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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JESSIE LEE JETMORE STODDARD-
NUNEZ,

Plaintiff,

v.

CITY OF HAYWARD, et al.,

Defendants.

Case No. 13-cv-04490-KAW

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS WITH LEAVE TO AMEND;
ORDER DISSOLVING STAY**

Re: Dkt. No. 38

Before the Court is Defendants' motion to dismiss. Plaintiff opposes the motion. The Court held a hearing on the matter on November 5, 2015. The Court has considered the papers filed by the parties, the relevant legal authority, and the arguments advanced by counsel, and for the reasons set forth below, the motion is GRANTED IN PART and DENIED IN PART WITH LEAVE TO AMEND, and the stay previously in effect is now DISSOLVED.

I. BACKGROUND

A. Factual background

On March 3, 2013, at approximately 3:20 a.m., Hayward Police Officer Manuel Troche ("Troche") was on patrol in his police cruiser in Hayward, California. (1st Am. Compl. ("FAC") ¶ 9, Dkt. No. 21.) 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. ¶¶ 9, 10.) Officer Troche accelerated to catch-up to the Honda, but he did not activate the patrol car's siren or

1 flashing lights to alert Pakman that he was being pulled over. (Id. ¶ 10.) Apparently unaware of
2 Officer Troche's presence, Pakman continued to drive. (Id.) He made a right turn and reached a
3 cul-de-sac surrounded by several apartment buildings. (Id.) He traveled the length of the cul-de-
4 sac, made another right turn into an empty parking lot, and parked the car. (Id. ¶ 11.)

5 Officer Troche parked his patrol car at the parking lot's entrance. (Id. ¶ 12.) He shined the
6 patrol car's spot light in the direction of the Honda Civic, allegedly blinding Pakman and Shawn.
7 (Id.) McLeod exited the patrol car and stood alongside it. (Id.) Officer Troche walked over to the
8 passenger side of the Honda, drew his firearm, and began giving commands. (Id. ¶ 13.) 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. ¶ 14.) At that point,
12 Officer Troche discharged his service weapon. (Id. ¶ 15.) Shawn was shot multiple times. (Id.)
13 The fatal gunshot severed arteries in his neck. (Id.)

14 Pakman, who was operating the Honda at the time of the shooting was charged with
15 Shawn's murder under California Penal Code section 187(a), two counts of assault with a deadly
16 weapon under California Penal code section 245(a)(1), and two counts of felony driving under the
17 influence under California Vehicle Code sections 23152(a) and (b). (Defs.' Req. for Judicial
18 Notice ("Defs.' RJN"), Ex. 1, Dkt. No. 38-3.) Pakman pled no contest to involuntary manslaughter
19 under California Penal Code section 192(b) and five counts of felony DUI under California
20 Vehicle Code section 23152(b). (Defs.' RJN, Ex. 2, Dkt. No. 38-4)

21 **B. Procedural background**

22 On September 27, 2013, Jessie Lee Jetmore Stoddard-Nunez ("Plaintiff"), Shawn's brother,
23 commenced this action against the City of Hayward and Officer Manuel Troche ("Defendants") as
24 Shawn's successor-in-interest and personal representative of his estate. (Compl. ¶¶ 3-6, Dkt. No.
25 1.) On October 23, 2013, Defendants filed a motion to dismiss, or alternatively, stay the action
26 pending resolution of Pakman's criminal prosecution, and moved for a more definite statement.
27 (Defs.' Mot., Dkt. No. 8.) The Court (1) granted the motion to stay the proceedings but allowed
28 the parties to propound written discovery and conduct depositions of percipient witnesses, except

1 Officer Troche and Pakman, (2) granted Plaintiff leave to amend his wrongful death claim to
2 include the declaration required by California Code of Civil Procedure section 377.32, and (3)
3 granted Defendant's motion for a more definite statement as to Plaintiff's assault and battery
4 claims. (Dec. 23, 2013 Order at 18, Dkt. No. 20.)

