UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JOSEPHINE SMITH, an individual, et al., Plaintiffs, v. CITY OF SANTA CLARA, a public entity, et al. Defendants.	Case No.: 5:11-cv-03999-LHK ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Josephine Smith and A.S., a minor appearing through her guardian ad litem, bring this action seeking damages against the City of Santa Clara, the City of Santa Clara Police Department, Detective Kenneth Henderson, Sergeant Greg Hill, and Clay Rojas pursuant to 42 U.S.C. § 1983, California Civil Code §§ 52.1-3, and several state common law causes of action. Plaintiff[1] alleges that her home was unreasonably, and therefore unlawfully, searched. Plaintiff also alleges that she was unreasonably, and therefore unlawfully, detained and arrested in violation of her Fourth Amendment rights. Additionally, Plaintiff alleges that excessive force was used in the course of the unlawful detention, and that the detention and associated force constituted retaliation for her exercise of her First Amendment rights. Finally, Plaintiff alleges that the

[1] Though both Josephine Smith and A.S. are named as Plaintiffs in this matter, the claims relate primarily to Josephine Smith. Accordingly, for the sake of simplicity, the Court will refer to Josephine Smith as "Plaintiff" in this Order, although A.S. remains a Plaintiff as well.

conduct of the officers who searched her home constituted assault, battery, negligence, and negligent and intentional infliction of emotional distress.

Defendants City of Santa Clara ("the City"), City of Santa Clara Police Department ("the Police Department"), Detective Kenneth Henderson ("Detective Henderson"), and Sergeant Greg Hill ("Sergeant Hill")[2] now move for partial summary judgment on Plaintiffs' § 1983 claims for invasion of privacy, false arrest, illegal search, and First Amendment retaliation, and Plaintiffs' state law claims to the extent that they are based on improper detention and search. ECF No. 54. Defendant Henderson moves for summary judgment on all claims. Sergeant Hill, the City, and the Police Department do not move for summary judgment on the excessive force claim or excessive force-related elements of the state law claims. Defendant Clay Rojas ("Defendant Rojas") has moved separately for summary judgment by filing a joinder in the other Defendants' motion, along with a separate brief. ECF No. 64. Plaintiff filed oppositions to both motions, ECF Nos. 68-69. The original group of Defendants filed a Reply, ECF No. 80, in which Defendant Rojas filed a joinder. ECF No. 84. Defendant Rojas also filed a separate reply. ECF No. 83.[3] The Court will address the first Defendants' motion first, and will address Defendant Rojas's motion separately in this Order.

Pursuant to Civil Local Rule 7-1(b), the Court deemed both Defendants' motions suitable for decision without oral argument and vacated the December 13, 2012 hearing on these motions. ECF No. 85. Having considered the parties' submissions and arguments as well as the relevant law, the Court GRANTS in part and DENIES in part all Defendants' motions for partial summary judgment.

I. BACKGROUND

[2] In this Order, the Court will refer to the City, the Police Department, Detective Henderson, and Sergeant Hill collectively as "Defendants," because these four defendants together brought one motion. Clay Rojas is also a Defendant, but brought a separate motion for summary judgment. Accordingly, the Court will refer to him as "Defendant Rojas." When the Court intends to refer to all of the defendants in this case including Rojas, the Court will so indicate.

[3] Plaintiff also submitted separate evidentiary objections. ECF No. 70. However, Civil Local Rule 7-3 requires that "[a]ny evidentiary and procedural objections to the motion must be contained within the brief or memorandum." Accordingly, the Court disregards Plaintiff's separately filed objections.

On October 7, 2010, Vahid Zarei was stabbed while attempting to retrieve his car, which had been stolen. *See* Decl. of Daniel Burde at ¶ 6. Zarei could not identify his attacker, but recognized the woman who was with the attacker, and who drove the car away from the scene, as an acquaintance named Justine. *Id.* at ¶ 5; Decl. of Tyson Shearer ("Shearer Decl.") at ¶ 9. A witness identified a photograph of Justine Smith (hereinafter, "Justine"), pulled from a police mug shot database, as the woman who had been with the attacker. Shearer Decl. at ¶ 10.

Detective Michael Carlton (not a defendant here), one of the officers dispatched to respond to the stabbing incident, discovered that Justine was on active probation. *See* Carlton Depo. at 95;5-7. Detective Carlton obtained a DMV printout listing Justine's address as 942 Gale Drive in Campbell, California. Exh. I to Decl. of Michael C. Serverian in support of Defendants' Partial Motion for Summary Judgment ("Serverian Decl."); Carlton Depo. at 103:5-8. Detective Carlton then called the probation department, Carlton Depo. at 93:4-94:22, who sent via fax several documents listing Justine's address as 940 Gale Drive in Campbell. Exh. H to the Serverian Decl.; Carlton Depo. at 105:3-5. Those documents included:

- An undated probation department "Assessment" form, apparently completed by Justine herself, listing Justine's address as 940 Gale Drive, with the notation "just moving back. Before I lived there for 10 years." Exh. H to Serverian Decl.
- A probation report dated June 2, 2010, apparently filled out by Justine herself, listing her address as 940 Gale Drive, and the notation "in process of moving out of mother's house." *Id.*
- A partial probation report dated December 22, 2009, listing 940 Gale Drive as Justine's address. The report also indicates that Josephine Smith and A.S. reside at 940 Gale Drive with Justine. *Id.*
- A "Probation Field Sheet" dated October 7, 2010, listing Justine's address as 940 Gale Drive, and listing Josephine Smith and A.S. as "Others in Home." *Id.*

