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Attorneys for P & A Marketing, Inc.; Panda Home Fashions LLC; Shewak Lajwanti Home Fashions, Inc. dba S.L. Home Fashions, Inc.; and Welcome Industrial Corporation; and *Special Litigation Co-Counsel for* Karen Sue Naylor, solely in her capacity as Chapter 7 Trustee of the Debtor's Estate

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re ANNA'S LINENS, INC., Debtor.	Case No. 8:15-bk-13008-TA Chapter 7 **NOTICE OF MOTION AND MOTION TO CONTINUE HEARING ON SALUS DEFENDANTS' STAY MOTION TO A DATE ON OR AFTER FEBRUARY 3, 2017; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JERROLD L. BREGMAN** **LBR 9013-1(m)** **Current Hearing Date:** Date: January 24, 2017 Time: 11:00 a.m. Place: Courtroom 5B United States Bankruptcy Court 411 West Fourth Street Santa Ana, California

PLEASE TAKE NOTICE that Karen Sue Naylor, not individually but solely in her capacity as chapter 7 trustee (the "Trustee") of the estate (the "Estate") of the above-captioned

debtor (the "Debtor"), together with P & A Marketing, Inc., Panda Home Fashions LLC, Shewak Lajwanti Home Fashions, Inc. dba S.L. Home Fashions, Inc., and Welcome Industrial Corporation, all of whom, together with the Trustee, are plaintiffs (collectively, "Plaintiffs") in that certain adversary proceeding pending before this Court as No. 8:15-ap-01482-TA (the "Adversary Proceeding"), hereby move (the "Motion") this Court for entry of an order continuing the hearing on the motion, entitled *Memorandum of Points and Authorities in Support of Motion of Salus Capital Partners, LLC to Stay Pending the Appeal of this Court's December 20, 2016 Order [Dkt. No. 1734] Approving Application of the Trustee to Employ Brutzkus Gubner as Joint Special Co-Litigation Counsel* filed January 3, 2017 [Doc. # 1743] (the "Stay Motion"), filed by Salus Capital Partners, LLC ("Salus") on behalf of itself and certain of the lenders identified in the Adversary Proceeding (the "Salus Defendants"), which Stay Motion is currently scheduled to be heard on January 24, 2017 (the "Scheduled Hearing Date"). The Motion seeks the continuance of the Scheduled Hearing Date to a date, at the Court's convenience, that is on or after February 3, 2017 (the "Requested Adjournment Date").

PLEASE TAKE FURTHER NOTICE that the Plaintiffs believe that the Stay Motion is frivolous and without merit, and have served Defendants' counsel ("Counsel") Joseph P. Davis of Greenberg Traurig, LLP, with a letter (the "Rule 11 Letter") pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure ("FRBP") requesting that Counsel withdraw the Stay Motion and reserving the right to file a sanctions motion in the event that the Stay Motion goes forward and is denied.

PLEASE TAKE FURTHER NOTICE that this Motion is brought pursuant to Local Bankruptcy Rule 9013-1(m) for the purpose of allowing the full 21-day "safe harbor" period under Rule 9011 to run before the Stay Motion is heard, following the service of the Rule 11 Letter. The Trustee's counsel delivered the Rule 11 Letter to Counsel by email on January 12, 2017 and by overnight courier for delivery on January 13, 2017, so the 21-day "safe harbor" period runs February 2, 2017.

PLEASE TAKE FURTHER NOTICE, as more fully set forth below, the Motion is premised upon the improper and legally frivolous Stay Motion by which the Salus Defendants seek a stay, without bond, pending their appeal (the "Appeal") of the Bankruptcy Court's December 20, 2016 order [Docket No. 1734] (the "Employment Order") approving the Trustee's application to retain the undersigned law firm, Brutzkus Gubner ("BG"), as the Trustee's special litigation co-counsel for purposes of prosecuting the Estate's claims in the Adversary Proceeding. The Stay Motion assumes the Salus Defendants' Appeal is viable; however, the Appeal is legally frivolous because the Employment Order is an interlocutory order which is not subject to the right of appeal under binding Ninth Circuit authority. *See, e.g., Westwood Shake & Shingle, Inc. (Security Pac. Bank Washington v. Steinberg*), 971 F2d 387, 389 (9th Cir. 1992) ("[w]here the underlying bankruptcy court order involves the appointment or disqualification of counsel ... [CA] courts have uniformly found that such orders are interlocutory even in the more flexible bankruptcy context."), *cited in In re Butler Industries*, 8 F.3d 25, 1993 WL 410703 *2 (9th Cir. 1993); *and In re Plant Insulation Co*., 2010 WL 1526320 *1 (Bankr. N.D. CA. Apr. 14, 2010) (order approving debtor's counsel over objection based on alleged conflict was interlocutory and therefore not entitled to appeal as of right under 28 U.S.C. Section 158 (a)(1), and no harm to objector sufficient to justify district court's discretionary review of interlocutory order by "leave of court" under 28 U.S.C. Section 158(a)(3)).[1] Salus acknowledges that the Employment Order is interlocutory in nature as evidenced by its *Memorandum of Points and Authorities in Support of Salus Capital Partners, LLC's Motion for Leave to Appeal Nunc Pro Tunc* [Doc. #6 in Case No. 8:17-cv-00011-AG pending before the United States District Court in the Central District of California] (the "Belated Leave Request") filed with the District Court on January 14, 2017.

PLEASE TAKE FURTHER NOTICE that there is good cause for this Motion to be granted, including because there is no reason to deny Counsel the full 21-day period to which Rule 9011 generally entitles a prospective target of a sanctions motion. Moreover, there is no harm or

[1] A copy of each unpublished decision that is cited in this Notice of Motion and Motion and the accompanying Memorandum of Points and Authorities is attached hereto as "Exhibit 2" to the accompanying declaration of Jerrold L. Bregman.

prejudice from continuing the status quo by briefly continuing the hearing on the Stay Motion to protect the Trustee's rights, after which the Salus Defendants may proceed with their Stay Motion. If the Stay Motion is not withdrawn, the Trustee's contemplated sanctions motion would request sanctions after the Stay Motion is denied in an amount not less than the amount required to compensate the Trustee's counsel for their legal fees and costs for responding to the Stay Motion, including those of BG and the Trustee's general counsel Ringstad & Sanders, LLP (the "Sanctions Motion"). The Trustee provided Counsel with an un-filed draft of the Sanctions Motion under cover of the Rule 11 Letter. There has been no prior continuance of the hearing on the Stay Motion. Before filing this Motion, the Trustee's counsel requested by the Rule 11 Letter that Counsel agree to continue the hearing on the Stay Motion until a date after the 21-day "safe harbor" period of Rule 11 had run; Counsel provided no response whatsoever, as of this date this Motion was filed, to this request for a stipulation to continue the hearing on the Stay Motion or to the Rule 11 Letter. In accordance with LBR 9013-1(m)(1), this Notice of Motion and Motion were served by email and also overnight mail at least 3 days before the Scheduled Hearing Date.

PLEASE TAKE FURTHER NOTICE that this Motion is based on this Notice, the attached Memorandum of Points and Authorities, the record and the filings in the Debtor's case and the Adversary Proceeding, of which filings the Court may take judicial notice, any additional evidence to be submitted before the hearing on this Motion, if any, and the accompanying Declaration of Jerrold L. Bregman.

Respectfully submitted,

DATED: January 17, 2017

BRUTZKUS GUBNER

By: */s/ Jerrold L. Bregman*
STEVEN T. GUBNER
JASON B. KOMORSKY
JERROLD L. BREGMAN
Attorneys for P & A Marketing, Inc.; Panda Home Fashions LLC; Shewak Lajwanti Home Fashions, Inc. dba S.L. Home Fashions, Inc.; and Welcome Industrial Corporation; and *proposed co-counsel for* Karen Sue Naylor, solely in her capacity as Chapter 7 Trustee of the Debtor's Estate

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By the Motion, the Trustee requests an order continuing the Scheduled Hearing Date to the Requested Adjournment Date[2] pursuant to Local Bankruptcy Rule 9013-1(m), which rule provides in relevant part as follows:

> **(m) Continuance.**
>
> (1) Motion for Continuance. Unless otherwise ordered, a motion for the continuance of a hearing under this rule must be filed as a separately captioned motion, and must be filed with the court and served upon all previously noticed parties by **facsimile, email, personal service**, **or overnight mail at least 3 days before the date set for the hearing**.
>
> (A) The motion must set forth in detail the reasons for the continuance, state whether any prior continuance has been granted, and be supported by the declaration of a competent witness attesting to the necessity for the continuance.
>
> (B) A proposed order for continuance must, in accordance with LBR 9021-1(b), be lodged with the court upon the filing of the motion.
>
> (C) Unless the motion for continuance is granted by the court at least 1 day before the hearing, the parties must appear at the hearing.

(Emphasis in original.)

The Requested Hearing Date is the first date after the 21-day "safe harbor" period of Rule 11, which preserves the Trustee's right to file the Sanctions Motion in the event Counsel does not withdraw the Stay Motion before the hearing thereon and the Stay Motion is denied. The Sanctions Motion would be based on Rule 11, as incorporated by Fed. R. Bankr. P. 9011, the Court's inherent authority, and / or 28 U.S.C. § 1927, for Counsel's filing and prosecuting the frivolous Stay Motion.

The Stay Motion is frivolous because the Appeal upon which it is based is not viable due to the fact the Employment Order is interlocutory under binding Ninth Circuit authority and therefore is not subject to appeal as of right. *See, e.g., Westwood Shake & Shingle, Inc. (Security Pac. Bank Washington v. Steinberg)*, 971 F2d 387, 389 (9th Cir. 1992) ("[w]here the underlying bankruptcy court order involves the appointment or disqualification of counsel ... [CA] courts have uniformly

[2] Terms not defined herein shall have the meanings ascribed to them in the preceding Notice of Motion and Motion.

found that such orders are interlocutory even in the more flexible bankruptcy context."), *cited in In re Butler Industries*, 8 F.3d 25, 1993 WL 410703 *2 (9th Cir. Oct. 5, 1993) (unpublished); *and In re Plant Insulation Co.*, 2010 WL 1526320 *1 (Bankr. N.D. CA. Apr. 14, 2010) (order approving debtor's counsel's employment over objection based on an alleged conflict was interlocutory and therefore not entitled to appeal as of right under 28 U.S.C. § 158 (a)(1), and movant's request under 28 U.S.C. § 158(a)(3) for "leave of court" to file appeal was not supported by a showing of irreparable harm to movant). The Employment Order is not subject to appeal under 28 U.S.C. § 158 (a)(1) because the Employment Order is interlocutory. As of the filing of the Stay Motion, Salus had failed to request leave of the District Court to appeal the Employment Order, much less provide evidence or legal argument in support of granting leave to appeal the Employment Order under 28 U.S.C. § 158(a)(3).[3] Salus filed its Belated Leave Request only after oppositions were filed to the Stay Motion, and after receipt of the Rule 11 Letter.

The additional time requested by the Motion for continuance will allow the Salus Defendants the full opportunity to consider the applicable law and presumably withdraw the Stay Motion on their own accord (and conserve Estate resources by avoiding a hearing on the Stay Motion before the "safe harbor" period has run). The continuance of the hearing on the Stay Motion, because it preserves the Trustee's right to recover for the harm for responding to the meritless Stay Motion, itself may motivate the withdrawal of the Stay Motion and thereby advance the interests of judicial economy. Adjournment is in the best interest of judicial economy to allow some space for the disposition of the Salus Defendants' meritless Appeal, which seeks to overturn binding law that the Employment Order is interlocutory and appeal is improper. The Stay Motion is silent with respect to such binding authority.

[3] The Salus Defendants belatedly filed a motion in District Court Case No. 8:17-CV-00011-AG [Doc. # 6] (previously defined as the "Belated Leave Request") asking the District Court to consider their notice of appeal to be a motion for leave to file appeal. The Belated Motion was filed on January 13, 2017, after the Trustee had filed her oppositions to the Stay Motion on January 10, 2017 [Doc. # 1757 and #1760], and the day after the Rule 11 Letter was served on Counsel. The Belated Leave Request provides no explanation for Salus' failure to follow the applicable rules or any meritorious argument or authority as to why the District Court should depart from binding Ninth Circuit precedent to consider the interlocutory appeal of the Employment Order.

There is no harm from a brief adjournment of the hearing on the Stay Motion and continuation of the status quo in the interim. By contrast, the Estate would be exposed to substantial harm if the Stay Motion were to proceed without the preservation of the Trustee's rights arising from the Rule 11 Letter after denial of the Stay Motion, which damages equal no less than the legal fees and costs which have been needlessly deployed and consumed responding to the Stay Motion and additional resources to be expended in connection with the hearing thereon.

The voluminous pleadings opposing BG's employment, the Appeal, the election to have the Appeal heard in front of the District Court, Salus' deliberate failure to seek leave to appeal an interlocutory order, and the Stay Motion, all appear to be improper delay tactics designed to (i) increase the costs to the Estate of pursuing litigation against the Salus Defendants, (ii) increase the costs and fees the Salus Defendants will likely allege they are owed under their loan documents with the Debtor, (iii) gain settlement leverage, and (iv) disrupt the Trustee's prosecution of the Adversary Proceeding against the Salus Defendants and others. All objective appearances are that the Stay Motion was filed in an obvious attempt to further delay BG's prosecution of the Adversary Proceeding for the improper purpose of delay itself, and to run up the fees and costs for the Estate, with its consequence of enriching Counsel's law firm, all to the Estate's detriment and without the requisite "reasonable and competent" inquiry. The Stay Motion only serves to harass the Trustee, to delay the prosecution of the Adversary Proceeding, delay the administration of the bankruptcy case, and to needlessly increase the costs of litigation.

It is well known that employment orders are interlocutory and not subject to appeal as a matter of right. The case law on employment orders with respect to their interlocutory nature is abundant. It is clear (because the Employment Order is an interlocutory order), Salus will not prevail on its Appeal. Thus, Salus' actions with respect to this matter suggest a bad faith attempt to hinder the Trustee's administration of this bankruptcy case and prosecution of the Adversary Proceeding.

The Instant Motion should be granted to preserve the Trustee's rights with respect to the Rule 11 Letter and contemplated Sanctions Motion. The instant Motion should be granted for the reasons

set forth herein, as supported by the record and the filings in the Debtor's case and the Adversary Proceeding, of which filings the Court may take judicial notice,[4] and the accompanying Declaration of Jerrold L. Bregman, as well as all other evidence as may be properly presented to this Court in the event of any hearing on this Motion.

