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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LAUREL BRESAZ, et al.,
Plaintiffs,
v.
COUNTY OF SANTA CLARA, et al.,
Defendants.

Case No.:14-CV-03868-LHK

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

Re: Dkt. No. 13

Plaintiffs Laurel Bresaz, Donna Hayes, and Steven Marshall (collectively, “Plaintiffs”) bring this action against the County of Santa Clara, Aldo Groba, and Kristin Anderson (collectively, “Defendants”). Plaintiffs allege that Defendants violated the United States Constitution and various federal and state statutes in connection with an incident that led to the death of Brandon Marshall (“Decedent”). *See* ECF No. 1 (“Compl.”). Before the Court is Defendants’ motion to dismiss six of the eleven causes of action in Plaintiffs’ Complaint. ECF No. 13 (“Mot.”). Having considered the parties’ submissions, the relevant law, and the record in this case, the Court GRANTS in part and DENIES in part Defendants’ motion to dismiss, for the reasons stated below.

I. BACKGROUND

A. Factual Background

1 The following is drawn from the factual allegations in Plaintiffs' Complaint.

2 Plaintiffs are relatives of the Decedent. Laurel Bresaz ("Bresaz") is the wife and successor
3 in interest to the Decedent. Compl. ¶ 5. Donna Hayes is the mother of the Decedent, and Steven
4 Marshall ("Marshall") is the Decedent's father. *Id.* ¶¶ 6-7. Aldo Groba ("Groba") and Kristin
5 Anderson ("Anderson") are both deputies employed by the Santa Clara County Sheriff's Office,
6 the local sheriff's department for the County of Santa Clara. *Id.* ¶¶ 9-11.

7 This lawsuit stems from an incident which occurred on December 10, 2013. *Id.* ¶ 17.
8 Decedent was an employee at the company Roku, Inc. ("Roku") in Saratoga, California. *Id.* ¶ 15.
9 Plaintiffs allege that the Decedent "had a history of mental illness for which he had taken
10 prescription medication," and that the Decedent may have been taking prescription medication on
11 December 10, 2013. *Id.* ¶¶ 16-17. At some point in the late morning or early afternoon of
12 December 10, 2013 (which was a Tuesday), the Decedent entered a conference room in the Roku
13 offices where a meeting was in progress. *Id.* ¶ 17. The Decedent "appeared emotionally distressed
14 and disoriented." *Id.* While in the conference room, the Decedent called Marshall and requested
15 that Marshall "pick him up from work right away because he was having a problem." *Id.* One or
16 more Roku employees also called 911 to request help for the Decedent. *Id.* No Roku employees
17 who witnessed the Decedent's behavior at that time reported that the Decedent posed a threat of
18 violence or criminal behavior. *Id.*

19 The Decedent then left the building and went to the Roku parking lot. *Id.* ¶ 18. At some
20 point, employees with the Santa Clara County Fire Department arrived on the scene and spoke
21 with the Decedent. *Id.* According to the fire department employees, the Decedent appeared
22 "manic." *Id.* The Decedent voluntarily agreed to go to the hospital. *Id.* Subsequently, paramedics
23 arrived on the scene and advised the Decedent that he could have a family member take him to the
24 hospital. *Id.* ¶ 19. After the Decedent agreed, a paramedic called Marshall on the Decedent's cell
25 phone. *Id.* The paramedic told Marshall that the Decedent was not feeling well and needed to be
26 taken to the hospital. *Id.* Marshall expressed at least twice to the paramedic a desire to take his son

1 to the hospital. *Id.* ¶¶ 19-20.

2 Subsequent to the arrival of the paramedics, Groba and Anderson arrived at the scene. *Id.*
3 ¶ 21. Plaintiffs allege that Groba and Anderson, *inter alia*, knew or should have known at the time
4 that “they were responding to a call seeking help for an emotionally distressed individual” and that
5 the Decedent “was experiencing mental health issues that required specialized medical assistance,
6 procedures, and tactics.” *Id.* Plaintiffs also allege that Groba and Anderson “knew or should have
7 known that the paramedics were making arrangements with [Marshall] to get appropriate medical
8 care for [the Decedent].” *Id.* ¶ 23. Anderson, “[d]espite lacking a reasonable belief that [the
9 Decedent] presented any threat of harm to anyone . . . approached [the Decedent] from behind,
10 when his back was to her, and began interacting with him.” *Id.* ¶ 24. This caused the Decedent
11 “further distress” and the Decedent became “even more upset and agitated.” *Id.* ¶¶ 24-25.

12 At some point, the Decedent “moved toward [Anderson].” *Id.* ¶ 25. Groba then “moved
13 quickly” to the Decedent, “possibly causing [the Decedent] to fear for his life.” *Id.* The Decedent,
14 “[p]ossibly acting in self-defense,” swung his key chain, a short, thin, rounded, aluminum rod, at
15 Groba and Anderson. *Id.* Groba then shot the Decedent in the stomach. *Id.*

16 At the time Groba shot the Decedent, Marshall was on the phone with one of the
17 paramedics at the scene. *Id.* ¶ 28. Marshall heard the gunshot over the phone, and heard the
18 Decedent cry out. *Id.* Marshall heard the Decedent cry out a second time before the paramedic
19 ended the call. *Id.*

20 Either Groba or Anderson, or both deputies, restrained the Decedent’s legs with zip ties.
21 *Id.* ¶ 29. Plaintiffs also claim that Groba and Anderson otherwise “delay[ed] critical medical
22 treatment for the gunshot wound.” *Id.* Santa Clara County Emergency Medical Services
23 transported the Decedent to Santa Clara Valley Medical Center, where Bresaz, Marshall, and
24 Hayes, as well as other members of the Decedent’s family, arrived. *Id.* ¶ 31. The Decedent died at
25 approximately 3:45 p.m. on December 10, 2013. *Id.*

26 **B. Procedural History**

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1 On August 26, 2014, Plaintiffs filed the instant lawsuit in this Court, alleging eleven causes
2 of action under the U.S. Constitution and various federal and state statutes. *See* Compl. Bresaz, as
3 successor in interest to the Decedent, asserts a cause of action under 42 U.S.C. § 1983 for
4 violations of the Decedent’s rights under the Fourth and Fourteenth Amendments of the U.S.
5 Constitution; violation of 42 U.S.C. § 12132, the Americans with Disabilities Act; violation of
6 California Civil Code § 52.1, the Bane Act; intentional and negligent infliction of emotional
7 distress under California Code of Civil Procedure § 377.30; and negligence. *Id.* ¶¶ 45, 52, 63, 77,
8 85, 90 & 97. The Plaintiffs collectively assert causes of action under 42 U.S.C. § 1983 and
9 California Code of Civil Procedure § 377.60 for violation of their Fourteenth Amendment right to
10 familial relationships with the Decedent; wrongful death pursuant to California Code of Civil
11 Procedure § 377.60; and violation of California Civil Code § 52.1, the Bane Act. *Id.* ¶¶ 58, 71 &
12 82. Marshall individually asserts a cause of action for negligent infliction of emotional distress. *Id.*
13 ¶ 104.

