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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JESSIE LEE JETMORE STODDARD-  
NUNEZ, et al.,

Plaintiffs,

v.

CITY OF HAYWARD, et al.,

Defendants.

Case No.: 3:13-cv-4490 KAW

ORDER REGARDING DEFENDANTS'  
MOTION TO DISMISS, OR  
ALTERNATIVELY, STAY THE ACTION,  
AND FOR A MORE DEFINITE  
STATEMENT

On October 23, 2013, Defendants filed a motion to dismiss, or alternatively, stay the action pending non-party Arthur Pakman's criminal prosecution for decedent Shawn Joseph Jetmore Stoddard-Nunez's murder. (Mot. to Dismiss, Dkt. No. 8.) On December 5, 2013, the Court held a hearing, and after careful consideration of the parties' arguments, for the reasons set forth below, the Court GRANTS IN PART AND DENIES IN PART both the motion to dismiss and the motion to stay, and GRANTS the motion for a more definite statement.

**I. BACKGROUND**

**A. Factual background**

On March 3, 2013, at approximately 3:20 a.m., City of Hayward Police Officer Manuel Troche ("Troche") was on patrol in his police cruiser in Hayward, California. (Compl. ¶ 10, Dkt. No. 1.) Russell McLeod ("McLeod") was Officer Troche's civilian ride along. (Id.) Officer Troche was traveling on Foothill Boulevard when he noticed a maroon Honda Civic moving erratically. (Id. ¶¶ 10, 11.) Shawn Joseph Jetmore Stoddard-Nunez ("Shawn") was sitting in the front passenger seat of the Honda Civic. (Id.)

Officer Troche suspected that the driver, Arthur Pakman ("Pakman"), was operating the vehicle while under the influence and attempted to initiate a traffic stop. (Id. ¶¶ 10, 12.) He accelerated to catch-up to the Honda, but he did not activate the patrol car's siren or flashing lights

1 to alert Pakman that he was being pulled over. (Id. ¶ 11.) Apparently unaware of Officer  
2 Troche's presence, Pakman continued to drive. (Id.) He made a right turn and reached a cul-de-  
3 sac surrounded by several apartment buildings. (Id.) He traveled the length of the cul-de-sac,  
4 made another right turn into an empty parking lot, and stopped the vehicle. (Id.)

5 Officer Troche parked his patrol car at the parking lot's entrance. (Id. ¶ 13.) He shined  
6 the patrol car's spot light in the direction of the Honda Civic, allegedly blinding Pakman and  
7 Shawn. (Id.) McLeod exited the patrol car and stood outside the passenger side of the police  
8 cruiser. (Id.) Officer Troche drew his firearm and began giving commands. (Id. ¶ 14.) Pakman  
9 then backed out of his parking space, steered the vehicle toward the parking lot's entrance, and  
10 began driving forward, apparently with the goal of maneuvering the Honda between Officer  
11 Troche's patrol car and a pole located at the entryway to the parking lot. (Id. ¶ 15.)

12 At that point, Officer Troche discharged his service weapon, firing nine rounds into the  
13 Honda as the vehicle moved passed his patrol car and into the street. (Id. ¶ 16.) One of those  
14 rounds struck Shawn. (Id.) Shawn died as a result of his injuries. (Id.) Pakman, who was  
15 operating the Honda at the time of the shooting, is awaiting trial on criminal charges. (Brick  
16 Decl., Dkt. No. 10, Ex. 2.)<sup>1</sup> Pakman is charged with Shawn's murder, two counts of assault with a  
17 deadly weapon, and two counts of felony driving under the influence. (Id.) According to  
18 Plaintiff, Pakman is being charged with murder under a provocative act theory. (Opp'n at 9.)

19 **B. Procedural background**

20 On September 27, 2013, Jessie Lee Jetmore Stoddard-Nunez ("Plaintiff"), Shawn's  
21 brother, commenced this action against the City of Hayward and Officer Manuel Troche  
22 ("Defendants") as Shawn's successor-in-interest and personal representative of his estate.  
23 (Compl. ¶¶ 3-6.) Plaintiff asserts six causes of action: (1) a claim under 42 U.S.C. § 1983 against

24 \_\_\_\_\_  
25 <sup>1</sup> Upon Defendants' request, the court takes judicial notice of the existence of the Clerk's Docket  
26 and Minutes dated October 8, 2013, the Conformed Criminal Complaint, and the offenses listed in  
27 the charging document. FED. R. CIV. P. 201; see Lee v. City of Los Angeles, 250 F.3d 668, 689  
28 (9th Cir. 2001). To the extent that Defendants' seek judicial notice of an April 5, 2013 news  
article for the facts and conditions surrounding Pakman's arrest and impending trial, the request is  
denied. See FED. R. CIV. P. 201.

1 Officer Troche for using excessive force in violation of the Fourth Amendment; (2) a claim under  
2 § 1983 against Officer Troche for wrongful death; (3) a claim under § 1983 against Officer  
3 Troche for violating the right to familial relationships; (4) a § 1983 claim based on *Monell v.*  
4 *Department of Social Services*, 436 U.S. 658 (1978) against the City for an alleged failure to train,  
5 tantamount to a policy, custom, and long-standing practice of condoning and encouraging the  
6 abuse of police authority and disregard for constitutional rights; (5) a state law claim for wrongful  
7 death against Officer Troche; and (6) state law claims for assault and battery against Officer  
8 Troche. (Compl. ¶¶ 6-8, 10.)