II. RELEVANT BACKGROUND

This bankruptcy case was commenced by the filing of a voluntary petition for relief by the Debtor under Chapter 11 of Title 11 of the United States Code on June 14, 2015. On or about September 18, 2015, the Official Committee of Unsecured Creditors (the "Committee") and those certain lenders named as defendants in the Adversary Proceeding (the "Lender Defendants") entered into a tolling agreement (the "Tolling Agreement") as to certain claims the Committee may ultimately assert against the Lender Defendants, which Tolling Agreement contemplated the appointment of a Chapter 7 Trustee. Following conversion of this case to one under Chapter 7 on March 30, 2016, the Trustee was appointed and the Trustee substituted in as the party in interest to the Tolling Agreement, on behalf of the Estate, and thereafter agreed with the Lender Defendants that the Estate's rights thereunder shall expire as of 11:59 p.m. PDT on October 3, 2016, absent further written agreement of the parties to the Tolling Agreement.

On December 30, 2015, the Adversary Proceeding was commenced by the filing of the Complaint For: *(1) Fraud; (2) Negligent Misrepresentation; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Breach of Fiduciary Duty; (5) Aiding and Abetting Fraud; (6) Aiding and Abetting Breach of Fiduciary Duty; (7) Breach of Fiduciary Duty; (8) Unjust Enrichment; and (9) Equitable Subordination* by the Vendor Plaintiffs (as defined in the complaint). On January 15, 2016, the Vendor Plaintiffs filed their First Amended Complaint in the Adversary Proceeding. At that time, the Vendor Plaintiffs noted that certain claims were being brought derivatively for the benefit of the Estate. On October 4, 2016, the Plaintiffs filed their Second Amended and Corrected Complaint. On October 4, 2016, the Trustee filed the application to retain

[4] *See C.B. v. Sonora Sch. Dist*., 691 F. Supp.2d 1123, 1138 (E.D. Cal. 2009) ("The Court may take judicial notice of matters of public record, including … the court's records available to the public through the PACER system via the internet.").

BG which is the subject of the Employment Order (the "Application"), which the Salus Defendants vigorously opposed. The Salus Defendants filed their Stay Motion on January 3, 2017. The Trustee filed oppositions to the Stay Motion on January 10, 2017. The Trustee's Rule 11 Letter was served on Counsel on January 12, 2017.

III. MOTION SHOULD BE GRANTED TO PRESERVE TRUSTEE'S RIGHT TO FILE THE CONTEMPLATED SACTIONS MOTION

Federal Rule of Bankruptcy Procedure 9011 ("Bankruptcy Rule 9011"), substantially incorporating Federal Rule of Civil Procedure 11 ("Rule 11") into bankruptcy proceedings, permits the Bankruptcy Court to impose sanctions upon a party and its attorney for the filing of abusive and frivolous pleadings. If a pleading filed with the Bankruptcy Court violates any of its requirements, then another party may file a motion pursuant to Rule 9011(c) to have the bankruptcy court impose sanctions against the offending attorney, party and/or law firm. An attorney's signature on a filing "is tantamount to a warranty that the complaint is well grounded in fact and existing law (or proposes a good faith extension of the existing law)." *In re Sanford*, 403 B.R. 831, 841 (Bankr. D. Nev. 2009) (citing *Christian v. Mattel, Inc*., 286 F.3d 1118, 1127 (9th Cir. 2002)).

In determining whether sanctions are appropriate under Bankruptcy Rule 9011, the Court "must consider both frivolousness *and* improper purpose on a sliding scale, where the more compelling the showing as to one element, the less decisive need be the showing as to the other." *Dressler v. The Seely Co. (In re Silberkraus),* 336 F.3d 864, 870 (9th Cir. 2003) (citing *Marsch v. Marsch (In re Marsch),* 36 F.3d 825, 830 (9th Cir. 1994) (emphasis in original). For sanctions, "attorney conduct is measured objectively against a reasonableness standard, which consists of a competent attorney admitted to practice before the involved court." *Valley National Bank of Arizona v. Needler (In re Grantham Brothers),* 922 F.2d 1438, 1441 (9th Cir. 1991).

Additionally, the language of Rule 9011 and Rule 11 are substantially similar, "so courts analyzing sanctions under Rule 9011 commonly rely on cases interpreting Rule 11." *Miller v. Cardinale (In re: DeVille),* 361 F.3d 539, 550 n.5 (9th Cir. 2004) (citing *In re Grantham Brothers,* 922 F.2d at 1441). "The guiding principle for all sanctions is deterrence," and this is true whether

the sanctions are sought pursuant to Rule 9011, Rule 11, or the Court's inherent authority. *In re Sanford,* 403 B.R. at 847. "Attorney compliance with [FRBP] 9011 is assessed through an objective standard." *Id.*, at 841. "Subjective bad faith is not necessary; the attorney must only fail to meet the standard of a competent attorney admitted to practice before the [pertinent] court." *Id*. Even one baseless allegation may provide a sufficient basis for FRBP 9011 Sanctions. *In re Nelson*, 650 Fed. App.'s 528 (9th Cir. 2016). "[S]anctions for violations of FRBP 9011 are reserved for those rare situations in which a litigant asserts a thoroughly baseless claim or defense, or pursues a matter for a wholly improper purpose." *In re Quinones*, 543 B.R. 638, 649 (Bankr. N.D. Cal. 2015). Sanctions "should not be assessed against a party merely because the party unsuccessfully asserted a claim or defense." *Id*.

The procedural requirements for imposing sanctions are straight forward. FRBP 9011(c) provides that if the court "determines that subdivision (b) has been violated, the court may … impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." Further, FRBP 9011 contains what is colloquially called a "safe harbor" provision, which provides that a motion for sanctions "may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected …." FRBP 9011(c)(1)(A).

Furthermore, the Advisory Committee Notes to Rule 11 direct courts to consider the following factors when determining sanctions awards:

1. Whether the improper conduct was willful, or negligent;
2. Whether it was part of a pattern of activity, or an isolated event;
3. Whether it infected the entire pleading, or only one particular count or defense;
4. Whether the person has engaged in similar conduct in other litigation;
5. Whether it was intended to injure;
6. The effect it had on the litigation process in time or expense;
7. Whether the responsible person is trained in the law;

8. What amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and

9. The amount needed to deter similar activity by other litigants.

FRBP 9011, 2003 advisory committee notes; *see also Union Planters Bank v. L&J Dev. Co., Inc.*, 115 F.3d 378, 386 (6th Cir. 1997) (upholding $50,000 sanctions where unfounded factual contention were advanced to delay the proceeding and gain settlement leverage).

A. The Stay Motion is Frivolous

Under Fed. R. Bankr. P. 8005, the Bankruptcy Court may suspend the continuation of related proceedings under the Bankruptcy Code during the pendency of an appeal. As decreed by the Supreme Court, a motion for stay pending appeal must satisfy the following four elements:

(1) ***Appellant is likely to succeed on the merits***;

(2) Appellant will suffer irreparable injury absent a stay;

(3) No substantial harm will come to appellee as a result of a stay; and

(4) The stay will not harm the public interest.

Nken v. Holder, 556 U.S. 418, 434 (2009); *accord*, *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (emphasis added). The granting of a stay is not a matter of right, but rather is within the Judge's discretion. *Nken*, 556 U.S. at 418 and 434. The party requesting a stay "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–434.

Salus will not prevail with its appeal of the Employment Order for the simple fact that the Employment Order is an interlocutory order. Even if Salus were to purport to offer any evidence that it may prevail on appeal, and even if its chances of success were "better than negligible" (which they are not), that would be insufficient to warrant a stay. *Nken*, 418 U.S. at 434. More than a mere possibility of success is required.

All objective appearances are that the baseless Stay Motion was filed in a concerted effort to further delay BG's prosecution of the Adversary Proceeding for the improper purpose of delay itself, and to run up the fees and costs for the Estate, with its consequence of enriching Counsel, all to the Estate's detriment and without the requisite "reasonable and competent" inquiry. The Stay Motion

only serves to harass the Trustee, to delay the prosecution of the Adversary Proceeding, delay the administration of the bankruptcy case, and to needlessly increase the costs of litigation.

Rule 9011 provides that sanctions may be imposed where a pleading is "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *In re Brooks-Hamilton*, 271 Fed.App'x 654, 660 n.9 (9th Cir. 2008). "Improper purpose is determined by an objective standard, and a 'court confronted with solid evidence of a pleading's frivolousness may *in circumstances that warrant it* infer that it was filed for an improper purpose.'" *Id*. (emphasis in original) (citation omitted).

Though Plaintiffs are not by the instant Motion requesting its exercise, this Court independently has the inherent authority to sanction Counsel for its filings to harass the Trustee, delay the prosecution of the Adversary Proceeding and run up litigation costs. "Regardless of Rule 11, the court maintains the power to sanction parties for filings that waste the time of the court and require opposing parties to expend unnecessary resources." *Megargee ex rel. Lopez v. Whittman* 2006 WL 2988945, at *21 (E.D. Cal. 2006). Further to the foregoing, "the court maintains the inherent power to levy sanctions, including attorneys' fees when a party has acted in 'bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id*. quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); (*Rink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001).

Another independent basis for awarding sanctions is 28 U.S.C. § 1927, which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

"Sanctions are appropriate under Section 1927 'when there is no obvious violation of the Federal Rules, but where, within the rules, the proceeding is conducted in bad faith for the purpose of delay or increasing costs.'" *Megargee ex rel. Lopez*, WL 2988945, at *21, quoting *Pickern v. Pier 1 Imps. (U.S.), Inc.,* 339 F. Supp. 2d 1081, 1091 (E.D. Cal. 2004) (citing *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), as amended by 803 F.2d 1085 (9th Cir. 1986)). Sanctions under

Section 1927 are appropriate when: (1) the attorney multiplied the proceedings; (2) the attorney's conduct was unreasonable and vexatious; and (3) the conduct resulted in an increase in the cost of the proceedings." *Megargee ex rel. Lopez*, WL 2988945, at *21 (citations omitted). "An award of sanctions under Section 1927 requires a finding of recklessness or bad faith." *Id*. (citations omitted).

Here, the Stay Motion was doomed from the inception because the Employment Order is an interlocutory order under applicable Ninth Circuit. The Stay Motion not only fails to acknowledge this seminal fact, or the controlling Ninth Circuit authority in this regard, it does not address the Salus Defendants' failure to even request leave to appeal the interlocutory order under 28 U.S.C. §158(a)(3) (which defect is not explained in the Belated Leave Request). All objective appearances are that the baseless Stay Motion was filed at the eleventh hour solely to further delay BG's prosecution of the Adversary Proceeding for the improper purpose of delay itself, and to run up the fees and costs for the Estate, with its consequence of enriching Counsel, all to the Estate's detriment and without the requisite "reasonable and competent" inquiry.

Moreover, the Stay Motion is further to a pattern of activity by Salus to disrupt the Adversary Proceeding by attacking the Trustee's choice of counsel using spurious means to do so. Another example, on December 15, 2016, the Salus Defendants filed a meritless objection [Docket # 1732] to the proposed form of the Employment Order, in which the Salus Defendants provided no new facts or law and which was evidently designed purely to harass the Trustee, delay the entry of the Employment Order, delay prosecution of the Adversary Proceeding, enrich Counsel by the fees therefor, and run up the costs of litigation to the Estate's detriment.

B. No Harm From Brief Continuance of the Hearing on the Stay Motion

No harm is contemplated or likely to result from a brief continuance of the hearing on the Stay Motion to a date on or after the Requested Adjournment Date. The Salus Defendants cannot show they would suffer any harm from the granting of the Motion which would continue the status quo and the Scheduled Hearing Date for a few days. By contrast, the Estate would be exposed to substantial harm if the Stay Motion were to proceed without the preservation of the Trustee's rights arising from the Rule 11 Letter after denial of the Stay Motion, which damages equal no less than

the legal fees and costs which have been needlessly deployed and consumed responding to the Stay Motion and additional resources to be expended in connection with the hearing thereon.

IV. CONCLUSION

For the reasons set forth above, the Trustee respectfully requests that the Court enter an Order, substantially in the form of the proposed order lodged with this Motion, continuing the Scheduled Hearing Date to a date on or after the Requested Adjournment Date, to preserve the Trustee's right to file the Sanctions Motion in the event Counsel does not voluntarily withdraw the Stay Motion which is subsequently denied, and providing the Trustee such other and further relief as the Court determines is proper.

Respectfully submitted,

DATED: January 17, 2017

BRUTZKUS GUBNER

By: */s/ Jerrold L. Bregman*
STEVEN T. GUBNER
JASON B. KOMORSKY
JERROLD L. BREGMAN
Attorneys for P & A Marketing, Inc.; Panda Home Fashions LLC; Shewak Lajwanti Home Fashions, Inc. dba S.L. Home Fashions, Inc.; and Welcome Industrial Corporation; and *proposed co-counsel for* Karen Sue Naylor, solely in her capacity as Chapter 7 Trustee of the Debtor's Estate

DECLARATION OF JERROLD L. BREGMAN

I, Jerrold L. Bregman, hereby declare as follows:

1. I am an attorney at law, duly licensed to practice in the State of California and admitted to practice before this Court. I am a partner at Brutzkus Gubner ("BG"), special litigation co-counsel for Karen Sue Naylor in her capacity as chapter 7 trustee (the "Trustee") of the Debtor's estate (the "Estate"), and attorneys for P & A Marketing, Inc., Panda Home Fashions LLC, Shewak Lajwanti Home Fashions, Inc. dba S.L. Home Fashions, Inc., and Welcome Industrial Corporation, all of whom, together with the Trustee, are plaintiffs (collectively, "Plaintiffs") in the Adversary Proceeding (all terms not defined herein shall have the meanings ascribed to them in the foregoing motion to which this Declaration is annexed (the "Motion")).

2. I am one of the attorneys at BG with responsibility for representing Plaintiffs in the Adversary Proceeding. I know the facts declared herein to be true of my own personal knowledge, and if called upon could competently testify thereto.

3. On January 12, 2017, I sent the Rule 11 Letter by email to Counsel, Joseph P. Davis (at: davisjo@gtlaw.com), who signed the Stay Motion, and also to Counsel's partner in the Los Angeles office of their firm, Howard J. Steinberg (at: steinbergh@gtlaw.com). A true and correct copy of the Rule 11 Letter (but without the referenced Sanctions Motion which was enclosed with the Rule 11 Letter) is hereto attached as "**Exhibit 1**." I also instructed my assistant to send the Rule 11 Letter to Counsel by United Parcel Service ("UPS") for delivery on January 13, 2017, and I personally reviewed an email from UPS confirming the Rule 11 Letter was delivered to Counsel's offices on January 13, 2017.