14 On November 5, 2014, Defendants filed the instant motion to dismiss. *See* Mot.
15 Defendants move to dismiss all of Plaintiffs’ claims against Anderson; Bresaz’s claim under the
16 Americans with Disabilities Act; Plaintiffs’ claim under the Bane Act; Bresaz’s claims for
17 intentional and negligent infliction of emotional distress; and Marshall’s claim for negligent
18 infliction of emotional distress. *See id.* On November 19, 2014, Plaintiffs filed an opposition to the
19 motion to dismiss. ECF No. 14 (“Opp’n”). On November 26, 2014, Defendants filed a reply. ECF
20 No. 18 (“Reply”).

21 **II. LEGAL STANDARD**

22 **A. Motion to Dismiss**

23 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an
24 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*
25 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the
26 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
27 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a

1 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
2 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). For purposes
3 of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as
4 true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek*
5 *v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

6 Nonetheless, the Court is not required to “assume the truth of legal conclusions merely
7 because they are cast in the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064
8 (9th Cir. 2011) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere
9 “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to
10 dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678.
11 Furthermore, “a plaintiff may plead [him]self out of court” if he “plead[s] facts which establish
12 that he cannot prevail on his . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.
13 1997) (quoting *Warzon v. Drew*, 60 F.3d 1234, 1239 (7th Cir. 1995)).

14 **B. Leave to Amend**

15 If the Court determines that the complaint should be dismissed, it must then decide
16 whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave
17 to amend “should be freely granted when justice so requires,” bearing in mind “the underlying
18 purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or
19 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation
20 marks and alterations omitted). When dismissing a complaint for failure to state a claim, “a
21 district court should grant leave to amend even if no request to amend the pleading was made,
22 unless it determines that the pleading could not possibly be cured by the allegation of other facts.”
23 *Id.* at 1130 (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Accordingly, leave to
24 amend is denied only if allowing amendment would unduly prejudice the opposing party, cause
25 undue delay, be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG*
26 *Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008).

27 **III. ANALYSIS**

A. Plaintiffs' Claims Against Defendant Anderson

1
2 Defendants first move to dismiss all of Plaintiffs' claims against Defendant Anderson.
3 Mot. at 2-5. Defendants argue that Anderson did not violate the Decedent's constitutional rights
4 because Anderson did not do anything unconstitutional. Mot. at 3-4. Specifically, Defendants
5 argue "Anderson did [not] violate the Fourth Amendment or do anything wrong in approaching
6 [the Decedent] and attempting to interact with him." Mot. at 4. Therefore, Plaintiffs fail to allege
7 that Anderson "did anything other than engage in a lawful encounter with [the Decedent]," and
8 thus Plaintiffs fail to allege that Anderson violated the Decedent's constitutional or statutory
9 rights. *Id.* Plaintiffs respond that, even assuming Anderson's conduct did not by itself violate the
10 Decedent's rights, Anderson can still be held liable based on the fact that Anderson was an
11 integral participant in the Decedent's death. Opp'n at 2.

12 In the Ninth Circuit, a plaintiff may hold multiple police officers liable when at least one
13 officer violates the plaintiff's constitutional rights based on an "integral participant" theory of
14 liability. *Chuman v. Wright*, 76 F.3d 292, 295 (9th Cir. 1996). "[I]ntegral participation does not
15 require that each officer's actions themselves rise to the level of a constitutional violation." *Boyd*
16 *v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir. 2004) (internal quotation marks omitted). Rather, the
17 integral participant inquiry looks to whether an officer was a "full active participant" in the
18 alleged Constitutional violation, *id.* (quoting *Melear v. Spears*, 862 F.2d 1177, 1186 (5th Cir.
19 1989), as well as whether the officer "performed police functions" that were "integral to the
20 [Constitutional violation]," *Melear*, 862 F.2d at 1186; *see also Bracken v. Okura*, 955 F. Supp. 2d
21 1138, 1152 (D. Haw. 2013) ("[I]ntegral participation requires some fundamental involvement in
22 the conduct that allegedly caused the violation.").

23 For instance, where an officer provides "armed backup" to the officer who directly
24 commits the constitutional violation, that fact alone may provide sufficient reason to find the first
25 officer to be an "integral participant." *Hopkins v. Bonvicino*, 573 F.3d 752, 770 (9th Cir. 2009)
26 ("integral participant" rule is deemed satisfied where involved officers "provided armed backup
27 during an unconstitutional search") (internal quotation marks omitted). Alternatively, where an

1 officer participates in the conduct that leads to the constitutional violation “in a meaningful way,”
2 that officer may be held liable as an integral participant. *Boyd*, 374 F.3d at 780. For example, in
3 *Blankenhorn v. City of Orange*, the plaintiff alleged that police officers violated his Constitutional
4 rights by placing him in hobble restraints during arrest. 485 F.3d 463, 479-80 (9th Cir. 2007). The
5 Ninth Circuit held that an officer who helped handcuff the plaintiff while the plaintiff was lying on
6 the ground was an “integral participant” in the alleged Constitutional violation, because the
7 officer’s “help in handcuffing [the plaintiff] was instrumental in the officers’ gaining control of
8 [the plaintiff], which culminated in [another officer’s] application of hobble restraints.” *Id.* at 481,
9 n.12; *see also Bracken*, 955 F. Supp. 2d at 1152-53 (officer who was present at stop, stood in front
10 of plaintiff, and requested identification from plaintiff was “clearly a knowing participant in the
11 stop” and therefore was an “integral participant” in whatever alleged constitutional violations
12 occurred during the stop).

13 However, the “integral participant” theory does not permit the finder of fact to “find the
14 individual officers liable for merely being present at the scene of the” constitutional violation.
15 *Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002). Therefore, officers who are mere
16 “bystanders” during the commission of constitutional violations are not considered integral
17 participants. *Boyd*, 374 F.3d at 780. For instance, an officer who arrives at the scene after the
18 unconstitutional act is completed, or an officer who provides crowd control at the scene, are not
19 integral participants. *Blankenhorn*, 485 F.3d at 481 n.12. Nor is an officer who interviews a
20 witness in the front yard of a building, and does not participate in the unconstitutional search of
21 the building “in any fashion,” an integral participant. *Hopkins*, 573 F.3d at 770.