5 Plaintiff filed an amended complaint on January 6, 2014, asserting: (1) a claim under 42
6 U.S.C. § 1983 against Officer Troche for violation of Shawn's Fourth Amendment right to be free
7 from excessive force, (2) a claim under § 1983 against Officer Troche for wrongful death, (3) a
8 claim against the City pursuant to § 1983 and *Monell v. Department of Social Services*, 436 U.S.
9 658 (1978), (4) a state law claim for wrongful death against Officer Troche, and (5) claims for
10 assault and battery, also asserted against Office Troche. (FAC ¶¶ 24-25, 26-30, 31-39, 40-44, 45-
11 46, 47-48.) In the complaint, Plaintiff alleges that he is Shawn's successor-in-interest and his sole
12 surviving biological brother and thus has standing to bring this action. (FAC ¶ 3.)

13 Attached to the amended complaint is a copy of Shawn's birth certificate and a declaration
14 in which Plaintiff states that he is Shawn's successor-in-interest, that he is Shawn's brother, that
15 Shawn has no children, and that no person has a superior right to bring the instant action.
16 (Stoddard-Nunez Decl. & Ex. A, Dkt. No. 21-1.)

17 Pursuant to the briefing schedule set by the Court at an August 4, 2015 case management
18 conference, Defendants moved to dismiss the complaint on October 1, 2015. (Minute Entry, Dkt.
19 No. 37; Defs.' Mot. to Dismiss ("Defs.' Mot."), Dkt. No. 38.) Plaintiff filed his opposition on
20 October 15, 2015, along with a second declaration from Plaintiff in which he states that the
21 parental rights of his and Shawn's birth parents were terminated, as were those of their adoptive
22 parents. (Pl.'s Opp'n to Defs.' Mot. to Dismiss ("Pl.'s Opp'n"), Dkt. No. 39; 2d Stoddard-Nunez
23 Decl., Dkt. No. 39-1.) Defendants filed their reply on October 22, 2015. (Defs.' Reply in Support
24 of Mot. to Dismiss ("Defs.' Reply"), Dkt. No. 40.) The Court held a hearing on the motion on
25 November 5, 2015.

26 **II. LEGAL STANDARD**

27 **A. Motion to dismiss under Rule 12(b)(6)**

28 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss based

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

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

11 A claim is plausible on its face when a plaintiff "pleads factual content that allows the
12 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
13 *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate
14 "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
15 will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

16 "Threadbare recitals of the elements of a cause of action" and "conclusory statements" are
17 inadequate. *Iqbal*, 556 U.S. at 678; see also *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th
18 Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat
19 a motion to dismiss for failure to state a claim."). "The plausibility standard is not akin to a
20 probability requirement, but it asks for more than a sheer possibility that a defendant has acted
21 unlawfully When a complaint pleads facts that are merely consistent with a defendant's
22 liability, it stops short of the line between possibility and plausibility of entitlement to relief."
23 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (internal citations omitted).

24 Generally, if the court grants a motion to dismiss, it should grant leave to amend even if no
25 request to amend is made "unless it determines that the pleading could not possibly be cured by
26 the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations
27 omitted).

28 ///

1 Plaintiff lacks standing to bring this suit and that his claims are barred under Heck v. Humphrey,
2 512 U.S. 477, 479 (1994). The Court addresses each argument in turn.

3 1. Plaintiff's standing

4 In this case, Plaintiff asserts a survival claim for violation of Shawn's Fourth Amendment
5 rights and a state law claim for wrongful death. (FAC ¶¶ 24-25, 40-44.) Defendants argue that
6 Plaintiff has not established standing to assert these claims because Shawn's parents, as to which
7 Plaintiff makes no factual allegations, may have a superior right. (Defs.' Mot. at 5-8.) In his
8 opposition and accompanying declaration, Plaintiff asserts that Shawn has no surviving spouse or
9 children and that the rights of Shawn's natural parents, and subsequent adoptive parents, were
10 terminated while Plaintiff and Shawn were still minors. (Pl.'s Opp'n at 9, 10; 2d Stoddard-Nunez
11 Decl.) As explained below, these assertions are not found in the operative complaint, which
12 warrants dismissal with leave to amend.

