment substantive due process
27 claim.

1 C. Monell Violation

2 Defendants also move for summary judgment on plaintiffs' *Monell* claim. "While
3 the liability of municipalities doesn't turn on the liability of individual officers, it is contingent on
4 a violation of constitutional rights." *Henrich*, 39 F.3d at 916. Because this court has found no
5 reasonable factfinder could conclude a constitutional violation occurred in this case, the court
6 GRANTS defendants' motion for summary judgment as to this claim.

7 D. Negligence

8 Defendants also move for summary judgment on plaintiffs' claim that defendants
9 negligently shot Bush. In California, "an officer's lack of due care can give rise to negligence
10 liability for the intentional shooting death of a suspect." *Hayes*, 736 F.3d at 1232 (quoting *Munoz*
11 *v. Olin*, 24 Cal. 3d 629, 634 (1979)). Negligence requires showing: (1) a duty to use due care;
12 (2) a breach of that duty; (3) proximate or legal causation; and (4) damages resulting from the
13 breach. *Ladd v. Cty. of San Mateo*, 12 Cal. 4th 913, 917 (1996).

14 Although an officer must always act reasonably when using lethal force, what
15 reasonable means differs in Fourth Amendment and state negligence contexts. *Brown v.*
16 *Ransweiler*, 171 Cal. App. 4th 516, 534 (2009) (quotation omitted); *Billington*, 292 F.3d at 1190.
17 State negligence claims "consider[] the totality of the circumstances surrounding any use of
18 deadly force," whereas federal excessive force claims "focus more narrowly on the moment when
19 force is used" *Hayes v. City. of San Diego*, 57 Cal. 4th 622, 638 (2013). At the same time,
20 akin to federal courts' evaluation of Fourth Amendment excessive force claims, California
21 negligence law evaluates reasonableness from the perspective of an officer on the scene; not
22 "with the 20/20 vision of hindsight." *Id.* at 638 (quoting *Graham*, 490 U.S. at 396). Thus, "[l]aw
23 enforcement personnel have a degree of discretion as to how they choose to address a particular
24 situation." *Id.* If they act within "the range of conduct that is reasonable under the
25 circumstances" there is no requirement that they choose the "most reasonable" action or the
26 conduct that is the least likely to cause harm" to avoid negligence liability. *Id.*

1 1. Pre-Shooting Conduct Under State Negligence Law

2 The distinction between state and federal use-of-force standards is clear when an
3 officer's pre-shooting conduct provokes the dangerous situation that caused the deadly shooting.
4 In that scenario, "tactical conduct and decisions preceding the use of deadly force are relevant
5 considerations under California law" and could show, as part of the totality of the circumstances,
6 the use of deadly force was unreasonable, even if the same use of deadly force was reasonable
7 under Fourth Amendment law. *Hayes*, 57 Cal. 4th at 625. *Grudt* exposes this precise dichotomy.
8 *See Grudt v. City of L.A.*, 2 Cal. 3d 575, 587 (1970). In *Grudt*, the California Supreme Court held
9 the officer's decision to shoot the suspect was justified under the Fourth Amendment because the
10 suspect was accelerating his truck toward the officer at the time. Yet the officers' questionable
11 pre-shooting conduct made summary judgment on the negligence claim inappropriate. *Id.* at 585–
12 88. Officers had approached Grudt's car in civilian clothes, in a high crime area, late at night,
13 and rapped their gun muzzles on his window. *Id.* at 587. Grudt was hard of hearing and thought
14 he was being robbed, so he accelerated towards a second plainclothes officer who then opened
15 fire on him. *Id.* The court found a jury might impose negligence liability after taking account of
16 the pre-shooting conduct, and emphasized if there is "a reasonable doubt as to whether such
17 questioned conduct falls within or without the bounds of ordinary care then such doubt must be
18 resolved as a matter of fact rather than of law." *Id.* at 587 (citing *Toschi v. Christian*, 24 Cal. 2d
19 354, 360 (1944)).

20 A federal district court in *Howard* also cited an officers' pre-shooting conduct as
21 reason to deny summary judgment on a negligence claim, despite the reasonableness of the
22 shooting under Fourth Amendment law. *See Howard v. Cty. of Riverside*, No. EDCV1200700
23 VAPOPX, 2014 WL 12589650, at *9–10 (C.D. Cal. May 7, 2014). In *Howard*, an armed and
24 dangerous suspect fled felony arrest and was thought to be hiding in an unlocked closet in a
25 small, dark, enclosed shed. *Id.* at 9. Instead of waiting for a K-9 unit, one lone officer crawled
26 into the shed, with limited cover from other officers, and opened the closet. *Id.* When the suspect
27 quickly emerged, the officer shot him in the face without warning. *Id.* Although the suspect bore
28 no weapon, the close confines and quick movements rendered the fatal shot reasonable under the

1 Fourth Amendment. *Id.* But the court held that a jury could find negligence liability based on the
2 pre-shooting decision to send a lone officer into a small, enclosed storage shed to open the door to
3 the closet where a potentially armed and dangerous suspect might be hiding, rather than waiting
4 for K-9 support. *Id.* at 10.

