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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 16-cv-2989-WQH-MDD

ESTATE OF TIMOTHY GENE SMITH, by his successor in interest WYATT ALLEN GUNNER SMITH; SANDY LYNN SIMMONS; and WYATT ALLEN GUNNER SMITH,  
Plaintiffs,

**ORDER**

v.

CITY OF SAN DIEGO; SCOTT HOLSLAG; NATALIE ANN MACEY d/b/a MACEY BAIL BONDS; LEGAL SERVICE BUREAU, INC. d/b/a GLOBAL FUGITIVE RECOVERY; and DAN ESCAMILLA, as an individual and on behalf of LEGAL SERVICE BUREAU, INC.,  
Defendants.

HAYES, Judge:

The matters before the Court are the Motion to Dismiss Plaintiffs' Second Amended Complaint and Request for Related Relief (ECF No. 99) and the Motion to File Documents Under Seal (ECF No. 100) filed by Defendants City of San Diego and Scott Holslag.

1 **I. Background**

2 On December 8, 2016, this action was initiated by the filing of the Complaint (ECF  
3 No. 1). On December 29, 2016, a First Amended Complaint (the “FAC”) (ECF No. 7) was  
4 filed. The FAC brought claims stemming from an incident during which Smith was  
5 allegedly shot and killed by Holslag and other officers. FAC at ¶ 40. The FAC brought a  
6 number of claims including claims against Defendant Scott Holslag for violating the Fourth  
7 and Fourteenth Amendments; claims against Defendant City of San Diego for a *Monell*  
8 violation, failure to train, and failure to supervise; and a claim against Holslag and the City  
9 of San Diego under California Civil Code § 52.1. (ECF No. 7 at 11–18).

10 On February 9, 2017, Holslag filed a Motion to Dismiss five of the claims against  
11 him, including the claim brought under California Civil Code § 52.1 and the claims for  
12 violations of the Fourth and Fourteenth Amendments. (ECF No. 16). On the same day,  
13 the City of San Diego filed a Motion to Dismiss the claims brought against it for a *Monell*  
14 violation, failure to train, and failure to supervise, as well as the claim brought under  
15 California Civil Code § 52.1. (ECF No. 17). On July 13, 2017, the Court issued an Order  
16 denying Holslag’s Motion to Dismiss and granting the City of San Diego’s. (ECF No. 44).  
17 The Court concluded (1) “that the facts alleged in the [FAC] and the reasonable inferences  
18 from those facts support a claim that the use of deadly force was not reasonable under the  
19 circumstances,” (2) that “[t]he facts alleged do not support the inference that Smith posed  
20 an immediate threat to the safety of police officers or the public justifying the use of deadly  
21 force as a matter of law,” and (3) “that the right at issue was clearly established.” *Id.* at 6.

22 On March 9, 2018, Plaintiffs Sandy Lynn Simmons, Wyatt Allen Gunner Smith, and  
23 the Estate of Timothy Gene Smith (acting through his successor in interest Wyatt Allen  
24 Gunner Smith) filed a Second Amended Complaint (ECF No. 96) (the “SAC”). The SAC  
25 brings claims against Holslag for violations of the Fourth and Fourteenth Amendments and  
26 claims against both Holslag and the City of San Diego for battery and wrongful death.  
27 SAC at 9–13. The SAC also brings a claim against Holslag and the City of San Diego  
28 under California Civil Code § 52.1. SAC at 11.

1 On March 23, 2018, the City of San Diego and Scott Holslag (together, the “City  
2 Defendants”) filed a Motion to Dismiss Plaintiffs’ Second Amended Complaint and  
3 Request for Related Relief (ECF No. 99) (the “City Defendants’ Motion”). In support of  
4 their Motion, the City Defendants lodged twenty-seven videos (the “Videos”) and eleven  
5 transcripts of certain Videos (the “Transcripts”). See ECF Nos. 100, 101. The City  
6 Defendants also filed a Motion to Seal the Videos and the Transcripts. (ECF No. 100). On  
7 March 26, 2018, Plaintiffs filed an Opposition to the Motion to Seal. (ECF No. 105). On  
8 June 11, 2018, Plaintiffs filed a Response to the City Defendants’ Motion. (ECF No. 118).  
9 On July 2, 2018, the City Defendants filed a Reply to the Plaintiffs’ Response. (ECF  
10 No. 119). On July 24, 2018, the Court held oral argument on the City Defendants’ Motion  
11 as well as the Motion to Seal the Videos and Transcripts. (ECF No. 123).