9 On October 23, 2013, Defendants filed a motion to dismiss, or alternatively, stay the  
10 action. They assert that this matter should be stayed until the conclusion of Pakman's pending  
11 criminal prosecution; that Plaintiff lacks standing to bring a survivor action; that Officer Troche  
12 enjoys immunity from liability for Plaintiff's state law claims; and that Plaintiff has failed to state  
13 sufficient facts to constitute a cause of action for assault. (*Id.* at 4, 5, 6.) Defendants also move  
14 for a more definite statement on the grounds that Plaintiff did not plead assault and battery as  
15 separate causes of action. (*Id.* at 12.)

## 16 II. DISCUSSION

### 17 A. The court grants, in part, Defendants' motion for a stay pending the 18 resolution of the underlying criminal proceedings.

#### 19 1. Defendants have established that Younger abstention is appropriate in this 20 case.

21 Younger abstention is appropriate where (1) there are ongoing state judicial proceedings,  
22 (2) those proceedings implicate important state interests, and (3) there is an adequate opportunity  
23 in the state proceedings to raise constitutional challenges. *Middlesex County Ethics Comm'n v.*  
24 *Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Once these three threshold elements are met,  
25 a court may properly abstain "if the court's action would enjoin, or have the practical effect of  
26 enjoining, ongoing state court proceedings." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143,  
27 1149 (9th Cir. 2007) (citation and footnote omitted).  
28

1 Defendants contend that the requirements for Younger abstention are met in this case,  
2 warranting a stay in this civil case pending resolution of the underlying criminal proceedings.  
3 (Mot. to Dismiss at 7, 8, 9.) The court agrees.

4 Defendants rely on *Quesada v. City of Antioch*, No. C 08-1567 JL, 2008 WL 4104339  
5 (N.D. Cal. Aug. 29, 2008), in support of their motion for a stay. In *Quesada*, six plaintiffs  
6 brought claims for excessive force and wrongful arrest. *Id.* at \*1. One plaintiff faced criminal  
7 charges for resisting arrest in violation of California Penal Code sections 69 and 148(a)(1). *Id.*  
8 Two other plaintiffs were charged with violations Penal Code section 148(a)(1). *Id.*

9 The district court stayed the action pending resolution of the criminal proceedings. *Id.* It  
10 determined that the elements for Younger abstention had been met. *Id.* First, there were ongoing  
11 criminal proceedings against three of the named plaintiffs. *Id.* (citation omitted). Second, those  
12 proceedings, being criminal in nature, implicated important state interests, namely California's  
13 interest in prosecuting state criminal laws free from federal interference. *Id.* (citing *Juidice v.*  
14 *Vail*, 430 U.S. 327, 334 (1977)). Third, the state court proceedings provided an adequate  
15 opportunity to address the federal questions at issue in the civil case. *Id.* Specifically, the court  
16 reasoned that because the three plaintiffs were charged with resisting arrest, they could defend  
17 against those charges by introducing "evidence that the officers unlawfully arrested them and/or  
18 used unreasonable or excessive force to effect those arrests." *Id.*

19 *Quesada* is instructive with respect to the first three elements of Younger abstention.  
20 Here, there are ongoing state criminal proceedings, i.e., Pakman's criminal prosecution. Those  
21 criminal proceedings implicate important state interests, specifically the state's interest in  
22 prosecuting state criminal laws free of federal interference. In addition, those criminal  
23 proceedings will address the federal questions raised in this case. While those proceedings  
24 involve Pakman, not Shawn, the issues of Pakman's criminal liability for Shawn's murder, assault  
25 with a deadly weapon, and felony DUI will necessarily resolve whether Officer Troche was  
26 justified, and thus acted reasonably, during the events giving rise to this civil case.

27 The applicable criminal statutes and related jury instructions reflect the unavoidable  
28 overlap between the issues in the criminal proceedings and this civil action. California Penal

1 Code section 187(a)(1) defines murder as "the unlawful killing of a human being, or a fetus, with  
2 malice aforethought." The jury instruction on provocative act murder states: "[a] person can be  
3 guilty of murder under the provocative act doctrine even if someone else did the actual killing."  
4 CALCRIM No. 560. That jury instruction lists the elements of the offense as follows: (1) in  
5 committing or attempting to commit the underlying crime, the defendant intentionally did a  
6 provocative act; (2) defendant knew that the natural and probable consequences of the  
7 provocative act were dangerous to human life and then acted with conscious disregard for life; (3)  
8 in response to defendant's provocative act, a third party killed the decedent; and (4) the decedent's  
9 death was the natural and probable consequence of the defendant's provocative act. *Id.* While a  
10 provocative act is generally one that goes beyond that which is required to commit the underlying  
11 felony, assault with a deadly weapon may, on its own, be a provocative act because it  
12 demonstrates either express or implied malice. *Id.*

