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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CASE NO.: CV 00-4158 ABC (BQRx)

W. FIGUEROA, et al.,	)	
	)	
Plaintiffs,	)	ORDER RE: DEFENDANTS' MOTION FOR
	)	SUMMARY JUDGMENT OR,
v.	)	ALTERNATIVELY, FOR A SUMMARY
	)	ADJUDICATION OF ISSUES
DARYL GATES, et al.,	)	
	)	
Defendants.	)	
_____	)	

This case arises out of the shooting deaths of two men, Jose Figueroa and Mario Guerrero (the "decedents"), by the Los Angeles Police Department ("LAPD") Special Investigations Section ("SIS"). Forty-one defendants have moved for summary judgment or, alternatively, for a summary adjudication of issues and for bifurcation of the "Monell" claims for municipal liability.<sup>1</sup> The motions came on regularly for hearing before this court on June 10, 2002. At the conclusion of oral argument, the Court took the matter

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<sup>1</sup>Plaintiffs have filed a request for certification under Chuman v. Wright, 960 F.2d 104 (9<sup>th</sup> Cir. 1992), should the Court deny Defendants' summary judgment motion based on the existence of genuinely disputed issues of material fact. Defendants have not opposed this request.

1 under submission to consider several new authorities cited by the  
2 parties. For the reasons indicated below, Defendants' Motion for  
3 Summary Judgment is GRANTED IN PART and DENIED IN PART, and their  
4 Motion for bifurcation of the "Monell" claims is GRANTED.

5  
6 **I. STANDARD ON A MOTION FOR SUMMARY JUDGMENT  
OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION OF ISSUES**

7 The Court may grant summary adjudication on a particular claim,  
8 defense, or issue under the same standards used to consider a summary  
9 judgment motion. See Fed. R. Civ. P. 56(a), (b); Pacific Fruit  
10 Express Co. v. Akron, Canton & Youngstown R.R. Co., 524 F.2d 1025,  
11 1029-30 (9th Cir. 1975).

12 The party moving for summary judgment has the initial burden of  
13 establishing that there is "no genuine issue as to any material fact  
14 and that [it] is entitled to a judgment as a matter of law." Fed. R.  
15 Civ. Pro. 56(c); see British Airways Bd. v. Boeing Co., 585 F.2d 946,  
16 951 (9th Cir. 1978); Fremont Indemnity Co. v. California Nat'l  
17 Physician's Insurance Co., 954 F. Supp. 1399, 1402 (C.D. Cal. 1997).

18 If, as here, the moving party has the burden of proof at trial  
19 (e.g., a plaintiff on a claim for relief, or a defendant on an  
20 affirmative defense), the moving party must make a "showing sufficient  
21 for the court to hold that no reasonable trier of fact could find  
22 other than for the moving party." Calderone v. United States, 799  
23 F.2d 254, 259 (6th Cir. 1986) (quoting from Schwarzer, Summary  
24 Judgment Under the Federal Rules: Defining Genuine Issues of Material  
25 Fact, 99 F.R.D. 465, 487-88 (1984)). Thus, if the moving party has  
26 the burden of proof at trial, that party "must establish beyond  
27 peradventure all of the essential elements of the claim or defense to  
28 warrant judgment in [its] favor." Fontenot v. Upjohn Co., 780 F.2d

1 1190, 1194 (5th Cir. 1986) (emphasis in original); see Calderone, 799  
2 F.2d at 259.

3       Once the moving party satisfies this initial burden, "an adverse  
4 party may not rest upon the mere allegations or denials of the adverse  
5 party's pleadings . . . [T]he adverse party's response . . . **must set**  
6 **forth specific facts** showing that there is a genuine issue for trial."  
7 Fed. R. Civ. Pro. 56(e) (emphasis added). A "genuine issue" of  
8 material fact exists only when the nonmoving party makes a sufficient  
9 showing to establish the essential elements to that party's case, and  
10 on which that party would bear the burden of proof at trial. Celotex,  
11 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in  
12 support of the plaintiff's position will be insufficient; there must  
13 be evidence on which a reasonable jury could reasonably find for  
14 plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252  
15 (1986). The evidence of the nonmovant is to be believed, and all  
16 justifiable inferences are to be drawn in favor of the nonmovant. Id.  
17 at 248. However, the Court must view the evidence presented "through  
18 the prism of the substantive evidentiary burden." Id. at 252.

19       When a motion for summary judgment or summary adjudication  
20 asserts the defense of qualified immunity, "the first inquiry must be  
21 whether a constitutional right would have been violated on the facts  
22 alleged . . . ." Saucier v. Katz, 533 U.S. 194, 200 (2001). "[T]he  
23 next, sequential step is to ask whether the right was clearly  
24 established. This inquiry, it is vital to note, must be undertaken in  
25 light of the specific context of the case . . . ." Id. at 201.

26 //

27 //

28 //

1 **II. STATEMENT OF FACTS<sup>2</sup>**

2 The LAPD SIS is a special unit "whose purpose was to interdict  
3 and apprehend armed, violent career criminals." Cunningham v. Gates,  
4 229 F.3d 1271, 1278 (9<sup>th</sup> Cir. 2000) (as amended). On July 12, 1999,  
5 the SIS officers were assigned to begin a surveillance operation of  
6 Oswaldo Arevalo, a male Hispanic. The SIS officers were told that  
7 Arevalo and another Hispanic male were suspected of committing a  
8 series of armed robberies. Decl. of Joe Callian ¶¶ 4-5; Decl. of  
9 Brian Davis ¶¶ 4-5.<sup>3</sup> In particular, the individuals were suspected of  
10 committing "take over" style robberies of travel agencies, robbing  
11 employees of blank airline tickets. Decl. of Dean Gizzi ¶ 5. SIS  
12 officers trailed Arevalo from July 12, 1999, to August 13, 1999.  
13 Callian Decl. ¶ 6; Davis Decl. ¶ 6.

14 On the morning of August 14, 1999, surveillance began at  
15 Arevalo's residence, 19400 Hatton Street. Callian Decl. ¶ 6-7.  
16 Detectives Callian and Avila observed Arevalo drive to a gas station  
17 in a gray 1991 Lincoln Continental and purchase gas, then return to  
18 the residence. Callian Decl. ¶ 8.

19 Later that morning, Arevalo and Manuel Echevarrio left the house  
20 and entered a purple 1996 Toyota RAV-4. Decedents, Jose Figueroa and  
21 Mario Guerrero, also left the house and entered the Lincoln. Decl. of  
22

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23 <sup>2</sup>The Court notes that both Defendants' Statement of  
24 Uncontroverted Facts and Plaintiffs' Statement of Controverted Facts  
25 are entirely unhelpful. Defendants' Statement consists of a mere 14  
26 facts, none of which have anything to do with the shooting at issue.  
27 Plaintiffs' Statement is a mere reiteration of their opposition brief.  
Accordingly, the Court has had to construct a statement of facts, and  
determine whether any material facts are actually in dispute, with  
virtually no assistance from the parties.

28 <sup>3</sup>Except as noted, Plaintiffs' objections to Defendants' evidence  
are not well-taken and are overruled.