4. Among other things, the Rule 11 Letter requests Salus' consent to stipulate to request a continuance of the Scheduled Hearing Date in light of the Rule 11 Letter, to allow Counsel the full 21-day period to consider the substance of the Trustee's counsel's letter as provided for in Rule 11. As of the date hereof, and after inquiry within our firm, to my knowledge Counsel has not provided any response whatsoever to this request or the Rule 11 Letter.

5. I believe that the Motion for a continuance of the hearing on the Stay Motion is

meritorious and should be granted in order to preserve the Trustee's right to file the contemplated Sanctions Motion in the event the Salus Defendants do not withdraw their Stay Motion which is denied.

6. Attached hereto as "Exhibit 2" is a true and correct copy of each of the unpublished decisions cited in the Motion, arranged in the order in which they appear.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this date, January 17, 2017, at Woodland Hills, California.

JERROLD L. BREGMAN

Exhibit 1

(Rule 11 Letter w/o enclosed draft Sanctions Motion)

BRUTZKUS GUBNER
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January 12, 2017

VIA E-MAIL AND
OVERNIGHT COURRIER

Joseph P. Davis
Greenberg Traurig, LLP
One International Place
Boston, MA 02110

Re: In re Anna's Linens, Inc. (the "Debtor")
Bankruptcy Case No. 8:15-bk-13008-TA
Adversary Proceeding No. 8:15-ap-01482-TA
Our File No. 4123.002

Dear Mr. Davis:

I write this letter to you pursuant to Federal Rule of Civil Procedure 11 and Federal Rule of Bankruptcy Procedure 9011 (together, "Rule 11").

As you know, our firm is special litigation co-counsel for Karen Sue Naylor in her capacity as chapter 7 trustee (the "Trustee") of the Debtor's estate (the "Estate"), and attorneys for P & A Marketing, Inc., Panda Home Fashions LLC, Shewak Lajwanti Home Fashions, Inc. dba S.L. Home Fashions, Inc., and Welcome Industrial Corporation, all of whom, together with the Trustee, are plaintiffs (collectively, "Plaintiffs") in the above-referenced adversary proceeding (the "Adversary Proceeding) against your clients, Salus Capital Partners, LLC ("Salus") and certain of the lenders identified in the Adversary Proceeding (collectively, with Salus, the "Salus Defendants").

We are in receipt of the *Memorandum of Points and Authorities in Support of Motion of Salus Capital Partners, LLC to Stay pending the Appeal of this Court's December 20, 2016 Order [Dkt. No. 1734] Approving Application of the Trustee to Employ Brutzkus Gubner as Joint Special Co-Litigation Counsel* that you filed on behalf of the Salus Defendants on January 3, 2017 [Docket No. 1743] ("Motion"). The hearing on the Motion is presently scheduled for January 24, 2017 (the "Scheduled Hearing").

Through the Motion, which you signed, the Salus Defendants seek a stay pending their appeal (the "Appeal") of the Bankruptcy Court's December 20, 2016 order approving the Trustee's application to retain our firm as the Trustee's special litigation co-counsel for purposes of prosecuting the Estate's claims in the Adversary Proceeding [Docket No. 1734] (the "Employment Order").

The Motion is premised upon the Salus Defendants' contention that the Appeal is viable and, indeed, that it will be successful. Under binding Ninth Circuit authority that is directly on point, however, the Appeal will not be successful because the Employment Order is an interlocutory order which is not subject to appeal as of right. As you presumably know but decided for whatever reason to not address in the Motion, there are several cases within our circuit, including issued by the Ninth Circuit itself, stating without equivocation that bankruptcy court orders approving retention applications are interlocutory orders that are not subject to appeal, even in instances where the application to employ counsel was objected to on the basis of an alleged conflict of interest. The clear law in the Ninth Circuit is that such orders are interlocutory and not subject to the right of appeal. *See, e.g., Westwood Shake & Shingle, Inc. (Security Pac. Bank Washington v. Steinberg)*, 971 F2d 387, 389 (9th Cir. 1992) ("[w]here the underlying bankruptcy court order involves the appointment or disqualification of counsel ... [CA] courts have uniformly found that such orders are interlocutory even in the more flexible bankruptcy context."), *cited in In re Butler Industries*, 8 F.3d 25, 1993 WL 410703 *2 (9th Cir. 1993), *and In re Plant Insulation Co.*, 2010 WL 1526320 *1 (Bankr. N.D. CA. Apr. 14, 2010) (order approving debtor's counsel over objection based on alleged conflict was interlocutory and therefore not entitled to appeal as of right under 28 U.S.C. Section 158 (a)(1), and no harm to objector sufficient to justify district court's discretionary review of interlocutory order by "leave of court" under 28 U.S.C. Section 158(a)(3)).

All objective appearances are that you and the Salus Defendants filed the baseless Motion in an obvious attempt to further delay our prosecution of the Adversary Proceeding for the improper purpose of delay itself, and to run up the fees and costs for the Estate, with its consequence of enriching your firm, all to the Estate's detriment and without the requisite "reasonable and competent" inquiry. The Motion only serves to harass the Trustee, to delay the prosecution of the Adversary Proceeding, delay the administration of the bankruptcy case, and to needlessly increase the costs of litigation. Your failure to abide by Ninth Circuit law, or even seek leave for an exception to the law, is on display by the Motion.

The Motion cannot and will not result in any relief in the Salus Defendants' favor. The above-referenced legal authority is indisputable. There are no facts indicating otherwise. There is no reasonable argument to modify or reverse the law as it stands. When the Court conducts its objective review of the Motion, it will determine that the Motion was filed without the requisite reasonable and competent inquiry, and that the Motion only serves to harass the Trustee, to delay the prosecution of the Adversary Proceeding and bankruptcy case, and to needlessly increase the costs of litigation.

Consequently, now is the time for you to withdraw your Motion. Should you fail to do so, it is our intention, at the appropriate time, to seek sanctions against you

according to the rules and procedure specified in Rule 11. This letter serves as your "safe-harbor" notice. An unfiled copy of the motion is enclosed herewith.

Your failure to withdraw the Motion within 21 days of the service hereof, or such shorter period as may be set by the Court, entitles the Plaintiffs to file, formally notice, and calendar the within motion.

If you are not prepared to withdraw the Motion by tomorrow, January 13, 2017, and if you would like more time to consider this notice before we act, please let us know by close of business tomorrow and we will stipulate to adjourn the Scheduled Hearing to a date on or after February 6, 2017, to allow the full 21 days, and we will promptly send you a simple stipulation requesting adjournment of the Scheduled Hearing. Otherwise, and in accordance with Rule 11, we intend to file a motion asking the Court to shorten the "safe harbor" period from 21 days to 11 days, ending on the day before the Hearing, or adjourn the Scheduled Hearing to a date on or after February 6th, which motion would also increase our costs and the damages recoverable as sanctions.

Please contact me at your earliest convenience to let me know that you will be withdrawing the Motion.

Sincerely,

Steven T. Gubner

Encl.

cc: Howard J. Steinberg (w/encl.)
Nanette Sanders (w/encl.)

1711236

Exhibit 2

(Unpublished cases *Butler*; *Plant*; and *Megargee*)

8 F.3d 25
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Ninth Circuit.

In re BUTLER INDUSTRIES, INC., Debtor.
Herbert WOLAS, Plaintiff-Appellant,
NATIONAL ASSOCIATION, National Association of Bankruptcy Trustees, Amicus.

No. 90-55758.
|
Submitted Oct. 8, 1993.*
|
Decided Oct. 15, 1993.

Appeal from the United States District Court for the Central District of California, No. CV-89-4868-WJR, William J. Rea, District Judge, Presiding.

C.D.Cal., 114 B.R. 695.

DISMISSED.

Before: FLETCHER and D.W. NELSON, Circuit Judges, and WILL,** District Judge.

MEMORANDUM***

***1** Appellant Herbert Wolas, the Chapter 7 trustee for the estate of Butler Industries, appeals the district court's order affirming the bankruptcy court's order denying his application to employ his law firm. Wolas seeks reversal on the grounds that the bankruptcy court's determination that a trustee must show "cause" in order to employ the trustee's law firm to represent the estate sets a higher standard for representation by such a firm than is required by the Bankruptcy Code. *See* 11 U.S.C. §§ 327(a) & 327(d). We dismiss because we lack jurisdiction to consider an appeal from the district court's affirmance of an interlocutory order of the bankruptcy court.

BACKGROUND

Appellant, Herbert Wolas, is the trustee for an estate in bankruptcy. On April 4, 1989, in his capacity as trustee, Wolas applied to the bankruptcy court, requesting that the law firm of Wolas, Soref & Ickowicz, in which he is a partner, be appointed as legal counsel for the estate. The bankruptcy court denied the motion, stating that a trustee must show "cause" to justify the appointment of his law firm as counsel under § 327(d) of the bankruptcy code. *In re Butler Industries,* 101 B.R. 194, 197 (Bankr.C.D.Cal.1989).

Wolas contends that the right of a trustee to select counsel of his choice is granted by statute, provided that the selection is in the "best interests" of the estate. Wolas argues that because the largest secured and unsecured creditors approve the selection of counsel, the counsel selected must be in the best interests of the estate. Wolas also contends that the bankruptcy court's holding that a trustee must show "cause" in order to employ the trustee's law firm sets a higher standard for representation by such a firm than is required by the bankruptcy code. On appeal, the district court affirmed the bankruptcy court's order. Wolas timely appealed to this court.

We requested the appellant to brief the question of whether this court has jurisdiction to review the order denying appointment of counsel in light of this court's decision in *Security Pac. Bank Washington v. Steinberg (In re Westwood Shake & Shingle, Inc.),* 971 F.2d 387 (9th Cir.1992).

DISCUSSION

Wolas contends that we have jurisdiction over this appeal on two theories. First, Wolas argues that under the standard of finality used for bankruptcy appeals, 28 U.S.C. § 158(d), the denial of counsel is a final judgment. Alternatively, Wolas argues that the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949), permits review in this case.

A. Jurisdiction Over Appeals From Bankruptcy Court Orders That Deny Appointment of Counsel

This court has jurisdiction over final orders of the district court reviewing bankruptcy court decisions.

158(d); *United States v. Technical Knockout Graphics (In re Technical Knockout Graphics),* 833 F.2d 797, 800 (9th Cir.1987). However, we do not have discretion to hear interlocutory appeals under § 158(d). *Security Pac. Bank Washington,* 971 F.2d at 389. In this case, to determine whether the district court's order is final, we must look to the nature of the underlying bankruptcy court order. *Id.; Foster Secs., Inc. v. Sandoz (In re Delta Servs. Indus.),* 782 F.2d 1267, 1268 (5th Cir.1986). If the underlying bankruptcy court order is interlocutory, the district court order affirming or reversing it is also interlocutory. *Security Pac. Bank Washington,* 971 F.2d at 389; *see also Belo Broadcasting v. Rubin (In re Rubin*), 693 F.2d 73, 76 (9th Cir.1982) (district court decisions on interlocutory appeals from bankruptcy court are interlocutory orders under 28 U.S.C. § 1293, the predecessor of § 158(d)).

***2** In *Security Pac. Bank Washington,* this court found that "[w]here the underlying bankruptcy court order involves the appointment or disqualification of counsel, ... courts have uniformly found that such orders are interlocutory even in the more flexible bankruptcy context." 971 F.2d at 389 (citations omitted). We further held that "we lack jurisdiction under 28 U.S.C. § 158(d) to review a district court's affirmance of a bankruptcy court's interlocutory order concerning the appointment of counsel." *Id.*

Wolas seeks to distinguish *Security Pac. Bank Washington,* arguing that the underlying facts in that case involved an order appointing counsel, while this case involves an order *denying* the appointment of counsel. Wolas argues that when the court appoints counsel, the court has continuing supervision over the counsel; in contrast, denial of the appointment of counsel is more final because the court never has the opportunity to reconsider the issue. *See also Foster Secs.,* 782 F.2d at 1271 (finding bankruptcy court order appointing interim trustee to be interlocutory and noting that if the bankruptcy judge finds the trustee to have interests adverse to the estate, the court may always reconsider its decision).

This distinction is not persuasive for our purposes. In *Security Pac. Bank Washington,* we clearly considered both the appointment and the disqualification of counsel, and held that all orders "concerning the appointment of counsel" are interlocutory. 971 F.2d at 389; *see also Intercontinental Enters., Inc. v. Keller (In re Blinder Robinson & Co.),* 132 B.R. 759, 763 (D.Colo.1991) (disqualification of counsel is not a final order); *In re Sharpe,* 98 B.R. 337, 339 (N.D.Ill.1989) (same). Moreover, just as the bankruptcy court may disqualify counsel later in the proceedings, it also may consider a new motion to appoint counsel. We are bound by the precedent of this court in *Security Pac. Bank Washington* and find that we lack jurisdiction under 28 U.S.C. § 158(d) to review this claim.[1]

B. Collateral Order Doctrine

Alternatively, Wolas argues that this court may exercise jurisdiction over this appeal pursuant to the collateral order doctrine. The collateral order doctrine enunciated in *Cohen,* 337 U.S. 541, allows courts of appeals to treat orders that are interlocutory in nature as final under 28 U.S.C. § 1291 if three conditions are met. The order must (1) conclusively determine the disputed question, (2) resolve an important question completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from final judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978).

The Supreme Court has applied the *Cohen* factors to deny review to orders involving the appointment or disqualification of counsel. *See Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 440 (1985) (both orders disqualifying counsel and orders denying motion to disqualify not collateral orders subject to appeal).

***3** In *Security Pac. Bank Washington,* we held that an order appointing counsel does not meet the standard set by *Cohen* for two reasons. First, these orders are not separate from the merits: " 'only after assessing ... the final judgment could an appellate court decide whether the client's rights had been prejudiced.' " 971 F.2d at 390 (citing *Richardson-Merrell,* 482 U.S. at 439). Second, such orders "are usually amenable to appellate review after a final judgment has been entered." *Id.*

We see no reason to conclude that an order denying appointment of counsel is more readily separable from the merits of the case than one that appoints counsel. *See Foster Secs.,* 782 F.2d at 1273 (order denying disqualification of counsel does not lend itself more readily to consideration apart from the merits than one granting disqualification). Similarly, orders denying counsel are equally amenable to appellate review after final judgment as are orders appointing counsel. *See Richardson-Merrell,* 472 U.S. at 431.