22 Here, Plaintiffs allege that Anderson may be held liable for Defendant Groba’s alleged use
23 of excessive force because Anderson was an integral participant in the incident. Plaintiffs allege
24 that while Anderson and Groba were responding to the scene in front of Roku’s offices, the two
25 deputies “knew or should have known” that they were “responding to a call seeking help for an
26 emotionally distressed individual” and that the Decedent “was experiencing mental health issues
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1 that required specialized medical assistance, procedures, and tactics.” Compl. ¶ 21. Plaintiffs also
2 allege that Anderson and Groba “knew or should have known that the paramedics were making
3 arrangements with [Marshall] to get appropriate medical care for [the Decedent].” *Id.* ¶ 23.
4 Plaintiffs further allege that Anderson, “lacking a reasonable belief that [the Decedent] presented
5 any threat of harm to anyone . . . approached [the Decedent] from behind, when his back was to
6 her, and began interacting with him.” *Id.* ¶ 24. Plaintiffs claim that Anderson “knew or should
7 have known this would cause [the Decedent] further distress.” *Id.* Plaintiffs further allege that
8 because Anderson “caused [the Decedent] to become even more upset and agitated,” the Decedent
9 moved toward Anderson. *Id.* ¶ 25. Plaintiffs allege that Groba then “overreached and moved
10 quickly to [the Decedent], possibly causing [the Decedent] to fear for his life” and “possibly act in
11 self-defense” when the Decedent allegedly “swung his key chain . . . at the deputies.” *Id.* Plaintiffs
12 therefore allege that Anderson’s actions “unreasonably interfered with the paramedics’ efforts to
13 arrange appropriate medical care” and “provoke[ed] a violent confrontation” that led to the
14 Decedent’s death. *Id.* ¶ 23.

15 Accepting the factual allegations in the Complaint as true and construing the pleadings in
16 the light most favorable to Plaintiffs, *Manzarek*, 519 F.3d at 1031, the Court finds that Plaintiffs
17 have pled sufficient facts to show that Anderson was an integral participant in the incident which
18 led to the alleged violation of Decedent’s constitutional and statutory rights. Plaintiffs allege that
19 Anderson, knowing that the Decedent was experiencing mental health issues, recklessly
20 approached the Decedent from behind while the Decedent was in an agitated state and attempted
21 to engage the Decedent in conversation. Compl. ¶¶ 23-24. Plaintiffs allege that this caused the
22 Decedent further distress and led to the chain of events which culminated in Groba’s alleged use
23 of excessive force and the Decedent’s death. *Id.* ¶ 25. Plaintiffs have therefore alleged that
24 Anderson, by provoking the Decedent into engaging in the conduct which led to the constitutional
25 and statutory violations at issue in this lawsuit, participated “in a meaningful way” in the
26 unconstitutional and illegal conduct. *Boyd*, 374 F.3d at 780. Put another way, Anderson’s
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1 “physical participation in the alleged violation was part of a closely related series of physical acts
2 leading to the violation,” which is sufficient to find that Anderson was an integral participant.
3 *Bracken*, 955 F. Supp. 2d at 1152 (citing *Blankenhorn*, 485 F.3d at 481 n.12).

4 Defendants argue that Anderson was not an integral participant because Anderson did not
5 independently violate the Decedent’s constitutional rights. *See Mot.* at 4-5. However, the integral
6 participant theory “does not require that each officer’s actions themselves rise to the level of a
7 constitutional violation.” *Boyd*, 374 F.3d at 780. Rather, an officer is an integral participant when
8 that officer participates “in a meaningful way” in the conduct that led to the alleged violations. *Id.*
9 Defendants also argue that Anderson’s conduct was no different than the conduct of an officer in
10 *Hopkins* who was not found to be an integral participant in the search of a building. Reply at 5. In
11 *Hopkins*, the Ninth Circuit held that an officer who “waits in the front yard” of a building,
12 interviews a witness who was not the defendant, and “does not participate in the unconstitutional
13 search [of the building] in any fashion” was not an integral participant. *Hopkins*, 573 F.3d at 770.
14 Here, in contrast to *Hopkins*, Plaintiffs have alleged that Anderson approached the Decedent and
15 provoked the physical confrontation which culminated in Groba’s alleged use of excessive force
16 and the Decedent’s death. Compl. ¶¶ 23-25. Whereas the officer in *Hopkins* could be characterized
17 as a “mere bystander [to his colleagues’ conduct],” *Hopkins*, 573 F.3d at 770, here Anderson
18 participated in a meaningful way in the allegedly unconstitutional and illegal conduct by
19 provoking the Decedent’s acts. Accordingly, the Court disagrees that Anderson’s alleged conduct
20 is analogous to the officer’s conduct in *Hopkins*.¹

21 For the foregoing reasons, the Court finds that Plaintiffs have sufficiently alleged that
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23 ¹ In Defendants’ motion to dismiss, Defendants cite two cases in support of their argument. *Mot.*
24 at 2-3. In *United States v. Washington*, the Ninth Circuit held, *inter alia*, that no Fourth
25 Amendment seizure occurs when a law enforcement officer “merely identifies himself and poses
26 questions to a person if the person is willing to listen.” 490 F.3d 765, 770 (9th Cir. 2007). In
27 *United States v. Mendenhall*, the Supreme Court held that when an officer questions an individual,
28 “[a]s long as the person to whom questions are put remains free to disregard the questions and
walk away, there has been no intrusion upon that person’s liberty or privacy.” 446 U.S. 544, 552
(1980). Neither *Washington* or *Mendenhall* dealt with the issue of integral participant liability, and
therefore are not applicable here.

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Anderson was an integral participant in the alleged violation of the Decedent’s Constitutional rights. Accordingly, Defendants’ motion to dismiss Plaintiffs’ claims against Anderson is DENIED.

B. Bresaz’s Claim as Successor in Interest to Decedent for Violation of the Americans with Disabilities Act

Defendants next move to dismiss Bresaz’s fourth cause of action for the alleged violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132. Mot. at 5-6. Bresaz alleges the fourth cause of action as the successor in interest to the Decedent. Compl. ¶ 65. In the Complaint, Bresaz alleges that the Decedent is a disabled individual within the meaning of the ADA; that the Decedent was otherwise qualified to participate in or receive the benefit of Santa Clara County’s emergency medical services; and that Defendants deprived the Decedent of his rights under the ADA by denying the Decedent the benefit of the County’s emergency health services. *Id.* ¶¶ 66-68. Defendants move to dismiss Bresaz’s ADA claim on two grounds: that Plaintiffs fail to adequately allege that the Decedent had a disability within the meaning of the statute, and that the ADA does not apply to “exigent law enforcement activity to quickly developing circumstances occurring in a public place.” Mot. at 5-6. Plaintiffs contend that they have adequately pled in the Complaint that the Decedent had a disability within the meaning of the statute, because Plaintiffs have alleged that the Decedent “had a history of mental illness” and that the Decedent’s mental illness resulted in a “significant disruption” of a meeting at the Decedent’s work. Opp’n at 5-7. Plaintiffs also argue that the ADA applies to the circumstances of the Decedent’s death. Opp’n at 8-9. As discussed more fully below, the Court finds that Plaintiffs have failed to adequately plead that the Decedent had a disability within the meaning of the ADA, and therefore does not address Defendants’ alternate argument for dismissal.