## 12 **II. Motion to Seal**

13 The City Defendants state that the Videos come from the body-worn cameras of  
14 officers at the scene of the events underlying Plaintiffs’ claims, as well as an ABEL video  
15 filmed from a helicopter that was also present at the scene. (ECF No. 99-1 at 16). The  
16 City Defendants state that the Videos “document[] the arrival of the Officers to include  
17 Holslag to the scene, the use of verbal warnings prior to the use of force, Smith’s actions  
18 prior to the use of force, the events leading up to the use of force, and the events that  
19 occurred afterward.” *Id.*

20 The City Defendants contend that compelling reasons exist to seal the Videos and  
21 the Transcripts considering the Videos and the Transcripts:

- 22 1. contain private, confidential information about Timothy Smith, including  
23 information related to his identity and death;
- 24 2. “may and/or do contain the confidential, private information of members of the  
25 public and/or SDPD Officers to include specific information regarding their  
26 identities, badge numbers, and/or addresses”; and  
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1 3. “contain privileged Official Information acquired in confidence by a police officer  
2 in the course of his duty that was not open, or officially disclosed, to the public prior  
3 to the time the claim of privilege was made.”

4 (ECF No. 100-2 at 5).

5 Plaintiffs contend that the City Defendants have not articulated a compelling reason  
6 to seal the Videos and the Transcripts. (ECF No. 105 at 5–6). Plaintiffs contend that  
7 counsel for the Estate of Timothy Smith is in the best position to protect Timothy Smith’s  
8 interests, and that Timothy Smith has no interest in sealing the Videos and the Transcripts.  
9 *Id.* Plaintiffs contend that “[t]he claim that the identities of the officers may be revealed is  
10 of no moment here [because] Holslag is named as a defendant [and t]he other officers’  
11 identities have been revealed by Defendants themselves in their own pleadings.” *Id.* at 6.  
12 Plaintiffs contend that “no prejudice can come from the revelation of a badge number” and  
13 that “[t]here are no addresses of any of the officers in the sealed materials.” *Id.* Plaintiffs  
14 contend that the City Defendants’ arguments in favor of sealing the Videos and the  
15 Transcripts “is particularly frivolous” because the Office of the District Attorney already  
16 disclosed to the public the ABEL video and the name of the officer who shot Timothy  
17 Smith. *Id.* Plaintiffs contend that “[t]he death of Mr. Smith, and this litigation, is precisely  
18 the type of significant public event that warrants the most vigorous protection of the  
19 public’s right of access to judicial records and proceedings.” *Id.* at 4–5.

20 “Historically, courts have recognized a ‘general right to inspect and copy public  
21 records and documents, including judicial records and documents.’” *Kamakana v. City  
22 and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner  
23 Communs., Inc.*, 435 U.S. 589, 597 n.7 (1978)). The proponent of a motion to seal “bears  
24 the burden of overcoming this strong presumption by meeting the compelling reasons  
25 standard.” *Id.* at 1178 (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135  
26 (9th Cir. 2003)). To fulfill its burden, the moving party “must articulate compelling reasons  
27 supported by specific factual findings . . . that outweigh the general history of access and  
28 the public policies favoring disclosure . . . .” *Id.* at 1179 (citations and quotation marks

1 omitted). The presumed right of access to court proceedings and documents can be  
2 overcome “only by an overriding right or interest ‘based on findings that closure is essential  
3 to preserve higher values and is narrowly tailored to serve that interest.’” *Oregonian*  
4 *Publishing Co. v. United States District Court*, 920 F.2d 1462, 1465 (9th Cir. 1990)  
5 (quoting *Press-Enterprise Co. v. Superior Court*, 446 U.S. 501, 510 (1985)).

6 “Under the compelling reasons standard, the district court must weigh ‘relevant  
7 factors,’ base its decision ‘on a compelling reason,’ and ‘articulate the factual basis for its  
8 ruling, without relying on hypothesis or conjecture.’” *Pintos v. Pacific Creditors Ass’n*,  
9 605 F.3d 665, 679 (9th Cir. 2010) (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th  
10 Cir. 1995)). “‘Relevant factors’ include the ‘public interest in understanding the judicial  
11 process and whether disclosures of the material could result in improper use of the material  
12 for scandalous or libelous purposes or infringement upon trade secrets.’” *Id.* at 659 n.6  
13 (citing *Hagestad*, 49 F.3d at 1434); *see also Kamakana*, 447 F.3d at 1179 (“In general,  
14 ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify  
15 sealing court records exist when such ‘court files might have become a vehicle for improper  
16 purposes,’ such as the use of records to gratify private spite, promote public scandal,  
17 circulate libelous statements, or release trade secrets.”). When allowing public access to  
18 judicial record would “promot[e] the public’s understanding . . . of [a] significant public  
19 event[,],” that fact weighs against sealing the judicial record. *Valley Broad. Co. v. U.S.*  
20 *Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1294 (9th Cir. 1986).