For these reasons, we conclude that a bankruptcy court's order declining to appoint counsel is not final under the *Cohen* collateral order doctrine.

Because the district court order refusing to appoint as counsel the law firm of Wolas, Soref & Ickowicz was interlocutory, the district court's affirmance of that order

was also interlocutory. We lack jurisdiction over this appeal pursuant to 28 U.S.C. § 158(d). Accordingly, the appeal in this case is DISMISSED.

All Citations

8 F.3d 25, 1993 WL 410703 (Table)

Footnotes

* Appellant, Herbert Wolas, elected not to argue.

** Honorable Hubert L. Will, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

1 The Supreme Court has also declined to distinguish between orders appointing counsel and those denying counsel, and has found that an order disqualifying counsel is an interlocutory order in both the civil and the criminal context. *See Richardson-Merrell v. Koller,* 472 U.S. 424, 430 (1984) (stating that "[a]n order disqualifying counsel in a civil case is not a final judgment" and immediate appellate review is only appropriate if the collateral order doctrine applies); *Flanagan v. United States,* 465 U.S. 259 (1984) (pretrial orders disqualifying counsel in criminal cases are not subject to immediate appeal); *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 377 (1971) (order refusing to disqualify counsel in civil case is not subject to immediate appeal).

2010 WL 1526320
Only the Westlaw citation is currently available.
United States District Court, N.D. California, San Francisco Division.

In re PLANT INSULATION COMPANY, Debtor.
United States Fire Insurance Company, Appellant,
v.
Official Committee of Unsecured Creditors, Appellee.

No. C 09-4222 RS.
|
Bankr.Ct. No. 09-31347 TEC.
|
April 14, 2010.

West KeySummary

1 **Bankruptcy**
Interlocutory Orders; Collateral Order Doctrine
Bankruptcy
Petition for Leave; Appeal as of Right; Certification

An insurance company did not show that it would suffer irreparable harm from a bankruptcy court's interlocutory order appointing a certain law firm as counsel for the official committee of unsecured creditors in the bankruptcy proceedings. As a result, the insurance company would not be granted leave to appeal the order. The insurance company had argued that the law firm should have been disqualified from representing the committee because the law firm had previously represented the insurance company in another matter. But the bankruptcy court barred the law firm from representing the committee with respect to issues that would bring it into direct conflict with the insurance company's interests. Whatever harm to the insurance company that might arise from the law firm's representation of the committee on other matters was insufficient to support an immediate appeal. 28 U.S.C.A. §§ 158(a)(3), 1292(b).

Cases that cite this headnote

ORDER DENYING MOTION FOR LEAVE TO APPEAL AND DISMISSING APPEAL

RICHARD SEEBORG, District Judge.

I. INTRODUCTION

***1** United States Fire Insurance Company initiated this proceeding by simultaneously filing a notice of appeal from a decision of the Bankruptcy Court and, in the alternative, a motion for leave to appeal, in the event there is no appeal as of right. The order that U.S. Fire seeks to challenge appoints the Law Firm of Sheppard Mullin Richter & Hampton, LLP as counsel for the Official Committee of Unsecured Creditors in the bankruptcy proceedings. US Fire contends that Sheppard Mullin should have been disqualified from representing the Committee, given its prior representation of U.S. Fire in another matter.

The Committee opposes U.S. Fire's motion for leave to appeal, and separately moves to dismiss as to the notice of appeal that U.S. Fire filed. The two motions were both set for hearing on the same day, but the Court took them under submission without oral argument, prior to the reassignment of this case to the undersigned. Under Ninth Circuit precedent, the Bankruptcy order in dispute here is not separately appealable either as a "final" or a "collateral" order. Accordingly, dismissal of the notice of appeal must be granted. While the Court has discretion to grant leave to appeal an interlocutory order in appropriate circumstances, U.S. Fire has not shown that such leave is warranted here. Therefore its motion will be denied.

II. DISCUSSION

Appeals from Bankruptcy Court decisions are governed

by 28 U.S.C. § 158. Subdivision (a)(1) of that section vests in district courts the jurisdiction to hear appeals "from final judgments, orders, and decrees." Subdivision (a)(3) permits appeals to district courts of interlocutory bankruptcy orders and decrees, "with leave of court." Here, U.S. Fire contends it is entitled to appeal as of right the order appointing Sheppard Mullin as counsel for the Committee, either as a "final" or "collateral" order, or that it should be granted leave to appeal under subdivision (a)(3) of section 158.

a. *"Final" judgments*

Relying on the Third Circuit decision in *In re BH & P, Inc.*, 949 F.2d 1300 (3rd Cir.1991), U.S. Fire insists that the order appointing Sheppard Mullen is "final" and immediately appealable under § 158(a)(1). In *BH & P*, however, the bankruptcy court had *disqualified* counsel, thereby rendering a final decision with respect to that counsel's participation in the case. *See also,* Bruce I. McDaniel, Annotation, *Order on Motion to Disqualify Counsel as Separately Appealable under 28 U.S.C.A. § 1291,* 44 A.L.R. Fed. 709 (1979) (collecting cases and observing that while orders disqualifying counsel are "uniformly held" to be appealable, treatment of orders denying requests to disqualify varies by jurisdiction.)

The Ninth Circuit has unambiguously held that a bankruptcy order appointing counsel in the face of objections regarding a purported conflict is *not* a "final" order, but an interlocutory one. *In re Westwood Shake & Shingle, Inc.,* 971 F.2d 387 (9th Cir.1992). US Fire's contention that the order is "final" for purposes of permitting immediate appeal as of right is simply not tenable.

b. *"Collateral" orders*

***2** The collateral order doctrine enunciated in *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), allows an interlocutory order to be treated as final for purposes of appealability if three conditions are met. The order must (1) conclusively determine the disputed question, (2) resolve an important question completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from final judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). Although this doctrine was developed in the context of 28 U.S.C. § 1291, which governs appeals from district courts, there is no reason it could not in theory apply to render an interlocutory bankruptcy order immediately appealable to a district court under 28 U.S.C. § 158(a)(1). Again, however, clear Ninth Circuit precedent precludes a conclusion that the order appointing Sheppard Mullen is immediately appealable as a collateral order. *In re Westwood Shake & Shingle, Inc.,* supra, 971 F.2d at 390-391.[1]

c. *Permissive appeal under section 158(a)(3)*

To determine whether leave to appeal an interlocutory order is warranted under section 158(a)(3), it is appropriate to look to the analogous provisions of 28 U.S.C. § 1292(b), which governs appellate review by the Courts of Appeals of interlocutory district court orders. *Belli v. Temkin (In re Belli),* 268 B.R. 851, 858 (B.A.P. 9th Cir.2001).[2] Under this standard, leave to appeal is proper where, "the appeal presents a meritorious issue on a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal would materially advance the ultimate termination of the litigation." *Id.* at 858.

Here, as noted, U.S. Fire's initial brief in support of its motion completely fails to argue that the standards of section 158(a)(3) are met here, although it does address somewhat similar issues in the context of arguing that review should be permitted under the collateral order doctrine. US Fire's opposition to the Committee's motion to dismiss argues generally that equitable considerations support immediate review, but does not specifically address section 158(a)(3) standards. US Fire's reply brief in support of its own motion finally addresses the crucial issues, but falls short of establishing that leave to appeal should be granted here.

Whether the denial of a disqualification motion is ever subject to discretionary review under Ninth Circuit precedent is somewhat unclear. In *Shurance v. Planning Control Int'l, Inc.,* 839 F.2d 1347 (9th Cir.1988), the court strongly suggested that such matters will rarely, if ever, support review. First, the court observed that denial of disqualification does not present a "controlling question of law" bearing on the outcome of the litigation. 839 F.2d at 1347-48. Second, the court noted that allowing the appeal would not "materially advance the ultimate termination of the litigation." *Id.* at 1348.

***3** The *Shurance* court acknowledged that what it characterized as "dicta" in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), supports the proposition that an appeal of a denial of a disqualification may sometimes satisfy the criteria for a discretionary interlocutory appeal, but only upon a compelling showing of irreparable harm. The *Shurance* court went on to declare simply that "28 U.S.C. § 1292(b)

is not the proper avenue by which to obtain review of the district court's denial of a motion to disqualify an attorney for conflict of interest." 839 F.2d at 1348.[3]

Assuming that discretionary review is nonetheless permissible upon an adequate showing of potential irreparable harm notwithstanding a failure to meet the usual requirements for such review, U.S. Fire has not established that review is warranted here. US Fire criticizes the bankruptcy court for having on the one hand found there to be no "substantial relationship" between the two matters, while on the other hand having imposed restrictions that preclude Sheppard Mullen from representing the Committee with respect to issues that would bring it into direct conflict with U.S. Fire's interests. US Fire contends this demonstrates a flawed legal analysis, because either there is a conflict requiring disqualification, or there is not. Even assuming, for purposes of argument, that the Bankruptcy Court had committed legal error in one or more aspects of its ruling, the fact that Sheppard Mullen has been barred from advising the Committee where its interests are directly adverse to U.S. Fire undermines any argument that irreparable harm is certain to result.

Whatever harm to U.S. Fire might theoretically arise from Sheppard Mullen's representation of the Committee on other matters simply is insufficient to support an appeal at this juncture, particularly in light of the Supreme Court's observation that, "[a]n order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not." *Firestone Tire & Rubber Co. v. Risjord*, supra, 449 U.S. at 374. Accordingly, the motion for leave to appeal is denied.

IV. CONCLUSION

The motion to dismiss the appeal is granted. US Fire's alternative motion for leave to appeal is denied. The Clerk shall close the file.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 1526320

Footnotes

1 US Fire appears to conflate appeal as of right under the collateral order doctrine with appeals by leave of court under 28 U.S.C. § 158(a)(3). For example, even though U.S. Fire's original motion expressly seeks leave to appeal under section 158(a)(3), the brief only discusses the collateral order doctrine, leading the Committee to argue in its opposition and own motion that U.S. Fire has not sought permission to appeal under section 158(a)(3). Then, in its reply brief, U.S. Fire attempts to distinguish *Westwood Shake* on grounds that it was the Ninth Circuit, not the district court, that declined to entertain the appeal. While it is true that the district court in *Westwood Shake* had reviewed the bankruptcy court order, presumably under section 158(a)(3), that does not somehow undermine or render inapplicable the Ninth Circuit's holding that the bankruptcy order was neither final nor within the collateral order doctrine.

2 As the *Belli* court pointed out, the procedures under the two statutes are somewhat different in that section 158(a)(3) does not involve certification by the first court that a question warranting immediate review exists.

3 The *Shurance* court described this as a rule laid down with "clarity" in *Trone v. Smith*, 553 F.2d 1207 (9th Cir.1977). Although the *Trone* court did not explain its reasoning, the case citations it employed imply that the court then believed review under section 1292(b) was unnecessary because review was available under the collateral order doctrine. *See Trone*, 553 F.2d at 1207 (citing, e.g., *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2nd. Cir.1974)); *Silver Chrysler*, 496 F.2d at 805-806 (holding denial of disqualification motion appealable as of right under the collateral order doctrine). As a result, Ninth Circuit case law appears to present a Catch 22 for parties challenging disqualification motion determinations: Per *Trone* discretionary review is not available because appeal as of right is possible, but per *Westwood Shake* the order is neither final nor within the collateral order doctrine, so there is no appeal as of right.

2006 WL 2988945
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Stanleigh Glean MEGARGEE, an incompetent, by Hazel and Art LOPEZ, his guardian ad litem; and Katie Taylor, a minor, by Terry Huerta, her guardian ad litem, Plaintiffs,
v.
Bill WITTMAN, Chad Rhyman, and Brandon Hall, in their individual capacity as sheriffs of the County of Tulare, and the County of Tulare, and Does 1 through 100, inclusive, Defendants.

No. CV F 06-0684 AWI LJO.
|
Oct. 17, 2006.

Attorneys and Law Firms

Brian Edward Claypool, Dongell Lawrence Finney Claypool LLP, Los Angeles, CA, for Plaintiffs.

Justus C. Spillner, Graham Christenson Mills, McCormick, Barstow, Sheppard, Wayte & Carruth LLP, Fresno, CA, Teresa M. Saucedo, Visalia, CA, for Defendants.

MEMORANDUM OPINION AND ORDER DENYING IN PART AND GRANTING IN PARTY DEFENDANTS' MOTIONS TO DISMISS

ANTHONY W. ISHII, District Judge.

***1** This action arises out of Defendants' shooting Plaintiffs. The court has jurisdiction over Plaintiffs' civil rights causes of action brought pursuant to 42 U.S.C. § 1983 under 28 U.S.C. § 1331 and supplemental jurisdiction over Plaintiffs' state law causes of action. Because the events underlying this action occurred in Tulare County, which lies in this court's district and division, venue is proper.

PROCEDURAL BACKGROUND

On June 2, 2006, Plaintiffs filed a complaint, alleging federal civil rights and state law causes of action. On June 9, 2006, Plaintiffs filed a first amended complaint ("complaint"). The first cause of action alleges excessive force in violation of the fourth amendment against all Defendants except Defendant County of Tulare ("County"). The second cause of action alleges entity liability and official liability against all Defendants except Defendant Bill Wittman ("Wittman"). The third cause of action alleges negligent hiring, training supervision, and retention against Wittman and County. The fourth cause of action alleges negligence against all Defendants. The fifth cause of action alleges battery against all Defendants. The sixth cause of action alleges failure to provide medical care against all Defendants. The seventh cause of action alleges spoliation of evidence against all Defendants.[1]

On August 1, 2006 and August 4, 2006, Defendants County, Wittman, Chad Rhyman ("Rhyman"), and Brandon Hall ("Hall") filed motions to dismiss the first amended complaint. Defendants contend the first and fifth causes of action should be dismissed because the use of force was legally justified. Defendants contend the second cause of action should be dismissed as to County, Hall, and Rhyman because there are no facts upon which they can be liable. County and Hall contend the third and fourth causes of action should be dismissed as to them because they are not liable. Hall and Rhyman contend the fourth cause of action should be dismissed as to them because they owed no duty to Plaintiffs and their actions were not negligent. Defendants contend the sixth cause of action should be dismissed because Defendants are not liable. Defendants contend the seventh cause of action should be dismissed because there is not tort for spoilage of evidence in California and/or Plaintiffs cannot recover for this tort. Defendants contend Taylor cannot recover for emotional distress damages. Finally, Defendants request that the court strike paragraphs from the complaint.