Title II of the ADA prohibits a public entity from discriminating against a qualified individual with a disability on the basis of that disability. 42 U.S.C. § 12132; *Weinreich v. L.A. County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). To state a claim of disability discrimination under Title II, the plaintiff must allege four elements: (1) the plaintiff is an

1 individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the
2 benefit of some public entity's services, programs, or activities; (3) the plaintiff was either
3 excluded from participation in or denied the benefits of the public entity's services, programs, or
4 activities, or was otherwise discriminated against by the public entity; and (4) such exclusion,
5 denial of benefits, or discrimination was by reason of the plaintiff's disability. *Weinreich*, 114
6 F.3d at 978.

7 With respect to the first element, the ADA defines "disability" as:

8 (A) a physical or mental impairment that substantially limits one or
9 more of the major life activities of such individual;

10 (B) a record of such an impairment; or

11 (C) being regarded as having such an impairment.

12 42 U.S.C. § 12102(1). The phrase "physical or mental impairment" means, *inter alia*, "any mental
13 or psychological disorder" including "emotional or mental illness." 28 C.F.R. § 35.104. The
14 phrase "a record of such an impairment" means, *inter alia*, having a "history of . . . mental or
15 physical impairment that substantially limits one or more major life activities." *Id.* Here, Plaintiffs
16 argue that the Decedent was disabled within the meaning of the ADA as defined by either subpart
17 (A) or subpart (B). *See* Opp'n at 5-7. The Court addresses each subpart in turn after discussing the
18 general standard as applied to ADA claims.

19 "To survive a motion to dismiss [an] ADA claim," the plaintiff "must state facts to show
20 that a claim to relief is plausible on its face." *Kittleson v. Sears, Roebuck & Co.*, No. CV 10-00106
21 DAE BMK, 2010 WL 2485935, at *3 (D. Haw. June 15, 2010). "[V]ague and conclusory
22 allegations" that the ADA's statutory requirements are satisfied "are insufficient to survive a
23 motion to dismiss." *Ovitsky v. Oregon*, No. 3:12-CV-02250-AA, 2013 WL 4505832, at *3-4 (D.
24 Or. Aug. 20, 2013). Other district courts in this Circuit have dismissed ADA claims for failing to
25 allege with the requisite factual particularity that the elements of the ADA are met, including that
26 the plaintiff is disabled within the meaning of the statute. *See Longariello v. Gompers Rehab. Ctr.*,
27 No. CV-09-1607-PHX-GMS, 2010 WL 94113, at *3 (D. Ariz. Jan. 5, 2010) ("Merely labeling

1 himself as ‘disabled’ in the Complaint is insufficient to explain what physical or mental disability
 2 [the plaintiff] has.”); *Kaur v. City of Lodi*, No. 2:14-CV-828-GEB-AC, 2014 WL 3889976, at *4-5
 3 (E.D. Cal. Aug. 7, 2014) (finding that “conclusory allegations are insufficient under the applicable
 4 pleading standard to allege facts from which a reasonable inference may be drawn that Parminder
 5 suffered from a disability defined in the ADA.”); *Lambdin v. Marriott Resorts Hospitality Corp.*,
 6 No. CIV. 14-00345 SOM, 2015 WL 263569, at *2 (D. Haw. Jan. 21, 2015) (“It is not enough for
 7 Lambdin to state, in conclusory fashion, that he has a disability. Having been injured or living
 8 with an impairment does not necessarily guarantee that one is protected by the ADA.”) (citing
 9 *Sanders v. Arenson Prods., Inc.*, 91 F.3d 1351, 1354 n.2 (9th Cir. 1996)).

10 Here, as for the first subpart of the statute—whether the Decedent had a “physical or
 11 mental impairment that substantially limits one or more . . . major life activities,” § 12102(1)(A)—
 12 Plaintiffs make only two allegations in support of Plaintiffs’ claim that the Decedent was disabled
 13 within the meaning of the ADA. First, Plaintiffs allege that the Decedent “had a history of mental
 14 illness for which he had taken prescription medication.” Compl. ¶ 16. Second, Plaintiffs allege that
 15 county firefighters who were at the Roku parking lot at the time of the December 10, 2013
 16 incident later reported that the Decedent “appeared ‘manic.’” *Id.* ¶ 18. Where, as here, a plaintiff
 17 alleges that he or she is disabled within the meaning of the ADA, courts have generally required
 18 the plaintiff to plead the disability with some factual specificity. *See O’Guinn v. Lovelock Corr.*
 19 *Ctr.*, 502 F.3d 1056, 1058 (9th Cir. 2007) (plaintiff adequately alleged that he was disabled where
 20 plaintiff pled that he suffered from mental illness including “brain damage, and organic
 21 personality disorder”); *Puckett v. Park Place Entm’t Corp.*, 332 F. Supp. 2d 1349, 1353 (D. Nev.
 22 2004) (Plaintiff’s allegation that he suffered from multiple sclerosis “[c]learly . . . qualifies as a
 23 physical impairment for purposes of the ADA” and satisfies the disability inquiry in an ADA
 24 cause of action); *William S. v. Lassen Cnty.*, No. S-05-1217 DFL CMK, 2006 WL 929398, at *3
 25 (E.D. Cal. Apr. 11, 2006) (denying motion to dismiss ADA claim even though plaintiff failed to
 26 specifically allege how he was mentally or physically impaired, where another of plaintiff’s claims
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1 specified that plaintiff was HIV positive). Here Plaintiffs offer no factual allegations to support
2 Plaintiffs' claim that the Decedent was disabled, such as the type or nature of mental illness the
3 Decedent had. Plaintiffs' allegation that the Decedent had a "mental illness," without more, is a
4 "formulaic recitation of the elements of a cause of action" under the ADA and does not satisfy
5 Plaintiffs' pleading obligations. *See Twombly*, 550 U.S. at 555. Plaintiffs' additional allegation
6 that the Decedent appeared to be "manic" is similarly insufficient. Plaintiffs do not allege that the
7 Decedent was manic; rather, Plaintiffs allege that the Decedent "appeared 'manic'" to fire
8 department personnel at the scene. Compl. ¶ 18. Moreover, even assuming that the appearance of
9 being manic constitutes a disability in the ordinary usage sense of the term "disability," the fact
10 that the Decedent *appeared* to have a disability in one isolated incident does not equate to the
11 Decedent having a "disability" within the meaning of the ADA. *See Sanders*, 91 F.3d at 1354 n.2
12 ("The ADA defines 'disability' with specificity as a term of art. Hence a person may be 'disabled'
13 in the ordinary usage sense, or even for purposes of receiving disability benefits from the
14 government, yet still not be 'disabled' under the ADA.").