Defendant Rojas, then an officer on the Special Enforcement Team tasked with conducting the probation search, separately obtained information about Justine from the County's database of arrestees. The documents obtained by Defendant Rojas included:

- The same DMV information originally obtained by Detective Carlton, listing Justine's address from February 22, 2009 through December 30, 2009 as 942 Gale Drive, and from January 27, 2010 through May 14, 2010 as 940 Gale Drive. Exh. I to Serverian Decl.
- A Santa Clara County "Arrest and Disposition History" for Justine dated October 7, 2010, identified by Sergeant Hill as a "CJIC Printout," (for "Criminal Justice Information Control"), which notes that Justine was on probation with a search condition, but does not list an address. Exh. J to Serverian Decl.
- A second CJIC printout entitled "Query Probation Grant," which again notes that Justine was on probation, with a search condition, scheduled to terminate on October 9, 2012, and not listing any address. Exh. K to Serverian Decl.
- A third CJIC printout entitled "List emergency contacts," identifying "Josie Smith" as the emergency contact for Justine. The address listed for Josie Smith is 942 Gale Drive as of 12/5/2001, and no address is listed as of 3/31/2009. Exh. L to Serverian Decl.
- A fourth CJIC printout entitled "Query person detail," listing Justine's address as 940 Gale Drive. Exh. M to Serverian Decl.

940 and 942 Gale Drive comprise a duplex owned by Plaintiff Josephine Smith ("the duplex"). *See* Decl. of Josephine Smith in support of Plaintiffs' opposition to Defendants' motion for partial summary judgment ("Smith Decl.") at ¶ 2. On the basis of the information detailed above that had been collected by Detective Carlton and Officer Rojas, the police determined that Justine resided at that duplex, and that the duplex would be the appropriate place to search for her. Two officers, Detective Henderson and Detective Shimada (not a defendant here), were assigned to conduct surveillance of the duplex. Henderson Depo. at 30:6-17; 39:14-16. They watched the duplex from approximately 10:00 a.m. until approximately 3:00 p.m., but did not see Justine or anyone fitting the description of the attacker. Toward the end of the surveillance period, Detective

Henderson was informed that a team of officers would be arriving soon to conduct a probation search of the premises, looking for Justine. *Id.* at 45:14-21. When the officers arrived, Detective Henderson and Detective Shimada were assigned to move to the adjoining street, where they would watch the back of the house. *Id.* at 51:16-52:7.

Several officers, including Officer Rojas and Sergeant Hill, went to the door of the 940 unit, where the door was open, but the metal security screen was closed. *See* Hill Depo. at 52:7-12; Smith Depo. at 88:19-20. Plaintiff has testified that when she answered the door, the man she found was holding a battering ram, and that though he did not identify himself, she recognized that he was a police officer. *See* Smith Decl. at ¶ 5. The officers spoke to Plaintiff. Defendants contend that they informed Plaintiff that they were there to conduct a probation search. *See* Hill Depo. at 54:20-24. Plaintiff claims that she was told only that they were looking for Justine, and that they needed to search the house – not that this was a probation search. *See* Smith Depo. at 89:14-90:14.

The parties agree that Plaintiff did not allow them entry, and that Defendant Rojas then removed Plaintiff from the doorway and placed her in handcuffs, to allow the officers to enter and search the house. Hill Depo. at 56:10-15. According to Plaintiff, Plaintiff asked Defendant Rojas to close the security screen to avoid scaring her eight-year-old granddaughter, A.S., and at this point Defendant Rojas "lifted [her] off the ground and pulled [her] out of [the] house. After pulling [her] outside, he pushed [her] into a fence. He twisted [her] arms behind [her] back." *Id.* at ¶ 7. Plaintiff further testified that when she indicated to Defendant Rojas that she was not under arrest, he said "You are now," and handcuffed her. *Id.* at ¶ 8; Smith Depo. at 96:21. Defendant Rojas disputes this description of the encounter. Rojas Depo. at 56:2-57:23. Another officer then waited with her outside the house while Defendant Rojas and other officers searched the house. A total of six officers entered the 940 unit. *See* Defendants' Response to Special Interrogatory No. 6, Rose Decl. Exh. L.

The officers did not find anyone else in the house, though they did find that the garage contained a bed, female clothing, a desk, and a phone bill addressed to Justine at that address. The

officers then asked Plaintiff to let them into the 942 unit, but she explained that the unit was rented out to tenants, and that Justine did not live there. Hill Depo. at 69:14-18; Smith Decl. at ¶ 11. The officers insisted on searching the unit, and obtained the keys from Plaintiff, who showed officers where to find them in a drawer in the 940 unit. The officers then entered the 942 unit, where they found no sign of Justine. Most of the officers then left the scene. Detective Henderson then returned to Gale Drive from his position behind the house, spoke to Plaintiff, and removed the handcuffs. He also briefly went inside the 940 unit.

