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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

HARRY VELEZ, et al.,  
  
Plaintiffs,  
  
v.  
  
TEHAMA COUNTY SHERIFF'S  
DEPARTMENT, et al.,  
  
Defendants.

CIV. NO. 17-960 WBS KJN

MEMORANDUM AND ORDER RE: MOTION  
TO DISMISS

This case arises out of the death of Harry Velez ("Velez"). Velez's mother, Maria Lazada, and son, Andre O'Hara, (collectively "plaintiffs") filed this action on behalf of themselves and decedent against Sheriff Dave Hencratt, Sergeant Steve Hoag, Deputy Robert Bakken ("Deputy Bakken"), Deputy Dustin Maria ("Deputy Maria"), the State of California, the City of Dairyville, Tehama County, and the Tehama County Sheriff's Department, alleging that Deputies Bakken and Maria used excessive force while arresting Velez, causing his death. Presently before the court is the Motion of defendants Bakken,

1 Maria, and the County of Tehama to Dismiss plaintiffs' First  
2 Amended Complaint ("FAC"). (Docket No. 17)

3 I. Factual and Procedural History

4 On September 21, 2016, the Tehama County Sheriff's  
5 Department responded to a 911 call made by Velez, who claimed he  
6 had been drugged by his girlfriend Natasha Finck ("Finck"). (FAC  
7 ¶ 5.) Deputy Bakken and Deputy Maria responded to the call.  
8 (Id.) After speaking with Velez and Finck, Deputy Bakken  
9 allegedly pushed Velez to the ground and handcuffed him. (Id. ¶¶  
10 6-7.) Plaintiffs allege that Velez then rose to his feet and was  
11 again tackled by Deputies Bakken and Maria, who repeatedly tased  
12 and punched Velez. (Id. ¶ 8.) During the attack, plaintiffs  
13 purport that Velez yelled for help. (Id. ¶ 9.) At all times  
14 during the incident, plaintiffs allege that Velez had no weapons,  
15 made no threats to the deputies, and did not resist arrest. (Id.  
16 ¶ 13.)

17 Velez was transported to the hospital where he died  
18 from Hypoxic Encephalopathy (lack of oxygen to the brain) with  
19 Multisystem Organ Failure. (Id. ¶¶ 11-12.) According to the  
20 autopsy, Velez was tased at least ten times. (Id. ¶ 8.) The  
21 autopsy also reports that Velez had abrasions on his face,  
22 forearms, knee, toes, and wrists, and had contusions on his  
23 fingers, chest, and abdominal walls. (Id. ¶ 12.)

24 On October 13, 2016, plaintiffs presented California  
25 Tort Claims Act ("CTCA") claims to the County of Tehama on behalf  
26 of themselves and the decedent regarding the September 21, 2016  
27 incident. (Decl. of Sean Houghtby ("Houghtby Decl.") ¶ 5, Ex. A  
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1 (Docket No. 17-2).<sup>1</sup> On November 1, 2016, the County of Tehama  
2 Board of Directors rejected these claims. (Id. ¶ 6, Ex. B.) On  
3 November 2, 2016, Tehama County drafted California Tort Claims  
4 Act rejection notices addressed to both plaintiff. Each  
5 rejection notice included the following language: "WARNING;  
6 Subject to certain expectations, you have only six (6) months  
7 from the date this notice was personally delivered or deposited  
8 in the mail to file a court action on this claim. See Government  
9 Code Section 945.6." (Id.)<sup>2</sup> That same day, these rejection  
10 notices were placed in prepaid envelopes addressed to plaintiffs,  
11 and the envelopes were placed for collection and mailing with the  
12 United States Postal Service. (Id. ¶¶ 7-9.)

13 Plaintiffs submitted their complaint to the court on  
14 May 1, 2017, seeking damages for injuries to the decedent and to  
15 compensate the family members for mental anguish and pecuniary  
16 injuries. The complaint was not officially filed by the Clerk  
17 until May 5, 2017. (Docket No. 1.) On October 11, 2017, the  
18 court granted defendants' Motion for a More Definite Statement  
19 and dismissed plaintiffs' complaint with leave to amend. (Docket  
20 No. 11.) On November 10, 2017, plaintiffs filed their First  
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22 <sup>1</sup> The court takes judicial notice of the CTCA claims  
23 because judicial notice may be taken of records of state  
24 administrative and judicial agencies, Mack v. S. Bay Beer  
25 Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir.1986) (abrogated  
26 on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino,  
27 501 U.S. 104, 111 (1991)), including governmental claim  
28 submissions and responses, Clarke v. Upton, 703 F. Supp. 2d 1037,  
1042 (E.D. Cal. 2010) (judicial notice of claim filings may be  
considered on a Rule 12(b)(6) motion to dismiss).

<sup>2</sup> The court takes judicial notice of these rejection  
notices for the same reasons explained in footnote 1.