1 Larry Winston ¶ 7. Detectives Gizzi and Spelman followed Arevalo and  
2 Echeverria in a Toyota to a parking lot at 17050 Chatsworth Street.  
3 Gizzi Decl. ¶ 9. Arevalo exited the Toyota and walked toward the  
4 building. Gizzi Decl. ¶ 10. Figueroa and Guerrero parked nearby.  
5 Winston Decl. ¶ 7. Arevalo apparently<sup>4</sup> exited the building and met  
6 with Figueroa and Guerrero. Echevarria then picked Arevalo up and  
7 drove away from the building. Id. ¶ 8. Figueroa and Guerrero exited  
8 the Lincoln and entered the building, leaving 10 or 15 minutes later  
9 with a plastic trash bag. They reentered the Lincoln and drove away.  
10 Id. ¶ 9.

11 The officers continued to trail the two vehicles. They received  
12 a radio transmission that a robbery had occurred at 17050 Chatsworth  
13 Street and the suspects were armed with guns. E.g., Gizzi Decl. ¶  
14 12.<sup>5</sup>

15 As he followed the Lincoln, Detective Davis, one of the members  
16 of the surveillance team, observed Guerrero, the passenger, "moving  
17 about the front passenger seat . . . 'doing something weird.'" He  
18 states in his declaration that he observed Guerrero "to be removing or  
19 putting something on and then climb[ing] over the front seat to the  
20 rear seat." Davis Decl. ¶ 13.

21 When the Lincoln reached the Hatton Street residence, Detectives  
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23 <sup>4</sup>Defendants have not provided the Court with declarations from  
24 officers who saw the following events. The officers' statements about  
25 the radio transmissions are not hearsay as long as they are merely  
offered for their effect on the officers rather than for their truth.

26 <sup>5</sup>Defendants have not provided the Court with a declaration from  
27 Detective Bennett, who made this radio transmission. The other  
28 officers' statements about what they heard are hearsay if admitted for  
the truth of the matter - that Figueroa and Guerrero were, in fact,  
armed. But it is not hearsay if admitted merely for the effect on the  
officers, that they believed that the suspects were armed.

1 Gizzi and Spelman parked directly behind it. Detective Gizzi  
2 identified himself as a police officer and ordered Figueroa and  
3 Guerrero to raise their hands. Gizzi Decl. ¶ 14; see also Decl. of  
4 Richard Spelman ¶ 13 ("I shouted, 'Police, put your hands up.'").  
5 Detective Gizzi observed Guerrero rise from the back seat and turn  
6 toward the officers. Gizzi Decl. ¶ 14. Detective Spelman saw  
7 Guerrero raise his hand, holding a dark object, which Detective  
8 Spelman states in his declaration appeared to be a handgun. Spelman  
9 Decl. ¶ 13.

10 "Suddenly, Detective Spelman shouted 'Gun'." Gizzi Decl. ¶ 15.  
11 Detective Spelman fired one round. Spelman Decl. ¶ 14. After  
12 Detective Rodriguez observed Guerrero turn his head toward the  
13 officers, he fired two rounds at Guerrero. Decl. of Rodney Rodriguez  
14 ¶ 15. Guerrero climbed into the front seat, then out of the front  
15 passenger window, landing on the pavement. He rose to his knees,  
16 facing away from the officers, "with both hands concealed at his front  
17 waistband." Detective Gizzi again identified himself as a police  
18 officer and ordered Guerrero to raise his hands. Guerrero did not  
19 comply, but he turned his head toward the officers, with his hands in  
20 front of his body. Gizzi Decl. ¶ 15.

21 Meanwhile, Detective Rodriguez observed Figueroa exiting the  
22 vehicle, facing toward Detectives Spelman and Gizzi. Figueroa lifted  
23 his shirt and reached into his front waistband.<sup>6</sup> Detective Rodriguez  
24 fired one shot at him, Rodriguez Decl. ¶ 16, as did Detective Spelman.  
25 Spelman Decl. ¶ 14. Figueroa dropped to his knees and crawled toward  
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27 <sup>6</sup>Plaintiffs have raised a question about Detective Rodriguez's  
28 credibility. It is unclear how Detective Rodriguez could have seen  
Figueroa take these actions if Figueroa was facing away from him.

1 the front of the car. Detective Rodriguez ordered him to raise his  
2 hands and move away from the vehicle. Rodriguez Decl. ¶ 16.

3 Detective Gizzi shot Guerrero. Gizzi Decl. ¶ 16. Detective  
4 Winston fired two rounds at Figueroa. Winston Decl. ¶ 13. Both men  
5 were killed, having been shot in the back. Pls.' Ex. 9 at 133, 158.  
6 Both were unarmed. There was an unloaded gun and ammunition in the  
7 car. Spelman Decl. ¶ 16; Pls.' Ex. 6 at 8:4.

### 8 9 **III. PROCEDURAL HISTORY**

10 Plaintiffs, who are relatives of the decedents, filed their  
11 initial Complaint on April 19, 2000, and their First Amended Complaint  
12 on June 19, 2000. Plaintiffs filed their Second Amended Complaint  
13 ("SAC"), which is the operative document, on June 27, 2000.  
14 Plaintiffs allege claims under the Civil Rights Act of 1872, 42 U.S.C.  
15 § 1983, and the Racketeer Influenced and Corrupt Organizations Act  
16 ("RICO"), 18 U.S.C. § 1961, et seq. Defendants are 72 named  
17 individuals who comprise eight groups: (1) former LAPD police chiefs,  
18 including Bernard Parks, who was still in office at the time of the  
19 shooting deaths; (2) former Mayor Richard Riordan, who was in office  
20 at the time of the shooting deaths; (3) the members of the Los Angeles  
21 City Council in office at the time of the incident; (4) former members  
22 of the Los Angeles City Council; (5) members of the Los Angeles Board  
23 of Police Commissioners (the "Board") who were in office at the time  
24 of the incident; (6) former members of the Los Angeles Board of Police  
25 Commissioners; (7) current and former members of the City Attorney's  
26 Office, including Mayor James K. Hahn; and (8) members of the SIS,  
27 including the officers actually involved in the shooting. SAC ¶ 4.  
28 All Defendants are sued in both their individual and official

1 capacities. SAC ¶ 5.

2 On August 28, 2000, ruling on a motion filed by 10 Defendants,  
3 the Court dismissed the RICO claim as a matter of law. On November 3,  
4 2000, ruling on a motion filed by 23 Defendants, the Court dismissed  
5 the claims against former Police Chief Willie Williams in his official  
6 capacity. On January 8, 2001, the Court granted Plaintiffs' motion to  
7 strike the affirmative defense of absolute immunity asserted by the  
8 City Council Defendants, but allowed Defendants to proceed on the  
9 qualified immunity defense. On March 29, 2001, the Court denied two  
10 motions to dismiss filed by nine Defendants.