15 In addition, even assuming that Plaintiffs' allegation that the Decedent's "mental illness"
16 or "manic" appearance was sufficient, Plaintiffs have not alleged how the Decedent's mental
17 illness "substantially limits one or more of the major life activities of" the Decedent as required by
18 the first subpart of the statute. *See* 42 U.S.C. § 12102(1). Federal regulations define "substantially
19 limits" as "[u]nable to perform a major life activity that the average person in the general
20 population can perform," or being "[s]ignificantly restricted as to the condition, manner or
21 duration under which an individual can perform a particular major life activity" as compared to the
22 average person. *E.E.O.C. v. United Parcel Serv., Inc.*, 306 F.3d 794, 801 (9th Cir. 2002) (citing 29
23 C.F.R. § 1630.2(j)(1)(i)-(ii)). In deciding whether a disability "substantially limits" a "major life
24 activity," relevant factors "that should be considered include '[t]he nature and severity of the
25 impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long-
26 term impact, or the expected permanent or long-term impact of or resulting from the impairment.'"

1 *Id.* (quoting 29 C.F.R. § 1630.2(j)(2)(i)-(iii)).

2 Here, Plaintiffs argue that they have adequately pled that the Decedent’s mental illness
3 “substantially limited” a major life activity of the Decedent because the Decedent “experience[ed]
4 mental and emotional distress at work, resulting in a significant disruption of a meeting.” Opp’n at
5 7; Compl. ¶ 3. Plaintiffs are correct that federal regulations define “working” as a “major life
6 activity.” *See* 42 U.S.C. § 12102(2)(A). However, Plaintiffs have not alleged that the Decedent’s
7 mental illness substantially limited the Decedent’s ability to perform at work as compared to the
8 average person; rather, Plaintiffs allege that the Decedent’s mental illness disrupted a *single*
9 meeting at work. Compl. ¶ 3. Where, as here, a plaintiff’s allegations “do not illuminate the
10 nature, severity, duration and impact of [the plaintiff’s] disability,” such allegations are
11 insufficient to “suggest that [the plaintiff] is substantially impaired by [the] purported disability.”
12 *Rodriguez v. John Muir Med. Ctr.*, No. C 09-0731 CW, 2010 WL 1002641, at *2 (N.D. Cal. Mar.
13 18, 2010) (dismissing with leave to amend allegation that plaintiff “had a disability involving her
14 back” which “impacted major life activities such as lifting,” because even though “lifting”
15 qualified as a major life activity under the ADA, plaintiff failed to allege sufficient facts to imply
16 she was “substantially impaired”); *United Parcel*, 306 F.3d at 801 (to determine if a disability
17 “substantially limits one or more major life activities,” courts should look at whether the plaintiff
18 is “[u]nable to perform a major life activity that the average person in the general population can
19 perform,” or whether the plaintiff is “[s]ignificantly restricted as to the condition, manner or
20 duration under which an individual can perform a particular major life activity” as compared to the
21 average person) (emphasis added); *see also Baker v. Roman Catholic Archdiocese of San Diego*,
22 No. 14CV0800 JM JMA, 2014 WL 7205738, at *4 (S.D. Cal. Dec. 17, 2014) (where a complaint
23 “borrows from 42 U.S.C. § 12102(a)(2)(A) (defining “major life activities” to include working
24 and “caring for oneself . . . seeing, hearing, eating, sleeping, walking, . . .”) to allege that major life
25 activities such as working, walking, and seeing were impacted by her disability” the complaint
26 “fails to state a claim.”). In their opposition, Plaintiffs argue that the Decedent’s “mental illness

1 substantially limited his ability to concentrate, think, communicate, and perform his job.” Opp’n a
2 7. However, this allegation appears nowhere in Plaintiffs’ Complaint.

3 As for the second subpart—whether the Decedent had “a record of [a physical or mental
4 impairment that substantially limits one or more major life activities],” § 12102(1)(B)—Plaintiffs
5 similarly fail to sufficiently allege that the Decedent had “a record of” physical or mental
6 impairment that substantially limited one or more of his major life activities. To allege a record of
7 physical or mental impairment, a plaintiff must allege with at least some factual detail what the
8 record of impairment is. *See Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir. 2002) (plaintiffs
9 sufficiently alleged they had a “record” of physical or mental impairment where plaintiffs alleged
10 that they were addicted to drugs in the past, that they have been rehabilitated, and that they no
11 longer use drugs). Here, Plaintiffs argue that they have sufficiently alleged that the Decedent had a
12 “record” of physical or mental impairment because Plaintiffs allege in the Complaint that the
13 Decedent has a “history” of mental illness. Opp’n at 7; Compl. ¶ 16. However, “vague and
14 conclusory allegations” are insufficient to state a claim under the ADA. *Ovitsky*, 2013 WL
15 4505832, at *3-4; *see also Twombly*, 550 U.S. at 555 (a “formulaic recitation of the elements of a
16 cause of action” do not satisfy a plaintiff’s pleading obligations). Plaintiffs must allege, with at
17 least some factual particularity, how the Decedent here had a “record” or “history” of physical or
18 mental impairment within the meaning of the ADA. *See Thompson*, 295 F.3d at 896.

19 For the foregoing reasons, Defendants’ motion to dismiss Plaintiffs’ fourth cause of action
20 is GRANTED. However, Plaintiffs could cure the deficiencies identified herein by including some
21 factual specificity as to Plaintiffs’ claim. Therefore, Plaintiffs are given leave to amend as to
22 Plaintiffs’ fourth cause of action. *See Lopez*, 203 F.3d at 1130 (district court should give leave to
23 amend if the pleading can be cured by the allegation of other facts) (internal quotation marks
24 omitted).

25 **C. Plaintiffs’ Claim for Violation of the Bane Act**

26 Defendants next move to dismiss Plaintiffs’ seventh cause of action brought for
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1 Defendants’ alleged violation of the Decedents’ rights under California Civil Code § 52.1, the
2 Bane Act (“Bane Act”). Plaintiffs’ seventh cause of action asserts a claim on behalf of Plaintiffs
3 under the Bane Act because of Defendants’ alleged violation of “[the Decedent’s] rights under the
4 Fourth and Fourteenth Amendments to the United States Constitution, the ADA, and Article I,
5 Sections 1, 7, and 13 of the California Constitution.” Compl. ¶ 83. In Defendants’ motion to
6 dismiss, Defendants argue that the Bane Act only provides a personal cause of action and is
7 therefore limited to “plaintiffs who have been the subject of” a violation of the Bane Act. Mot. at
8 7. Accordingly, Defendants argue that Plaintiffs cannot assert a violation of the Bane Act on
9 Plaintiffs’ behalf because of harm suffered by the Decedent.² *Id.*

10 The Bane Act provides in relevant part that a person may bring a cause of action “in his or
11 her own name and on his or her own behalf” against anyone who “interferes by threats,
12 intimidation or coercion, with the exercise or enjoyment” of any constitutional or statutory right.
13 Cal. Civ. Code § 52.1. However, “[t]he Bane Act is simply not a wrongful death provision. It
14 clearly provides for a *personal* cause of action for the victim of a hate crime.” *Bay Area Rapid*
15 *Transit Dist. v. Superior Court*, 38 Cal. App. 4th 141, 144 (1995) (“*BART*”) (emphasis in
16 original). A party lacks standing to bring a claim under the Bane Act when the party does not
17 claim to have personally suffered a violation of a constitutional or statutory right. *Id.* (finding
18 parents of decedent did not have standing to bring their own Bane Act claim because of
19 constitutional violations suffered by the decedent).