21 The Court finds that the City Defendants have not articulated a compelling reason  
22 that would outweigh the public’s interest in disclosure of the Videos and the Transcripts or  
23 justify sealing the Videos and the Transcripts. Accordingly, the Motion to Seal (ECF No.  
24 100) is denied. *See Kamakana*, 447 F.3d at 1179.

### 25 **III. The Videos and the Transcripts**

26 The City Defendants request that the Court consider the Videos and the Transcripts  
27 without converting their Motion into a motion for summary judgment. (ECF No. 99 at 3).  
28 Plaintiffs contend that the Court should not consider the Videos and the Transcripts when

1 analyzing the City Defendants’ Motion under Federal Rule of Civil Procedure (“Rule”)  
2 12(b)(6) because the SAC does not necessarily rely on the Videos or the Transcripts. (ECF  
3 No. 118 at 5). The City Defendants contend that the SAC does necessarily rely on the  
4 Videos and the Transcripts because they depict the events that form the basis of the  
5 Plaintiffs’ claims. (ECF No. 119 at 3).

6 Courts “are permitted to consider documents that were not physically attached to the  
7 complaint where the documents’ authenticity is not contested, and the plaintiff’s complaint  
8 necessarily relies on them.” *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013). In  
9 *Sams v. Yahoo! Inc.*, the plaintiff claimed that disclosures that Yahoo! had made in  
10 response to two grand jury subpoenas from a Georgia District Attorney’s Office were  
11 unlawful because the subpoenas failed to comply with the requirements of Georgia law.  
12 *Id.* at 1178. The Ninth Circuit Court of Appeals held that it could consider the subpoenas  
13 themselves when ruling on Yahoo!’s motion to dismiss “[b]ecause the subpoenas [we]re  
14 critical to [the] lawsuit[] and there [wa]s no factual dispute as to their contents.” *Id.* at 1179.

15 A complaint necessarily relies on a piece of evidence when the piece of evidence  
16 itself is indispensable to a claim in the complaint. *See Sams*, 713 F.3d at 1178–79  
17 (considering two subpoenas when deciding a motion to dismiss where the plaintiff’s claim  
18 was that the subpoenas themselves were unlawful). A complaint does not necessarily rely  
19 on every piece of evidence that depicts the events forming the basis of the claims in the  
20 complaint. In this case, neither the Videos nor the Transcripts are an indispensable part of  
21 Plaintiffs’ claims; they are evidence of the events underlying Plaintiffs’ claims.  
22 Consequently, the SAC does not necessarily rely on the Videos or the Transcripts, and the  
23 Court may not consider the Videos or the Transcripts when analyzing the City Defendants’  
24 Motion under Rule 12(b)(6). *See id.*; *but see Covert v. City of San Diego*, No. 15CV2097  
25 AJB (WVG), 2017 WL 1094020, at \*5 (S.D. Cal. Mar. 23, 2017) (considering a video of  
26 the events underlying an excessive force claim, as well as a transcript of that video); *Lihosit*  
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1 v. *Flam*, No. CV-15-01224-PHX-NVW, 2016 WL 2865870, at \*3–4 (D. Ariz. May 17,  
2 2016) (same).<sup>1</sup>