11 The instant motions for summary judgment and bifurcation were  
12 filed by 41 Defendants<sup>7</sup> on March 25, 2002, and noticed for hearing on  
13 April 15, 2002. On March 27, 2002, the Court continued the hearing  
14 date to April 29, 2002, and set an extended briefing schedule. On  
15 April 17, 2002, the Court granted Plaintiffs' Ex Parte Application to  
16 further continue the hearing date to its present setting, June 10,  
17 2002. Plaintiffs filed their opposition briefs to the summary  
18 judgment motion and the bifurcation motion, as well as a request for  
19 so-called Chuman certification, on April 29, 2002. Defendants filed a  
20 reply brief on the summary judgment motion on May 20, 2002.  
21 Defendants did not file a reply brief on the bifurcation motion.

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23 <sup>7</sup>Daryl Gates, Willie L. Williams, Bernard Parks, Richard Riordan,  
24 Richard Alarcon, Hal Bernson, Laura Chick, Michael Feuer, Ruth  
25 Galanter, Michael Hernandez, Nate Holden, Mark Ridley-Thomas, Rudy  
26 Svorinich, Joel Wachs, Gerald Chaleff, Raquel de la Rocha, Herbert  
27 Boeckmann, Dean Hansell, T. Warren Jackson, Stanley Sheinbaum, James  
28 K. Hahn, Daniel Koenig, Jerry Brooks, Brian Davis, Joseph Freia, Dean  
Gizzi, Edward Guiza, John Helms, Rodney Rodriguez, Richard Spelman,  
Lawrence Winston, Philip James Wixon, John Tortorici, Joe Callian,  
James Toma, Charles Bennett, Gary Holbrook, James Harris, Robert  
Kraus, James Kilgore, and Angela Krieg.



1 IV. DISCUSSION

2 Section 1983 creates a cause of action against any person who,  
3 acting under color of state law, violates the constitutional rights of  
4 another person. See 42 U.S.C. § 1983. Plaintiffs allege that  
5 Defendants violated decedents' Fourth and Fourteenth Amendment rights  
6 when the SIS "followed plaintiffs' decedents whom they believed would  
7 commit a crime;" "let decedents commit the crime of robbery;" "took no  
8 action whatever to protect" the victims; allowed decedents to get  
9 away; and shot and killed decedents when they returned home. See SAC  
10 ¶¶ 16-25; 33-49. Defendants' motion for summary judgment on the  
11 Section 1983 claims is based on numerous grounds: that the SIS  
12 officers involved in the shooting are entitled to qualified immunity;  
13 that the members of the Board of Police Commissioners are entitled to  
14 qualified immunity; that the other SIS officers did not personally  
15 participate in the incident, have any supervisory authority, or have a  
16 duty to intervene; that Defendants Daryl Gates, Willie L. Williams,  
17 and Stanley Sheinbaum were not in office at the time of the incident;  
18 that the members of the City Council and the City Attorney did not act  
19 in bad faith in indemnifying police officers for the payment of prior  
20 punitive damages awards; and that former Mayor Richard Riordan had no  
21 direct power over police policy. The Court addresses each of these  
22 arguments in turn.

23 **A. The Shooting Officers are Not Entitled to Qualified Immunity**

24 Defendants first seek summary adjudication of the claims against  
25 the officers involved in the shooting, Detectives Gizzi, Rodriguez,  
26 Spelman, and Winston, on the basis of qualified immunity. Under Katz,  
27 the first question is whether, "[t]aken in the light most favorable to  
28 the party asserting the injury, . . . the facts alleged show the

1 [officers'] conduct violated a constitutional right[.]” 533 U.S. at  
2 201.<sup>8</sup> Plaintiffs allege that the shooting officers shot decedents in  
3 the back, killing them, even though they were unarmed and posed no  
4 reasonable threat to the officers or to anyone else. See SAC ¶¶ 21-  
5 27. These facts allege a constitutional violation.

6 Under the Fourth Amendment, police may use only such force as is  
7 objectively reasonable under the circumstances. See Graham v. Connor,  
8 490 U.S. 386, 397 (1989). An officer’s use of **deadly** force is  
9 reasonable only if “the officer has probable cause to believe that the  
10 suspect poses a significant threat of death or serious physical injury  
11 to the officer or others.” Tennessee v. Garner, 471 U.S. 1, 3 (1985).  
12 If, as alleged, decedents posed no threat to the officers or others,  
13 then the use of deadly force was patently unreasonable and violated  
14 the Fourth Amendment.

15 On the second prong of the qualified immunity analysis, “whether  
16 the right was clearly established,” Katz, 533 U.S. at 201, the Court  
17 asks whether “‘the contours of the right [were] sufficiently clear  
18 that a reasonable official would understand that what he is doing  
19 violates that right.’” Id. at 202 (quoting Anderson v. Creighton, 483  
20 U.S. 635, 640 (1987)).<sup>9</sup> The clearly established “inquiry . . . must  
21 be undertaken in light of the specific context of the case . . .,” id.

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23 <sup>8</sup>Defendants’ motion misapplies the first question, asking whether  
24 Plaintiffs can “establish” a constitutional violation, rather than if  
25 they have alleged a violation, and failing to consider the allegations  
in the light most favorable to Plaintiffs.

26 <sup>9</sup>The veracity of the officers’ statements that they believed that  
27 they were in danger is largely irrelevant to the question of qualified  
immunity, where the inquiry is whether “the law . . . put the  
28 officer[s] on notice that [their] conduct would be clearly  
unlawful[.]” Katz, 533 U.S. at 202.

1 at 201, and with regard to the law at the time of the alleged  
2 violations. See Anderson, 483 U.S. at 639. Contrary to Defendants'  
3 suggestion, in the Ninth Circuit, Plaintiffs need not produce a case  
4 directly on point to demonstrate that the right was clearly  
5 established. See Deorle v. Rutherford, 272 F.3d 1272, 1285-86 (9<sup>th</sup>  
6 Cir. 2001) (as amended). The Court bears in mind that:

7  
8 [d]eadly force cases pose a particularly difficult problem  
9 under this regime because the officer defendant is often the  
10 only surviving eyewitness. Therefore, the judge must ensure  
11 that the officer is not taking advantage of the fact that  
12 the witness most likely to contradict his story - the person  
13 shot dead - is unable to testify. The judge must carefully  
14 examine all the evidence in the record, such as medical  
15 reports, contemporaneous statements by the officer and the  
16 available physical evidence, as well as any expert testimony  
17 proffered by the plaintiff, to determine whether the  
18 officer's story is internally consistent and consistent with  
19 other known facts. In other words, the court may not simply  
20 accept what may be a self-serving account by the police  
21 officer.

22 Scott v. Henrich, 39 F.3d 912, 915 (9<sup>th</sup> Cir. 1994) (citations  
23 omitted).

24 "Certain principles are clearly established . . . that implement  
25 the fundamental rules regarding the use of deadly force. Law  
26 enforcement officers may not shoot to kill unless, at a minimum, the  
27 suspect presents an immediate threat to the officer or others, or is  
28 fleeing and his escape will result in serious threat of injury to  
persons." Harris v. Roderick, 126 F.3d 1189, 1201 (9<sup>th</sup> Cir. 1997).  
The Court must apply these principles in the specific context of this  
case - viewing the facts in the light most favorable to Plaintiffs -  
to determine if the officers<sup>10</sup> were on notice that their conduct was

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<sup>10</sup>Because the shooting officers' declarations are virtually  
identical as to what they saw, did, and believed, the Court sees no  
(continued...)