13 A determination that Pakman, in fact, committed a provocative act by driving the Honda  
14 Civic at Officer Troche and his civilian ride along will essentially resolve the issue of whether  
15 Officer Troche fired at the vehicle in response to this provocative act. That, in turn, will  
16 necessarily determine whether the shots Officer Troche fired were merely an ancillary, rather than  
17 an actual, cause of Shawn's death. In such case, the criminal proceedings will resolve the central  
18 issue in this civil case, as Officer Troche would have been justified, and thus would have acted  
19 reasonably, in shooting at a vehicle being driven directly at him and his civilian ride along by a  
20 defendant acting with a conscious disregard for human life. Conversely, if the jury finds Pakman  
21 did not commit a provocative act by driving the car at Officer Troche and his civilian ride along,  
22 then Officer Troche's conduct would not have occurred in response to any alleged provocative act  
23 and his shooting at the vehicle, rather than Pakman's provocative act, would be the actual, as  
24 opposed to an ancillary, cause of Shawn's death. It would follow then, that Officer Troche's use  
25 of force was unreasonable under the circumstances, i.e., if he merely shot into a fleeing vehicle.

26 This same analysis applies to the assault with a deadly weapon charges Pakman faces in  
27 the criminal proceedings. California Penal Code section 245, subdivision (a)(1) provides:  
28

1 Any person who commits an assault upon the person of another with a deadly  
2 weapon or instrument other than a firearm shall be punished by imprisonment in  
3 the state prison for two, three, or four years, or in a county jail for not exceeding  
one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the  
fine and imprisonment.

4 CALCRIM No. 875 outlines the elements for the offense. That jury instruction lists the elements  
5 of the offense as follows: (1) the defendant did an act with a deadly weapon other than a firearm  
6 that by its nature would directly and probably result in the application of force to a person; (2) the  
7 defendant did that act willfully; (3) when the defendant acted, he was aware of the facts that  
8 would lead a reasonable person to realize that his act by its nature would directly and probably  
9 result in the application of force to someone; (4) when the defendant acted, he had the present  
10 ability to apply force likely to produce great bodily injury with a deadly weapon other than a  
11 firearm to a person; and (5) the defendant did not act in self-defense or in defense of someone  
12 else.<sup>2</sup> CALCRIM No. 875. Here, then, a determination by the jury that Pakman did in fact  
13 assault Officer Troche or his civilian ride along with a deadly weapon, i.e., the Honda Civic,  
14 would also resolve the issue of whether Officer Troche fired at the vehicle in response to that  
15 assault, essentially establishing that his conduct was justified and thus reasonable.

16 In light of the relevant statutes and applicable jury instructions, the court agrees with  
17 Defendants' assertion that "[t]he issue of whether the force used was reasonable will certainly be  
18 fully litigated by the defense relating to the charges of murder and felony assault." See (Mot. to  
19 Dismiss at 8.) As discussed above, "Pakman will have to argue that Officer Troche did not have a  
20 reason to open fire on his car" and "the prosecution will necessarily have to raise the [argument]  
21 that Officer Troche fired to defend himself and his passenger from the car which was being driven  
22 at them." (See Reply at 6, Dkt. No. 15.) Under these circumstances, any disposition in this civil  
23 case prior to the resolution of criminal proceedings may be at odds with the outcome of the  
24 criminal proceedings, and thus tantamount to interference with the criminal case. This implicates  
25 the policy underlying the doctrine of Younger abstention. See *Gilbertson v. Albright*, 381 F.3d  
26 965, 968 (9th Cir. 2004) ("Younger principles apply to actions at law as well as for injunctive or  
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28 <sup>2</sup> Element 5 is given when instructing on self-defense or defense of another.

1 declaratory relief because a determination that the federal plaintiff's constitutional rights have  
2 been violated would have the same practical effect as a declaration or injunction on pending state  
3 proceedings.").

4 Accordingly, the court finds that all of the elements for Younger abstention are met in this  
5 case. A stay of these civil proceedings is therefore appropriate, subject to the allowances  
6 discussed below.

7 2. Other considerations also warrant a stay in this action as well as a decision  
8 to permit limited discovery.

9 Citing dictum found in *Wallace v. Kato*, 549 U.S. 384, 393-94 (2007), Defendants offer an  
10 additional argument in support of their motion for a stay in this case. (See Mot. to Dismiss at 9.)  
11 In opposition, Plaintiff references other cases emanating from this district, in which the presiding  
12 judges permitted the actions to proceed subject to certain limitations on discovery. (See Opp'n at  
13 10.) In light of the parties' arguments during the hearing, the court is persuaded that each party's  
14 respective position has merit.