5 In *Biscotti v. Yuba City*, the Ninth Circuit found the district court erred in granting
6 summary judgment for the officers on plaintiff’s negligence claim without considering pre-
7 shooting facts that colored the reasonableness of the ultimate shot. *See* 636 F. Appx. 419, 421–22
8 (9th Cir. 2016). There, the decedent emerged from her porch with a gun and did not obey
9 officers’ commands; they then shot her. *Id.* at 421. Although the shooting was reasonable under
10 the Fourth Amendment, the court faulted the district court for disregarding the officers’ pre-
11 shooting tactical decisions that “obscured their law enforcement identity and increased the
12 likelihood of a violent and deadly encounter.” *Id.* The pre-shooting conduct involved the
13 officers’ arriving after dark, knowing one occupant of the house might be armed and intoxicated.
14 *Id.* Instead of parking their marked cruisers in a visible spot, the officers approached from the
15 side wearing dark uniforms, partially hid behind pillars, did not announce themselves as police
16 officers, and then “shouted imperceptible orders at one of the residents who walked onto her
17 porch.” *Id.* at 422. The court found this pre-shooting tactical approach raised a reasonable
18 dispute as to the officers’ negligence in triggering the violent finale, and thus there was a triable
19 issue as to whether the officers’ ultimate decision to shoot was reasonable under California
20 negligence law. *Id.*

21 2. Discussion

22 Here, plaintiffs base much of their negligence claim on the officers’ pre-shooting
23 conduct, contending the officers unreasonably used “counter intuitive and ill-fated” tactics in
24 approaching Bush, given his mental state. *See* Pls.’ Opp’n at 11–12. Unlike the cases discussed
25 above, no reasonable jury could find the officers’ pre-shooting conduct here was unreasonable
26 under California negligence law. In contrast to the facts here, in *Grudt*, the officers approached a
27 hearing-impaired man’s car in civilian clothes, with guns drawn in a dark high crime area; they
28 rapped their guns on his window, then shot him when he tried to drive away. In *Thomas*, officers

1 made a rash decision to send a lone officer into a small space where an armed and dangerous
2 target of a felony arrest warrant might have been hiding rather than waiting for a K-9 or other
3 proper backup. And in *Biscotti*, the officers approached a home with a potentially intoxicated and
4 armed individual inside, after dark, obscured their identity, shouted unclear commands, and then,
5 without warning, shot a resident when she appeared with a gun.

6 Here, quite differently, the undisputed evidence demonstrates officers were
7 methodical and engaged in reasonable exercises of judgment in their pre-shooting conduct. The
8 officers met beforehand to devise a plan to deal with a suicidal, erratic, unstable, armed
9 individual. UMF 15. They arrived in marked cruisers and uniforms, in daylight, surveyed the
10 scene, talked to people on the scene, clearly announced their presence, waited outside the house,
11 and shouted to Bush that they were here to help him. UMF 35–38. Bush emerged, yelling in part
12 unintelligibly, and immediately advanced on them with a pellet rifle. UMF 42, 47–48. The
13 officers clearly and repeatedly commanded him to drop his weapon. UMF 49–51. Once he did
14 not and instead advanced on the officers, they tried first to use the K-9 as a less lethal method to
15 defuse and disarm Bush. UMF 55. Although Bush initially dropped his rifle, when the K-9
16 unexpectedly veered away, he picked it back up and pointed it at the officers. UMF 55. It was at
17 this point that Deputy Cornelius shot Bush.

18 Plaintiffs are critical of the officers’ tactical decisions, including choosing to
19 deploy a K-9 when they knew another dog was on the property, using guns instead of non-lethal
20 weapons, and not tailoring their negotiation tactics to the needs of a person who was mentally
21 distraught. *See* Pls.’ Opp’n at 11–12. The law of negligence does not require officers to choose
22 the “‘most reasonable’ action or the conduct that is the least likely to cause harm,” so long as their
23 conduct falls “within the range of conduct that is reasonable under the circumstances.” *Hayes*, 57
24 Cal. 4th at 632 (citation omitted). Here, no reasonable jury could find using a K-9 as the officers
25 did was unreasonable. The K-9 was properly trained, evaluated and certified. Evans Decl. ¶ 4.
26 While the officers were told of the other dog on the property, that dog was chained up; plaintiffs
27 cite no evidence to suggest the law enforcement K-9 had a history of noncompliance, or authority
28 for the proposition that the presence of the chained dog counseled against use of a K-9 at all.