1 unconstitutional.

2 The officers never saw decedents with weapons. See Gizzi Decl. ¶  
3 11; Rodriguez Decl. ¶ 11; Spelman Decl. ¶ 10; Winston Decl. ¶ 9.  
4 However, they were advised via radio transmissions that the two  
5 suspects in the robbery were armed with guns. See Gizzi Decl. ¶ 12;  
6 Rodriguez Decl. ¶ 12; Spelman Decl. ¶ 11; Winston Decl. ¶ 10.  
7 Decedents were parked in a driveway,<sup>11</sup> blocked in by police cars.  
8 See Gizzi Decl. ¶¶ 13-14; Rodriguez Decl. ¶¶ 13-14; Spelman Decl. ¶¶  
9 12-13; Winston Decl. ¶¶ 11-12. Detective Spelman asserts that he saw  
10 Guerrero raise his hand and point a dark object at the officers, which  
11 Spelman believed to be a gun. See Spelman Decl. ¶ 13. The officers  
12 demanded that decedents put their hands up, but decedents faced away  
13 from the officers with their hands concealed in their waistbands.  
14 See Gizzi Decl. ¶ 15; Rodriguez Decl. ¶ 16; Spelman Decl. ¶ 14;  
15 Winston Decl. ¶ 13. Decedents were shot in the back. See Pls.' Ex. 9  
16 at 133, 158. The officers found an unloaded gun and ammunition in the  
17 car. See Spelman Decl. ¶ 16; Pls.' Ex. 6 at 8:4.

18 The officers' declarations suggest that the events at the  
19 residence unfolded rapidly, giving decedents little, if any,  
20 opportunity to comply with their orders. See, e.g., Rodriguez Decl. ¶

21 \_\_\_\_\_  
22 <sup>10</sup>(...continued)  
23 need to address each of them individually at this stage. But  
24 see Cunningham v. Gates, 229 F.3d 1271, 1287 (9<sup>th</sup> Cir. 2000) ("in  
25 resolving a motion for summary judgment based on qualified immunity, a  
court must carefully examine the specific factual allegations against  
each individual defendant (as viewed in the light most favorable to  
the plaintiff)").

26 <sup>11</sup>There is a dispute about whether decedents' car faced a fence  
27 or a garage. The Court is unable to resolve the dispute, in large  
28 part because of the poor quality of the photographs submitted. See,  
e.g., Pls.' Ex. 11 at 207. The Court assumes, for purposes of this  
Motion, that decedents parked in front of a garage.

1 15 ("I heard Detectives Spelman and Gizzi identify themselves as  
2 police officers. This was followed by a detective who shouted 'Gun.'  
3 I then heard gunshots emanate from Detective Spelman and Gizzi's  
4 location."); Winston Decl. ¶ 12 ("I heard Detective Gizzi identify  
5 himself as a police officer and Detective Spelman shout 'Gun'. I then  
6 heard a gunshot come from the area of Detective Spelman and Gizzi's  
7 vehicle . . . ."); see also Dep. of Raquelle de la Rocha at 24:18-19  
8 ("it all happened very quickly").

9 This case bears none of the hallmarks of the cases in which the  
10 Ninth Circuit and other courts have found excessive force defendants  
11 to be entitled to qualified immunity. Decedents never brandished  
12 their (unloaded) weapon, much less used it. Cf. Pace v. Capobianco,  
13 283 F.3d 1275, 1282 (11<sup>th</sup> Cir. 2002) (decendent had used his car as a  
14 deadly weapon); Medina v. Cram, 252 F.3d 1124, 1132 (10<sup>th</sup> Cir. 2001)  
15 ("Mr. Medina communicated he had a gun[] [and] emerged from the house  
16 covering what could reasonably be interpreted as a weapon"); Wilson v.  
17 Meeks, 52 F.3d 1547, 1553-54 (10<sup>th</sup> Cir. 1995) (the court found that  
18 the decendent had pointed a gun at the officer); Scott v. Henrich, 39  
19 F.3d 912, 915 (9<sup>th</sup> Cir. 1994) (decendent had recently fired shots and  
20 was "acting 'crazy'"). Decedents did not flee. Cf. Pace, 283 F.3d  
21 1275 (decendent was shot after a high speed chase); Reese v. Anderson,  
22 926 F.2d 494, (5<sup>th</sup> Cir. 1991) (decendent was shot after a high-speed  
23 chase that ended when his car spun out of control). Decedents did not  
24 actively resist arrest. Cf. Medina, 252 F.3d at 1127 (decendent  
25 continued to approach the officers after they attempted to stop him  
26 with less-lethal force, including beanbag rounds and an attack dog).

27 Defendants' reliance on their primary case, Forrett v.  
28 Richardson, 112 F.3d 416 (9<sup>th</sup> Cir. 1997), overruled on other grounds

1 by 9<sup>th</sup> Cir. R. 39-1.6, is particularly misplaced.<sup>12</sup> In Forrett, the  
2 decedent had already shot one victim at point-blank range, stolen a  
3 number of guns, knowingly eluded the police for an extended period of  
4 time in a residential area, and was in the process of scaling a  
5 backyard wall in order to escape when he was shot. He continued to  
6 flee despite numerous verbal orders and warning shots. Defendants  
7 cannot rely on Forrett to assert that it was clearly established that  
8 they could shoot two suspects, trapped in a driveway, who had given no  
9 indication that they would attempt to flee.

10 In contrast to the above-discussed cases, those cases in which  
11 courts have found the defendants not entitled to qualified immunity  
12 are much more closely analogous to this one. Viewing the facts in the  
13 light most favorable to Plaintiffs,<sup>13</sup> the officers were on notice that  
14 their actions were unlawful.

15 Courts have repeatedly held that excessive force defendants are  
16 not entitled to qualified immunity in cases where decedents did not  
17 have weapons on their persons, brandish weapons, or threaten to use  
18 them - even if the officers believed the decedents were armed.  
19 See Harris v. Roderick, 126 F.3d 1189, 1203 (9<sup>th</sup> Cir. 1997) (finding  
20 that shooting the plaintiff was not objectively reasonable where he

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21  
22 <sup>12</sup>As an initial matter, the Court rejects any reliance on Forrett  
23 or Anderson v. Russell, 247 F.3d 125 (9<sup>th</sup> Cir. 2001), both of which  
24 were decided on motions for judgment as a matter of law after trial.  
25 The Supreme Court made clear in Katz that the factual question of  
26 whether excessive force was used is different from the legal question  
of whether the defendants are entitled to qualified immunity. See 533  
U.S. at 197 ("the ruling on qualified immunity requires an analysis  
not susceptible of fusion with the question whether unreasonable force  
was used in making the arrest").

27 <sup>13</sup>Defendants give lip service to this standard, but persist in  
28 presenting the facts in the light most favorable to the shooting  
officers.