1 Amended Complaint. (Docket No. 15.) The First Amended Complaint  
2 contains eight claims for relief: (1) a § 1983 claim for  
3 violation of plaintiffs' Fourth Amendment rights; (2) a § 1983  
4 claim for violation of plaintiffs' First Amendment rights; (3)  
5 assault; (4) battery; (5) false arrest/imprisonment; (6)  
6 intentional infliction of emotional distress; (7) negligent  
7 hiring, training, supervision or retention of employees; (8) and  
8 wrongful death.

9 II. Discussion

10 A. State Law Claims

11 Defendants seek dismissal of all state law claims (i.e.  
12 claims three through eight), alleging that plaintiffs failed to  
13 comply with the timing requirements mandated by Cal. Govt. Code §  
14 945.6 of the California Tort Claims Act. Under those  
15 requirements, all claims alleged against public entities and  
16 their employees must be brought within 6 months or 182 days,  
17 whichever is earlier, from the date the notice rejections were  
18 deposited in the mail. Cal. Govt. Code § 945.6; Gonzales v.  
19 County of Los Angeles, 199 Cal. App. 3d 601, 604 (2d Dist. 1988).  
20 This six month period "is mandatory and strict compliance is  
21 required." Clarke v. Upton, 703 F. Supp. 2d 1037, 1044 (E.D.  
22 Cal. 2010) (citing Julian v. City of San Diego, 183 Cal. App. 3d  
23 169, 176 (4th Dist. 1986)).

24 Tehama County sent plaintiffs their rejection notices  
25 on November 3, 2016. (Houghtby Decl. ¶ 5, Ex. A.) Six months  
26 from this date was May 3, 2017, and 182 days later was May 4,  
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1 2017.<sup>3</sup> Although plaintiffs' complaint was not filed by the Clerk  
2 until May 5, 2017, it was received and entered by the Clerk on  
3 May 1, 2017, days before the statute of limitations was set to  
4 expire on these claims. The delay was due to the fact that  
5 plaintiffs did not pay the requisite court filing fees until May  
6 5. However, the Ninth Circuit has determined that "a complaint  
7 is filed when it is placed in the actual or constructive custody  
8 of the clerk of the court, despite any subsequent rejection by  
9 the clerk of the pleading for non-compliance with a provision of  
10 the local rules." Ordonez v. Johnson, 254 F. 3d 814, 816 (9th  
11 Cir. 2001). Accordingly, because here the "complaint arrive[d]  
12 in the custody of the clerk within the statutory period," the  
13 "court should regard [it] as 'filed.'" Smith v. Frank, 923 F.2d  
14 139, 141 (9th Cir. 1991), citing Loya v. Desert Sands Unified  
15 School Dist., 721 F.2d 279, 281 (9th Cir. 1983). Therefore, the  
16 court concludes that plaintiffs complied with the statute of  
17 limitations and will deny defendants' Motion to Dismiss on that  
18 ground.

19 B. Claims One through Seven

20 Claims one through seven are survival claims brought on  
21 behalf of the decedent by O'Hara, his purported successor in  
22 interest. A "party seeking to bring a survival action under §  
23 1983 bears the burden of demonstrating that a particular state's  
24 law authorizes a survival action and that the plaintiff meets the  
25 state's requirements for bringing a survival action." 42 U.S.C.

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26 <sup>3</sup> The court will take judicial notice of these dates  
27 because such facts are "capable of accurate and ready  
28 determination by resort to sources whose accuracy cannot  
reasonably be questioned." Fed. R. Evid. 201(b).

1 § 1983; Hayes v. County of San Diego, 736 F.3d 1223, 1228 (9th  
2 Cir. 2013) (internal citation omitted). Therefore, O'Hara has the  
3 burden of alleging and proving both that California law allows  
4 for survival actions and also that he has satisfied California's  
5 requirements for bringing this action.

6 Under California law, any person seeking to commence an  
7 action, or to continue a pending action, as the decedent's  
8 successor in interest must execute and file an affidavit or  
9 declaration "that conforms with the enumerated requirements of §  
10 377.32(a)." Cotta v. County of Kings, 79 F. Supp. 3d 1148, 1159  
11 (E.D. Cal. 2015). Here, O'Hara brings claims as Velez's  
12 successor in interest (see FAC ¶ 4), but he has not filed the  
13 requisite affidavit or declarant. However, "[r]ather than  
14 directing plaintiffs to file a second amended complaint at this  
15 point . . . the court orders [O'Hara] to file a declaration  
16 establishing that [he] has the capacity to proceed on behalf of  
17 [decedent]." See Estate of Burkhart v. U.S., No. C. 07-5467 PJH,  
18 2008 WL 4067429 (N.D. Cal. Aug. 26, 2008).

19 IT IS THEREFORE ORDERED that defendants' Motion to  
20 Dismiss (Docket No. 17) be, and the same hereby is, DENIED.  
21 Plaintiffs have thirty days from the date this Order is signed to  
22 file the requisite affidavit in order to comply with Cal. Code  
23 Civ. Proc. § 377.32.

24 Dated: February 6, 2018

  
25 **WILLIAM B. SHUBB**  
26 **UNITED STATES DISTRICT JUDGE**  
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