The remaining officers, including Detective Henderson, then spoke to Plaintiff further. They asked her some questions about Justine, but Plaintiff indicated that she did not know where to find Justine. Plaintiff has testified that after the officers left, she felt pain in her arms, and has submitted photographic evidence of bruises on both arms. *See* Smith Depo. at 18:19-23:4; Exh. H to the Decl. of Brandon Rose (photographs).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." *See id.* "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 254. The question is "whether a jury could reasonably find either that the [moving party] proved his case by the quality and quantity of evidence required by the governing law or that he did not." *Id.* "[A]ll justifiable inferences must be drawn in [the nonmovant's] favor." *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc) (citing *Liberty Lobby*, 477 U.S. at 255).

The moving party bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatory answers,

admissions and affidavits, if any, that it contends demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *See* Fed. R. Civ. P. 56(e); *see also Liberty Lobby*, 477 U.S. at 250. The opposing party need not show the issue will be resolved conclusively in its favor. *See Liberty Lobby*, 477 U.S. at 248–49. All that is necessary is submission of sufficient evidence to create a material factual dispute, thereby requiring a jury or judge to resolve the parties' differing versions at trial. *See id.*

The moving party bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party, but on an issue for which the opposing party will have the burden of proof at trial, the party moving for summary judgment need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325; *accord Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Once the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 250.

III. DISCUSSION

A plaintiff asserting a claim under § 1983 must demonstrate that (1) the action occurred "under color of state law," and (2) the action resulted in the deprivation of a constitutional or federal statutory right. *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988) (internal citations omitted); 42 U.S.C. § 1983 (2006) (Section 1983 imposes civil liability on any person who, under color of state law, "subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."). The parties do not dispute that the officers were acting under color of state law. They dispute only whether Defendants violated Plaintiffs' Fourth

Amendment rights by (1) searching Ms. Smith's home, and (2) detaining Ms. Smith during the search. Because Plaintiff bears the burden of proof at trial on her § 1983 claims, Defendants, as the moving party, bear the initial burden on summary judgment of pointing out "an absence of evidence to support [Plaintiffs'] case." *Celotex Corp.*, 477 U.S. at 325.

Sergeant Hill and Detective Henderson also argue that they should be granted summary judgment on Plaintiff's § 1983 claims because they are entitled to qualified immunity. The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Because qualified immunity is an immunity from suit, rather than a defense to liability, it is effectively lost if a case is erroneously permitted to go to trial. *Id.* For this reason, the Supreme Court has stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Id.* Therefore, if, drawing all reasonable inferences in favor of the nonmoving party, it is clear as a matter of law that the defendants are entitled to qualified immunity, summary judgment should be granted. *See Wilkinson v. Torres*, 610 F.3d 546, 548 (9th Cir. 2010) (reversing denial of summary judgment where defendants were entitled to qualified immunity as a matter of law). Where a defendant's entitlement to qualified immunity turns on genuinely disputed issues of fact, however, summary judgment is not appropriate. *See Espinosa v. City and County of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010) (affirming denial of summary judgment because there were genuine issues of fact regarding whether officers violated plaintiff's Fourth Amendment rights and whether those rights were clearly established); *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003) ("If a genuine issue of material fact exists that prevents a determination of qualified immunity at summary judgment, the case must proceed to trial.").

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-part approach for analyzing qualified immunity. The analysis contains both a constitutional inquiry and an immunity inquiry. *Johnson v. County of Los Angeles*, 340 F.3d 787, 791 (9th Cir. 2003). The

constitutional inquiry requires the court to determine this threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. If the Court determines that a constitutional violation could be made out based on the parties' submissions, the second step is to determine whether the right was clearly established. *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

The Supreme Court recently held that the *sequence* of analysis set forth in *Saucier* is not mandatory and that a court may exercise its sound discretion in determining which of the two prongs of the qualified immunity analysis to address first. *Pearson*, 129 555 U.S. at 241-42. Thus, in some cases, it may be unnecessary to reach the ultimate constitutional question when officers would be entitled to qualified immunity in an event, a result consistent with longstanding principles of judicial restraint.

A. Detective Henderson

Detective Henderson argues that he has no liability on any of Plaintiff's claims because he did not participate in the search that gave rise to all of Plaintiff's claims. Plaintiff claims that Detective Henderson did participate, and that even if he did not actually search the house, that he can be liable under the "integral participant" doctrine.

The evidence as to whether Detective Henderson actually participated in a search of Plaintiff's property is equivocal. The evidence shows that Detective Henderson was assigned primarily to surveillance during the incident and spent much of the time parked on the street behind the house. *See* Henderson Depo. at 30:10-12. Detective Henderson also testified that he did not search either the 940 or 942 unit. *See id*. at 59:23-25 ("Q: Did you go in and search any of these addresses? A: No."). Detective Henderson did, however, testify that he "walked into the living room" of the 940 unit after some of the other officers had left. *Id.* at 60:3. Moreover, in Defendants' response to Plaintiffs' request for admission, Defendants specifically admitted that Detective Henderson searched the 940 unit. Rose Decl. Exh. M at No. 33. Even if Detective

Henderson entered the unit only after most of the officers had left the scene, there remains a question as to whether his entry could be considered part of the search. Though the question is close, the Court finds, that, given the conflicting nature of the evidence concerning the precise nature and level of Detective Henderson's participation in the incident, there remains a genuine issue of material fact as to Detective Henderson's liability. Accordingly, Defendants' motion for summary judgment that Detective Henderson has no liability because he did not participate in the incident is DENIED. However, the fact that Detective Henderson may have participated in the search does not automatically defeat his motion for summary judgment as to the search and seizure-related claims on which the other defendants have moved. Rather, Detective Henderson may still establish that he is entitled to summary judgment on the search and seizure claims, along with the other defendants. Moreover, Detective Henderson may yet prove at trial that he did not actually participate in any search.

