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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

Estate of TIMOTHY GENE SMITH,  
deceased, by his successor in interest  
JANIE RICHELLE SANDERS;  
JANIE RICHELLE SANDERS, as an  
individual; SANDY LYNN  
SIMMONS; and WYATT ALLEN  
GUNNER SMITH,

Plaintiffs,

v.

CITY OF SAN DIEGO; SHELLEY  
ZIMMERMAN AND SCOTT  
HOLSLAG, as individuals and  
employees of City of San Diego;  
NATALIE ANN MACEY, as an  
individual doing business as Macey  
Bail Bonds; LEGAL SERVICE  
BUREAU, Inc., a California domestic  
corporation doing business as Global  
Fugitive Recovery; DAN  
ESCAMILLA, as an individual and on  
behalf of Legal Service Bureau, Inc.;  
LELAND CHAPMAN BAIL BOND  
CO. INC., a Colorado corporation;  
LBC, Inc., a Hawaii corporation;  
KAMA AINA BAIL BONDS, INC., a  
Hawaii corporation; LELAND B.  
CHAPMAN, as an individual and on  
behalf of Leland Chapman Bail Bond  
Co. Inc., LBC, Inc., and Kama Aina  
Bail Bonds, Inc.,

Defendants.

CASE NO. 16cv2989-WQH-MDD

ORDER

HAYES, Judge:

The following motions are pending before the Court: 1) Defendant Scott  
Holslag’s motion to dismiss the first amended complaint (ECF No. 16), 2) Defendants

1 City of San Diego and Shelley Zimmerman’s motion to dismiss the first amended  
2 complaint (ECF No. 17), and 3) Defendant Natalie Ann Macey’s motion to dismiss the  
3 first amended complaint (ECF No. 23).

#### 4 **BACKGROUND**

5 On December 8, 2016, the Estate of Timothy Gene Smith; Janie Sanders, the  
6 surviving spouse of Timothy Smith; Sandy Simmons, the mother of Timothy Smith;  
7 and Wyatt Smith, the son of Timothy Smith initiated this action by filing a complaint.  
8 (ECF No. 1). On December 29, 2016, Plaintiffs filed the First Amended Complaint  
9 (hereinafter “the complaint”) alleging constitutional violations pursuant to 42 U.S.C.  
10 § 1983 and state law claims against Defendant Police Officer Scott Holstag for the  
11 unconstitutional use of deadly force; against Defendants City of San Diego and Shelley  
12 Zimmerman for failure to properly train, supervise and discipline police officers; and  
13 against other named defendants for conspiracy to violate civil rights (ECF No. 7).

14 On February 9, 2017, Defendant Scott Holstag filed a motion to dismiss  
15 Plaintiff’s first amended Complaint. (ECF No. 16).

16 On February 9, 2017, Defendants City of San Diego and Shelley Zimmerman  
17 filed a motion to dismiss Plaintiff’s first amended Complaint. (ECF No. 17).

18 On March 3, 2017, Defendant Natalie Macey filed a motion to dismiss Plaintiff’s  
19 first amended Complaint. (ECF No. 23).

20 Plaintiff filed responses in opposition to all motions to dismiss (ECF Nos. 26,  
21 30).

#### 22 **ALLEGATIONS OF THE COMPLAINT**

23 On November 4, 2015, decedent Timothy Smith was with Janie Sanders, his wife,  
24 in the Pacific Beach area of San Diego. At the time, Sanders was on bail for minor,  
25 non-violent drug possession charges pending in the State of Missouri. Defendant  
26 Natalie Ann Macey, d/b/a/ Macey Bail Bonds, had posted bail in Missouri on behalf of  
27 Sanders in the amount of \$7500. Sanders and Smith left Missouri to visit Smith’s sister  
28 in San Diego.

1 Macey hired Defendants Escamilla, Legal Services Bureau, Leland Chapman Bail  
2 Bonds Co., and/or Kama Aina Bail Bonds (hereinafter referred to as “hired bondsmen”)  
3 to apprehend Sanders. Smith had not committed any crime in California and was not  
4 wanted for any crime in California.

5 Macey and the hired bondsmen in an intentional and malicious effort to  
6 apprehend Sanders fabricated false information about past violent activity of both  
7 Sanders and Smith, including acts of violence, assault, weapons possession, and child  
8 molestation. These defendants printed and distributed “WANTED” posters throughout  
9 San Diego which contained this false information and photos of Sanders and Smith.