On September 1, 2006, Plaintiffs filed oppositions to County's motion, Wittman's motion, and Rhyman's motion. Plaintiffs did not file a formal opposition to Hall's motion. On September 11, 2006, Defendants filed reply briefs.

LEGAL STANDARD

A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure if it appears beyond

doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)); *Balistreri v. Pacifica Police Department,* 901 F.2d 696, 699 (9th Cir.1990). A Rule 12(b)(6) dismissal can be based on the failure to allege a cognizable legal theory or the failure to allege sufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530,533-34 (9th Cir.1984). In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v.. Rex Hospital Trustees,* 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor. *Jenkins v. McKeithen,* 395 U.S. 411, 421 (1969).

***2** A Rule 12(b)(6) motion to dismiss for failure to state a claim is disfavored, *see Hall v. City of Santa Barbara,* 833 F.2d 1270, 1274 (9th Cir.1986), and may be granted only in extraordinary circumstances, *see Gilligan v. Jamco Develop. Corp.,* 108 F.3d 246, 249 (9th Cir.1997). Essentially, a motion to dismiss for failure to state a claim tests plaintiff's compliance with the liberal requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. *See* 5A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1356. Rule 8(a)(2) only requires parties seeking relief in federal court by way of complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). As the Supreme Court has noted, when evaluating a complaint for failure to state a claim, the question is not whether the facts stated in the complaint, if proven, would entitle the plaintiff to any relief. Instead, the question is whether there is any set of "facts that could be proved consistent with the allegations of the complaint" that would entitle plaintiff to some relief. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002); *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *Diaz v. Gates,* 380 F.3d 480, 482 (9th Cir.2004).

ALLEGED FACTS

The complaint alleges that on June 6, 2005, Plaintiff Stanleigh Glean Megargee ("Megargee") was driving a stolen truck in Visalia, California. There were three passengers in the vehicle: Plaintiff Katie Taylor ("Taylor"), Dennis Carter, and Brent Wallis. Megargee was 17 years old at the time, and Taylor was 15 years old.

The complaint alleges that Plaintiffs and the other passengers had been attempting a residential burglary when they were interrupted by Defendants, members of the Tulare County Sheriff's Department.

The complaint alleges that a chase then ensued, with Plaintiffs in the stolen vehicle and at least two Tulare County Sheriff's cars. The complaint alleges that the chase lasted approximately 15 minutes.

The complaint alleges that the chase ultimately led to a cul-de-sac at or near the intersection of Prospect Avenue and Selina Street in Visalia, California. The complaint alleges that Defendants' cars and the residential buildings located on the cul-de-sac effectively blocked Plaintiffs' vehicle from any potential escape.

The complaint alleges Megargee put the vehicle in "park" and waited in the truck. The complaint alleges Defendants' two cars rammed into Plaintiffs' vehicles from either side, securing the stolen vehicle between the two Sheriff's cars. The complaint alleges a garage behind Plaintiffs' vehicle prevented Megargee from driving the vehicle in reverse to escape.

The complaint alleges that at no time did Megargee or Taylor try to run away, nor did they physically or verbally threaten Defendants.

The complaint alleges that one of the passengers in Plaintiffs' vehicle immediately jumped out of the vehicle and surrendered to Defendants. The complaint alleges that within seconds, before any other passenger or Plaintiffs had an opportunity to surrender, Defendants opened fire on the cab of the truck. The complaint alleges Defendants fired shots at Plaintiffs and the remaining passengers.

***3** The complaint alleges Defendants' first shot Megargee in the chest, causing Megargee to fall unconscious and slump forward in the driver's seat against the steering wheel. The complaint alleges Defendants fired the shots at close range because Megargee had gunpowderder burns on his chest. The complaint alleges Megargee made no attempt to escape once the vehicle was trapped in the cul-de-sac.

The complaint alleges that after falling unconscious, at a time when Megargee posed no threat to anyone, Defendants again shot Megargee, this time in the head. The complaint alleges that this shot was also fired at extremely close range, as there were gunpowder burn marks on Megargee's face.

The complaint alleges that Defendants shot Taylor at least three times, and Taylor sustained severe injuries to her upper left leg.

The complaint alleges that Defendants did not check Megargee's vital signs and tossed him out of the truck onto the concrete street. The complaint alleges that Defendants only checked Megargee's vital signs several minutes later, and found that he had survived the close-range execution-style shooting.

The complaint alleges that Defendants did not find any weapons in the truck or on any of the individuals, including Megargee and Taylor.

The complaint alleges that Defendants' cars were equipped with audio and visual recording equipment. The complaint alleges this equipment was in operation at the time of the incident. The complaint alleges that all recordings of the incident were unlawfully destroyed by members of the Tulare County Sheriff's Department.

The complaint alleges that as a result of Megargee's injuries, doctors had to perform a full partial lobotomy, resulting in the removal of approximately 25% of Megargee's brain. The complaint alleges that as a result of his injuries, Megargee's cognitive and reasoning skills have been destroyed. The complaint alleges that Megargee cannot control even involuntary bodily functions, and Megargee's motor skills have been permanently and vastly impaired.

The complaint alleges that as a result of the injuries sustained by Taylor, surgeons were forced to remove a portion of her femur in order to save her leg. The complaint alleges Taylor also suffered extreme emotional distress when Megargee was shot in the head. The complaint alleges that portions of Megargee's brain landed in Taylor's lap.

The complaint alleges that Megargee's and Taylor's injuries are the result of the use of excessive force by Defendants. The complaint alleges that Plaintiffs were unarmed and neither presented a threat to the public or members of the Tulare County Sheriff's Department. The complaint alleges Defendants immediately resorted to the use of deadly force when less severe methods of controlling the situation were readily apparent.

The complaint alleges that at the time of the incident, Defendant County had customs, practices, and polices including, but not limited to: (a) allowing Sheriff's Deputies to cover up excessive use of force by false detaining, arresting, and encouraging the wrongful prosecution of the victims of excessive force, through charges of resisting arrest, and related offenses; (b) allowing an ongoing pattern of deliberate indifference on the part of deputies to the rights and privileges of the people of the County of Tulare to be free from excessive force, unreasonable seizures, and other violations of individuals' civil rights; (c) allowing deputies to use excessive force and intimidation tactics against people in order to make those people more submissive in their interactions with law enforcement; and (d) failing to provide criteria for the use of deadly force and failing to take into account special circumstances when individuals are trapped in a vehicle with no means of escape and rendered unconscious.

DISCUSSION

A. First Cause of Action-Fourth Amendment Violation
***4** The first cause of action alleges excessive force in violation of the Fourth Amendment against all Defendants except County. Defendants contend that the first cause of action should be dismissed because the use of force was legally justified.

The Fourth Amendment guarantees the right "to be secure in their persons ... against unreasonable ... seizures." U.S. Const. amend. IV. Claims alleging that law enforcement officials used excessive force during an arrest, investigatory stop, or other seizures should be analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor,* 490 U.S. 386, 395, (1989); *Drummund v. City of Anaheim,* 343 F.3d 1052, 1056 (9th Cir.2003); *Billington v. Smith,* 292 F.3d 1177, 1184 (9th Cir.2002); *Robinson v. Solano County,* 278 F.3d 1007, 1009 (9th Cir.2002). Under the Fourth Amendment, officers may only use such force as is "objectively reasonable" under the circumstances. *Graham v. Connor,* 490 U.S. 386, 397 (1989). To determine whether the force used was reasonable, courts balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (citations omitted); *Billington,* 292 F.3d at 1184.

In evaluating the nature and quality of the intrusion, the court must consider "the type and amount of force inflicted" on the plaintiff *Jackson v. City of Bremerton,* 268 F.3d 646, 651-52 (9th Cir.2001); *Chew v. Gates,* 27 F.3d 1432, 1440 (9th Cir.1994). Next, the court must balance the plaintiff's alleged intrusions against the governmental interests at stake. *Jackson v. City of Bremerton,* 268 F.3d 646, 652 (9th Cir.2001). Because objective reasonableness is a fact specific inquiry, courts must "pay careful attention to the facts and circumstances

of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 397; *Drummond,* 343 F.3d at 1058; *Robinson,* 278 F.3d at 1013. The determination of reasonableness must "be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and must "embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396-97; *Drummond,* 343 F.3d at 1058; *Robinson,* 278 F.3d at 1009.

1. Rhyman and Hall

All Defendants contend Plaintiff's fourth amendment cause of action must be dismissed because the use of force was reasonable. Defendants primarily focus on Plaintiffs' actions prior to entering the cul-de-sac. Plaintiffs contend that, taking the complaint's allegations as true, the complaint state a claim for unreasonable force.

***5** The complaint alleges that once the truck came to a stop in the cul-de-sac, neither Megargee or Taylor tried to run away nor did they physically or verbally threaten Defendants. The court recognizes that the determination of reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and must allow for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation. *Graham,* 490 U.S. at 396-97; *Drummond,* 343 F.3d at 1058. However, based on the complaint's allegations, at the time Plaintiffs were shot, they were sitting in a truck that had been blocked in, Plaintiffs were not trying to run away, and Plaintiffs posed no physical threat to Defendants. The most important single element in a reasonableness inquire is "whether the suspect poses an immediate threat to the safety of the officers or others." *Smith v. City of Hemet,* 394 F.3d 689, 702 (9th Cir.2005). Because the complaint contains no allegations that Plaintiffs posed an immediate threat to Defendants or others, the court cannot find as a matter of law that Defendants' use of force was reasonable based on the complaint's allegations. Thus, Rhyman's and Hall's motions to dismiss the Fourth Amendment cause of action must be denied.

2. Wittman

Because there are no allegations in the complaint that Wittman was present at the scene at the time of the shooting, Plaintiffs' first cause of action against Wittman requires Plaintiffs to plead additional facts.

Wittman's liability is premised on Wittman's job as Tulare County Sheriff. Generally, there is no respondeat superior liability under 42 U.S.C. § 1983. *Jones v. Williams,* 297 F.3d 930, 934 (9th Cir.2002). To prove a supervisor's liability, the plaintiff must show (1) the supervisor's personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Jeffers v. Gomez,* 267 F.3d 895, 915 (9th Cir.2001). Supervisors can be held liable if they play an affirmative part in the alleged deprivation of constitutional rights by setting in motion a series of acts by others which the supervisor knew or reasonably should have known would cause others to inflict the constitutional injury. *Graves v. City of Coeur D'Alene,* 339 F.3d 828, 848 (9th Cir.2003) (*citations omitted*) (quoting *Rise v. Oregon,* 59 F.3d 1556, 1563 (9th Cir.1995)); *Larez v. City of LA,* 946 F.2d 630, 646 (9th Cir.1991). "Supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others." *Menotti v. City of Seattle,* 409 F.3d 1113, 1149 (9th Cir.2005) (quoting *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir.1991)).

***6** The complaint does not allege that Wittman was present and personally involved in the shooting. Rather, the complaint alleges that Wittman failed to properly supervise and train Rhyman and Hall in the proper use of force when interacting with the public. The complaint alleges that Wittman was responsible for such training. The complaint alleges Wittman knew there were customs, practices, and policies in the Tulare County Sheriff's Department that were causing the unlawful and unreasonable use of force by deputies, but Wittman failed and refused to take appropriate actions. These allegations sufficiently allege that Wittman's inaction in the training, supervision, or control of his subordinates contributed to Hall and Rhyman's alleged improper shooting of Plaintiffs. As such, the first cause of action alleges a Fourth Amendment violation by Wittman based on his failure to adequately train, supervise, and control Hall and Rhyman. Accordingly, the first cause of action cannot be dismissed as to Wittman.

B. Second Cause of Action-Municipality Liability

The second cause of action alleges entity liability and official liability against all Defendants except Wittman. Defendants contend the second cause of action should be dismissed as to County, Hall, and Rhyman because there are no facts upon which they can be liable.

1. Rhyman and Hall

Defendants Rhyman and Hall contend the second cause of action must be dismissed as to them because there is no evidence they were supervisors. As discussed above, a "supervisor may be liable under § 1983 only 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." *Jeffers,* 267 F.3d at 915. The complaint alleges that Rhyman and Hall are employed by the County of Tulare. The complaint implies that Rhyman and Hall were two of the officers in the cul-de-sac who shot at Plaintiffs. There are no allegations in the complaint stating or implying that Rhyman and Hall were supervisors and/or supervised any of the other officers at the scene. While the complaint states a claim against Rhyman and Hall for a violation of Plaintiffs' Fourth Amendment rights, as alleged in the first cause of action, the complaint fails to state a claim against Rhyman and Hall in the supervisory capacity. The second cause of action alleges a separate theory of liability for the alleged constitutional violations based on supervisory liability. Because the complaint does not allege Rhyman and Hall were supervisors, the second cause of action is subject to dismissal as to Rhyman and Hall.

When dismissing a complaint, the Ninth Circuit has stated that "leave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts." *Bly-Magee v. California,* 236 F.3d 1014, 1019 (9th Cir.2001) (internal quotation marks omitted); *Chang v. Chen,* 80 F.3d 1293, 1296 (9th Cir.1996). Because it is possible that a supervisory cause of action under 42 U.S.C. § 1983 could be alleged against Rhyman and Hall if additional allegations concerning their status as supervisors are added to the complaint, the second cause of action against Rhyman and Hall is dismissed with leave to amend.

2. County

***7** County also moves to dismiss the second cause of action. Local governments can be "persons" subject to liability under 42 U.S.C. § 1983. *Monnell v. Dep't of Social Servs.,* 436 U.S. 658, 690 (1978). However, a local government unit may not be held responsible for the acts of its employees under a respondent superior theory of liability. *Monell,* 436 U.S. at 691; *Fuller v. City of Oakland,* 47 F.3d 1522, 1534 (9th Cir.1995). Rather, to state a claim for municipal liability, a plaintiff must allege that he suffered a constitutional deprivation that was the product of a policy or custom of the local government unit. *See City of Canton, Ohio, v. Harris,* 489 U.S. 378, 385 (1989). Thus, prevail on their claims against County, Plaintiffs must show: (1) that an officer violated his constitutional rights, and (2) the County's policy caused the violation. *See Monell,* 436 U.S. at 690-92. A Section 1983 plaintiff may establish local government liability based on official policy or custom only by (1) alleging and showing that a city or county employee committed the alleged constitutional violation under a formal governmental policy or longstanding practice or custom that is the customary operating procedure of the local government entity; (2) establishing that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself was an act of official governmental policy which was the result of a deliberate choice made among various alternatives; or (3) proving that an official with final policy-making authority either delegated policy-making authority to a subordinate or ratified a subordinate's unconstitutional decision or action and the basis for it. *Monnell,* 691; *Gillette v. Delmore,* 979 F.2d 1342, 1346-47 (9th Cir.1992).