15 In *Wallace*, the petitioner filed a § 1983 claim against the City of Chicago and several  
16 Chicago police officers, seeking damages for an alleged unlawful arrest. *Id.* at 387. The district  
17 court granted summary judgment in favor of the defendants. *Id.* On appeal, the Seventh Circuit  
18 affirmed, holding that the petitioner's suit was time-barred because his cause of action accrued at  
19 the time of his arrest, not when his conviction was set aside. *Id.* (citation omitted). The Court  
20 granted certiorari and concluded that the action was time-barred because the petitioner filed the  
21 action more than two years from the time "he appeared before the examining magistrate and was  
22 bound over for trial." *Id.* at 391-92. In resolving the issue, the Court noted: "If a plaintiff files a  
23 false-arrest claim before he has been convicted (or files any other claim related to rulings that will  
24 likely be made in a pending or anticipated criminal trial), it is within the power of the district  
25 court, and in accord with common practice, to stay the civil action until the criminal case or the  
26 likelihood of a criminal case is ended." 549 U.S. at 393-94 (citing *Heck v. Humphrey*, 512 U.S.  
27 477, 487 n.8 (1994); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996)).  
28

1           The Court's similar guidance in Heck lends support to Defendants' position. 512 U.S. at  
2 487 n.8. In that case, the Court held that a state prisoner's damages claims, which necessarily  
3 implied the invalidity of his conviction, could not be maintained under § 1983 absent a showing  
4 "that the conviction or sentence ha[d] been reversed on direct appeal, expunged by executive  
5 order, declared invalid by a state tribunal authorized to make such determination, or called into  
6 question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. In so holding,  
7 the Court went on to state: "[I]f a state criminal defendant brings a federal civil rights lawsuit  
8 during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an  
9 appropriate response to the parallel proceedings." *Id.* at 487 (citing *Colorado River Water*  
10 *Conservation Dist. v. United States*, 424 U.S. 800 (1976)).

11           While neither party cites to the Ninth Circuit's decision in *Beets v. County of Los Angeles*,  
12 669 F.3d 1038, 1040 (9th Cir. 2012), that opinion is more instructive here. There, two parents  
13 filed a § 1983 action, alleging that a sheriff's deputy used excessive force when he shot and killed  
14 their son. *Id.* Their son's accomplice was convicted on several counts, including aiding and  
15 abetting in the assault on a peace officer with a deadly weapon. *Id.* The district court dismissed  
16 the action because Heck precluded the plaintiffs from attempting to show that the sheriff's deputy  
17 used excessive force. *Id.* On appeal, the Ninth Circuit affirmed. *Id.* It reasoned that because the  
18 jury that convicted the accomplice had already determined that the deputy acted within the scope  
19 of his employment and did not use excessive force, a civil judgment in favor of plaintiffs would  
20 tend to undermine the accomplice's conviction. *Id.* The Ninth Circuit noted that the accomplice  
21 challenged the propriety of the deputy's actions in her criminal trial and that her interests in doing  
22 so were in no way inconsistent with the plaintiffs' interests. *Id.*

23           Though discovery in this case may ultimately reveal that *Beets* is factually distinguishable,  
24 the decision nonetheless illustrates that the concerns underlying the Court's dicta in *Wallace* and  
25 *Heck* may extend to situations where, as here, a plaintiff's civil action runs the risk of disturbing a  
26 related criminal proceeding, irrespective of whether the civil plaintiff, or some other party  
27 involved in underlying events, is the criminal defendant. *Beets*, 669 F.3d at 1040. Here, while it  
28 is *Pakman*, not *Shawn*, awaiting trial on criminal charges stemming from the same events giving



1 rise to this civil action, there is a significant overlap between the state court criminal action and  
2 the instant case. As Defendants argue, to the extent that the state court proceedings resolve the  
3 issue of Pakman's liability for Shawn's murder under a provocative act theory, the matter of  
4 proximate causation will be addressed. A key element to Pakman's defense will be challenging  
5 the propriety of Officer Troche's actions. Pakman will argue that Officer Troche acted  
6 unreasonably when he shot at the Honda Civic nine times because Pakman was not driving the  
7 vehicle at him or his civilian ride along, and thus any reasonable officer would not have believed  
8 that Pakman was about to strike either of them with the car. This would undermine the theory  
9 that Pakman provoked the shooting by driving the Honda Civic in the Officer Troche's direction.

10 As explained in *Witkin*, confusion over what constitutes a provocative act may be avoided  
11 if the term "provocative act murder" is reserved for intervening-act causation cases where, during  
12 commission of the crime, the intermediary (a police officer or crime victim) is provoked by the  
13 defendant's conduct into shooting back, resulting in someone's death. 1 WITKIN CAL. CRIM. LAW  
14 CRIMES – PERSONS § 170 (2010). The California Supreme Court has similarly clarified the theory  
15 of provocative act murder:

16 The traditional provocative act factual pattern is but a subset of those homicide  
17 cases in which death results through the acts of an intermediary. In all homicide  
18 cases in which the conduct of an intermediary is the actual cause of death, the  
19 defendant's liability will depend on whether it can be demonstrated that his own  
20 conduct proximately caused the victim's death—i.e., whether it can be shown that  
21 the intermediary's conduct was merely a dependent intervening cause of death,  
and not an independent superseding cause. If proximate causation is established,  
the defendant's level of culpability for the homicide in turn will vary in  
accordance with his criminal intent.

22 *People v. Cervantes*, 26 Cal. 4th 860, 873 n. 15 (2001).