13 a. Wrongful death claim

14 A family member may bring a state law wrongful death claim to recover damages based on
15 their own injuries resulting from a decedent's death. Cal. Code Civ. Proc. § 377.60; see Ruiz v.
16 Podolsky, 50 Cal. 4th 838, 844 (2010). A plaintiff who brings a wrongful death claim must plead
17 and prove standing, which is governed by California Code of Civil Procedure section 377.60. See
18 Nelson v. Cty. of Los Angeles, 113 Cal. App. 4th 783, 789 (2004).

19 Section 377.60 reads, in pertinent part:

20 A cause of action for the death of a person caused by the wrongful act or neglect of
21 another may be asserted by any of the following persons or by the decedent's
22 personal representative on their behalf:

23 (a) The decedent's surviving spouse, domestic partner, children, and issue of
24 deceased children, or, if there is no surviving issue of the decedent, the persons,
25 including the surviving spouse or domestic partner, who would be entitled to the
26 property of the decedent by intestate succession.

27 (b) Whether or not qualified under subdivision (a), if they were dependent
28 on the decedent, the putative spouse, children of the putative spouse, stepchildren,
or parents. As used in this subdivision, "putative spouse" means the surviving
spouse of a void or voidable marriage who is found by the court to have believed in
good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the
time of the decedent's death, the minor resided for the previous 180 days in the
decedent's household and was dependent on the decedent for one-half or more of
the minor's support.

1 The category of persons eligible to bring wrongful death actions is strictly construed. Cal. Civ.
2 Proc. Code. § 377.60; see *Medrano v. Kern Cty. Sheriff's Officer*, 921 F. Supp. 2d 1009, 1018
3 (E.D. Cal. 2013). A sibling is barred from bringing a wrongful death action unless the decedent
4 has no surviving issue or parents. Cal. Civ. Proc. Code § 377.60(a); Cal. Prob. Code § 6402(c).

5 In this case, the first amended complaint does not contain any allegations regarding
6 Shawn's parents. It is only in the arguments and declaration offered in opposition to the instant
7 motion to dismiss that Plaintiff first addresses the matter. Absent allegations establishing that
8 Shawn has no living parents, Plaintiff has failed to allege facts sufficient to establish standing to
9 bring a wrongful death claim. See *Medrano*, 921 F. Supp. 2d at 1018 (dismissing wrongful death
10 claim with leave to amend where complaint alleged that plaintiffs were the decedent's successors
11 in interest, but did not contain specific allegations regarding the existence of any spouse, issue, or
12 surviving parents).

13 b. Survival claim

14 California law also authorizes a decedent's personal representative or successor-in-interest
15 to assert a Fourth Amendment claim on behalf of an individual killed as a result of an officer's
16 excessive force. See *Cooke v. Liles*, No C 12-1844 SBA, 2013 WL 1196990, at *5 (N.D. Cal.
17 Mar. 25, 2013) (citing Cal. Civ. Proc. Code § 377.30). An individual is a decedent's successor-in-
18 interest if he or she is "the beneficiary of the decedent's estate or other successor in interest who
19 succeeds to a cause of action or to a particular item of the property that is the subject of a cause of
20 action." Cal. Civ. Proc. Code § 377.11.

21 If Shawn died intestate, the beneficiary of his estate is "the sole person or all of the persons
22 who succeed to a cause of action, or to a particular item of property that is the subject of a cause of
23 action, under Sections 6401 and 6402 of the Probate Code[.]" Cal. Civ. Proc. Code § 377.10. As
24 discussed above, Plaintiff's right to recover here would be subordinate to that of a living parent
25 based on the order of intestate succession. See Cal. Prob. Code § 6402. Though Plaintiff asserts
26 that he is Shawn's successor-in-interest and that no person has a superior right to bring this action,
27 he has not alleged facts in the operative complaint establishing that Shawn has no surviving
28 parents. Plaintiff has, therefore, failed to allege sufficient facts to establish his standing to

1 maintain a survival claim. See Cooke, 2013 WL 1196990, at *5 (dismissing survival claim for
2 excessive force with leave to amend where plaintiffs had not alleged facts establishing that they
3 were the decedent's personal representative or successor-in-interest).