The complaint alleges that at the time of the shooting, County had customs, practices, and polices of allowing deputies to cover up excessive use of force, allowing an ongoing pattern of deliberate indifference, allowing deputies to use excessive force, and failing to provide criteria for the use of deadly force. The complaint alleges that the shooting of Plaintiff was the direct and proximate result of these customs, practices, and polices. "In this circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice." *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1127 (9th Cir.2002); *Karim-Panahi v. Los Angeles Police Dep't,* 839 F.2d 621, 624 (9th Cir.1988); *Shah v. County of Los Angeles,* 797 F.2d 743, 747 (9th Cir.1986). Because the complaint alleges County's improper policies, practices, and customs and alleges that the shooting was a result of these policies, practices, and customs, the complaint states a claim for municipality liability against County. Thus, the

second cause of action states a claim against County, and is not subject to dismissal.

***8** County also alleges that because the officers in the cul-de-sac did not violate Plaintiffs' Fourth Amendment rights, County cannot be liable. A city or county cannot be liable for damages based on the actions of one of its employees unless the employee inflicted constitutional harm. *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986); *Scott v. Henrich,* 39 F.3d 912, 916 (9th Cir.1994); *Forrester v. City of San Diego,* 25 F.3d 804, 808 (9th Cir.1994). For the reasons discussed above, the complaint states a claim for a violation of Plaintiffs' Fourth Amendment rights by Rhyman and Hall. Thus, the second cause of action cannot be dismissed as to County on the ground that Plaintiffs have not alleged an underlying constitutional violation.

C. Fourth Cause of Action-Negligence by Rhyman and Hall

The fourth cause of action alleges negligence against all Defendants. As to Hall and Rhyman, the complaint alleges that Megargee's and Taylor's injuries were a result of the use of excessive force by Hall and Rhyman. Hall and Rhyman contend that the fourth cause of action should be dismissed as to them because they owed no duty to Plaintiffs and their actions were not negligent.

In California, the elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and the breach as the proximate cause of the resulting injury. *Ladd v. County of San Mateo,* 12 Cal.4th 913, 917-18 (1996); *Mendoza v. City of Los Angeles,* 66 Cal.App.4th 1333, 1339 (1998).

Rhyman and Hall contend that they owed Plaintiffs no legal duty of care, and thus Plaintiffs cannot establish any claim of negligence based on Defendants' actions in shooting Plaintiffs. Duty is the expression of a court's conclusion that a particular plaintiff is entitled to protection. *Rowland v. Christian,* 69 Cal.2d 108, 112 (1968); *Mendoza v. City of Los Angeles,* 66 Cal.App.4th 1333, 1339 (1998). Factors which are to be considered in deciding whether a particular defendant owed a tort duty to a given plaintiff include (1) the foreseeablility of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability. *Rowland,* 69 Cal.2d at 70; *Munoz v. City of Union City,* 120 Cal.App.4th 1077, 1094 (2004). Where a public entity is involved, the court considers the following additional factors: the availability, cost, and prevalence of insurance for the risk involved; the extent of the agency's powers; the role imposed on it by law; and the limitations imposed on it by budget. *Thompson v. County of Alameda,* 27 Cal.3d 741, 750 (1980); *Munoz,* 120 Cal.App.4th at 1095; *Adams v. City of Fremont,* 68 Cal.App.4th 243, 267-68 (1998). California courts have recognized a duty on the part of police officers to use reasonable care when deciding to use and employ deadly force. *Munoz,* 120 Cal.App.4th 1077, 1101 (2004); *see also Davis v. City of Sacramento,* 24 Cal.App.4th 393, 404-06 (1994) (upholding jury verdict of no negligence in police shooting of man during investigation of domestic disturbance; issue in dispute was whether officer used reasonable care, with no discussion of duty). Thus, Rhyman and Hall owed Plaintiffs a duty to use reasonable care when they employed force in the cul-de-sac.

***9** Rhyman and Hall also contend that the complaint fails to state a claim for negligence. The court has already determined that based on the complaint's allegations, Defendants' use of force was unreasonable under the Fourth Amendment. California courts apply this same standard in evaluating a tort claim based on an officer's allegedly negligent use of deadly force. *See Munoz,* 120 Cal.App.4th 1077, 1102-06; *David v. City of Fremont,* 2006 WL 2168329, 21 (N.D.Cal.,2006). Thus, the complaint's allegations state a cause of action for negligence against Rhyman and Hall.

Finally, Rhyman and Hall contend that they are immune from liability for any possible negligence. A public employee is liable in tort to the same extent as a private person, "except as otherwise provided by statute." Cal. Gov.Code § 820(a). In determining if a state cause of action states a claim against a public employee, it is necessary to have in mind the special immunities and defenses set forth in the statute.

Rhyman and Hall mention California Government Code § 820.2 as a potential source of immunity. California Government Code § 820.2 provides that: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Cal. Gov.Code § 820.2. This statute does not confer immunity on officers for discretionary acts involving the unreasonable use of force. *Estate of Torres v. Terhune,* 2002 WL 32107949, 13(E.D.Cal.2002); *Price v. County of San Diego,* 990

F.Supp. 1230, 1244 (S.D.Cal.1998); *Scruggs v. Haynes,* 252 Cal.App.2d 256, 266 (1967). The compliant contains allegations showing that Rhyman's and Hall's use of force was not reasonable. For the same reasons that the court has determined that the complaint states a claim for excessive force under the Fourth Amendment, Defendants are not entitled to immunity under Section 820 .2.

Rhyman and Hall also cite to California Government Code § 845.8(b) as a potential source of immunity. Section 845.8(b) provides that neither a public entity nor a public employee is liable for:

> ....
>
> (b) Any injury caused by:
>
> (1) An escaping or escaped prisoner;
>
> (2) An escaping or escaped arrested person; or
>
> (3) A person resisting arrest.

Cal. Gov.Code § 845.8. In their motions, neither Rhyman nor Hall explain why they believe they are entitled to Section 845.8(b) immunity. Presumably, Rhyman and Hall's theory is that they cannot be liable for Plaintiffs because their injuries were caused by their own conduct in resisting arrest. Defendants claim that they had probable cause to arrest Plaintiffs based on the attempted burglary and Plaintiffs' attempted to escape. While the complaint's allegations seem to concede that Plaintiffs' resisted arrest by driving away in the stolen vehicle, the complaint alleges that at the time Plaintiffs were shot, neither Megargee or Taylor were trying to run away nor did they physically or verbally threaten Defendants. Taking the complaint's allegations as true and making all inferences in favor of the complaint, Megargee and Taylor were not resisting arrest at the time they were shot. When evaluating a complaint for failure to state a claim the question is whether there is any set of "facts that could be proved consistent with the allegations of the complaint" that would entitle plaintiff to some relief. *Swierkiewicz,* 534 U.S. at 514; *Diaz,* 380 F.3d at 482. There are facts consistent with the complaint's allegations that could show Megargee and Taylor were not resisting arrest at the time they were shot. Thus, Defendants are not entitled to immunity under Section 845.8(b) at this time.

***10** Accordingly, Rhyman's and Taylor's motion to dismiss the negligence cause of action must be denied. Taking the allegations in the complaint as true, Rhyman and Taylor owed Plaintiffs' a duty to use reasonable force, Rhyman and Taylor breached this duty by not using reasonable force, and Rhyman and Taylor are not entitled to any immunities.

D. Third & Fourth Causes of Action-Negligent Supervision By Wittman and County

The third cause of action alleges negligent hiring, training, supervision, and retention against Wittman and County. The fourth cause of action alleges negligence against all Defendants. As to Wittman and County, the fourth cause of action alleges that County had a policy and custom of allowing deputies to cover up excessive use of force, allowing an ongoing pattern of deliberate indifference, allowing deputies to use excessive force, and failing to provide criteria for the use of deadly force. County and Wittman contend the third cause of action and fourth cause of action should be dismissed as to them because they are not liable.

Public entities are not liable for their own negligent conduct or omission to the same extent as a private person or entity. *Eastburn v. Regional Fire Protection Authority,* 31 Cal.4th 1175, 1180 (2003). Public entities cannot be held liable in tort for negligence except where there is a specific statute declaring them to be liable or creating a specific duty of care. *Eastburn v.. Reg'l Fire Prot. Auth.,* 31 Cal.4th 1175 (2003); *Munoz,* 120 Cal.App.4th at 1112. California Government Code § 815(a) provides:

> A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

Cal. Gov't.Code § 815.

The California Court of Appeal in *Munoz v. City of Union City,* 120 Cal.App.4th 1077 (2004), found no statutory basis for a public entity's liability that is premised on an officer's use of excessive force. *Id.* at 1113. Similarly, this court and several other United States District Courts have found no state statutory basis for a claim that a municipality is directly liable for the negligent hiring, supervision, or training of its police officers, and such a cause of action must be dismissed. *See, e.g., Sanders v.. City of Fresno,* 2006 WL 1883394, *9 (E.D.Cal.2006); *Sorgen v. City and County of San Francisco,* 2006 WL 2583683, *10 (N.D.Cal.2006); *Reinhardt v. Santa Clara County,* 2006 WL 662741, *6 (N.D.Cal.2006). Plaintiffs have also identified no such statute in their complaint or opposition briefs. Therefore, County's and Wittman's motion to dismiss Plaintiffs' claims for negligence must be granted.

The court does recognize that a "public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." Cal. Gov't Code § 815.2(a). Section 815 .2 "makes a public entity vicariously liable for its employee's negligent acts or omissions within the scope of employment." *Eastburn,* 31 Cal.4th at 1180; *Hoff v. Vacaville Unified Sch. Dist.,* 19 Cal.4th 925, 932. However, "liability of the employer only attaches if and when it is adjudged that the employee was negligent," and, although "public entities always act through individuals, that does not convert a claim for direct negligence into one based on vicarious liability." *Munoz,* 120 Cal.App.4th at 1113-114; *Sanders,* 2006 WL 1883394 at *9. The court has reviewed the complaint. The third cause of action alleges negligence based on Defendants' customs, practices, and policies. The fourth cause of action also alleges that policies and customs caused the shooting. Nowhere in the complaint do Plaintiffs allege that either County or Wittman are liable on a vicarious liability theory. Rather, the complaint alleges County's and Wittman's own actions and inactions constituted negligence. Such a theory is simply not available absent a statute. Thus, the third cause of action and fourth cause of action are subject to dismissal as to County and Wittman.[2]

***11** Absent unusual circumstances, dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by amendment. *Chang,* 80 F.3d at 1296. Because it might possible a statute does exist imposing a duty on County and/or Wittman and it is possible there is authority showing County and/or Wittman can be vicariously liable for the actions of the Deputies on the scene, the court will dismiss the negligence causes of action against County and Wittman with leave to amend. Although the court allows Plaintiffs to amend the negligence causes of action, Plaintiffs are advised that any amended complaint that includes negligence causes of action against County and Wittman must be based upon a well-founded belief that a cognizable or arguable legal theory exists that would support such a theory. *See* Fed.R.Civ.P. 11; *Les Shockley Racing Inc. v. National Hot Rod Ass'n,* 884 F.2d 504, 510 (9th Cir.1989).

E. Fifth Cause of Action-Battery

The fifth cause of action alleges battery against all Defendants. Defendants contend the complaint fails to state a claim for battery.

The elements of a civil battery are: (1) The defendant intentionally did an act which resulted in a harmful or offensive contact with the plaintiff's person; (2) The plaintiff did not consent to the contact; and (3) The harmful or offensive contact caused injury, damage, loss or harm to the plaintiff. *Piedra v. Dugan,* 123 Cal.App.4th 1483, 1495 (2004); *Fluharty v. Fluharty,* 59 Cal.App.4th 484, 497 (1997).

1. Individual Defendants

California Penal Code § 835a states that a peace officer who has reasonable cause to believe person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. In order to prevail on a claim of battery against a police officer, the plaintiff bears the burden of proving the officer used unreasonable force. *Munoz v. City of Union City,* 120 Cal.App.4th 1077, 1102 (2004); *Susag v. City of Lake Forest,* 94 Cal.App.4th 1401, 1415 (2002); *Edson v. City of Anaheim,* 63 Cal.App.4th 1269, 1272 (1998). The question is whether the officers' actions were objectively reasonable based on the facts and circumstances confronting them. *Munoz,* 120 Cal .App.4th at 1103. In calculating if the force was excessive, the trier of fact must recognize that police officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force needed. *Edson,* 63 Cal.App.4th at 1273. A state battery claim is the state counterpart to a federal civil rights claims of excessive force; in both, the plaintiff must prove the unreasonableness of the officer's conduct. *Munoz,* 120 Cal.App .4th at 1102 n. 6.

As discussed above, the complaint alleges that once the truck came to a stop in the cul-de-sac, Megargee or Taylor did not try to escape nor did they pose a threat to Defendants. Taking the allegations in the complaint as true, at the time the shots were fired, the officers did not face any apparent danger and the circumstances did not justify the amount of force employed. For the same reasons as the Fourth Amendment causes of action cannot be dismissed at this stage, the fifth cause of action is also not subject to dismissal.

2. County

***12** County asks that the fifth cause of action be dismissed for the additional reason that there is no statute imposing liability on County. As discussed above, public entities cannot be held liable in tort except where there is a specific statute declaring them to be liable or creating a

specific duty of care. Cal. Gov't Code § 815(a). No party has cited a statutory basis for a municipality being liable if its officers commit a battery. In addition, no party has cited any authority that a municipality is vicariously liable for such actions. *See* Cal. Gov't Code § 815.2(a); *Eastburn,* 31 Cal.4th at 1180. Therefore, County's motion to dismiss Plaintiffs' fifth cause of action for battery. While it is unclear what statute Plaintiffs will cite, dismissal of this cause of action as to Defendant County will be with leave to amend.