23 In light of the above, any argument by Plaintiff that Officer Troche, not Pakman, was the  
24 proximate cause of Shawn's death, or that Officer Troche was or was not provoked by Pakman's  
25 conduct, would undermine the criminal proceedings on that issue. The cases discussed above  
26 caution against that very scenario. *Wallace*, 549 U.S. at 393-94; *Heck*, 512 U.S. at 487 n.8; *Beets*,  
27 669 F.3d at 1040. In addition, once the criminal matter has concluded, *Heck* may bar Plaintiff's  
28 suit, notwithstanding the fact that any resulting criminal conviction would lie against Pakman, not

1 Shawn. See, e.g., *Beets*, 669 F.3d at 1038. Conversely, if acquitted, Pakman may elect to bring  
2 his own civil action against Officer Troche and the City, subjecting Defendants to a duplicative  
3 lawsuits stemming from the same incident. A stay would thus be appropriate for these reasons.

4 Other reasons, however, also support a decision to allow limited discovery in this case  
5 pending the stay. During the hearing on Defendants' motion, Defendants argued that they would  
6 be disadvantaged by a decision to permit discovery because Pakman—a key witness—will  
7 undoubtedly assert his Fifth Amendment right against self-incrimination, preventing Defendants  
8 from obtaining crucial information. Plaintiff, however, persuasively argues that the prejudice it  
9 will suffer if discovery is not allowed outweighs any such disadvantage to Defendants.  
10 Specifically, Plaintiff is concerned about preserving percipient witness testimony in the event the  
11 parties are not permitted to conduct discovery until after the criminal proceedings have  
12 concluded. This concern is substantial, and it undermines Defendants' position that discovery  
13 should not be permitted. True, Pakman will be an unavailable witness while he awaits trial, but  
14 he will be unavailable to both Defendants and Plaintiff. Other witnesses, will be equally  
15 available, or unavailable as the case may be, to both parties in this case, and the court is not  
16 persuaded that Defendants should be spared the inconvenience of conducting discovery because a  
17 key eye witness is unavailable at the expense of risking the preservation of all other potential  
18 evidence in this case.

19 For these reasons, the court will stay the action but permit limited discovery to proceed.  
20 The parties may propound written discovery and conduct depositions of percipient witnesses,  
21 excluding Officer Troche and Pakman. The parties may present any discovery disputes that might  
22 arise in joint letter format, consistent with the court's standing order, available at  
23 <http://www.cand.uscourts.gov/kaworders>. The parties shall file a joint case management  
24 statement that includes, among other required content, an update on the status of related criminal  
25 proceedings 7 days before the case management conference currently scheduled for April 8, 2014.  
26 Given that the parties will engage in limited discovery, the court addresses the merits of the  
27 Defendants' motion to dismiss and request for a more definite statement below.

28 ///

1           **B.       The court grants, in part, Defendants' motion to dismiss without prejudice.**

2           Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss  
3 based on the failure to state a claim upon which relief may be granted. A motion to dismiss  
4 under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint.  
5 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

6           In considering such a motion the court must "accept as true all of the factual  
7 allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per*  
8 *curiam*) (citation omitted), and may dismiss the case or a claim "only where there is no  
9 cognizable legal theory" or there is an absence of "sufficient factual matter to state a facially  
10 plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035,  
11 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro*, 250  
12 F.3d at 732) (internal quotation marks omitted).

13           A claim is plausible on its face when a plaintiff "pleads factual content that allows  
14 the court to draw the reasonable inference that the defendant is liable for the misconduct  
15 alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must  
16 demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of  
17 a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
18 "Threadbare recitals of the elements of a cause of action" and "conclusory statements" are  
19 inadequate. *Iqbal*, 556 U.S. at 678; see also *Epstein v. Wash. Energy Co.*, 83 F.3d 1136,  
20 1140 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are  
21 insufficient to defeat a motion to dismiss for failure to state a claim."). "The plausibility  
22 standard is not akin to a probability requirement, but it asks for more than a sheer possibility  
23 that a defendant has acted unlawfully. . . . When a complaint pleads facts that are merely  
24 consistent with a defendant's liability, it stops short of the line between possibility and  
25 plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at  
26 557) (internal citations omitted).

27           Generally, if the court grants a motion to dismiss, it should grant leave to amend even if  
28 no request to amend is made "unless it determines that the pleading could not possibly be cured

1 by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations  
2 omitted).

3 Defendants move to dismiss the complaint on three separate grounds. (Mot. to Dismiss at  
4 4, 5, 6.) First, Defendants argue that Plaintiff lacks standing to sue as Shawn's successor-in-  
5 interest because he has not filed the declaration required under California Code of Civil Procedure  
6 section 377.32. (Id. at 4, 5.) Second, Defendants assert that Officer Troche enjoys immunity  
7 from liability for the fifth cause of action for wrongful death and the sixth cause of action for  
8 assault and battery. (Id. at 5.) Third, Defendants contend that Plaintiff has failed to plead  
9 sufficient facts to constitute a cause of action for assault. (Id. at 6.) The court addresses each of  
10 these arguments in turn.