4 The content of Plaintiff's opposition and accompanying declaration, however, suggests that
5 the pleading deficiency regarding standing can be remedied by amendment. The first amended
6 complaint is dismissed with leave to amend so that Plaintiff may properly plead facts establishing
7 his standing to maintain his wrongful death and survival claims.

8 2. Heck

9 In Heck v. Humphrey, 512 U.S. 477 (1994), the Court held that a state prisoner's damages
10 claims, which necessarily implied the invalidity of his conviction, could not be maintained under
11 § 1983 absent a showing "that the conviction or sentence ha[d] been reversed on direct appeal,
12 expunged by executive order, declared invalid by a state tribunal authorized to make such
13 determination, or called into question by a federal court's issuance of a writ of habeas corpus." Id.
14 at 486-87.

15 The Ninth Circuit has explained that under Heck, "if a criminal conviction arising out of
16 the same facts stands and is fundamentally inconsistent with the unlawful behavior for which
17 section 1983 damages are sought, the 1983 action must be dismissed." Smith v. City of Hemet,
18 394 F.3d 689, 695 (9th Cir. 2005) (en banc). Consequently, "the relevant question is whether
19 success in a subsequent § 1983 suit would 'necessarily imply' or 'demonstrate' the invalidity of the
20 earlier conviction or sentence." Smith, 394 F.3d at 695 (quoting Heck, 512 U.S. at 487).

21 Here, Defendants argue that Pakman's conviction for involuntary manslaughter bars
22 Plaintiff's claims, as a favorable resolution of those claims would necessarily imply the invalidity
23 of Pakman's conviction. (Defs.' Mot. at 9.) Defendants contend that "Pakman's conviction
24 conclusively determines that Officer Troche fired at Pakman's vehicle in direct response to the
25 danger thrust upon him by Pakman driving at the officer and his ride along passenger." (Id.) They
26 assert that Pakman was thus the proximate cause of Shawn's death, as a conviction for involuntary
27 manslaughter would not have been possible otherwise. (Id.) Defendants also assert that Pakman's
28 only action during the incident was driving a vehicle in the direction of Officer Troche and his ride
along. (Id.) According to Defendants, this is the only act which could serve as the basis for

1 Pakman's conviction, and it shows that Officer Troche's use of force was reasonable because he
2 fired shots in response to Pakman's conduct. (Id. at 9, 10.) Defendants claim that Plaintiff now
3 seeks to undermine that conviction "by claiming that Officer Troche was the proximate cause of
4 the homicide" and by "contradict[ing] the fact that Officer Troche justifiably and therefore
5 reasonably, shot in direct response to Pakman's action of driving a car at him and his passenger[.]"
6 (Id. at 12.)

7 The judicially-noticed documents show that Pakman was charged with Shawn's murder
8 under California Penal Code section 187(a), two counts of assault with a deadly weapon under
9 California Penal code section 245(a)(1), and two counts of felony driving under the influence
10 under California Vehicle Code sections 23152(a) and (b). (Defs.' RJN, Ex. 1.) The documents
11 also show that instead facing trial for these offenses, Pakman pled no contest to involuntary
12 manslaughter under California Penal Code section 192(b) and five counts of felony DUI under
13 California Vehicle Code section 23152(b). (Id., Ex. 3.) There is mention of a stipulated factual
14 basis for the plea, but that basis is not articulated. (Id.) As such, it does not resolve the matter at
15 issue in this case, i.e., the reasonableness of Officer Troche's conduct, and it certainly does not
16 establish that the factual account Defendants urge the Court to adopt must be the basis for
17 Pakman's plea.¹

18 While a plea of no contest qualifies as a conviction under Heck, it does not, unlike a jury
19 trial "necessarily determine the lawfulness of the officers' actions throughout the whole course of
20 his conduct." *Kyles v. Baker*, 72 F. Supp. 3d 1021, 1037 (N.D. Cal. 2014) (citations, quotations,
21 and internal modifications omitted). Along these lines, Plaintiff argues that the physical evidence
22 in this case will show that "different actions occurred during the course of one continuous
23 transaction." (Pl.'s Opp'n at 12.) He asserts that Officer Troche and his ride along were never in
24 danger when Pakman drove near them since he successfully drove past them without hitting them,
25 that the bullet trajectory analysis will show that Officer Troche shot at Pakman's car several times,
26 and that the vast majority of the shots came after Pakman's car no longer posed a danger to him or

27 ¹ For these reasons, a motion for summary judgment brought on Heck grounds would not likely be
28 granted in this case.