### 3 **IV. Discussion**

4 The City Defendants contend that Smith fled the police into public areas of Pacific  
5 Beach, ignored police commands, ignored verbal warnings, ignored other uses of force  
6 including a K-9 unit, obtained a dangerous vantage point above Holslag and other officers  
7 by jumping up on a ledge above an alley way, and reached into his pockets prior to Holslag  
8 using force on Smith. (ECF No. 99-1 at 28). The City Defendants contend that Holslag is  
9 entitled to qualified immunity because “[t]here is no case law precedent that clearly  
10 establishes that an officer confronted with these unique facts would be committing  
11 unlawful or [un]constitutional conduct by using deadly force.” *Id.* at 30. The City  
12 Defendants contend that Holslag’s actions were reasonable and therefore Plaintiffs’ Fourth  
13 Amendment, battery, and wrongful death claims fail. *Id.* at 33–34. The City Defendants  
14 contend that Plaintiffs’ claim under the Fourteenth Amendment fails because the factual  
15 circumstances surrounding Holslag’s use of force demonstrate that he had a legitimate law  
16 enforcement objective at the time of the incident. *Id.* at 30. The City Defendants contend  
17 that Plaintiffs’ claim under California Civil Code § 52.1 fails because “[t]he SAC fails to  
18 allege any facts which would indicate threats, intimidation, and coercion independent from  
19 the intimidation and coercion inherent in the alleged use of force.” *Id.* at 33 (emphasis  
20 omitted).

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24 <sup>1</sup> The City Defendants request that the Court convert their Motion into a motion for summary judgment  
25 if the Court concludes that it may not consider the Videos and Transcripts when analyzing the Motion  
26 under Rule 12(b)(6). (ECF No. 99 at 4). The Court declines to convert the City Defendants’ Motion into  
27 a motion for summary judgment. *See Advanced Steel Recovery, LLC v. X-Body Equip., Inc.*, No.  
28 216CV00148KJMEFB, 2016 WL 4192439, at \*3 (E.D. Cal. Aug. 9, 2016) (“Given the early stage of this  
case, the lack of discovery, and the sparse record before the court, the court declines to convert defendants’  
Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment.”).

1 Plaintiffs contend that the City Defendants made all of these arguments in their  
2 Motions to Dismiss the FAC. ECF No. 118 at 9–10 (citing ECF Nos. 16 and 17). Plaintiffs  
3 contend that the Court rejected these arguments in its Order denying Holslag’s Motion to  
4 Dismiss the FAC and granting the City’s Motions to Dismiss the FAC. *Id.* (citing ECF No.  
5 44). Plaintiffs contend that the FAC and the SAC are “nearly identical.” *Id.*

6 The City Defendants do not dispute that the arguments in the Motion before the  
7 Court were made in Holslag’s Motions to Dismiss the FAC, or that the Court rejected them.  
8 *See* ECF No. 119 at 7. However, the City Defendants contend that the Court should grant  
9 their most recent Motion because the allegations in the SAC are materially different from  
10 those in the FAC and because there has been a shift in the law on qualified immunity since  
11 the Court issued its Order denying the Motions to Dismiss the FAC. *Id.*

12 The Court finds that the differences in the material allegations in the SAC and the  
13 FAC do not justify reconsidering the Court’s disposition of the arguments raised in  
14 Holslag’s Motion to Dismiss the FAC and again in the Motion before the Court. *Compare*  
15 the FAC *and* the SAC.

16 The City Defendants’ contention that there has been a shift in the law on qualified  
17 immunity is based on two cases: *S.B. v. Cty. of San Diego*, 864 F.3d 1010 (9th Cir. 2017)  
18 and *Kisela v. Hughes*, 138 S. Ct. 1148 (2018). *S.B.*, however, was decided before the Court  
19 issued the Order on the Motions to Dismiss the FAC. *Compare S.B.*, 864 F.3d 1010  
20 (decided on May 12, 2017) *and* ECF No. 44 (issued on July 13, 2017). The City  
21 Defendants contend that *Kisela* changed the law concerning qualified immunity by  
22 establishing that courts cannot “define clearly established law at a high level of generality.”  
23 ECF No. 119 at 5–6 (citing *Kisela*, 138 S. Ct. at 1152). However, *Kisela* cited two cases  
24 for that proposition that were decided well before the Court issued its Order on the Motions  
25 to Dismiss the FAC: *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1776  
26 (2015) and *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). The Court finds that there has  
27 been no change in controlling law that would justify reconsidering the Court’s disposition  
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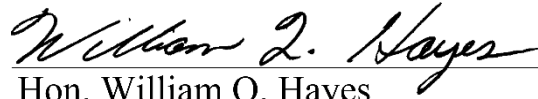


1 of the arguments raised in Holslag's Motions to Dismiss the FAC and again in the Motion  
2 before the court.

3 **V. Conclusion**

4 The Motion to Dismiss Plaintiffs' Second Amended Complaint and Request for  
5 Related Relief (ECF No. 99) and the Motion to File Documents Under Seal (ECF No. 100)  
6 are both DENIED.

7 Dated: August 3, 2018

  
8 Hon. William Q. Hayes  
9 United States District Court

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