1 had "made no aggressive move of any kind"); Curnow v. Ridgecrest  
2 Police, 952 F.2d 321, 325 (9<sup>th</sup> Cir. 1991) (finding that the defendants  
3 were not entitled to qualified immunity where, in one witness' version  
4 of the shooting, "Curnow did not point the gun at the officers and  
5 apparently was not facing them when they shot him the first time");  
6 Wilson v. City of Des Moines, 160 F.Supp. 2d 1038, 1040 (S.D. Iowa  
7 2001) (finding that the defendants were not entitled to qualified  
8 immunity where they shot an unarmed man running across the field  
9 because "they thought they saw a firearm"). As in Wilson, this was  
10 "not a case where the officers **clearly** saw that the suspect had a  
11 weapon." Id. at 1042.<sup>14</sup>

12 Similarly, defendants are not entitled to qualified immunity  
13 where the decedent is in retreat or has made no attempt to flee.  
14 See Harris, 126 F.3d at 1203 (finding that shooting the plaintiff was  
15 not objectively reasonable where he was running "back toward the cabin  
16 from which [he] had recently emerged"); cf. Acosta v. City & County of  
17 San Francisco, 83 F.3d 1143, 1148 (9<sup>th</sup> Cir. 1996) (as amended) ("it  
18 was not reasonable for [the officer] to believe that Acosta posed a  
19 threat of great bodily injury or harm to him or to anyone else" so the  
20 "officer could not have reasonably believed that shooting at the  
21 driver of the slowly moving car was lawful"). As in Harris, decedents  
22 here had returned to the home they had left earlier in the morning.

23 Lastly, the Court notes that "[t]he primary focus of [its]  
24

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25  
26 <sup>14</sup>The Wilson court also noted that no weapon was found at the  
27 scene of that shooting. An unloaded gun was found here, but the Court  
28 does not find the distinction relevant. There is no question that the  
plaintiffs in Curnow and Harris were armed. What matters is that they  
had not used the weapon in a threatening manner toward the officers  
before they were shot.

1 inquiry . . . remains on whether the officer was in danger at the  
2 exact moment of the threat of force." Medina, 252 F.3d at 1132.  
3 Accordingly, the fact that decedents might have been armed previously  
4 is largely irrelevant, if they did not pose a danger to the officers  
5 at the time they were shot. Cf. Harris, 126 F.3d at 1203 (finding  
6 defendant not entitled to qualified immunity "even though the suspect  
7 had engaged in a shoot-out with law enforcement officers on the  
8 previous day and may have been the person responsible for the death of  
9 one of the officers"). Viewing the facts in the light most favorable  
10 to Plaintiffs - decedents had not fled, had not threatened the  
11 officers with weapons, were not armed, and were facing away - the  
12 Court concludes that the shooting officers could not believe that  
13 using deadly force was lawful. Accordingly, they are not entitled to  
14 qualified immunity and the motion for summary judgment must be  
15 denied.<sup>15</sup>

16 **B. The Claims Against the Non-Shooting Officers are Dismissed**

17 Defendants next seek dismissal of the claims against the non-  
18 shooting police officer defendants. The Court agrees that there is no  
19 evidence that any of these officers were involved in the shooting, had  
20 any control over the operations of the SIS or the actions of the  
21

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22 <sup>15</sup>The Court notes that disputes of material fact also remain that  
23 prevent the Court from granting summary judgment to the shooting  
24 officers on the basis of qualified immunity. There are questions, for  
25 instance, about whether decedents' car faced a wall or a garage and  
26 how much time the officers gave decedents to comply before they  
27 started shooting. Cf. Wilson v. City of Des Moines, 160 F.Supp.2d at  
28 1042 ("Without having a sufficient record or a factual determination  
of Mozee's actions in the unlit field, the Court cannot determine what  
level of threat Mozee posed to perform an analysis of whether the  
officer's mistake as to the law was reasonable.").

The Court need not address the "danger creation" theory of  
liability.



1 shooting officers, set in motion any action that resulted in the  
2 shooting, or authorized, approved, or acquiesced in the shooting  
3 officers' conduct. See Decl. of Joseph Freia; Decl. of Daniel Koenig;  
4 Decl. of Jerry Brooks; Decl. of John Helms; Decl. of Philip James  
5 Wixon; Decl. of James Toma; Decl. of Gary Holbrook; Decl. of James  
6 Harris; Decl. of Robert Kraus; Decl. of Edward Guiza; Decl. of James  
7 Kilgore; Decl. of Angela Kreig; Decl. of John Tortorici; Decl. of  
8 Charles Bennett; Decl. of Brian Davis; Decl. of Joe Callian.

9 Plaintiffs have submitted no evidence in support of holding these  
10 officers liable.<sup>16</sup> The cases cited by Plaintiffs are inapposite. In  
11 Fairley v. Luman, 281 F.3d 913 (9<sup>th</sup> Cir. 2002) (per curiam), and  
12 Garcia v. Salt Lake City, 768 F.2d 303 (10<sup>th</sup> Cir. 1985), the courts  
13 held that municipal governments could be held liable, but did not  
14 address whether individual officers could be held liable for actions  
15 that took place when they were not present. In Grandstaff v. City of  
16 Borger, Tex., 767 F.2d 161 (5<sup>th</sup> Cir. 1985), the court held that four  
17 officers could be held liable for the shooting death of decedent, even  
18 though it was unclear which officer had actually killed decedent.  
19 However, the officers were all present and involved in the  
20 "firestorm." Id. at 168. The Fifth Circuit explicitly distinguished  
21 a case like this one, Dobson v. Camden, 725 F.2d 1003 (5<sup>th</sup> Cir. 1984),  
22 in which the defendants were not present or implicated in the  
23 incident. See id.

24 Because there is no evidence to support holding Defendants Freia,  
25 Koenig, Brooks, Helms, Wixon, Toma, Holbrook, Harris, Kraus, Guiza,  
26

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27 <sup>16</sup>In particular, they have produced no evidence to support their  
28 position that Defendant Koenig implemented or approved an SIS policy  
that caused decedents' deaths.

1 Kilgore, Kreig, Tortorici, Bennett, Davis, and Callian liable for  
2 decedents' deaths, the claims against these Defendants are dismissed.

3 **C. The Claims Against the Former Police Chiefs are Dismissed**

4 The Court previously dismissed the "official capacity" claims  
5 against former Police Chiefs Williams and Gates. Defendants now seek  
6 dismissal of the individual capacity claims against the former police  
7 chiefs. Officials who were no longer in office at the time of the  
8 incidents in question may be held liable if they "adopted a plan or  
9 policy authorizing or approving the alleged unconstitutional conduct."  
10 Heller v. Bushey, 759 F.2d 1371, 1375 (9<sup>th</sup> Cir. 1985), judgment  
11 vacated on other grounds sub nom. City of Los Angeles v. Heller, 475  
12 U.S. 796 (1986) (per curiam). Aside from citing Heller, Plaintiffs  
13 have produced no evidence of policies implemented or approved by Gates  
14 and Williams. Even more significantly, Plaintiffs have produced no  
15 evidence of causation, linking any such policy to decedents' deaths.  
16 Accordingly, the claims against Gates and Williams are dismissed.