10 On November 4, 2015, two officers of the San Diego Police Department saw  
11 Smith exiting a store in the Pacific Beach area. Smith was wearing tan shorts and no  
12 shirt. The officers gave chase and Smith fled. A perimeter was set up with helicopters  
13 overhead. Canine units were deployed. Smith was eventually cornered in an alley.  
14 Smith had no weapons. Smith did not make any verbal threats, or threatening  
15 movements or gestures. Officer Scott Holstag fatally shot Smith numerous times with  
16 a .45 caliber weapon. Officer Holslag failed to warn Smith that they would shoot him  
17 and failed to use any alternative, non-deadly measures to apprehend Smith. Smith  
18 posed no immediate threat to Officer Holslag or to any third person.

19 In 2002, Officer Holslag shot Gary Martin three times, killing an unarmed man  
20 while he was seated in his vehicle. The San Diego Police Department did not discipline  
21 Officer Holslag. The San Diego Police Department failed to alter any policies with  
22 respect to the practices or training of its police officers, including Officer Holslag. The  
23 City and the Police Department have a *de facto* policy, custom, and practice of not  
24 properly training its officers in the use of force and constitutional rights of arrestees; of  
25 authorizing and ratifying the use of excessive force; and failing to discipline and  
26 supervise officers who have been involved in excessive force allegations.

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28 **APPLICABLE STANDARD**

1 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state  
2 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that  
3 states a claim for relief must contain ... a short and plain statement of the claim showing  
4 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule  
5 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient  
6 facts to support a cognizable legal theory. *See Balistreri v. Pac. Police Dep’t*, 901 F.2d  
7 696, 699 (9th Cir. 1990).

8 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
9 requires more than labels and conclusions, and a formulaic recitation of the elements  
10 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
11 (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to dismiss, a court must  
12 accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
13 679 (2009). However, a court is not “required to accept as true allegations that are  
14 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”  
15 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum, for a  
16 complaint to survive a motion to dismiss, the non-conclusory factual content, and  
17 reasonable inferences from that content, must be plausibly suggestive of a claim  
18 entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.  
19 2009) (quotations omitted).

20 Where government officials are sued in their individual capacities for civil  
21 damages, a court must “begin by taking note of the elements a plaintiff must plead to  
22 state a claim . . . against officials entitled to assert the defense of qualified immunity.”  
23 *Iqbal*, 556 U.S. at 675. Government officials are entitled to qualified immunity unless  
24 the plaintiff can allege the violation of a “clearly established” constitutional right.  
25 *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

## 28 ANALYSIS

1 1) Defendant Scott Holslag’s motion to dismiss

2 Defendant Holslag moves to dismiss the first, second, sixth, seventh and eighth  
3 claims for relief. Defendant contends that the facts alleged in the complaint are not  
4 sufficient to support a claim that his use of deadly force was not reasonable under the  
5 totality of the circumstances. Defendant Holslag asserts that the facts alleged support  
6 the inference that it would be reasonable based upon information provided to the San  
7 Diego Police Department that Smith was an armed, dangerous, fleeing felon with a long  
8 history of committing violent crimes. Defendant Holslag asserts that reasonable  
9 inferences from the facts support “concerns that Smith was armed, violent, and a danger  
10 to the surrounding public given the information the police had.” (ECF No. 16-1 at 20).  
11 Defendant Holslag asserts that his “split-second decision to use deadly force was not  
12 a violation of Smith’s Fourth Amendment rights because there was probable cause –  
13 based on objectively reasonable facts – to believe Smith posed a threat of serious  
14 physical harm to others.” *Id.* Even if the Court concludes that there was a  
15 constitutional violation, Defendant Holslag contends that the right at issue was not  
16 clearly established.

17 Plaintiffs contend that the facts alleged support the inference that Defendant  
18 Holslag acted unreasonably when he shot and killed an unarmed man who posed no  
19 threat to the officer or the public. Plaintiffs assert that there are no facts in the  
20 complaint to support any inference that Holslag received an information about Smith  
21 at the time of the shooting. Plaintiffs assert that the fact alleged support an inference  
22 that Smith was unarmed, cornered in an alleyway, and posed no threat.