20 Here, in Plaintiffs’ seventh cause of action, Plaintiffs do not allege that they have suffered
21 a constitutional or statutory injury independent of the Decedent. *See* Compl. ¶ 83 (asserting claim
22 under the Bane Act for Defendants’ alleged violation of “[the Decedent’s] rights under the Fourth
23 and Fourteenth Amendments to the United States Constitution, the ADA, and Article I, Sections 1,
24 7, and 13 of the California Constitution.”). Accordingly, Plaintiffs lack standing to bring a claim
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26 ² Plaintiffs’ sixth cause of action is for a violation of the Bane Act brought by Bresaz as successor
27 in interest to the Decedent. Compl. ¶¶ 77-80. The sixth claim for relief is not at issue in
28 Defendants’ motion to dismiss.

1 under the Bane Act. *BART*, 38 Cal. App. 4th at 144.

2 Plaintiffs do not dispute that the seventh cause of action asserts a claim on Plaintiffs’
3 behalf for alleged constitutional and statutory violations suffered by the Decedent. Instead,
4 Plaintiffs argue that *BART* is no longer good law. Opp’n at 10. Specifically, Plaintiffs argue that
5 *BART* relied on one case in reaching its conclusion, *Boccatto v. City of Hermosa Beach*, 29 Cal.
6 App. 4th 1797 (1994), which was superseded by statute in 2000. Accordingly, Plaintiffs argue that
7 “*BART*’s reliance on *Boccatto* is no longer appropriate,” and that a “Bane Act claim is not merely a
8 ‘personal action,’ but one available to any party who otherwise meets the requirements of the Bane
9 Act.” Opp’n at 10.

10 Plaintiffs’ argument is not persuasive, for two reasons. First, Plaintiffs cite no authority,
11 and this Court located none, to support Plaintiffs’ argument that “any party who otherwise meets
12 the requirements of the Bane Act” can bring a claim under that statute. Nor do Plaintiffs cite any
13 authority for the argument that *BART* is no longer persuasive. To the contrary, the California
14 Courts of Appeal continue to treat *BART* as good law. *See, e.g., Navarette v. Tuttle*, No. B164474,
15 2005 WL 713789, at *5 (Cal. Ct. App. Mar. 30, 2005) (appellants, relatives of the decedent, did
16 not have standing to pursue a claim under the Bane Act for decedent’s death because “[t]he Bane
17 Act is simply not a wrongful death provision. It clearly provides for a *personal* cause of action for
18 the victim of a hate crime”) (quoting *BART*, 38 Cal. App. 4th at 144) (emphasis in original); *see*
19 *also LMN Co-Operative, Inc. v. Cnty. of Kern*, No. F061786, 2012 WL 1868932, at *4 (Cal. Ct.
20 App. May 23, 2012) (affirming lower court’s denial of class certification of a Bane Act claim, and
21 citing *BART*’s holding that the Bane Act “provides for a *personal* cause of action for the victim of
22 a hate crime.”) (emphasis in original). Absent convincing evidence to the contrary, the Court finds
23 the decision of the state Courts of Appeal persuasive on questions of state law. *See Vestar Dev. II,*
24 *LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) (holding that when interpreting
25 state law, if a state’s highest court has not decided the issue and “there is no convincing evidence
26 that the state supreme court would decide differently, a federal court is obligated to follow the
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1 decisions of the state’s intermediate appellate courts.”). Furthermore, district courts in California
2 continue to follow *BART*’s holding. *See, e.g., Medrano v. Kern Cnty. Sheriff’s Officer*, 921 F.
3 Supp. 2d 1009, 1016 (E.D. Cal. 2013) (plaintiffs, siblings of the decedent, “lack standing to bring
4 a claim under the Bane Act on their own behalf”) (citing *BART*, 38 Cal. App. 4th at 144).

5 Second, Plaintiffs overstate the *BART* court’s reliance on *Boccatto*. The *BART* court does
6 indeed cite to *Boccatto* to support the proposition that “the rational interpretation of the Bane Act”
7 is that “it is limited to plaintiffs who themselves have been subject of violence or threats.” *BART*,
8 38 Cal. App. 4th at 144 (citing *Boccatto*, 29 Cal. App. 4th at 1809). However, the *BART* court in
9 reaching its decision also cites the plain language of the Bane Act, as well as policy reasons for
10 why standing under the Bane Act should be limited to those who personally experience a
11 violation. *Id.* at 144 (citing and quoting Bane Act that a person may bring a cause of action “in his
12 or her own name and on his or her own behalf”); *id.* at 144-45 (declining to extend standing under
13 the Bane Act to those who do not personally experience a constitutional violation because “one
14 could see the nightmare of trying to determine where the scope and extent of such liability would
15 end”). Therefore, Plaintiffs err when they argue that “*BART* only relied upon *Boccatto v. City of*
16 *Hermosa Beach*.” Opp’n at 10 (emphasis added).

17 For the reasons stated above, Defendants’ motion to dismiss Plaintiffs’ seventh cause of
18 action is GRANTED. Moreover, because Plaintiffs’ seventh cause of action is barred as a matter
19 of law, granting Plaintiffs leave to amend would be futile. Therefore, Plaintiffs’ seventh cause of
20 action is dismissed without leave to amend. *See Lopez*, 203 F.3d at 1130 (court may dismiss claim
21 without leave to amend where “pleading could not possibly be cured by the allegation of other
22 facts.”) (internal quotation marks omitted).

23 **D. Bresaz’s Claim as Successor in Interest to Decedent for Intentional and Negligent**
24 **Infliction of Emotional Distress**

25 Defendants next move to dismiss Bresaz’s eighth and tenth causes of action for intentional
26 and negligent infliction of emotional distress respectively, brought pursuant to California Code of
27 Civil Procedure § 377.30. Bresaz asserts these two claims as successor-in-interest to the Decedent.