B. The Search

Detective Henderson and Sergeant Hill move for summary judgment that their search of the duplex was reasonable, and that even if it was not, they are entitled to qualified immunity because any law rendering the search unreasonable was not clearly established. Defendants present two reasons why the search was reasonable: (1) that it was a probation search for which consent had previously been given as a condition of Justine's probation; and (2) that it was legal as a protective sweep pursuant to *Maryland v. Buie*, 494 U.S. 325 (1990). Because the Court finds that it was not clearly established at the time of the search that the officers' conduct was unconstitutional, the Court need not consider the second prong of the qualified immunity analysis, concerning whether the search was actually permissible under the Fourth Amendment. In this case, the Court, mindful of the Supreme Court's guidance in *Pearson* 555 U.S. 223, finds that addressing the underlying Constitutional question that would have no effect on the outcome here would not be a wise use of judicial resources. Resolving the question would entail analysis of a number of complicated issues not clearly presented or briefed, as noted below, and would thus consume precious judicial resources while not providing a good opportunity to advance Fourth Amendment law.

Probationers may consent to future searches as a condition of probation. There is no dispute here that Justine had given such consent as a condition of her probation. Plaintiff articulates two arguements for why this consent did not render the search of Plaintiff's home reasonable: (1) that police did not have probable cause to believe that Justine lived there; and (2) that even if Justine did live there, Plaintiff's explicit refusal of consent trumped Justine's consent to the search.

In order to search a house without a warrant in conjunction with a search condition, officers must have a probable cause to believe that the target of the search actually lives at the address to be searched.[4] *See Motley v. Parks*, 432 F.3d 1072, 1080 (9th Cir. 2005). Plaintiff argues that the officers did not have probable cause because none of the officers actually spoke to Justine's probation officer, and because the documents the officers relied on did not contain "some indicia of reliability." Opp'n at 7. The Court finds that, whether or not the search was reasonable as a matter of law, the officers were reasonable to believe that the documents they had were sufficient to constitute probable cause that Justine lived at the duplex. The officers had documents from three separate sources (probation, the CJIC, and the DMV), all of which indicated that the 940 and 942 Gale Drive addresses were Justine's address. None of the documents contained any other address for Justine within the last ten years. *Portnoy v. City of Davis*, the case Plaintiff cites wherein a court in a different district found an absence of probable cause, is inapposite. In that case, the police had only the say-so over the phone of someone at the probation department that the target lived at the address they intended to search. *Portnoy*, 663 F. Supp.2 d 949, 954. Additionally, in *Portnoy*, there was some confusion about the actual correct house number, the target was actually

[4] Much of the law in this area developed in the context of parole searches, not probation searches. Though the Ninth Circuit has recently made clear that the two contexts can entail different analyses under the Fourth Amendment, *see United States v King*, 687 F.3d 1189 (9th Cir. 2012), at the time of the incident – in October, 2010 – the Ninth Circuit had treated the two contexts interchangeably. *See Motley v. Parks*, 432 F.3d 1072, 1083 n.9 (9th Cir. 2005) ("We have consistently recognized that there is no constitutional difference between probation and parole for purposes of the fourth amendment." (internal quotation and citations omitted). Thus, for purposes of the qualified immunity analysis, law concerning a parole search is relevant to what the officers would reasonably have believed was permissible.

in custody at the time, and the people living at the address were unrelated to the target, and had been living there nearly a year – in other words, there were several red flags that should have alerted the police that they had the wrong address. *Id.* This case is markedly different. The police had documents from three separate sources, all listing the Gale Drive duplex as Justine's address. The reports listing the address were generated that same morning, and at least one of them had been specifically updated to verify the Gale Drive address only a few months before. The police knew that Justine was not in custody, because a witness had reported seeing her participate in a violent crime just that morning. In the absence of any other address for Justine, it cannot be said that it was clearly established that the largely consistent information the officers had was not sufficient to constitute probable cause. Accordingly, the officers are entitled to qualified immunity on the issue of whether the search was legal.[5]

Regarding Plaintiff's refusal to consent to the search, it is true that by the time of the incident in 2010, the Supreme Court had decided *Georgia v. Randolph*, 547 U.S. 103 (2006), which established that where two residents are both present and one consents while the other objects to the search, the objection trumps the consent. However, it was not clear at the time – and indeed, is still unclear – whether this rule applies to a probation search. Indeed, Courts have explained again and again that probation and parole are special situations with needs that differ from other types of situations. *See, e.g.*, *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) ("A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement."). Thus, officers would be reasonable to believe that a rule that applies to searches generally does not apply the same way to probation searches. At the very least, the *Randolph* rule is in tension with the rule allowing probation searches on a finding of probable cause that the target

[5] Plaintiff makes much of her previous encounters with the San Jose and Santa Clara police departments concerning previous searches for Justine, in which she had told officers that Justine did not live with her. However, there is no evidence that these officers knew of those previous encounters. Because the qualified immunity analysis "shield[s] an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law," *Pearson*, 555 U.S. at 245, Plaintiff's previous experiences that were unknown to these officers do not bear on the question of whether these officers behaved reasonably at the time of the October 7, 2010 incident.

lives at the address. It was thus not clearly established that Plaintiff's refusal could or should trump the consent included as a condition of Justine's probation. Because it was not clearly established that the *Randolph* rule would apply in such a situation, the officers are immune from suit on this issue.