11 1. Plaintiff has not established standing to sue as Shawn's successor-in-  
12 interest.

13 Defendants challenge Plaintiff's standing to sue as Shawn's successor-in-interest based on  
14 Plaintiff's failure to comply with the application declaration requirement. (Mot. to Dismiss at 4,  
15 5.)

16 California Code of Civil Procedure section 377.32 requires that "[t]he person who seeks to  
17 commence an action or proceeding or to continue a pending action or proceeding as the decedent's  
18 successor in interest . . . shall execute and file an affidavit or a declaration under penalty of  
19 perjury[.]" showing, among other things, that he is the decedent's successor-in-interest or  
20 authorized to act on that person's behalf.

21 Plaintiff concedes that he has not filed the required declaration. (Opp'n at 7.) Plaintiff  
22 also correctly argues that this defect may be cured by promptly filing the required declaration.  
23 (Id.) Accordingly, Plaintiff shall file the required declaration within 14 days of this order.

24 2. Immunity does not bar Plaintiff's state law claims for wrongful death,  
25 assault, and battery.

26 As a preliminary matter, the court finds that the resolution of the statutory immunities  
27 issue is not appropriate at this stage. As discussed below, the allegations in the complaint, taken  
28 as true, establish that Officer Troche engaged in conduct falling outside the scope of both section  
820.2 and section 820.4. This prevents Defendants from making the requisite showing that

1 Officer Troche is immune from liability because the conduct complained of is the type of conduct  
2 contemplated by those provisions. Further factual development is necessary to determine whether  
3 Officer Troche's conduct may be appropriately characterized as self-defense, justifiable homicide,  
4 or some other variant of reasonable conduct. As such, this is an issue best suited for resolution at  
5 the summary judgment stage, not the pleading stage. See *Curtis v. Rodriguez*, 89 F. Supp. 2d  
6 1131, 1138 (N.D. Cal. 2000) ("[B]ecause Plaintiffs' allegations in the present case are broad  
7 enough to encompass conduct not within the scope of the cited immunity provisions, the [c]ourt  
8 cannot resolve at the pleading stage the issue of whether any or all of the immunities bar  
9 Plaintiff's claims.") (citation and footnote omitted). The analysis below illustrates this.

10 "Except as otherwise provided by statute, a public employee is not liable for an injury  
11 resulting from his act or omission where the act or omission was the result of the exercise of the  
12 discretion vested in him, whether or not such discretion be abused." CAL. GOV'T CODE § 820.2.

13 Defendants argue that the acts giving rise to Plaintiffs' claims for wrongful death, assault,  
14 and battery are discretionary acts within the meaning of section 820.2. (Mot. to Dismiss at 6.)  
15 On that basis, they assert that Officer Troche is immune from liability for these claims, which  
16 warrants dismissal of the claims with prejudice. (Id. at 6.) In support of their argument,  
17 Defendants cite *Reynolds v. County of San Diego*, 858 F. Supp. 1064 (S.D. Cal. 1994) for the  
18 proposition that any decision to use force against a suspect falls within the ambit of section 820.2  
19 because the provision insulates a public employee from liability "whether or not such discretion is  
20 abused." (Reply at 3.)

21 In *Reynolds*, a sheriff's deputy shot and killed a combative suspect, who was armed with a  
22 knife. 858 F. Supp. at 1066, 1067. As the deputy attempted to arrest the suspect, the suspect  
23 jerked to the side and made an upward motion with his arm, swinging the knife towards the  
24 deputy. Id. The deputy shot the suspect, who died of a single gunshot wound to the neck. Id.  
25 The suspect's wife and mother brought a § 1983 action against the county, the sheriff, and the  
26 deputy, asserting various federal and state law claims. Id. The defendants moved for summary  
27 judgment. Id. at 1066. The deputy argued that he enjoyed immunity from liability for the state  
28 law claims pursuant to section 820.2. Id. at 1074. The court, having determined that the deputy's

1 conduct was objectively reasonable, concluded that his actions were protected under section 820.2  
2 and granted summary judgment on the plaintiffs' state law claims. *Id.* at 1075.

3 Defendants misread *Reynolds* as holding that any decision to use force falls within the  
4 ambit of section 820.2 because the statute protects a public employee for a discretionary act  
5 "whether or not such discretion is abused." To the contrary, the *Reynolds* court premised its  
6 conclusion that the deputy had acted within his discretion on the determination that the deputy's  
7 conduct was objectively reasonable. *Reynolds*, 858 F. Supp. 1075. Here, no such determination  
8 has been made nor can be made as this stage. In addition, Defendants' misreading of *Reynolds*  
9 ignores settled case law establishing that section 820.2 does not embrace discretionary acts that  
10 otherwise involve unreasonable conduct. See *Blankenhorn v. City of Orange*, 485 F.3d 463, 487  
11 (9th Cir. 2007) (defendant officers, relying on section 820.2, were not entitled to summary  
12 judgment on state law claims where there were genuine issues of material fact on the  
13 reasonableness of the officers' use of force); *Robinson v. Solano County*, 278 F.3d 1007, 1016  
14 (9th Cir. 2002) (en banc) ("California denies immunity to officers who use excessive force in  
15 arresting a suspect.") (citation omitted); *Nelson v. City of Davis*, 709 F. Supp. 2d 978, (E.D. Cal.  
16 2010) (Discretionary immunity "does not protect tactical choices found to be unreasonable . . . .  
17 Nor does [it] provide protection against allegations that police officers used excessive force.")  
18 (citation omitted); *Martinez v. County of Los Angeles*, 47 Cal. App. 4th 334, 349 (1996) (a police  
19 officer is entitled to immunity under section 820.2 if circumstances reasonably created fear of  
20 death or serious bodily harm to the officer or another); *Scruggs v. Haynes*, 252 Cal. App. 2d 256,  
21 266 (1967) (discretionary act immunity did not apply where officer used unreasonable, excessive,  
22 unwarranted, and unnecessary force to effect an arrest).