G. Sixth Cause of Action-Failure to Obtain Medical Care

The sixth cause of action alleges failure to provide medical care against all Defendants. Defendants contend the sixth cause of action should be dismissed because Defendants are not liable. Unfortunately, no party has briefed a legal definition of this cause of action. Defendants do not define the elements of this cause of action nor argue how the complaint fails to allege all elements. It appears this cause of action is based on Plaintiffs' contention that Defendants did not obtain medical care of Megargee in a timely fashion, and this delay constituted negligence on the part of Defendants. Defendants position appears to be that they owed Plaintiffs no duty, and assuming they did owe a duty, Defendants are immune.

As discussed above, the basic elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and the breach as the proximate cause of the resulting injury. *Ladd,* 12 Cal.4th at 917-18.

1. Rhyman and Hall

The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative actions to protect a person, such as summoning medical care, unless they have some relationship that gives rise to a duty to act. *Paz v. State of California,* 22 Cal.4th 550, 558 (Cal.2000); *Williams v. State of California,* 34 Cal.3d 18, 23 (1983). However, one has a duty aid another if there is a duty to exercise due care. *Id.* Tort law has long recognized that when an actor creates a risk of harm, he or she has a duty of care. *See* Duty To Third Persons Based On Undertaking To Another, REST 3D TORTS-PH § 44 (2004). Under California law, police officers owe a duty to members of the public when the police created or increased the peril to members of the public by the police's affirmative acts. *McCorkle v. City of Los Angeles,* 70 Cal.2d 252 (1969); *M.B. v. City of San Diego,* 233 Cal.App.3d 699, 705 (1991),

Based on this authority, Megargee may have a negligence cause of action against Defendants Rhyman and Hall for their alleged failure to timely summon medical care. As the officers who shot Plaintiffs, Defendants Rhyman and Hall were responsible for putting Megargee in peril, creating a duty to Megargee. While evidence may later show that Rhyman and Hall did not breach any duty to Megargee and/or Megargee did not suffer any damages caused by Rhyman and Hall's actions concerning medical care, Rhyman and Hall owed Plaintiffs a duty. The complaint alleges that Defendants assumed Megargee was dead and did not summon medical care for him until well after the shooting. Based on the allegations in the complaint, Plaintiffs have stated a cause of action against Rhyman and Hall for their failure to summon medical care.

***13** In their motion, the only authority Rhyman and Hall cite for the proposition that the sixth cause of action must be dismissed is California Health and Safety Code § 1799.107. Section 1799.107 reads in pertinent part:

> (a) The Legislature finds and declares that a threat to the public health and safety exists whenever there is a need for emergency services and that public entities and emergency rescue personnel should be encouraged to provide emergency services. To that end, a qualified immunity from liability shall be provided for public entities and emergency rescue personnel providing emergency services.
>
> (b) .... neither a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner.
>
> (c) For purposes of this section, it shall be presumed that the action taken when providing emergency services was performed in good faith and without gross negligence. This presumption shall be one affecting the burden of proof.
>
> (d) For purposes of this section, "emergency rescue personnel" means any person who is an officer, employee, or member of a fire department or fire protection or firefighting agency of the federal government, the State of California, a city, county ... other public or municipal corporation or political subdivision of this state....
>
> (e) For purposes of this section, "emergency services" includes, but is not limited to, first aid and medical

> services, rescue procedures and transportation, or other related activities necessary to insure the health or safety of a person in imminent peril.

Cal.Health & Safety Code § 1799.107. Defendants Rhyman and Hall claim that they fall within this immunity. Defendants Rhyman and Hall contend that at best they delayed providing medical treatment, not that they failed to provide medical treatment. By its express terms, Section 1799.107 only apples to persons who are employees of a fire department or fire protection or firefighting agency. *See* Cal.Health & Safety Code § 1799.107(d). As such, this immunity provision is not available to Rhyman and Hall. Accordingly, based on the arguments in their motions, Defendants Rhyman and Hall are not entitled to have the sixth cause of action dismissed as to them.

2. Wittman

Unlike Defendants Rhyman and Hall, there are no allegations in the complaint that Defendant Wittman personally participated in the shooting. Plaintiffs cite no authority for the proposition that Defendant Wittman had a duty to Plaintiffs even though he is not the one who put Plaintiffs in peril by shooting them. Based on the allegations in the complaint and briefs submitted by the parties, Defendant Wittman must be dismissed from the sixth cause of action. Because it may be possible to state a cause of action against Defendant Wittman, this dismissal will be with leave to amend.

3. County

***14** Defendant County contends that it cannot be sued under state law for the tort of failing to provide medical care because no statute requires such a duty. As previously discussed, public entities cannot be held liable in tort for negligence except where there is a specific statute declaring them to be liable or creating a specific duty of care. Cal. Gov.Code § 815(a); *Munoz,* 120 Cal.App.4th at 1112. No party has cited a statutory basis for a claim that a municipality can be directly liable if its deputies fail to timely summon proper medical aid. In addition, no party has cited any authority that a municipality must be vicariously liable for its employees' failure to timely summon medical care. *See* Cal. Gov't Code § 815.2(a); *Eastburn,* 31 Cal.4th at 1180. Therefore, County's motion to dismiss Plaintiffs' claims for negligence must be granted. While it is unlikely that Plaintiffs will be able to cite such a statute, dismissal of this cause of action as to Defendant County will be with leave to amend.

H. Seventh Cause of Action-Spoilation of Evidence

The seventh cause of action alleges spoliation of evidence against all Defendants. Defendants contend the seventh cause of action should be dismissed because there is no tort for spoilage of evidence in California.

In *Cedars-Sinai Medical Center v. Superior Court,* 18 Cal.4th 1(1998), the California Supreme Court held that there is no tort remedy for intentional spoliation of evidence by a party to an action. *Id.* at 17-18. The California Supreme Court's holding concerned intentional spoliation of evidence when the spoliation victim knew or should have known of the spoliation before the trial or other decision on the merits in the underlying action. *Id.* at 17-18. In *Temple Community Hospital v. Superior Court,* 20 Cal.4th 464 (1999), the California Supreme Court extended the holding of *Cedars Sinai* to intentional third party spoliation of evidence. *Id.* at 466, 478. The California Supreme Court noted in *Cedars-Sinai* that discovery sanctions are available as a remedy for intentional spoliation of evidence by a party. *Cedars-Sinai,* 18 Cal.4th at 12. In *Temple Community Hospital,* the Supreme Court "recognize[d] that the salient distinction between first party and third party spoliation of evidence is the disparity in sanctions available within the confines of the underlying litigation." *Temple Community Hospital,* 20 Cal.4th at 476. However, the California Supreme Court reasoned that:

> [T]he victim of third party spoliation may deflect the impact of the spoliation on his or her case by demonstrating why the spoliated evidence is missing. (See Evid.Code § 412.) It also may be possible to establish a connection between the spoliator and a party to the litigation sufficient to invoke the sanctions applicable to spoliation by a party. (Code Civ. Proc. § 2025, subds. (j)(3), (o).)

Temple Community Hospital, 20 Cal.4th at 477.

***15** The California Supreme Court in *Cedars Sinai* appeared to leave open a possible cause of action for the intentional spoliation of evidence if the spoliation victim did not know and should not have known of the spoliation before the trial or other decision on the merits in the underlying action. Plaintiffs contend that they fall within this exception. Plaintiffs argue that they did not know and

had no reason to know that the videos would be destroyed prior to their destruction. Contrary to Plaintiffs' assumption, Plaintiffs failure to know about the spoilation before it occurred is not the only requirement for the possible exception set forth in *Cedars-Sinai.* Plaintiffs must also allege that they did not know about the spoilation prior to a decision on the merits in the underlying action. In this case, there is no underlying action that concluded before Plaintiffs knew about the spoilation. It appears, this action is the only action impacted by the spoilation, and this action has not yet concluded.

The Ninth Circuit has confirmed that a decision on the merits of an underlying litigation must have occurred for a party to have a spoliation cause of action. Evidence destroyed prior to any litigation does not fall within this exception. In *Saridakis v. United Airlines,* 166 F.3d 1272, (9th Cir.1999), the defendant hired Saridakis as an airframe maintenance mechanic, a position classified as safety-sensitive. During his time working with defendant, Saridakis sustained non-work related injuries and had one drug test returned positive for drug use. *Id.* at 1274 -75. As a result of injuries, Saridakis began to suffer from acute bursitis, knee complications, recurrent rectal fissures and insomnia. *Id.* For several years thereafter, Saridakis took the drug Marinol, and his drug tests came back negative or were ruled negative based on Saridakis' prescribed use of Marinol. *Id.* at 1275. After several years, Saridakis's drug test came back positive, but this time defendant's medical review officer refused to reverse the positive result because he found the use of Marinol for insomnia and pain unauthorized. *Id.* Saridakis was then discharged. *Id.*

Saridakis sued, and among other claims, Saridakis alleged the tort of intentional spoliation of evidence because defendant had destroyed the "lone urine sample." *Saridakis,* 166 F.3d at 1278 n. 7. Citing to *Cedars-Sinai,* the Ninth Circuit found that "there is no tort remedy for the intentional spoliation of evidence, in cases in which, as here, the spoliation victim knows of the alleged spoliation before a decision on the merits of the underlying action." *Id.* (internal quotes an cites omitted). The Ninth Circuit concluded that because Saridakis knew of the spoliated evidence prior to any ruling on the merits of the action, he had no tort remedy under California law. *Id.*

Plaintiffs contend in their opposition that they did not know and had no duty to know that the audio and video tapes would be tampered with or destroyed. Plaintiffs believed that these tapes would be preserved for a potential criminal action. However, the complaint does not allege anything about Plaintiffs' knowledge or lack of knowledge of the spoliation. Regardless no ruling on the merits of an underlying action has been alleged in the complaint or opposition. Plaintiffs' position is that the tapes would have assisted them in this action. The spoliation at issue occurred prior to a judgment in this action. Because Plaintiffs knew of the spoliation prior to any ruling on this action's merits, Plaintiffs' spoliation cause of action does not fit within *Cedars-Sinai's* possible exception. Thus, this cause of action must be dismissed because there is no cause of action available for the alleged spoliation of evidence.

***16** The court is mindful that "[i]f a complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.,* 806 F.2d 1393, 1401 (9th Cir.1986). Here, it is unclear what additional facts Plaintiffs could allege to create a cause of action for spoliation of evidence. Plaintiffs do not take the position that they did not know about the spoilation prior to another action's conclusion. As such, there are no facts Plaintiffs could allege to save this cause of action from dismissal. Accordingly, this cause of action will be dismissed without leave to amend.

I. Emotion Distress by Taylor

Defendants contend Taylor cannot recover for emotional distress damages.[3] The negligent causing of emotional distress is not an independent tort, and this tort is subsumed within negligence. *Potter v. Firestone Tire & Rubber Co.,* 6 Cal.4th 965, 984-85 (1993); *Burgess v. Superior Court,* 2 Cal.4th 1064, 1071-72 (1992); *Spates v. Dameron Hosp. Assn.,* 114 Cal.App.4th 208, 213 (2003). To establish negligent infliction of emotional distress the plaintiff must prove the traditional elements of negligence: duty, breach of duty, causation and damages. *Burgess,* 2 Cal.4th at 1071-72; *Friedman v. Merck & Co.,* 107 Cal.App.4th 454, 463 (2003).

Whether a plaintiff can establish that the defendant owed a duty is a question of law. *Burgess,* 2 Cal.4th at 1072. The duty element of a negligent infliction of emotional distress claim has evolved into different theories-one based on a direct victim theory and one based on bystander liability. The direct victim theory of negligent infliction of emotional distress is based upon the breach of a duty owed to the plaintiff which results in emotional distress. *Wooden v. Raveling,* 61 Cal.App.4th 1035, 1038 (1998). The direct victim theory requires a duty owed directly to the plaintiff "that is assumed by the defendant

or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.,* 48 Cal.3d 583, 590 (1989); *Spates,* 114 Cal.App.4th at 213.

The "bystander" theory addresses the question of duty in circumstances in which a plaintiff seeks to recover damages as a percipient witness to the injury of another ... [B]ystander liability is premised upon a defendant's violation of a duty not to negligently cause emotional distress to people who observe conduct which causes harm to another." *Burgess v. Superior Court of Los Angeles County,* 2 Cal.4th 1064, 1072 (1992) (internal cites and quotes omitted). To recover damages for emotional distress, absent physical injury, in a "bystander case" the plaintiff must be: (1) Closely related to the injury victim; (2) Present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) Suffer emotional distress as a result, beyond that which would occur in a disinterested witness. *Martin By and Through Martin v. United States,* 984 F.2d 1033, 1037 (9th Cir.1992); *Thing v. La Chusa,* 48 Cal.3d 644, 647 (1989).

***17** Defendants contend that Taylor cannot succeed on a direct theory of liability because the shooting was not directed at her and she cannot succeed on the bystander theory because she and Megargee were not closely related. In her opposition, Taylor contends that based on the complaint's allegations she has alleged negligent infliction of emotional distress based on a direct theory of liability. In order to state a claim for negligent infliction of emotional distress, the risk of severe emotional distress must be reasonably foreseeable. *Molien v. Kaiser Found. Hosp.,* 27 Cal.3d 916, 923 (1980). Consequently, the plaintiff must plead sufficient allegations of fact which would reasonably elicit a serious emotional response. *Accounts Adjustment Bureau v. Cooperman,* 158 Cal.App.3d 844, 847-48 (1984).

The complaint alleges that when the truck stopped in the cul-de-sac, neither Megargee or Taylor tried to escape or threaten Defendants. The complaint alleges that before any other passengers in the stolen vehicle had an opportunity to surrender, Defendants opened fire on the cab of the truck. The complaint alleges Defendants fired shoots at Plaintiffs. The complaint alleges Defendants first shot Megargee in the chest and then the head. The complaint alleges Defendants then shot Taylor at least three times. Nothing in these allegations suggests that Defendants' conduct was directed only at Megargee and not Taylor. The complaint alleges Defendants opened fire on the truck, in which both Megargee and Taylor were sitting. Based on the complaint's allegations, it was reasonably foreseeable that Taylor would suffer severe emotional distress by having officers shoot at a truck in which she was sitting when neither she nor anyone else in the truck were trying to escape or posing a threat to the officers. The court finds that facts consistent with the allegations of the complaint could be proved that would entitle Taylor to damages for negligent infliction of emotional distress. *See Swierkiewicz,* 534 U.S. at 514; *Diaz,* 380 F.3d at 482. Accordingly, Defendants' motion to dismiss Taylor's request for damages for negligent infliction of emotional distress must be denied.