Though under *Saucier* and *Pearson* this Court has the authority to decide the underlying constitutional question, the Court does not think this is the appropriate time to do so. In particular, the law concerning probation and parole appears to be in flux in the Ninth Circuit, *see United States v. King*, 687 F.3d 1189 (9th Cir. 2012), and this case, with its issues of consent and allegations of excessive force, does not present an especially good opportunity to develop that law. Moreover, the parties have not addressed this distinction in their briefing. Accordingly, the Court declines to resolve the underlying constitutional question of whether the Fourth Amendment permits a probation search where another resident of the house is present and objects.

Plaintiff additionally alleges that even if the officers were entitled to conduct a search, they were not entitled to search the entire property, but rather, were obligated to ask Plaintiff to which parts of the property Justine had access. However, Plaintiff cites no authority that would clearly establish such a requirement. Plaintiff relies primarily on *U.S. v. Davis*, 932 F.2d 752 (9th Cir. 1991). In *Davis*, the police searched a locked safe found in an apartment shared by a probationer and a roommate. The Ninth Circuit held that the police had not exceeded the scope of a permissible probation search when they searched the safe without a reasonable suspicion that it belonged to the probationer, and not the roommate. *Id.* at 758-59. The Ninth Circuit in *Davis* rejected a rule imposing on officers a general duty to inquire as to ownership or control of an object to be searched. *See id.* at 760. Given the holding that there is no general duty to inquire, the Court finds that there was no clearly established law rendering the officers' search of the entire duplex unreasonable.

Finally, Plaintiff alleges that Defendants violated the knock-notice rule, a judicially created Fourth Amendment-based rule that officers must announce their identity and purpose before they can forcibly enter a dwelling. *See Richards v. Wisconsin*, 520 U.S. 385 (1997). California also has

a knock-notice statute, though Plaintiff has not specifically alleged violation of the California statute. As an initial matter, Plaintiff did not plead violation of this knock-notice rule as grounds for any of her five causes of action rooted in § 1983. But even if the claim were properly brought, Plaintiff has not established that the officers' conduct violated clearly established law, even fully accepting Plaintiff's version of the facts. Plaintiff admits that she recognized the officers as police officers, and that they told her they were looking for Justine and intended to search the house for Justine. *See* Smith Decl. at ¶¶ 5-6. Moreover, Plaintiff testified at deposition that she knew Justine was placed on probation in 2009. Smith Depo. at 89:13-17. This Court is aware of no precedent requiring certain "magic words" to satisfy the knock-notice requirement. Because it was apparent to Plaintiff that the officers were police officers; that they were looking for Justine, who was on probation; and that they intended to search the house, the officers would have been fully reasonable to believe that their notice obligations had been discharged. They are thus entitled to qualified immunity for any violation of the knock-notice rule that could inhere in their conduct.

Having found that the officers were reasonable to believe that their search was legal as a probation search, the Court need not reach the question of whether the search was also justified as a protective sweep. In conclusion, Defendants' motion for summary judgment is GRANTED on grounds of qualified immunity as to Sergeant Hill and Detective Henderson's liability for the search.

C. The Detention

Plaintiff also claims that she was wrongly arrested, in violation of her Fourth Amendment rights. Defendants claim that they can have no liability and are entitled to qualified immunity because they legally detained Plaintiff incident to a lawful search.

It is clearly established that officers may detain an individual, and may even use handcuffs to do so,[6] to allow the completion of a lawful search. *See Muehler v. Mena*, 544 U.S. 93, 99 (2005) (upholding the handcuffing and detention of occupants during the search of a home and noting that

[6] The Court does not find that the use of handcuffs was necessarily reasonable in this case. Rather, the Court notes only that the mere fact that handcuffs were used does not transform what would otherwise be a detention incident to search into an arrest. Plaintiff may still argue at trial that the use of handcuffs in this case constituted excessive force.

"[a]n officer's authority to detain incident to a search is categorical."); *Michigan v. Summers*, 452 U.S. 692 (1981) (valid search warrant conveys the authority to detain occupants during the search). Moreover, the Ninth Circuit has explicitly held that it is lawful for officers to detain the occupants of a house, including family members of a probationer who used that address, while they conduct a lawful probation search. *See Sanchez v. Canales*, 574 F.3d 1169 (2009). Although *Sanchez* has now been called into question because it relies, in part, on the now-overruled proposition that there is no difference between a parole search and a probation search, *see King*, 687 F.3d at 1189, *Sanchez* was clearly good law at the time of the incident, in October, 2010. The officers were thus entitled to rely on it. As explained above, the officers were reasonable to believe that their probation search was lawful. Accordingly, to the extent that Plaintiff's claim is based on her being detained at all while the officers searched her house, the officers are clearly entitled to summary judgment on grounds of qualified immunity.[7] Thus, Sergeant Hill and Detective Henderson's motion for summary judgment on Plaintiff's § 1983 claims based on illegal detention is GRANTED on grounds of qualified immunity.