23 As the California Supreme Court has explained, "[C]lassification of the act of a public  
24 employee as 'discretionary' will not produce immunity under section 820.2 if the injury to another  
25 results, not from the employee's exercise of 'discretion vested in him' to undertake the act, but  
26 from his negligence in performing it after having made the discretionary decision to do so."  
27 *McCorkle v. City of Los Angeles*, 70 Cal. 2d 252, 261 (1969) (police officer liable for negligent  
28 conduct during a traffic investigation even though decision to initiate the investigation was

1 discretionary). Here, then, even if Officer Troche's decision to use force by discharging his  
2 firearm was a discretionary act, his decision to, as the allegations in the complaint suggest,  
3 employ an unreasonable amount of force is not protected. Thus, the language on which  
4 Defendants rely, i.e., that the immunity applies "whether or not such discretion is abused," does  
5 not save Officer Troche from liability for injuries caused by the alleged unreasonable manner in  
6 which he executed the discretionary decision to use force.

7         The allegations in the complaint, taken as true, preclude any determination that Officer  
8 Troche executed his decision to use force reasonably. They establish that at the time Officer  
9 Troche fired nine shots into the Honda, Officer Troche had not alerted Pakman, by means of a  
10 siren or flashing lights, that he was initiating a traffic stop. (Compl. ¶ 11.) Pakman was thus  
11 unaware that an officer was pursuing him. (Id. ¶ 12.) Once the Honda had parked and Officer  
12 Troche drew his firearm and began giving commands, Pakman was blinded by the spot light on the  
13 police car. (Id. ¶¶ 13, 14.) When Pakman began driving the vehicle in Officer Troche's direction,  
14 he was attempting to maneuver the car between the police cruiser and the entryway to the parking  
15 lot where the vehicle had been parked. (Id. ¶ 15.) Pakman was not attempting to drive the Honda  
16 Civic at Officer Troche and his civilian ride along. (See id.) Still, as the car "cleared the police  
17 car and went out onto the street," Officer Troche decided to use force and proceeded to fire nine  
18 shots into Pakman's vehicle.

19         So taken, the allegations in the complaint establish that Officer Troche's actions would not  
20 be discretionary within the meaning of section 820.2. At this stage, then, dismissal on immunity  
21 grounds is not appropriate because Plaintiffs' allegations establish conduct that falls outside the  
22 scope of section 820.2. This outcome is consistent with applicable case law, which shows that  
23 immunity under section 820.2 turns on the reasonableness of the conduct complained of, not  
24 simply whether or not a public employee exercised his or her discretion. Thus, Defendants'  
25 argument that officers would always be immune from liability because shooting a suspect  
26 constitutes a discretionary act, whether or not such discretion is abused, is untenable and  
27 inconsistent with established law.

28

1 Defendant's argument for a dismissal with prejudice pursuant to section 820.4 fares no  
2 better. That provision immunizes a public employee from liability "for his act or omission,  
3 exercising due care, in the execution or enforcement of any law." CAL. GOV'T CODE 820.4. As  
4 discussed above, Plaintiff's allegations, taken as true, bring into question whether Officer Troche  
5 exercised due care during the events giving rise to this suit.

6 Accordingly, insofar as Defendants seek a dismissal of the state law claims with prejudice  
7 based on the statutory immunities discussed above, their motion is denied without prejudice to  
8 raise such defenses in a motion for summary judgment.

9 3. Plaintiff has not adequately alleged an assault claim.

10 Defendants alternatively seek dismissal of Plaintiff's assault claim on the grounds that he  
11 has not "state[d] facts sufficient to constitute a cause of action." (Mot. to Dismiss at 6.)  
12 Specifically, Defendants contend that the complaint does not contain any facts in support of the  
13 element of apprehension. (Id.) Defendants' position has merit.

14 To state a claim for assault, a plaintiff must allege that: (1) the defendant acted with intent  
15 to cause a harmful or offensive contact, or threatened to touch the plaintiff in a harmful or  
16 offensive manner; (2) the plaintiff reasonably believed that he was about to be touched in a  
17 harmful or offensive manner or it reasonably appeared to the plaintiff that the defendant was  
18 about to carry out that threat; (3) the plaintiff did not consent to the defendant's conduct; (4) the  
19 plaintiff was harmed; and (5) the defendant' conduct was a substantial factor in causing the  
20 plaintiff's harm. So v. Shin, 212 Cal. App. 4th 652, 669 (2013). The essence of the intentional  
21 tort of assault is the apprehension of harmful or offensive contact. RESTATEMENT (SECOND) OF  
22 TORTS § 21. "The tort of assault is complete when the anticipation of harm occurs." Kiseskey v.  
23 Carpenters' Trust for So. Cal., 144 Cal. App. 3d 222, 232 (1983).