J. State Law Causes of Action-Compliance with California's Tort Claims Act

County contends that Plaintiffs' third, fourth, and sixth causes of action must be dismissed because Plaintiffs did not comply with the California Tort Claims Act. Defendants argue these causes of action were not reflected in Plaintiffs' claim form. Plaintiffs contend that their claim form need not have been identical to the complaint in this action, and their claim form put Defendants on notice concerning Plaintiffs' negligence causes of action and failure to render medical care cause of action. Because Plaintiffs' negligence causes of action and failure to render medical care cause of action are subject to dismissal for Plaintiffs' failure to cite a statute imposing a duty on County, it is unnecessary to determine if Plaintiff adequately presented their claims to County as required by California Government Code § 910.

K. Motions to Strike

***18** Defendants request that the court strike several phrases from the complaint. Defendants ask the court to strike the repeated use of the phrase "close-range execution-style shooting" when referring to Defendants' shooting of Megargee. Defendants also ask the court to strike allegations that County allows it deputies to "particularly use excessive force intimidation tactics against people who refused to kowtow to the sheriff's authority, in order to make those people more submissive in their interactions with law enforcement personnel." Defendants claim these phrases are prejudicial and do not further any factual determination necessary for Plaintiffs to prevail.

Rule 12(f) of the Federal Rules of Civil Procedure allows the court to strike from "any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The purpose of a Rule 12(f) motion is to avoid the costs that arise from litigating spurious issues by dispensing with those issues prior to trial.

Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir.1983). Immaterial matter is defined as matter that "has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty,* 984 F.2d 1524, 1527 (9th Cir.1993) (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, at 706-07 (1990)), *rev'd on other grounds,* 510 U.S. 517 (1994). Impertinent matter is defined as "statements that do not pertain, and are not necessary, to the issues in question." *Fantasy, Inc.* 984 F.2d at 1527. Granting a motion to strike may be proper if it will make the trial less complicated or if allegations being challenged are so unrelated to plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading will be prejudicial to the moving party. *Id.*

Defendants ask the court to strike references in the complaint to "close-range execution-style shooting" and Defendants allowing officers to "use excessive force intimidation tactics against people who refused to kowtow to the sheriff's authority." Defendants primary objection to these phrases is that they are inflammatory. "[T]he function of a Rule 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial...." *Sidney-Vinson v. A.H. Robins Co.,* 697 F.2d 880, 885 (9th Cir.1983). Rule 12(f) motions to strike are generally not granted unless it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation. *White v. Hansen,* 2005 WL 1806367, *14 (N.D.Cal.2005); *Rosales v. Citibank,* 133 F.Supp.2d 1177, 1179 (N.D.Cal.2001). Here, the court finds that these phrases do have a bearing on this action. The phrases describe the alleged method of shooting and alleged policy of the County. Whether Megargee was shot execution style is relevant to Plaintiffs' excessive force causes of action. Whether County has a policy of allowing officers to use excessive force as an intimidation tactic against people who do not comply with authority is relevant to Plaintiffs' excessive force causes of action against Wittman and County. Thus, the court does not find these phrases must be struck as irrelevant to this action.

***19** The court does recognize that these phrases use "colorful" language to describe facts and theories that could have been described in a more benign fashion. However, actual prejudice is necessary for the court to strike phrases from the complaint. *See Augustus v. Board of Public Instruction of Escambia County, Florida,* 306 F.2d 862, 868 (5th Cir.1962) ("[W]hen there is no showing of prejudicial harm to the moving party, the courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike."); 2-12 MOORE'S FEDERAL PRACTICE-CIVIL § 12.37 ("To prevail on this motion to strike, the movant must clearly show that the challenged matter has no bearing on the subject matter of the litigation and that its inclusion will prejudice the defendants."). Here, the court does not find the phrases so prejudicial that they must be struck. Given the purpose of the complaint under the Federal Rules of Civil Procedure and the fact the complaint is not evidence and is normally not viewed by the trier of fact, Plaintiffs' colorful terms of art in the complaint when they describe Defendants' alleged improper conduct will provide little if any impact on this action. Any doubt concerning the import of the allegations to be stricken weighs in favor of denying the motion to strike. *White v. Hansen,* 2005 WL 1806367, *14 (N.D.Cal.2005); *In re 2TheMart.com, Inc. Sec. Litig.,* 114 F.Supp.2d 955, 965 (C.D.Cal.2000). Accordingly, Defendants' motions to strike will be denied.

L. Sanctions

Plaintiffs request that the court impose sanctions on Defendants pursuant to Rule 11 of the Federal Rules of Civil Procedure. Plaintiffs claim Defendants' motions are frivolous. Plaintiffs believe they were filed simply as a delay tactic and for harassment. Defendants contend sanctions should not be imposed because Plaintiffs did not comply with Rule 1 1's requirements.

Under Rule 11 of the Federal Rules of Civil Procedure, an award of sanctions is required if a frivolous paper is filed. *Price v. State of Hawaii,* 939 F.2d 702, 709 (9th Cir.1991). "Frivolous filings are those that are both baseless and made without a reasonable and competent inquiry." *Buster v. Greisen,* 104 F.3d 1186, 1190 (9th Cir.1997). Rule 11 provides in pertinent part as follows:

> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new

law;

***20** (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. *10 (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Rule 11 imposes a duty on attorneys to certify that (1) they have read the pleadings or motions they file and (2) the pleading or motion is grounded in fact, has a colorable basis in law, and is not filed for an improper purpose. *Mike Nelson Co., Inc. v. Hathaway,* 2005 WL 2179310, *11 (E.D.Cal.2005) (citing *Smith v. Ricks,* 31 F.3d 1478, 1488 (9th Cir.1994)).

"Rule 11(c)(1)(A) provides strict procedural requirements for parties to follow when they move for sanctions under Rule 11." *Radcliffe v. Rainbow Const. Co.,* 254 F.3d 772, 788 (9th Cir.2001). Rule 11(c)(1)(A) provides that:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

The purpose of Rule 11(c)(1)(A)'s safe harbor is to give the offending party the opportunity to withdraw the offending pleading and thereby escape sanctions. *Barber v. Miller,* 146 F.3d 707, 710 (9th Cir.1998). The procedural requirements of Rule 11(c)(1)(A)'s safe harbor are mandatory. *Radcliffe,* 254 F.3d at 789; *Barder,* 146 F.3d at 710-11. Additionally, a request for Rule 11 sanctions must be made "separately form other motions or requests and [must] describe the specific conduct alleged to violate [Rule 11(b)]." Fed. R. Civ. Pro. 11(c)(1)(A); *Divane v. Krull Elec. Co.,* 200 F.3d 1020, 1025 (7th Cir.1999). A party's failure to comply with the mandatory procedural requirements makes Rule 11 sanctions inappropriate. *Mike Nelson Co.,* 2005 WL 2179310, *11

Plaintiffs' Rule 11 motion for sanction is filed as part of Plaintiffs' oppositions to Defendants' motions. There is no indication that Plaintiffs complied with the mandatory notice and 21-day waiting period. It is an abuse of discretion to impose sanctions when the mandatory procedures of Rule 1 1(c)(1)(A) have not been followed. Because Plaintiffs failed to follow the requirements of Rule 11(c)(1)(A), their request for sanctions under Rule 11 must be denied.

***21** However, Plaintiffs' failure to comply with Rule 11 does not absolve Defendants for improper filings. Regardless of Rule 11, the court maintains the power to sanction parties for filings that waste the time of the court and require opposing parties to expend unnecessary resources. The court maintains the inherent power to levy sanctions, including attorneys' fees when a party has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980); *Rink v. Gomez,* 239 F.3d 989, 991 (9th Cir.2001). While the court's inherent power extends to all litigation abuses, the litigant must have "engaged in bad faith or willful disobedience of a court's order." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 46-47 (1991); *Fink,* 239 F.3d at 992.

In addition, 28 U.S.C. § 1927 allows for sanctions. Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sanctions are appropriate under Section 1927 "when there is no obvious violation of the Federal Rules, but where, within the rules, the proceeding is conducted in bad faith for the purpose of delay or increasing costs." *Pickern v. Pier 1 Imps. (U.S.), Inc.,* 339 F .Supp.2d 1081, 1091

(E.D.Cal.2004) (citing *In re Yagman,* 796 F.2d 1165, 1187 (9th Cir.1986), *as amended by* 803 F.2d 1085 (9th Cir.1986)). Sanctions under Section 1927 are appropriate when: (1) the attorney multiplied the proceedings; (2) the attorney's conduct was unreasonable and vexatious; and (3) the conduct resulted in an increase in the cost of the proceedings. *B .K.B. v. Maui Police Dep't,* 276 F.3d 1091, 1107 (9th Cir.2002). An award of sanctions under Section 1927 requires a finding of recklessness or bad faith. *Ingle v. Circuit City,* 408 F.3d 592, 596 (9th Cir.2005); *B.K.B.,* 276 F.3d at 1107.

Defendants have three attorneys, plus the apparent oversight of County Counsel, defending this action. Defendants' law firm is not new to civil rights actions. This court is at a loss to explain how experienced attorneys would have believed it prudent to file a motion to dismiss, at which time the court may **only** look at the complaint's allegations, that alleged the complaint failed to state a claim for excessive force. The court is aware of no authority and Defendants have cited none that would allow this court to find no excessive force cause of action when at the time of the shooting Plaintiffs allege they were posing no threat and were not trying to escape.

However, dispite the wisdom of portions of Defendants' motion, sanctions are not warranted in this case. Several of Defendants' contentions not only had merit, but have resulted in the dismissal of several causes of action, one without leave to amend. Based on this court's reading of the law, Defendants are correct that Plaintiffs cannot maintain a cause of action for spoilation of evidence. While it appears based on the complaint allegations, Defendant Rhyman and Hall are not entitled to immunity on the state law causes of action, County is correct that the state law causes of action are not available against it unless Plaintiffs cite a statute providing for such liability. Finally, Defendants' motion has clarified the civil rights causes of action. The narrowing of Plaintiffs' causes of action resulting from Defendants' motions should assist the parties in discovery and the court in further orders. Thus, the court cannot find Defendants' motions were was improper and in bad faith. Accordingly, Plaintiffs' motions for sanctions are denied.

ORDER

***22** Based on the above memorandum opinion, the court ORDERS as follows:

1. County's, Wittman's, Rhyman's, and Hall's motions to dismiss are GRANTED in part and DENIED in part, as follows:

a. Wittman's, Rhyman's, and Hall's motions to dismiss the first cause of action are DENIED;

b. County's motion to dismiss the second cause of action is DENIED;

c. Rhyman's and Hall's motions to dismiss the second cause of action are GRANTED;

d. The second cause of action is DISMISSED WITH LEAVE TO AMEND as to Rhyman and Hall;

e. Rhyman's and Hall's motions to dismiss the fourth cause of action for negligence are DENIED;

f. County and Wittman's motion to dismiss the third cause of action and fourth cause of action for negligence is GRANTED;

g. The third cause of action and fourth cause of action are DISMISSED WITH LEAVE TO AMEND as to County and Wittman;

h. Rhyman's, Hall's, and Wittman's motions to dismiss the fifth cause of action for battery are DENIED;

i. County's motion to dismiss the fifth cause of action for battery is GRANTED;

j. The fifth cause of action is DISMISSED WITH LEAVE TO AMEND as to County;

k. Rhyman's and Hall's motion to dismiss the sixth cause of action for failure to obtain medical care is DENIED;

l. County's and Wittman's motion to dismiss the sixth cause of action for failure to obtain medical care is GRANTED;

m. The sixth cause of action is DISMISSED WITH LEAVE TO AMEND as to County and Wittman;

n. County's, Wittman's, Rhyman's, and Hall's motions to dismiss the seventh cause of action for spoliation of evidence are GRANTED;

o. The seventh cause of action is DISMISSED WITHOUT LEAVE TO AMEND;

p. Wittman's, Rhyman's, and Hall's motions to dismiss Taylor's request for damages based on negligent infliction of emotional distress are DENIED;

2. County's, Wittman's, Rhyman's, and Hall's motions to strike are DENIED;

3. Plaintiffs' motions for sanctions are DENIED; and

4. Plaintiffs MAY file a second amended complaint within twenty days of this order's date of service. If Plaintiffs fail to file a second amended complaint, this action will proceed on those causes of action found in the June 9, 2006 first amended complaint not dismissed by this order.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2988945

Footnotes

1 On July 31, 2006, Plaintiffs filed a second amended complaint. Defendants' motions to dismiss address the June 9, 2006 first amended complaint. In their oppositions to the motions to dismiss, Plaintiffs state that the only difference between the first amended complaint and the second amended complaint is that the second amended complaint adds Dan Baker as a Defendant in place of one of the Doe Defendants. In an order accompanying this order, the court has stricken the second amended complaint because it was not filed in compliance with Rule 15(a) of the Federal Rules of Civil Procedure.

2 The parties have not discussed whether a claim for negligence in training, supervision, and discipline that is made against a Sheriff is in fact a claim for direct liability against the public entity. Because Wittman is sued in his capacity as Sheriff, the court finds that for the purposes of immunity on the negligence claims, negligence claims against Wittman are in fact claims against County. *Sanders v. City of Fresno,* 2006 WL 1883394, *11 (E.D.Cal.2006); *see also Munoz,* 120 Cal.App.4th at 1112-13 (not distinguishing between Police Chief and City when requiring plaintiffs to identify a specific statute imposing a duty pursuant to *Eastburn*).

3 The operative complaint, the first amended complaint filed on June 9, 2006, does not contain a cause of action for infliction of emotional distress. However, it appears Taylor may be requesting emotional distress damages arising from Defendants' negligence. For the reasons discussed above, the only remaining negligence claims are against Rhyman and Hall.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: **21650 Oxnard Street, Suite 500, Woodland Hills, California 91367**

A true and correct copy of the foregoing document entitled **NOTICE OF MOTION AND MOTION TO CONTINUE HEARING ON SALUS DEFENDANTS' STAY MOTION TO A DATE ON OR AFTER FEBRUARY 3, 2017; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JERROLD L. BREGMAN** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) **January 17, 2017**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) **January 17, 2017,** I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

BY PERSONAL DELIVERY

Honorable Theodor C. Albert
United States Bankruptcy Court
411 West Fourth Street
Suite 5085 / Courtroom 5B
Santa Ana, CA 92701-4593

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

January 17, 2017	NIKOLA A. FIELDS	/s/ Nikola A. Fields
Date	*Printed Name*	*Signature*

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