Gerald Singleton, SBN 208783
Brody A. McBride, SBN 270852
SINGLETON LAW FIRM, APC
115 West Plaza Street
Solana Beach, CA 92075
Tel: (760) 697-1330
Fax: (760) 697-1329
Emails: gerald@geraldsingleton.com
brody@geraldsingleton.com

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARIA DEL SOCORRO QUINTERO PEREZ, BRIANDA ARACELY YANEZ QUINTERO; C.Y., a Minor, and J.Y., a Minor,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION OFFICE OF BORDER PATROL, JANET NAPOLITANO, THOMAS S. WINKOWSKI, DAVID AGUILAR, ALAN BERSIN, KEVIN K. McALLEENAN, MICHAEL J. FISHER, PAUL A. BEESON, RICHARD BARLOW, RODNEY S. SCOTT, CHAD MICHAEL NELSON, and DORIAN DIAZ, and DOES 1 – 50

Defendants.

Case No. 13-cv-1417-WQH-BGS

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MICHAEL FISHER'S MOTION FOR SUMMARY JUDGMENT

Judge: Hon. William Q. Hayes
Date: May 8, 2017
Ct. Rm.: 14B (Carter-Keep Courthouse)

[NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT]

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I. INTRODUCTION

Jose Alfredo Yañez Reyes ("Yañez") and Jose Ibarra Murietta ("Murietta") entered the United States through an existing hole in the primary border fence with the intention of finding work in the United States. Just after crossing, Yañez and Murietta were spotted by CBP Agents Chad Nelson ("Nelson") and Dorian ("Diaz"). Ultimately, Diaz shot and killed Yañez after Diaz allegedly saw Yañez throw 1 or 2 rocks and a table leg toward the area where Diaz and Nelson had caught (and were beating) Murietta.

Diaz shot Yañez, in part, because he understood that former CBP Chief Michael Fisher ("Fisher") had ratified and approved a pattern of CBP agents using deadly force in response to rock throwing incidents that, either did not pose a threat of serious bodily injury, or that reasonably could have been avoided ("Rocking Policy").

At a minimum, disputes of material fact exist with regard to whether Fisher's knew about and acquiesced to the Rocking Policy, as do disputes regarding whether Fisher's knowledge of and acquiescence to the Rocking Policy caused a violation of Yañez's Fourth Amendment rights.

Finally, the Court has already ruled that the law governing Fisher's supervisory liability was "clearly established" at the time of the incident for purposes of the qualified-immunity analysis. And the law of the case doctrine precludes reconsideration of this issue. The Court should deny Fisher's Motion for Summary Judgment.

II. DISPUTED FACTS

A. Whether a Rocking Policy Existed at The Time of The Incident is Disputed

While Fisher claims "CBP has never had a 'Rocking Policy,' or any written or unwritten policy that suggests that agents can use lethal force against a rock thrower, regardless of the level of threat posed," (ECF No. 179-2, Fisher SOF, No. 5), Plaintiffs have provided substantial evidence showing that such a policy did, in fact, exist at the time of the incident. (*See* Pls.' Resp. to Fisher SOF, No. 5.)

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B. Whether Fisher Had Investigative Authority as CBP Chief is Disputed

Fisher claims he "did not review investigative reports regarding lethal force cases . . . from . . . whatever outside agency investigated CBP matters." (*See* Fisher SOF, Nos. 1-3.) Plaintiffs dispute this assertion, however, given Fisher's own testimony that he "would review investigative reports from other agencies" and his testimony regarding the quantity of information he regularly received regarding incidents where lethal force was deployed in response to a rocking incident that did not pose a threat of serious bodily harm, or that could have been avoided. (*See* Pls.' Resp. to Fisher SOF, Nos. 1-3, 5, 20-21.)

C. Whether Fisher Had Authority to Change, Make, Affect, Implement, and/or Clarify CBP's Use of Force Policy is Disputed

Fisher claims he "did not have authority to change existing CBP policy regarding lethal force." (Fisher SOF, No. 7.) Plaintiffs dispute this claim, relying primarily on a 2014 memorandum that Fisher issued to all CBP agents regarding, among other things, the use of lethal force in response to rock throwing. (*See* Pls.' Resp. to Fisher SOF, No. 7.)

In this memorandum, Fisher stated: "I am *implementing* the following directive effective immediately, which *clarifies* existing guidelines contained in the CBP Use of Force Policy." (*Id.*) Admissions that Fisher made in a press interview further indicate that Fisher himself determined whether CBP would alter its Use of Force Policy with regard to instances of rock throwing at the border following the issuance of a CBP commissioned report that stated: "It is clear that agents are unnecessarily putting themselves in positions that expose them to higher risk," and that "CBP needs to train agents to deescalate these [rocking] encounters by taking cover, moving out of range, and/or using less lethal weapons." (*See* Pls.' Resp. to Fisher SOF, Nos. 5, 7.)

Plaintiffs have, therefore, produced substantial evidence regarding Fisher's authority over CBP's Use of Force Policy in effect at the time of the incident.

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D. Whether Fisher Had Authority to Discipline CBP Agents Who Used Lethal Force in Response to Rocking is Disputed

While Fisher claims he "did not play a role in disciplining agents," (Fisher SOF, No. 8), Plaintiffs have submitted evidence demonstrating that Fisher did have the authority to discipline agents, even though primary responsibility for this role was "delegated" to "Chief Patrol Agents" in various CBP sectors at some prior point unknown to Fisher, (*see* Pls. Resp. to Fisher SOF, No. 8).