1 Compl. ¶ 86 (claim for intentional infliction of emotional distress brought by Bresaz “in her
2 capacity as the Successor in Interest to [the Decedent]”); *id.* ¶ 98 (same, for claim for negligent
3 infliction of emotional distress). Defendants argue that where, as here, an estate brings a cause of
4 action pursuant to California Code of Civil Procedure § 377.30 to recover for the emotional
5 distress of a decedent, such a cause of action is barred by Code of Civil Procedure § 377.34. Mot.
6 at 7-8. Section 377.34 provides that when a survivor action is brought by a decedent’s successor in
7 interest, “the damages recoverable . . . do not include damages for pain, suffering, or
8 disfigurement.” Cal. Civ. Proc. Code § 377.34.

9 Plaintiffs respond to Defendants’ motion by arguing that district courts in this Circuit have
10 held that § 377.34 does not preclude Plaintiffs who bring a claim under 42 U.S.C. § 1983 from
11 recovering damages for the intentional and negligent infliction of emotional distress. *See* Opp’n at
12 13 (“Within this district, courts have recognized the availability of emotional distress damages in
13 survival actions, particularly those involving Section 1983 excessive force claims.”). Accordingly,
14 because Plaintiffs argue they may be able to recover damages for emotional distress under
15 Plaintiffs’ § 1983 claims, Plaintiffs contend they “should be permitted to recover emotional
16 distress damages on [the Decedent’s] behalf under state law as well.” Opp’n at 13.

17 The Court notes that there is a split of authority among California district courts on the
18 question of whether California Code of Civil Procedure § 377.34 prohibits an estate from
19 recovering emotional distress damages for a § 1983 claim brought on behalf of a decedent.
20 *Compare Cotton v. City of Eureka*, 860 F. Supp. 2d 999, 1014 (N.D. Cal. 2012) (holding that
21 plaintiffs who brought cause of action under § 1983 could recover for the decedent’s emotional
22 distress notwithstanding Code of Civil Procedure § 377.34 because “[a]t bottom, the Court finds
23 that application of California’s prohibition on the recovery of damages for pain and suffering in
24 survival actions is inconsistent with § 1983”), *with Venerable v. City of Sacramento*, 185 F. Supp.
25 2d 1128, 1133 (E.D. Cal. 2002) (dismissing claim for damages under § 1983 for a decedent’s
26 emotional distress because “state law does not permit recovery of a decedent’s pain and
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1 suffering”). However, the Court need not reach this question because this is not the issue raised in
 2 Defendants’ motion to dismiss. Rather, Defendants have only moved to dismiss Plaintiffs’ eighth
 3 and tenth causes of action on the grounds that these claims are improperly brought under
 4 *California Code of Civil Procedure* § 377.30. Mot. at 8; *see also* Compl. ¶ 86 (Plaintiffs’ eighth
 5 cause of action asserting claim for intentional infliction of emotional distress “pursuant to Cal.
 6 Code Civ. Proc. § 377.30”); *id.* ¶ 98 (Plaintiffs’ tenth cause of action asserting claim for negligent
 7 infliction of emotional distress “pursuant to Cal. Code Civ. Proc. § 377.30”).

8 California Code of Civil Procedure § 377.30 provides that “[a] cause of action that
 9 survives the death of the person entitled to commence an action or proceeding passes to the
 10 decedent’s successor in interest.” Cal. Civ. Proc. Code. § 377.30. However, the Code of Civil
 11 Procedure separately provides that when an action is brought by a decedent’s successor in interest,
 12 “the damages recoverable . . . *do not include damages for pain, suffering, or disfigurement.*” *Id.*
 13 § 377.34 (emphasis added). The Ninth Circuit has held that where the estate of a decedent brings
 14 tort claims under state law for the intentional and negligent infliction of emotional distress of the
 15 decedent, § 377.34 “clearly precludes recovery of emotional distress damages.” *Martin v. Cal.*
 16 *Dept. of Veterans Affairs*, 560 F.3d 1042, 1050-51 (9th Cir. 2009). Moreover, Plaintiffs cite no
 17 case, and this Court located none, that held that an estate may properly bring a cause of action
 18 under Code of Civil Procedure § 377.30 to recover for a decedent’s emotional distress simply
 19 because the estate also brings separate causes of action under § 1983.³

21 ³ All the cases Plaintiffs cite in their opposition involve the separate question of whether an estate
 22 may recover damages for the emotional distress of the decedent under a claim brought pursuant to
 23 42 U.S.C. § 1983. *See Cotton*, 860 F. Supp. 2d 999, 1010-11 (discussing admissibility of evidence
 24 of decedent’s pain and suffering to determine Plaintiffs’ damages under § 1983 claim); *Williams v.*
 25 *City of Oakland*, 915 F. Supp. 1074, 1075 (N.D. Cal. 1996) (discussing “whether pain and
 26 suffering damages, which do not survive under California law, are nonetheless available to
 27 survivors in a civil rights action under section 1983”); *T.D.W. v. Riverside County*, Case No.
 28 EDCV 08-232 CAS (JWJx), 2009 WL 2252072, at *5-7 (C.D. Cal. July 27, 2009) (denying
 Defendants’ motion in limine to exclude evidence of decedent’s pain and suffering to establish
 damages for estate’s § 1983 action); *Hirschfield v. San Diego Unified Port Dist.*, Case No. 08-CV-
 2103 BTM (NLS), 2009 WL 3248101, at *3-4 (S.D. Cal. Oct. 8, 2009) (permitting plaintiffs to
 amend complaint to add damages claim for decedent’s pain and suffering under § 1983 cause of
 action); *Guerrero v. County of San Benito*, No. C 08-0307 PVT, 2009 WL 4251435, at *5-6 (N.D.

1 Therefore, Defendants’ motion to dismiss Plaintiffs’ eighth and tenth causes of action is
2 GRANTED. Moreover, because Plaintiffs’ eighth and tenth causes of action are barred as a matter
3 of law, granting Plaintiffs leave to amend would be futile. Accordingly, Plaintiffs’ eighth and tenth
4 causes of action are dismissed without leave to amend. *See Lopez*, 203 F.3d at 1130 (court may
5 dismiss claim without leave to amend where “pleading could not possibly be cured by the
6 allegation of other facts.”) (internal quotation marks omitted).

7 **E. Marshall’s Claim for Negligent Infliction of Emotional Distress**

8 Finally, Defendants move to dismiss Marshall’s claim for negligent infliction of emotional
9 distress. Mot. at 9. Defendants argue that under California law only a relative of a victim who is
10 contemporaneously aware that an incident has caused injury to the victim can recover for
11 emotional distress. *Id.* Defendants further argue that because Marshall was not physically present
12 at the scene of the Decedent’s shooting, Marshall “could not have known that his son was shot
13 unless someone told him after the fact.” Reply at 9. Plaintiffs rebut that Marshall has adequately
14 alleged that Marshall was contemporaneously aware that the Decedent was shot at the time the
15 incident occurred. Opp’n at 14-15.