The Court need not decide the complicated and now unsettled question of whether, after *King*, a detention incident to a probation search, as opposed a parole search, remains lawful. There are many potentially significant ramifications of a decision regarding the differences between parole and probation searches, and as explained above, this case presents several complications that counsel against addressing the issue, unbriefed by the parties, at this time.

The only remaining question concerns the manner in which Plaintiff was detained. *See Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006) ("We interpret the Supreme Court's language to mean that the duration of a detention may be coextensive with the period of a search,

[7] Plaintiff argues extensively that she was arrested, rather than detained. However, all of the cases Plaintiff cites in addressing this distinction involve *Terry* stops, and whether a detention made in the context of an investigatory stop in some public place rose to the level of an arrest. *See* Opp'n at 14-15. Plaintiff was not stopped somewhere out in public for investigatory purposes, but rather restrained at her own home while the officers executed what they reasonably believed to be a lawful probation search. Because Courts have explicitly recognized the type of detention that occurred here as a lawful type of detention as distinct from the brief investigatory detention commonly referred to as a *Terry* stop, the Court does not find it necessary to analyze whether, had the detention occurred under different circumstances, it might have been considered an arrest.

and require no further justification. The police do not, however, have unfettered authority to detain a building's occupants in any way they see fit. *Muehler* confirms an officer's authority to detain a building's occupants during a search so long as the officer conducts the detention in a reasonable manner.") (internal citation omitted). However, questions about the manner, rather than the fact, of detention concern not the question of illegal detention itself, but rather of excessive force. Defendants have not moved for summary judgment on Plaintiff's excessive force claims. Thus, the Court will not consider the force and manner used in restraining Plaintiff during what, under *Muehler* and *Sanchez*, was an authorized detention incident to search. The question of excessive force in the detention of Plaintiff remains a question for trial. To the extent that Defendants intend to move for summary judgment on questions concerning the manner of detention, the motion is DENIED.

D. *Monell* Liability

In order to establish that the City or Police Department is liable for a constitutional violation, Plaintiff must show that a policy, custom, or practice of the City or Police Department was the "moving force" behind any such alleged constitutional injury. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978); *accord Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011). The Ninth Circuit has made clear that "'liability for improper custom may not be predicated on isolated or sporadic incidents.'" *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011) (quoting *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (internal quotation marks and citations omitted)). Rather, to hold a government entity liable under § 1983, a plaintiff must show that the alleged unconstitutional act results from "(1) an employee acting pursuant to an expressly adopted official policy; (2) an employee acting pursuant to a longstanding practice or custom; or (3) an employee acting as a 'final policymaker.'"[8] *Delia v. City of Rialto*, 621 F.3d 1069, 1081-82 (9th Cir. 2010) (quoting *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003)).

[8] There has been no allegation that the officers here were acting as "final policymakers." Thus, the Court will not address this potential basis for *Monell* liability.

Here, Plaintiff's *Monell* claim fails. Because the Court has found in favor of Defendants on grounds of qualified immunity, the Court has not ruled, as Defendants suggest, that there was no constitutional violation here. However, Plaintiff has provided no evidence that there is an official policy or custom of performing warrantless searches with no legal justification, or of detaining people during searches of their homes where not authorized by law. Indeed, Plaintiff presented evidence that the City and Police Department have *no* expressly adopted official policy on probation searches. *See* Winter Depo. at 37:18-22 ("In my search of the manual, I did not specifically find a section specifically relate to probation searches."). Moreover, Plaintiff has not produced evidence of any questionable searches or detentions other than the October 7, 2010 incident that forms the basis of this lawsuit. Without evidence of any other incident, the Court cannot find that there is a longstanding practice or custom. As Plaintiff has not put forward any evidence of either an official policy or a longstanding practice or custom, Plaintiff cannot establish that the city or police department is liable.

Moreover, to establish *Monell* liability on a theory of failure to train, a Plaintiff must show not only that training was inadequate, but that the city was deliberately indifferent to the constitutional rights of citizens. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). The fact that further training might have prevented any violation is insufficient. *See id.* at 392. Here, Plaintiff has not shown that the City and Police Department inadequately trained officers or had any policy of doing so, nor that the City or Police Department was deliberately indifferent. Plaintiff has presented evidence that the City and Police Department do not have a specific written policy on probation searches, and that the Police Department does have a practice of detaining people who interfere with lawful probation searches. *See* Winter Depo. at 37:20-22; 39:10-12; 62:20-25. But Plaintiff simply has not presented any evidence at all about the training that officers receive, on the topic of searches or any other subject. Under *City of Canton*, "the question [is] whether such inadequate training can justifiably be said to represent 'city policy.'" 489 U.S. at 390. Here, Plaintiff has not even shown that the City or Police Department inadequately trains its

officers, let alone that it has a conscious policy of doing so. Accordingly, Plaintiff cannot establish *Monell* liability on a failure to train theory.

Plaintiff has therefore failed to create a genuine issue of material fact as to any element of their § 1983 claim against the City or Police Department.[9] Defendants' motion for partial summary judgment with respect to the *Monell* claim against the City and Police Department for Plaintiffs' search and detention is therefore GRANTED.

E. State Law Immunities

Sergeant Hill and Detective Henderson[10] have moved for summary judgment on Plaintiff's state law claims (sixth through fifteenth causes of action). This motion is based on three types of statutory immunity for public employees or police officers: (1) discretionary immunity; (2) enforcement or execution of laws; and (3) penal code immunity.