E. Whether Fisher and Diaz Met in Person is Irrelevant

While Diaz and Fisher claim they have never met in person, neither Diaz nor Fisher has established how this is relevant to any claim or defense remaining in this action. *See* Fed. R. Evid. 402. Plaintiffs have, however, submitted substantial evidence showing Diaz was aware of Fisher's ratification and approval of the Rocking Policy, and that Diaz acted because of this policy when he decided to shoot Yañez. (*See* Pls.' Resp. to Fisher SOF, Nos. 6, 10-19.)

III. LEGAL STANDARD

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). The materiality of a fact is thus determined by the substantive law governing the claim or defense. When ruling on a summary judgment motion, the Court must examine all the evidence in the light most favorable to the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The Court cannot engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the jury. *Anderson*, 477 U.S. at 255.

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IV. ARGUMENT

A. Whether a Causal Link Exists Between Fisher's and Diaz's Actions Is Disputed

A supervisor may be liable for violating an individual's constitutional rights "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011).

Supervisors may also be held liable as follows: (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others." *Starr*, 652 F.3d at 1207-08; *see also OSU Student Alliance v. Ray,* 699 F.3d 1053, 1076 (9th Cir.2012) ("Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy.").

As set forth above, Plaintiffs have—regardless of Diaz's subjective beliefs and perceptions—submitted substantial evidence of a causal connection between Fisher's acquiescence in the Rocking Policy and Diaz's shooting of Yañez. (*See* Pls. Resp. to Fisher SOF, Nos. 5-6, 10-19.) That is, Plaintiffs have submitted substantial evidence demonstrating Fisher knew about, and refused to terminate, the Rocking Policy, and that this refusal constituted a "reckless and callous indifference to the rights of others." (*See id.*) Fisher's Motion for Summary Judgment should, therefore, be denied as to the issue of causation.

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B. Fisher Is Not Entitled to Qualified Immunity

1. The Court Has Already Determined The Supervisory Liability Standards Applicable Here Were Clearly Established at The Time of the Incident

Fisher argues the Court's previous reliance on *Starr v. Baca* (for the proposition that the law was "clearly established" with regard to Plaintiffs' claim against Fisher) was mistaken. (ECF Nos. 179-1 at 13-15, 46 at 17-19.) In making this argument, Fisher completely ignores this Court's May 15, 2015 Order, in which the Court rejected the very arguments Fisher now renews in his Motion for Summary Judgment. (ECF No. 77 at 30-38.)

The law of the case doctrine precludes re-litigation of this issue. *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1139 (S.D. Cal. 2014) ("'law of the case' doctrine and public policy dictate that the efficient operation of the judicial system requires the avoidance of re-arguing questions that have already been decided") (citing *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989)).

Even if Fisher had filed a timely motion for reconsideration following the Court's May 15, 2015 Order, Fisher raises no new facts or law that were not available before the deadline to file a motion for reconsideration expired. *See* CivLR 7.1.i.2.; *Sherman*, 997 F. Supp. 2d at 1139 ("This standard requires that the party show: (1) an intervening change in the law; (2) additional evidence that was not previously available; or (3) that the prior decision was based on clear error or would work manifest injustice.") (citing *Pyramid Lake*, 882 F.2d at 369 n.5; *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009); *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

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2. Whether Fisher Had Knowledge of and Acquiesced in The Rocking Policy Is Disputed

Fisher claims he "did not have investigatory authority over any use of force cases within the CBP" and that, leading up to the incident, he had no knowledge of the numerous examples of the Rocking Policy that preceded this incident. (ECF No. 179-1 at 16.) Fisher further argues that, "[a]bsent a judicial finding, or other official determination concerning the appropriateness of the force used in [these previous examples]," these previous examples cannot form a basis for concluding Fisher was aware of the Rocking Policy. (*Id.* at 17.)

As set forth above, Plaintiffs have submitted substantial evidence disputing Fisher's contentions that he "did not have investigatory authority" and that he neither knew of, or acquiesced to, the Rocking Policy leading up to the incident. (*See* Pls.' Resp. to Fisher SOF, Nos. 1-5, 20-21.)

With regard to his latter argument, Fisher provides no support for the proposition that a prior instance of an unconstitutional policy or pattern of practices must result in a "judicial finding or other official determination" before it may be considered as *some* evidence that a supervisor was aware that such a policy or pattern of practices existed or exists. A "trial within a trial" would not be required because each prior instance has been resolved in some way, and jurors would be able to consider the disposition of each prior example in *weighing* the value of this evidence.

In other words, the existence or lack of a "judicial finding or other official determination" goes to the weight of this evidence not its admissibility. These prior examples are relevant to a determination of whether Fisher knew of and acquiesced to the Rocking Policy. Because Plaintiffs' have submitted substantial evidence demonstrating Fisher knew of and acquiesced to the Rocking Policy, the Court should deny Fisher's Motion for Summary Judgment.

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V. CONCLUSION

For the foregoing reasons, the Court should deny Fisher's Motion for Summary Judgment, (ECF No. 179).

Dated: April 24, 2017

SINGLETON LAW FIRM, APC

By: *s/Brody McBride*

Brody A. McBride, Esq.

Attorneys for Plaintiffs