17 **D. Former Mayor Richard Riordan**

18 Defendants seek dismissal of the claims asserted against former  
19 Mayor Richard Riordan. In Cunningham v. Gates, 229 F.3d 1271, 1281  
20 n.13 (9<sup>th</sup> Cir. 2000) (as amended), the Ninth Circuit stated in dicta  
21 that Mayor Riordan "was clearly entitled to qualified immunity."  
22 Because it was not a holding, the Court is not bound by that  
23 statement. But the Court does find it persuasive. Plaintiffs have  
24 produced no evidence of specific actions Riordan took that caused  
25 decedents' deaths or specific actions that he could have taken. More  
26 significantly, for qualified immunity purposes, the Cunningham  
27 decision suggests that Riordan could not be held legally liable for  
28 his actions. Accordingly, the claims against former Mayor Riordan in

1 his individual and official capacities are dismissed.

2 **E. The Members of the City Council Who Voted to Indemnify the**  
3 **Defendants in Trevino Are Not Entitled to Qualified Immunity**

4 Under California Government Code § 825(b):

5 a public entity is authorized to pay that part of a judgment  
6 [against a public employee] that is for punitive or  
7 exemplary damages if the governing body of that public  
8 entity, acting in its sole discretion except in cases  
involving an entity of the state government, finds all of  
the following:

9 (1) The judgment is based on an act or omission of an  
10 employee or former employee acting within the course  
and scope of his or her employment as an employee of  
the public entity.

11 (2) At the time of the act giving rise to the  
12 liability, the employee or former employee acted, or  
13 failed to act, in good faith, without actual malice and  
in the apparent best interests of the public entity.

14 (3) Payment of the claim or judgment would be in the  
15 best interests of the public entity.

16 Plaintiffs allege that "by always seeing to it that punitive damages  
17 awarded by juries against LAPD officers for civil rights violations  
18 would be paid by the City, and not by the LAPD officers," the City  
19 Council member Defendants have fostered "a custom of use of excessive  
20 force by LAPD officers, and especially the defendant officers in this  
21 action, who feel that, no matter how badly and how frequently they  
22 violated and violate the Fourth Amendment . . . , they will be  
23 immunized from any civil penalty." SAC ¶ 42.

24 In Navarro v. Block, 250 F.3d 729 (9<sup>th</sup> Cir. 2001), rehearing  
25 denied, Plaintiffs' counsel brought a similar § 1983 claim against the  
26 Los Angeles County Board of Supervisors. On the Board's appeal from  
27 the district court order denying their motion for summary judgment,  
28 the Ninth Circuit held that "local legislators are not entitled to

1 qualified immunity if they implement their state-created power to  
2 indemnify police officers from punitive damage awards in bad faith."  
3 Id. at 734 (citing Cunningham v. Gates, 229 F.3d 1271 (9<sup>th</sup> Cir. 2000)  
4 (as amended)); Trevino v. Gates, 99 F.3d 911 (9<sup>th</sup> Cir. 1996) ("Trevino  
5 II"); see also Blumberg v. Gates, 144 F.Supp.2d 1221 (C.D. Cal. 2001)  
6 (denying motion to dismiss similar indemnification claim against the  
7 City Council).

8 Defendants seek summary judgment on the ground that there is no  
9 evidence that the City Council members ever voted to indemnify police  
10 officers in bad faith. Contrary to their suggestion, Plaintiffs bear  
11 the burden of producing evidence of Defendants' bad faith.  
12 See Cunningham, 229 F.3d at 1293 ("In order to defeat the council  
13 members' motion for summary judgment in the Smith case, Smith must  
14 present some evidence that the council members did not implement  
15 section 825's indemnification procedure in good faith . . . .").  
16 Plaintiffs have submitted transcripts of six City Council meetings in  
17 which indemnification for punitive damages awards was debated, and  
18 ultimately approved. See Pls.' Exs. AA (meetings on October 28, 1994,  
19 regarding Tave v. City of Los Angeles, No. CV 93-3238 ER (Mcx), and on  
20 April 17, 1996, and July 31, 1996, regarding Guerra v. City of Los  
21 Angeles, No. 92K40273), AAA (meetings on December 20, 1996, and  
22 January 8, 1997, regarding Clarke v. Gates, No. BC 101871, and on  
23 April 4, 1997, regarding Trevino v. Gates, No. CV 92-1981 JSL).  
24 Plaintiffs have also submitted related documentation. See Pls.' Exs.  
25 BB, DD (City Attorney's recommendations in Trevino v. Gates, No. CV  
26 92-1981 JSL, dated February 19, 1997, and in Clarke v. Gates, No. BC  
27 101871, dated November 25, 1996).

28 Most of the transcripts and documents are irrelevant. "Trevino

1 II draws a line in the sand. Indemnification decisions made before  
2 the opinion cannot give rise to personal liability[.]” Blumberg, 144  
3 F.Supp.2d at 1225; see also Cunningham, 229 F.3d at 1293 (“the council  
4 members are clearly entitled to qualified immunity for lawsuits based  
5 on pre-Trevino decisions to indemnify officers against punitive damage  
6 awards”). The Ninth Circuit issued the Trevino II opinion on November  
7 1, 1996. Accordingly, the Court will not consider any indemnification  
8 decisions prior to that date, including those in Guerra and Tave.<sup>17</sup>

9 Plaintiffs are left with their evidence regarding the Trevino and  
10 Clarke indemnification decisions.<sup>18</sup> The Ninth Circuit, in Cunningham,  
11 held that the Clarke deliberations “suggest[] that they [the City  
12 Council] implemented section 825’s indemnification procedure in good  
13 faith in accordance with Trevino.” 229 F.3d at 1293. This Court is  
14 bound by that decision.

15 Plaintiffs contend that the Trevino indemnification vote was in  
16 bad faith because the transcripts “show no deliberations, no analysis  
17 – just a motion and a vote to pay because the city attorney said,  
18 pay.” Opp’n at 16:10-11. The Court agrees that the deliberation and  
19 discussion – if the vote can even be characterized that way – in  
20 Trevino was extraordinarily short. The transcript comprises fewer  
21 than six pages. There is only a single comment aside from the City  
22 Attorney’s presentation, when Council Member Walters states: “[N]obody  
23 else is going to vote with me, but I would urge council members that

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24  
25 <sup>17</sup>The bulk of Plaintiffs’ opposition is devoted to a discussion  
26 of Guerra and Tave, which the Court does not consider.

27 <sup>18</sup>There was apparently a third case after Trevino II, Simmons v.  
28 City of Los Angeles, No. CV 95-6735 AHM (C.D. Cal.). See Motion at  
36:12-14. Neither party has provided the Court with any evidence  
about the deliberations or vote in that case.

1 you vote NO on the punitive damages." See Pls.' Ex. AAA at 138:20-22.