24 As a preliminary matter, federal courts have departed from the more stringent  
25 requirements of fact pleading and now apply the standards of notice pleading. See Twombly, 550  
26 U.S. at 570. Therefore, to the extent that Defendants suggest Plaintiff has failed to plead facts  
27 sufficient to constitute a cause of action, the argument fails because it relies on the standard  
28 federal courts have discarded. Insofar as Defendants argue that Plaintiff has failed to state a claim



1 for relief that is plausible on its face, however, their position has merit, as the allegations in the  
2 complaint are insufficient as to the element of apprehension.

3 In his opposition, Plaintiff argues that the complaint contains allegations that Shawn "was  
4 sitting in the Honda's front passenger seat" and that "[Defendant] was on the passenger side of the  
5 Honda[,] effectively placing [Shawn] in the direct line of fire." (Opp'n at 8; Compl. ¶¶ 10, 16.)  
6 In the complaint, Plaintiff also alleges that [Defendant] fired nine shots in the Honda as it cleared  
7 the police car and went out onto the street" and that "[o]ne of the bullets proved fatal as it cut  
8 through the arteries in [Shawn's] neck causing [his] death." (Compl. ¶ 16.)

9 Plaintiff argues that these allegations support a reasonable inference of apprehension. See  
10 Iqbal, 556 U.S. at 678. He argues that taking the allegations as true, they establish that Shawn  
11 was sitting in the passenger side of the Honda, between Pakman, who was sitting in the driver  
12 seat, and Officer Troche, who was standing on the passenger side of the vehicle. (See Compl. ¶¶  
13 10, 16.) Plaintiff asserts that from that frame of reference, Shawn likely saw Officer Troche take  
14 aim at the vehicle, heard the sound of multiple rounds of ammunition being fired, and watched as  
15 bullets shattered windows before suffering gunshot wounds himself. While Plaintiff contends that  
16 these are reasonable inferences to draw from the allegations contained in the complaint, which  
17 would suggest that Shawn suffered apprehension of an imminent battery, the court finds that these  
18 additional assertions should be contained within the complaint itself, not in the opposition to the  
19 motion to dismiss.

20 Accordingly, Defendants' motion to dismiss is granted to the extent it challenges the  
21 sufficiency of the allegations in the complaint on the issue of apprehension. Plaintiff shall amend  
22 the complaint to correct the deficiency within 14 days of the date of this order.

23 **C. The court grants Defendants' motion for a more definite statement as**  
24 **unopposed.**

25 The Federal Rules of Civil Procedure require that a complaint contain "a short and plain  
26 statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Rule  
27 12(e) authorizes a motion for a more definite statement when the pleading at issue is "so vague or  
28 ambiguous that the party cannot reasonably prepare a response." FED. R. CIV. P. 12(e).

1 The sole basis for Defendants' motion for a more definite statement is their contention that  
2 Plaintiff should separately plead their assault and battery claims. (Id.) In the complaint, Plaintiff  
3 pleads those claims together in the sixth cause of action. (Compl. at 11.) In their reply,  
4 Defendants correctly point out that Plaintiff does not address the motion for a more definite  
5 statement in his opposition. (Reply at 9.) During oral argument, Plaintiff did not object to  
6 pleading assault and battery as separate causes of action in the amended complaint. The court  
7 therefore grants the motion for a more definite statement as unopposed.

### 8 III. CONCLUSION

9 For the reasons set forth above, the court hereby orders as follows:

10 1. The court grants Defendants motion to stay the proceedings in part, subject to  
11 permitted limited discovery. As stated above, the parties may propound written discovery and  
12 conduct depositions of percipient witnesses, excluding Officer Troche and Pakman. No trial date  
13 or pretrial deadlines will be set pending the stay. The parties may present any discovery disputes  
14 that might arise in joint letter format, consistent with the court's standing order, available at  
15 <http://www.cand.uscourts.gov/kaworders>. The parties shall file a joint case management  
16 statement that includes an update on the status of related criminal proceedings 7 days before the  
17 case management conference currently scheduled for April 8, 2014.

18 2. The court grants Defendants' motion to dismiss in part and denies the motion in  
19 part. The motion is granted, with leave to amend, with respect to the wrongful death claim and  
20 the assault claim. The motion to dismiss is denied in all other respects.

21 3. The court grants Defendants' request for a more definite statement as unopposed.

22 Accordingly, Plaintiff shall file an amended complaint and the declaration required by  
23 California Code of Civil Procedure section 377.32 within 14 days of the date of this order.

24 IT IS SO ORDERED.

25 Dated: December 23, 2013

26   
KANDIS A. WESTMORE  
27 United States Magistrate Judge  
28