Discretionary immunity is afforded by Cal. Gov. Code § 820.2, which provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." California law is clear that this statute requires "judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government." *Johnson v. State*, 69 Cal. 2d 782, 793 (1968).

Plaintiff contends that the officers' actions here were "operational," and thus not considered an exercise of discretion. The Court agrees. A California Court of Appeal has clearly held that officers' actions taken in attempting to carry out their assigned duties are not covered by this type of immunity. *See Gillan v. City of San Marino*, 147 Cal. App. 4th 1033, 1051, 55 Cal. Rptr. 3d 158, 174 (2007) ("The decision to arrest Gillan was not a basic policy decision, but only an

[9] Regarding Plaintiff's remaining claims – the state law claims in the sixth through fifteenth causes of action – Defendants have not made any argument for summary judgment for the City or the Police Department. Rather, Defendants argue only that there is no municipal liability for Plaintiff's § 1983 claims. Though the state law claims are all listed in the First Amended Complaint as being brought against all defendants, it is not clear whether Plaintiff intends to assert these claims against the City and the Police Department, and if so, on what theory. Accordingly, the Court makes no ruling as to the City or Police Department's liability on state law claims at this time.

[10] As explained above, the motion filed by Defendants does not appear to include a motion by the City or Police Department on the state law claims.

operational decision by the police purporting to apply the law. The immunity provided by Government Code section 820.2 therefore does not apply."). The Ninth Circuit, citing *Gillan*, has also held that "the immunity provided by California Government Code § 820.2 does not apply to claims of false imprisonment or false arrest predicated on an officer's detaining a suspect without reasonable suspicion or probable cause." *Liberal v. Estrada*, 632 F.3d 1064, 1085 (9th Cir. 2011). Thus, § 820.2 clearly provides no protection from Plaintiff's claims as they relate to the detention. Moreover, the decision to search, like the decision to arrest, is not a "basic policy decision" of type this statute is designed to protect, and courts have declined to apply discretionary immunity to decisions involving surveillance, explaining that "[r]outine discretionary decisions as part of a person's normal job duties are not covered by this immunity." *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1123 (C.D. Cal. 2006) *aff'd sub nom. Bernhard v. City of Ontario*, 270 F. App'x 518 (9th Cir. 2008). The same reasoning applies to Plaintiff's search-related claims. The officers were not making policy in searching Plaintiff's house, but rather acting in accordance with existing policy permitting probation searches. Accordingly, the Court finds that the officers are not immune under § 820.2 from Plaintiff's state law claims as they concern search and detention.

Immunity for the enforcement and execution of laws is provided by Cal. Gov. Code § 820.4, which provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment." Sergeant Hill and Detective Henderson assert that this immunity protects them from Plaintiff's eighth through fifteen causes of action (and not from the sixth and seventh, Plaintiff's Bane Act claims). However, as this statue explicitly does not provide immunity for claims of false arrest, the Court finds that it can also provide no protection from Plaintiff's ninth cause of action, "False Arrest/False Imprisonment." Accordingly, the Court will consider its application only as to Plaintiff's eighth and tenth through fifteenth causes of action.

Section 820.4 provides immunity for officers whose actions are "objectively reasonable." *See Reynolds v. County of San Diego*, 858 F. Supp. 1064, 1074 (S.D. Cal. 1994). Thus, for this

immunity to apply, the Court would have to find that there is no genuine issue of material fact as to the objective reasonableness of the officers' actions. This is a different question from the federal law-based qualified immunity analysis above, concerning whether the officers' actions were unlawful under clearly established law, and is also distinct from the ultimate constitutional question of whether the officers' actions comported with the Fourth Amendment. Rather, it involves a very fact-specific balancing of what would have been "objectively reasonable" under the circumstances as a matter of California law. Here, there are several factual disputes about what exactly occurred. Specifically, there are disputes about both the behavior of Plaintiff and how, precisely, the officers responded. The resolution of these factual disputes will have a bearing on the objective reasonableness of the officers' behavior. Accordingly, the Court finds that there is a genuine issue of material fact as to the reasonableness of the officers' actions, and the Court cannot grant summary judgment that the officers are immune under § 820.4. As neither § 820.2 nor § 820.4 provides immunity, Sergeant Hill and Detective Henderson's motion for summary judgment is DENIED as to Plaintiff's eighth and tenth through fifteenth causes of action.

The third type of immunity Sergeant Hill and Detective Henderson claim is under California Penal Code § 847, which states: "There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer. . . acting within the scope of his or her authority, for false arrest or false imprisonment. . . [if] [t]he arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful." The Court has already found that the officers were reasonable to believe that their detention of Plaintiff was lawful.[11] Thus, the officers' detention of Plaintiff cannot give rise to liability under California law. Accordingly, Sergeant Hill and Detective Henderson's motion for summary judgment is GRANTED as to Plaintiff's ninth cause of action, Plaintiff's state law claim for False Arrest/False Imprisonment.