23 An excessive force claim is analyzed under the Fourth Amendment. *Graham v.*  
24 *Connor*, 490 U.S. 386, 395 (1989). Reasonableness of force is assessed from the  
25 perspective of a reasonable officer at the scene. *Id.* The relevant inquiry is whether  
26 officers’ actions are “objectively reasonable in light of the facts and circumstances  
27 confronting them, without regard to their underlying intent or motivation.” *Id.* at 397  
28 (quotation marks and citation omitted). “The calculus of reasonableness must embody

1 allowance for the fact that police officers are often forced to make split-second  
2 judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the  
3 amount of force that is necessary in a particular situation.” *Id.* at 396–97. However, “it  
4 is equally true that even where some force is justified, the amount actually used may be  
5 excessive.” *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

6 The Court concludes that the facts alleged in the complaint and the reasonable  
7 inferences from those facts support a claim that the use of deadly force was not  
8 reasonable under the circumstances. The facts alleged do not support the inference that  
9 Smith posed an immediate threat to the safety of police officers or the public justifying  
10 the use of deadly force as a matter of law. The Court further concludes that the right  
11 at issue was clearly established. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985)  
12 (“Where the suspect poses no immediate threat to the officer and no threat to others, the  
13 harm resulting from failing to apprehend him does not justify the use of deadly force.”).

14  
15 Defendant Scott Holslag’s motion to dismiss the first, second, sixth, seventh and  
16 eight claims for relief is denied.<sup>1</sup>

17 2) Defendants City of San Diego and Shelley Zimmerman’s motion to dismiss (ECF  
18 No. 17)

19 Defendants City of San Diego and Shelley Zimmerman move to dismiss the third,  
20 fourth, fifth, and sixth claims for relief. Defendants contend that the facts alleged in the  
21 complaint fail to state a claim that Officer Holslag’s use of force violated Smith’s  
22 constitutional rights. Because Plaintiffs fail to plead any constitutional violation,  
23 Defendants contend that Plaintiffs’ *Monell* claim fails as a matter of law. Defendants  
24 further contend that Plaintiffs provide no factual allegations supporting their claim of  
25 deliberate indifference, failure to properly train, failure to properly discipline and failure  
26 to properly supervise. Defendants assert that Plaintiff’s claim is based upon a single

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28 <sup>1</sup> Plaintiff voluntarily agrees to dismiss the eight claim for relief for wrongful  
death against Defendant Holslag brought by Plaintiff Sandy Simmons.

1 incident not sufficient to support a claim for a persistent or widespread custom or  
2 policy.

3 Plaintiffs contend that the complaint alleges sufficient facts to support deliberate  
4 indifference and ratification of unlawful practices which condone the unjustified use of  
5 force by officers.

6 42 U.S.C. § 1983 provides that “[e]very person who, under color of any [state  
7 law] subjects, or causes to be subjected, any citizen of the United States ... to the  
8 deprivation of any rights, privileges, or immunities secured by the Constitution and  
9 laws, shall be liable to the party injured.” 42 U.S.C. § 1983. Section 1983 does not  
10 provide for vicarious liability, local governments “may not be sued under § 1983 for an  
11 injury inflicted solely by its employees or agents.” *Monell v. Dep’t of Soc. Servs. of*  
12 *N.Y.*, 436 U.S. 658, 693 (1978). A local government entity may be sued for  
13 constitutional deprivations caused by a government “custom,” even when the custom  
14 has not been formally approved through official decision-making channels. *Id.* at 690.  
15 However, such a practice must be so permanent and well settled that it constitutes a  
16 “custom or usage” with the force of law. *Id.* at 691. “Liability for improper custom may  
17 not be predicated on isolated or sporadic incidents; it must be founded upon practices  
18 of sufficient duration, frequency and consistency that the conduct has become a  
19 traditional method of carrying out policy.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.  
20 1996).

21 In this case, the Court has concluded that the complaint states a claim against  
22 Officer Holslag for a violation of Plaintiff’s fourth amendment and fourteenth  
23 amendment rights based upon an excessive force theory of liability. The complaint  
24 alleges that City of San Diego and Shelley Zimmerman, the Chief of Police,  
25 proximately caused the constitutional violation through unlawful policies, customs and  
26 habits of improper and inadequate hiring, training, retention, discipline and supervision  
27 of its police officers. The complaint alleges that the police officers are not trained  
28 properly in the use of excessive force, and that the police officers are aware that no

1 discipline or adequate investigation will result from any excessive use of force. The  
2 complaint alleges that the police department has a policy requiring the use of body  
3 cameras and failed to enforce this policy. The complaint alleges that Officer Holslag  
4 shot and killed an individual in 2002, and that Officer Holslag was not disciplined.