2 Furthermore, the transcript suggests that the City Council voted  
3 to indemnify based on its earlier vote in Gomez v. Gates, No. CV 90-  
4 856 JSL (C.D. Cal.). See id. at 135:19-22 ("These judgments arise out  
5 of the Trevino case, which is the same set of facts that occurred in  
6 the Gomez case, which you had previously voted to pay punitives on.").  
7 The Court cannot find that the City Council relied on its earlier  
8 Gomez vote in good faith. The Gomez deliberations and vote were  
9 heavily criticized by this Court, Judge Letts writing, in Cunningham  
10 v. Gates, 989 F.Supp. 1262, 1274 (C.D. Cal. 1997) ("[N]o council  
11 member ever asked to see a transcript . . ., or even asked for a  
12 detailed summary of the testimony. The evidence does not reflect any  
13 discussion of the officer code of silence, or whether any officer  
14 testimony might have been tainted . . . . A jury could find that such  
15 'deliberations' were not in good faith."), affirmed in part and  
16 reversed in part by 229 F.3d 1271 (9<sup>th</sup> Cir. 2000) (as amended). The  
17 Court will not take judicial notice of Judge Letts' factual findings,  
18 and the City Council members cannot be held liable for the Gomez vote,  
19 which presumably predated Trevino II, as the punitive damages in that  
20 case were awarded in 1992. Nevertheless, a jury could find that the  
21 City Council members were on notice that there were questions about  
22 the good faith of the Gomez vote and did not act in good faith by  
23 relying solely on that earlier deliberation in voting to indemnify the  
24 officers in Trevino.<sup>19</sup>

25 Accordingly, the City Council members who voted to indemnify in

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26  
27 <sup>19</sup>The law imposing personal liability on City Council members is  
28 clear. This decision is based solely on the disputed issue of whether  
the City Council members voted in good faith in Trevino, a question of  
fact.

1 Trevino are not entitled to qualified immunity.<sup>20</sup> Because this claim  
2 is asserted against the City Council members in their individual  
3 capacities, any member who voted not to indemnify is entitled to  
4 qualified immunity. Additionally, those members who were not present  
5 for the Trevino vote are entitled to qualified immunity. Plaintiffs  
6 suggest that those City Council members who did not vote in Trevino  
7 can be held liable for "shirking" their duties. But no case has ever  
8 suggested that liability could be imposed on this basis. Accordingly,  
9 the individual capacity claims against Mark Ridley-Thomas, see Decl.  
10 of Mark Ridley-Thomas ¶ 4, Ruth Galanter, see Decl. of Ruth Galanter ¶  
11 4, and Richard Alarcon, see Decl. of Richard Alarcon ¶ 4, are  
12 dismissed.

13 **G. There is No Evidence that Former City Attorney James Hahn**  
14 **Recommended Indemnification in Trevino**

15 Defendants next seek summary adjudication of the claims against  
16 former City Attorney, now Mayor, James Hahn on the ground that, if the  
17 City Council members are not liable for voting to indemnify police  
18 officers, neither can the City Attorney be liable for advising them to  
19 do so. The Court has not dismissed the individual capacity claims  
20 against the City Council members and Defendants have provided no other  
21 grounds in support of the dismissal of the claims against the City  
22 Attorney.<sup>21</sup> However, there is no evidence that the only member of the  
23 \_\_\_\_\_

24 <sup>20</sup>The Court observes that Plaintiffs' burden of showing that a  
25 single indemnification vote in Trevino **caused** this shooting is steep.  
26 However, the Court also notes that several of the shooting officers  
here were named as defendants in Trevino.

27 <sup>21</sup>The Court also notes that Defendants' argument is logically  
28 flawed. The City Council might engage in a good faith deliberation  
and come to its own conclusion that indemnification was proper even if

(continued...)

1 office who has been served - James Hahn - acted in bad faith with  
2 respect to the Trevino vote. The member of the office, Daniel  
3 Woodard, who made the recommendation to the City Council in Trevino,  
4 see Pls.' Ex. AAA at 135:6-12, is named as a defendant, but has never  
5 been served (and therefore, is not a moving Defendant).<sup>22</sup> Plaintiffs  
6 have presented no evidence that James Hahn approved or participated in  
7 the recommendation.<sup>23</sup> Accordingly, the claims against James Hahn in  
8 his individual capacity will be dismissed.

9 **H. The Board of Police Commissioners and Chief Parks are Entitled to**  
10 **Qualified Immunity**

11 Next, Defendants contend that the members of the Board of Police  
12 Commissioners, and former Police Chief Bernard Parks, are entitled to  
13 qualified immunity on the individual capacity claims that allege that  
14 these defendants failed to adequately supervise the SIS officers.<sup>24</sup>

15 \_\_\_\_\_  
16 <sup>21</sup>(...continued)  
17 the City Attorney's recommendation was made in bad faith. Of course,  
18 a plaintiff might not be able to demonstrate that his injury was  
19 caused by the City Attorney's bad faith in such a case.

20 <sup>22</sup>The Court notes that Defendants have never sought dismissal of  
21 the unserved defendants.

22 <sup>23</sup>The Court does not make any finding regarding the existence of  
23 good faith or bad faith. A jury might find that the City Attorney's  
24 office recommendation that the City Council rely on Gomez was made in  
25 bad faith. There is simply no evidence that the only member of that  
26 office who has been served participated in that recommendation.

27 <sup>24</sup>Defendants' reliance on Cunningham, Reply at 14,  
28 mischaracterizes the Ninth Circuit's decision. In Cunningham, the  
court concluded it did not have jurisdiction over the supervisory  
defendants' appeal because the district court had denied summary  
judgment based on material factual disputes. See 229 F.3d at 1292.  
As a result, the court's comment that "evidence of supervisor  
misconduct seems virtually non-existent" is dicta. The Court may -  
and does - find it persuasive, but is not bound by it.

The Court also notes that it disagrees that the outcome of  
(continued...)



1 See SAC ¶¶ 9, 13-14 (alleging failure to investigate police misconduct  
2 and discipline police officers, particularly the SIS).

3 Liability may be imposed on supervisors under § 1983 if the  
4 plaintiff demonstrates “a sufficient causal connection between the  
5 supervisor’s wrongful conduct and the constitutional violation.”  
6 Redman v. County of San Diego, 942 F.2d 1435, 1446 (9<sup>th</sup> Cir. 1991) (en  
7 banc) (quoting Hansen v. Black, 885 F.2d 642, 646 (9<sup>th</sup> Cir. 1989)).  
8 “The requisite causal connection can be established . . . by setting  
9 in motion a series of acts by others which the actor knows or  
10 reasonably should know would cause others to inflict the  
11 constitutional injury.” Id. at 1447 (citing Johnson v. Duffy, 588  
12 F.2d 740, 743-44 (9<sup>th</sup> Cir. 1978)).

13 On the first step of the qualified immunity analysis, Plaintiffs  
14 have certainly alleged a violation of decedents’ rights by the Board  
15 of Police Commissioners and Chief Parks. They have alleged that  
16 decedents’ Fourth and Fourteenth Amendment rights were violated by the  
17 shooting officers, supra, and that the Board caused this violation by  
18 ratifying previous actions of the SIS. See Opp’n at 3-6.

19 As to the second prong of the qualified immunity test, the Court  
20 notes that Defendants - as is their right on a motion for summary  
21 judgment - have produced no evidence demonstrating a lack of wrongful  
22 conduct or a lack of causal link between their conduct and decedents’  
23 deaths.<sup>25</sup> In contrast to the defense of the City Council members,

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24  
25  
26 <sup>24</sup>(...continued)  
Cunningham would necessarily be different after Katz.

27 <sup>25</sup>Defendants also continue to confuse the question of qualified  
28 immunity with the merits of the case. Whether Plaintiffs could  
ultimately prove causation goes to the merits.