Finally, Defendants contend that they are entitled to summary judgment on Plaintiff's sixth and seventh causes of action, under California Civil Code §§ 52.1 and 52.3, both of which are part of a

[11] The cases discussing § 847 do not specifically address claims of detention not classified as arrests. However, because § 847 provides immunity from false arrest or false imprisonment claims, it does not appear intended to allow such claims where the officers effectuated a lawful detention, even if it did not rise to the level of an arrest.

law known as the Bane Act. The Bane Act, as relevant here, provides a cause of action for interference with an individual's exercise of his or her rights under the state and federal constitutions by means of threats, intimidation, or coercion. *See* Cal. Civ. Code § 52.1. Defendants provide two bases for summary judgment: (1) that Plaintiff's claims require that the City and/or officers have interfered with Plaintiff's constitutional rights, which Defendants contend Plaintiff has not established; and (2) that the same immunities apply to these claims as to Plaintiff's other state law claims.

Regarding immunities, the only immunity the Court has found to apply at this stage governs, by its terms, only claims for false arrest, and is thus inapplicable to Plaintiff's Bane Act claims, which allege not false arrest, but interference with rights by means of threats, intimidation, or coercion. Thus, Defendants have not established any statutory immunity for these claims.

Regarding interference with constitutional rights, the rights that must be interfered with to establish a Bane Act violation can be under either the United States or the California Constitutions. *See* Cal. Civ. Code §§ 52.1, 52.3. Plaintiff has alleged interference with rights under both. *See* First Amended Complaint, ECF No. 42, at ¶¶ 63 ("Defendants' conduct alleged herein interfered with, or constituted an attempt to interfere with, plaintiffs' rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and article I, sections 1, 2, 7, and 13 of the California Constitution"), 67 ("Plaintiffs are informed and believe, and thereon allege, that the acts of defendants alleged herein were done pursuant to a pattern and practice of depriving persons of rights, privileges, and immunities secured by the laws and Constitution of the State of California, and the laws and Constitution of the United States."). Defendants' arguments, however, concern only the Fourth Amendment to the United States Constitution, and do not address Plaintiff's allegations concerning the California Constitution. As the movants, Defendants bear the burden of demonstrating an absence of evidence in the record to establish Plaintiff's claims. *See Celotex*, 477 U.S. at 323. The only basis Defendants have provided, however, is their existing arguments about the reasonableness of the search and detention under the Fourth Amendment to the United States Constitution. Defendants have not even attempted to demonstrate a lack of

evidence for Plaintiff's claims arising under the California Constitution. Thus, Defendants have not met their burden to show an absence of evidence supporting Bane Act liability. Accordingly, Defendants' motion for summary judgment as to Plaintiff's sixth and seventh claims for relief are DENIED.

IV. DEFENDANT ROJAS

Defendant Rojas separately moves for summary judgment. Defendant Rojas moved by filing a joinder in Defendants' motion. Thus, like the first Defendants' motion, Defendant Rojas's motion is directed only to the search and detention claims, *not* to the claims of excessive force. To the extent that Officer Rojas's motion is grounded in his entitlement to qualified immunity based on the lack of clearly established law rendering it illegal to search Plaintiff's house or to detain Plaintiff during that search, Officer Rojas's motion is GRANTED for the reasons explained above.

Defendant Rojas's memorandum of points and authorities, however, also puts forth an argument for summary judgment that Defendant Rojas did not use excessive force. *See* ECF No. 64 at 7. These arguments are not properly before the Court, as the motion in which Defendant Rojas has joined specifically disclaims any argument that summary judgment should be granted on excessive force claims. However, even if the Court were to entertain Defendant Rojas's argument, the Court could not grant summary judgment on the excessive force claim. The excessive force inquiry requires a "careful balancing" of interests in a very fact-specific examination of each "particular situation." *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). As explained in this case, there are several disputed facts concerning what Plaintiff did and said when the officers approached, and what the officers, including Defendant Rojas, did and said in return. The required balancing inquiry will depend on the resolution of these factual disputes. Accordingly, to the extent that Defendant Rojas intends to move for summary judgment on the question of excessive force, his motion is DENIED.

V. CONCLUSION

For the reasons explained above, Detective Henderson's motion for summary judgment as to all claims due to lack of involvment is DENIED. Detective Henderson and Sergeant Hill's

motion for summary judgment and Defendant Rojas's motion for summary judgment on Plaintiff's first, second, fourth, and fifth claims under 42 U.S.C. § 1983 are GRANTED on grounds of qualified immunity insofar as the claims allege illegal search and detention only. Detective Henderson and Sergeant Hill's motion for summary judgment and Defendant Rojas's summary judgment on Plaintiff's sixth and seventh causes of action under the Bane Act are DENIED. Detective Henderson and Sergeant Hill's motion for summary judgment and Defendant Rojas's motion for summary judgment on Plaintiff's eighth and tenth through fifteenth causes of action for state law violations are DENIED. Detective Henderson and Sergeant Hill's motion for summary judgment and Defendant Rojas's motion for summary judgment on Plaintiff's ninth cause of action for state law false arrest/false imprisonment are GRANTED on grounds of immunity under Cal. Penal Code § 847.

The City of Santa Clara and Santa Clara Police Department's motion for summary judgment on Plaintiff's claims under 42 U.S.C. § 1983 is GRANTED. To the extent that the City and Police Department intend to move for summary judgment on Plaintiff's state law claims, they have presented no argument, and accordingly, the motion is DENIED.

To the extent that Defendant Rojas intends to move for summary judgment on Plaintiff's claims regarding excessive force, his motion is DENIED.

IT IS SO ORDERED.

Dated: January 15, 2013

LUCY H. KOH
United States District Judge