1 his ride-along.² Were Plaintiff to prevail on one of these theories, it would not undermine the
2 validity of Pakman's conviction. Rather, it would establish that the officer's reaction to Pakman's
3 act of driving the Honda in his direction was unreasonable under the totality of the circumstances.
4 Defendants concede as much in their reply, "if Plaintiff's allegation [that Officer Troche] was not
5 in danger was true, there would be no justification for firing a weapon at all."³ (Defs.' Reply at 7.)

6 Additionally, Plaintiff argues that after the shooting, Pakman crashed and fled on foot,
7 distracting the officers and preventing Shawn from receiving immediate medical attention. (Pl.'s
8 Opp'n at 13-14.) He claims that this could also be a possible factual basis for Pakman's no contest
9 plea. (Id. at 14.) Again, the Court declines to assume that the facts the parties marshal here must
10 be the basis for Pakman's no contest plea.

11 Nonetheless, the lack of a factual basis for the plea prevents the Court from concluding that
12 this § 1983 action would necessarily imply or demonstrate the invalidity of Pakman's conviction.⁴
13 See, e.g., *Sanford v. Motts*, 258 F.3d 1117, 1119-20 (9th Cir. 2001) (Heck was no bar to plaintiff's
14 claims where nothing in the record indicated the factual basis for her nolo plea); *Rhead v. Mundy*,
15 71 Fed. App'x 729, 730 (9th Cir. 2003) (reversing grant of summary judgment where the plaintiff's
16 § 1983 action would not necessarily imply the invalidity of his conviction because nothing in the
17 record revealed the factual basis of the plaintiff's nolo plea); *Johnson v. Gilroy Police Dep't*, No.
18 09-cv-03946-SI, 2011 WL 445921, at *4 (N.D. Cal. Feb. 4, 2011) (declining to dismiss claims on
19 Heck grounds because the minutes from the state court proceedings did not reveal the factual basis
20 the plaintiff's no contest plea); *Godoy v. Wadsworth*, No. CV 05-02913 NJV, 2009 WL 1458041,
21 at *4-5 (N.D. Cal. May 21, 2009) (defendants were not entitled to summary judgment based on

22 ² Defendants argue the facts alleged in the operative complaint do not support these theories.
23 Defs.' Reply at 6, 7. This argument is misguided, as the theories Plaintiff advances in his
24 opposition merely illustrate that discovery may show that the facts of this case diverge from the
25 account Defendants offer.

26 ³ Despite this concession, Defendants argue that the unjustified use of force would have been a
27 superseding event that would have absolved Pakman of criminal liability, and that this obviously
28 undermines the conviction. Not so. The issue of a superseding cause was never presented to a
jury, and none of the judicially-noticed documents suggest that superseding causation was
addressed in the criminal proceedings.

⁴ The lack of a factual basis for the no contest plea also prevents the Court from considering the
parties' arguments regarding causation, as a determination of that issue requires the Court to accept
the parties' speculation as to the facts underlying Pakman's conviction.

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Heck because there was no discussion of the facts underlying the plaintiff's guilty plea).

Accordingly, Defendants' motion is DENIED to the extent it seeks dismissal of Plaintiff's claims on Heck grounds.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART WITH LEAVE TO AMEND, and the stay previously in effect is hereby DISSOLVED. Plaintiff shall file a second amended complaint within 14 days of this order.

The Court will hold a case management conference in this case on January 26, 2016 at 1:30 p.m. The parties shall file an updated case management conference statement by no later than January 19, 2016.

IT IS SO ORDERED.

Dated: 11/10/2015


KANDIS A. WESTMORE
United States Magistrate Judge