1 Deputy Evans did explain in deposition that his K-9 “is not trained to avoid distractions, such as
2 pit bulls” but that “[h]e is not aggressive towards other animals.” Evans Depo. at 59:20–24.
3 Moreover, even if the use of the K-9 was a mistake, the court finds the immediate danger Bush
4 appeared to pose created a particularly broad zone of officer discretion in their use of tools of
5 their trade. *See* UMF 33. That the officers also had less lethal weapons including Tasers on their
6 persons does not render their decision to use a K-9 first unreasonable, nor the split second
7 decision to shoot after the K-9 misfired. Having carefully considered the question, the court finds
8 no reasonable jury could find the officers’ conduct leading up to the shooting did not fall well
9 within the “range of conduct that is reasonable under the circumstances.” *Hayes*, 57 Cal. 4th at
10 632.

11 “Reasonableness” under the Fourth Amendment and “reasonable care” under a
12 negligence theory are synonymous insofar as they consider the same conduct. *See Hernandez v.*
13 *City of Pomona*, 46 Cal. 4th 501, 513–17 (2009); *Atkinson v. Cty. of Tulare*, 790 F. Supp. 2d
14 1188, 1211 (E.D. Cal. 2011) (negligence and battery “measured by the same reasonableness
15 standard of the Fourth Amendment”) (citing *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269,
16 1272–73 (1998)). Thus, the analysis set forth in the Fourth Amendment discussion above applies
17 equally to the reasonableness analysis here under state negligence law.

18 No reasonable jury would find the officers’ use of deadly force was negligent.
19 Accordingly, the court GRANTS summary judgment for defendants as to plaintiffs’ negligence
20 claim.

21 E. Assault and Battery

22 Defendants also move for summary judgment on plaintiffs’ assault and battery
23 claim. “A state law battery claim is a counterpart to a federal claim of excessive use of force. In
24 both, a plaintiff must prove that the peace officer’s use of force was unreasonable.” *Brown*,
25 171 Cal. App. 4th at 527 (citing *Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1102 n.6
26 (2004)). Because the court has found no reasonable jury could find the officers’ use of force in
27 this case to be unreasonable as to the excessive force claim, the court GRANTS defendants’
28 motion for summary judgment as to this state claim as well.

1 F. Intentional Infliction of Emotional Distress

2 Plaintiffs’ intentional infliction of emotional distress claim in this case is
3 derivative of its battery claim. *See Susag v. City of Lake Forest*, 94 Cal. App. 4th 1401, 1415
4 (2002) (finding plaintiffs’ “intentional infliction of emotional distress [claim to be] derivative of
5 [plaintiffs’] battery [claim]” in an excessive force case). Because the court finds no reasonable
6 jury could find defendants’ use of force was unreasonable, the court GRANTS defendants’
7 motion for summary judgment as to this claim.

8 G. Negligent Infliction of Emotional Distress

9 As the name implies, a claim for negligent infliction of emotional distress requires
10 that plaintiffs prove defendants acted negligently. *See Ra v. Superior Court*, 154 Cal. App. 4th
11 142, 144 (2007). Because the court finds no reasonable jury could find defendants acted
12 negligently, the court GRANTS defendants’ motion as to this claim.

13 H. Wrongful Death

14 California Civil Procedure Code section 377.60 provides “[a] cause of action for
15 the death of a person caused by the wrongful act or neglect of another.” The elements of such a
16 claim are “the tort (negligence or other wrongful act), the resulting death, and the damages,
17 consisting of the pecuniary loss suffered by the heirs.” *Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App.
18 4th 1256, 1263 (Cal. Ct. App. 2006) (quotation and citation omitted).

19 Because the court finds no reasonable jury could find the officers committed tort
20 violations, the court GRANTS defendants’ motion for summary judgment as to this claim.

21 I. Bane Act Violation – California Civil Code section 52.1

22 “The Bane Act provides a civil cause of action against anyone who ‘interferes by
23 threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with
24 the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or
25 laws of the United States, or of the rights secured by the Constitution or laws of this state.’”
26 *Simmons v. Superior Court*, 7 Cal. App. 5th 1113, 1125 (Ct. App. 2016) (quoting Cal. Civ. Code
27 § 52.1). “The essence of a Bane Act claim is that the defendant, by the specified improper means
28 (i.e., ‘threat, intimidation or coercion’), tried to or did prevent the plaintiff from doing something

1 he or she had the right to do under the law or to force the plaintiff to do something that he or she
2 was not required to do under the law.” *King v. State*, 242 Cal. App. 4th 265, 294 (2015)
3 (quotation and brackets omitted). The Ninth Circuit has held that the elements of a Bane Act
4 claim are the same as the elements for excessive force under section 1983. *Chaudhry v. City of*
5 *L.A.*, 751 F.3d 1096, 1105 (9th Cir. 2014); *Cameron v. Craig*, 713 F.3d 1012, 1022 (9th Cir.
6 2013).

7 Because the court finds no reasonable jury could find the officers violated Bush’s
8 constitutional rights or state tort law, the court GRANTS defendants’ motion for summary
9 judgment as to the Bane Act claim as well.

10 IV. CONCLUSION

11 For the reasons stated above, the court GRANTS defendants’ motion for summary
12 judgment in its entirety. This case is now CLOSED.

13 DATED: April 28, 2017.

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16 UNITED STATES DISTRICT JUDGE
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