5 The Court concludes that the facts alleged in the complaint and the reasonable  
6 inferences from those facts do not support a claim for municipal and supervisory  
7 liability. The complaint alleges constitutional violations centered around a single  
8 incident of alleged excessive force. The allegations that this incident was proximately  
9 caused by a custom and practice of not properly training officers, authorizing and  
10 ratifying the use of excessive force, and not properly investigating officer's use of force  
11 are conclusory.

12 Defendants City of San Diego and Shelley Zimmerman motion to dismiss the  
13 third, fourth, fifth, and sixth claims for relief is granted.

14 3) Defendant Natalie Ann Macey's motion to dismiss

15 Defendant Natalie Ann Macey moves to dismiss the ninth claims for relief for  
16 conspiracy to violate civil rights pursuant to 42 U.S.C. § 1983.<sup>2</sup> Defendant Macey  
17 contends that there is no factual allegation that she or any bondsman acting on her  
18 behalf attempted to apprehend Smith or used excessive force in apprehending Smith.

19 Plaintiffs contend that the facts alleged in the complaint show that Defendant  
20 Macey conspired with others to fabricate and falsify information with the intent that law  
21 enforcement agencies would rely upon the false information, and that these actions  
22 resulted in the use of excessive force by law enforcement officers.

23 A civil rights plaintiff suing a private individual under § 1983 must demonstrate  
24 that the private individual acted under color of state law; plaintiffs do not enjoy  
25 Fourteenth Amendment protections against "private conduct abridging individual  
26 rights." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). In *Franklin*

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28 <sup>2</sup> The tenth, eleventh, and twelfth claims for relief have been dismissed with  
prejudice with respect to Defendant Macey. (ECF No. 35).

1 v. *Fox*, 312 F.3d 423,444-45 (9th Cir. 2002), the Court of Appeals explained,

2 A private individual's action may be "under color of state law" where  
3 there is "significant" state involvement in the action. *Johnson v. Knowles*,  
4 113 F.3d 1114, 1118 (9th Cir.1997). The Supreme Court has articulated  
5 four tests for determining whether a private individual's actions amount to  
6 state action: (1) the public function test; (2) the joint action test; (3) the  
7 state compulsion test; and (4) the governmental nexus test. *Id.* ...

8 Under the joint action test, "courts examine whether state officials and  
9 private parties have acted in concert in effecting a particular deprivation  
10 of constitutional rights." *Gallagher v. Neil Young Freedom Concert*, 49  
11 F.3d 1442, 1453 (10th Cir.1995) (citing *Collins*, 878 F.2d at 1154). The  
12 test focuses on whether the state has "so far insinuated itself into a  
13 position of interdependence with [the private actor] that it must be  
14 recognized as a joint participant in the challenged activity." *Gorenc v.*  
15 *Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507  
16 (9th Cir. 1989) (quoting *Burton*, 365 U.S. at 725, 81 S.Ct. 856).

17 The complaint in this case alleges that Macey and other hired bondsmen  
18 fabricated and falsified information about Smith. The complaint alleges that Macey and  
19 others published and disseminated the information to law enforcement agencies with  
20 the knowledge and expectation that law enforcement would act on the information. The  
21 complaint alleges that Macey and other hired bondsmen intended for police to rely upon  
22 false information resulting in the use of excessive force on the part of the police. The  
23 Court concludes that the facts alleged in the complaint and the reasonable inferences  
24 from those facts support a claim that Macey acted in concert with state officials to  
25 deprive Smith of his constitutional rights.

26 Defendant Natalie Ann Macey's motion to dismiss the ninth claims for relief is  
27 denied.  
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**CONCLUSION**

IT IS HEREBY ORDERED that 1) Defendant Scott Holslag’s motion to dismiss the first amended complaint (ECF No. 16) is denied , 2) Defendants City of San Diego and Shelley Zimmerman’s motion to dismiss the first amended complaint (ECF No. 17) is granted, and 3) Defendant Natalie Ann Macey’s motion to dismiss the first amended complaint (ECF No. 23) is denied.

DATED: July 13, 2017

  
**WILLIAM Q. HAYES**  
United States District Judge