16 In California, damages for a plaintiff-bystander’s emotional distress are recoverable only if
17 the plaintiff: “(1) is closely related to the injury victim, (2) is present at the scene of the injury-
18 producing event at the time it occurs and is then aware that it is causing injury to the victim and,
19 (3) as a result suffers emotional distress.” *Thing v. La Chusa*, 48 Cal. 3d 644, 668-69 (1989). Here,
20 Defendants argue that only the second factor—that the plaintiff must be “present at the scene of
21 the injury-producing event at the time it occurs and is then aware that it is causing injury to the
22 victim”—bars Marshall’s recovery. Mot. at 9.

23 California courts have described the second *Thing* requirement as mandating that the
24 plaintiff be “a percipient witness to the traumatic incident and was contemporaneously aware the
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26 Cal. Nov. 23, 2009) (finding that plaintiff could bring claim for damages under § 1983 for
27 decedent’s pain and suffering). Because Defendants have not moved to dismiss any claim for
28 emotional distress damages Plaintiffs might bring pursuant to § 1983, these cases are inapposite.

1 event was causing injury to the victim.” *Ra v. Superior Court*, 154 Cal. App. 4th 142, 148-49
 2 (2007); *Golstein v. Superior Court*, 223 Cal. App. 3d 1415, 1427 (1990) (recovery for emotional
 3 distress “should be limited by [the] more stringent definition of the requirement of
 4 *contemporaneous observance of event and injury.*”) (emphasis added). “[A] plaintiff may establish
 5 presence at the scene through non-visual sensory perception.” *Ra*, 154 Cal. App. 4th at 149; *In re*
 6 *Air Crash Disaster Near Cerritos, Calif.*, 967 F.2d 1421, 1424 (9th Cir. 1992) (under California
 7 law to recover for emotional distress, a plaintiff ““need not visually perceive the injury while it is
 8 being inflicted.””) (quoting *Wilks v. Hom*, 2 Cal. App. 4th 1264, 1269 (1992)). Indeed, “[a]
 9 plaintiff may recover based on an event perceived by other senses so long as the event is
 10 contemporaneously understood as causing injury to a close relative.” *Bird v. Saenz*, 28 Cal. 4th
 11 910, 916 (2002).

12 For instance, in *Haddox v. City of Fresno*, police pulled over a car and verbally warned the
 13 occupants of the vehicle that “Whoever moves will get shot.” No. 07-CV-00241-OWW-SMS,
 14 2008 WL 53244, at *1 (E.D. Cal. Jan. 2, 2008), *abrogated on other grounds as stated in Sanchez*
 15 *v. City of Fresno*, 914 F. Supp. 2d 1079, 1097 n.7 (E.D. Cal. 2012) (noting that *Haddox*’s
 16 statement of the pleading standard in deciding a Rule 12(b)(6) motion pre-dated *Ashcroft v. Iqbal*,
 17 556 U.S. 662 (2009)). At that time, the mother of one of the passengers in the vehicle was on the
 18 phone with one of the passengers of the car. *Id.* The mother heard a policeman shout, “If you drop
 19 your hands you will be shot” directed at the mother’s child. *Id.* The *Haddox* court held that the
 20 mother adequately stated a claim for the negligent infliction of emotional distress because she
 21 alleged, *inter alia*, that she “observe[d] an injury-producing event in progress” by hearing it over
 22 the phone. *Id.* at *13.

23 Here, Plaintiffs allege that Groba shot the Decedent “while Dr. Marshall was still on the
 24 phone with the second paramedic” at the scene. Compl. ¶ 28. Plaintiffs further allege that Marshall
 25 “contemporaneously heard [the] gun shot at the scene and [the Decedent’s] resultant cries of
 26 pain.” *Id.* ¶ 106. Plaintiffs also allege that Marshall “contemporaneously . . . was aware that [the
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1 Decedent] had been seriously injured.” *Id.* Accordingly, Plaintiffs have alleged sufficient facts
2 from which this Court can infer that Marshall was “a percipient witness to the traumatic incident
3 and was contemporaneously aware the event was causing injury to the victim.” *Ra*, 154 Cal. App.
4 4th at 148-49. This satisfies the second *Thing* requirement to state a claim for recovery for the
5 infliction of emotional distress. *Thing*, 48 Cal. 3d at 667-68 (for bystander to claim damages for
6 emotional distress, bystander must, *inter alia*, be “present at the scene of the injury-producing
7 event at the time it occurs and is then aware that it is causing injury to the victim”).

8 In Defendants’ reply, Defendants concede that Marshall may “establish presence at the
9 scene through non-visual sensory perception.” *Id.* at 9. Nevertheless, Defendants argue that
10 Marshall cannot prove that he was contemporaneously aware that Groba had shot the Decedent
11 because Marshall “was not present at the scene and could not have known that his son was shot
12 unless someone told him after the fact.” *Id.* However, in ruling on a Rule 12(b)(6) motion, the
13 Court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the
14 light most favorable to the nonmoving party.” *Manzarek*, 519 F.3d at 1031. Here, Plaintiffs’ allege
15 that at the time of the incident Marshall was on the phone with a paramedic at the scene, that
16 Marshall contemporaneously heard the gunshot and the Decedent’s resultant cries in pain, and that
17 Marshall contemporaneously “was aware that [the Decedent] had been seriously injured.” Compl.
18 ¶ 106. Accepting these allegations as true and drawing all inferences in Plaintiffs’ favor, *see*
19 *Manzarek*, 519 F.3d at 1031, Plaintiffs’ have sufficiently alleged a claim for the negligent
20 infliction of emotional distress. Accordingly, Defendants’ motion to dismiss Plaintiffs’ eleventh
21 cause of action is DENIED.

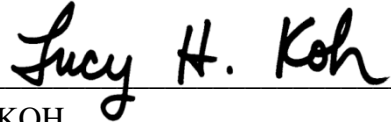
22 **IV. CONCLUSION**

23 Defendants’ motion to dismiss Plaintiffs’ seventh, eighth, and tenth causes of action is
24 GRANTED without leave to amend. Defendants’ motion to dismiss Plaintiffs’ fourth cause of
25 action is GRANTED with leave to amend. Defendant’s motion to dismiss is otherwise DENIED.
26 Should Plaintiffs elect to file an amended complaint to cure the deficiencies identified herein, they
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1 shall do so within thirty (30) days of the date of this Order. Failure to meet the thirty-day deadline to
2 file an amended complaint, or failure to cure the deficiencies identified in this Order, will result in a
3 dismissal with prejudice. Plaintiffs may not add new parties without leave of the Court or stipulation of
4 the parties pursuant to Federal Rule of Civil Procedure 15.

5 **IT IS SO ORDERED.**

6 Dated: March 17, 2015



LUCY H. KOH
United States District Judge

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