1 there are no declarations from the members of the Board. Plaintiffs  
2 have produced evidence that the Board "examines every incident  
3 involving the discharge of a firearm, an in-custody death or other  
4 deaths resulting from or involving law enforcement." Decl. of Raymond  
5 Fisher ¶ 3. The Board reviews deadly force cases and determines  
6 whether the use of lethal force was "in policy" or "out of policy."  
7 Id. ¶¶ 4, 10-12. The Board was on notice that "police officers have  
8 been allowed to 'lie and deny' charges during a personnel  
9 investigation without suffering any disciplinary consequences." Pls.'  
10 Ex. 5 at 31. Finally, Plaintiffs have submitted a declaration by an  
11 expert witness that approving actions of the SIS officers as "in  
12 policy" "licenses SIS officers to believe that their accounts will be  
13 accepted without question even though their accounts are contradicted  
14 by objective evidence."<sup>26</sup> Pls.' Ex. 8 ¶ 6.

15 Plaintiffs rely in part on the 1991 Christopher Commission  
16 Report, which was critical of LAPD practices. For a discussion of the  
17 Christopher Commission Report, see Cunningham v. Gates, 989 F.Supp.  
18 1262, 1266-67 (C.D. Cal. 1997), affirmed in part and reversed in part  
19 on other grounds by 229 F.3d 1271 (9<sup>th</sup> Cir. 2000). In Cunningham,  
20 this Court, Judge Letts writing, denied the Board members' motion for  
21 summary judgment because "the jury may find, on the basis of the  
22 Christopher Commission Report and of both positive evidence and lack  
23 of contrary evidence that there has been no change . . . . A jury  
24 could also find that if excessive force was used by the SIS officers  
25 in this case, there is a causal connection between these policies and  
26 the use of force against Cunningham and Soly." 989 F.Supp. at 1268.

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27  
28 <sup>26</sup>The Court gives this five-year-old declaration little weight,  
as it does not review any SIS action after 1996. Pls. Ex. 8 ¶ 1.

1 As in Cunningham, Defendants have produced no evidence that the  
2 Board's review of the SIS actions in lethal force cases has overcome  
3 these previously identified problems. See id. at 1268. But the Ninth  
4 Circuit, in the Cunningham appeal, noted its disagreement with Judge  
5 Letts' reasoning. See Cunningham, 299 F.3d at 1292 ("the evidence  
6 seems clearly to suggest that the commissioners took numerous steps to  
7 implement the recommendations of the Christopher Commission, and . . .  
8 evidence of supervisor misconduct seems virtually nonexistent").  
9 Here, too, the Court is presented with no evidence that the members of  
10 the Board have acted in bad faith in finding SIS actions to be "in  
11 policy."

12 Even Plaintiffs' evidence indicates that SIS "statistics do not  
13 necessarily indicate a pattern of excessive shootings." Decl. of Reva  
14 Tooley ¶ 5(c). Additionally, the Board's Office of the Inspector  
15 General has reported that the LAPD has engaged in "an increasing  
16 concerted effort to discipline officers for following the code of  
17 silence" about misconduct. See Pls.' Ex. 5 at 41.

18 Neither party has provided the Court with any relevant case law  
19 on supervisory liability that would have given the Board members  
20 notice that they could - or could not - be held liable for their  
21 actions with regard to the SIS. Plaintiffs' theory, that through  
22 policy and ratification, the Board and Police Chief fostered a custom  
23 of use of excessive force by SIS officers, is so similar to the theory  
24 of liability asserted against the City Council, that the Court  
25 concludes that the Board members were on notice by the Trevino II and  
26 Cunningham decisions that they could be held liable for approving SIS  
27 policy and use of lethal force in bad faith. Although Defendants have  
28 produced no evidence that the Board has acted in good faith since

1 Trevino II and Cunningham, Plaintiffs' own evidence suggests that the  
2 Board is making strides to remedy the problems identified by the  
3 Christopher Commission. And the deposition of Raquelle de la Rocha  
4 indicates that, in this case, the Board deliberated in good faith  
5 before approving this shooting as "in policy." The Board considered  
6 the shooting incident twice, reconsidering it after submission of an  
7 audiotape of the incident. See Raquelle de la Rocha Dep. at 23-24.

8 Because there is no evidence of a pattern of bad faith since  
9 Trevino II, or even that the vote in this case was taken in bad faith,  
10 the past and present members of the Board of Police Commissioners are  
11 entitled to qualified immunity on the claims asserted against them in  
12 their individual capacities.<sup>27</sup> Plaintiffs have presented no evidence  
13 of any personal actions by Chief Parks for which he could be held  
14 liable in his personal capacity. Accordingly, Chief Parks is also  
15 entitled to qualified immunity for the claims asserted against him in  
16 his individual capacity.<sup>28</sup>

17  
18 <sup>27</sup>In the alternative, Defendant Stanley Sheinbaum is entitled to  
19 qualified immunity because his term on the Board ended before the  
20 Trevino II and Cunningham decisions. See Decl. of Stanley Sheinbaum.

21 This Court's decision in Smith v. Gates, No. CV 97-1286 CBM  
22 (RJGx), 2002 WL 226736, \*3-\*5 (C.D. Cal. Feb. 5, 2002), Chief Judge  
23 Marshall writing, is not inapposite. Denying the individual Board  
24 members' motion for summary judgment, the Court concluded that, after  
25 Trevino, the Board members could be held individually liable despite  
26 the fact that the Board acts by majority rule. The Court did not  
27 address whether there was any evidence of bad faith presented in that  
28 case.

29 <sup>28</sup>Nothing in the press release about the incident in question,  
30 see Pls. Ex. CC, indicates that Chief Parks made any statement about  
31 the shooting.

32 The Court declines to order Defendants to turn over Chief Parks'  
33 report about the instant shooting at this stage. The report is  
34 irrelevant to the individual capacity claim against Chief Parks for  
35 two reasons. First, the report, even if authored and signed by Chief  
36 Parks, is irrelevant to the individual capacity claim against Chief Parks for  
37 two reasons. First, the report, even if authored and signed by Chief  
38 Parks, is irrelevant to the individual capacity claim against Chief Parks for

(continued...)

1 I. Plaintiffs Have Produced Sufficient Monell Evidence as to the  
2 City Council, the City Attorney, the Board of Police  
3 Commissioners and Chief Parks

4 Defendants seek dismissal of all of the official capacity  
5 "Monell" claims on the ground that there is no evidence that the  
6 purported constitutional wrongs were committed pursuant to "official  
7 policy." Defendants fail to distinguish among the various groups of  
8 "official capacity" defendants. More significantly, Defendants fail  
9 to recognize that municipal liability under Monell v. Department of  
10 Social Servs., 436 U.S. 658, 691 (1978), may attach in other ways,  
11 including evidence of a **custom**. See Mabe v. San Bernardino County,  
12 237 F.3d 1101, 1110 (9<sup>th</sup> Cir. 2001). Plaintiffs have produced  
13 sufficient evidence that the City Council has a custom of indemnifying  
14 officers found liable for excessive force. The jury is not barred  
15 from considering pre-Trevino II decisions because Trevino II only  
16 "draws a line in the sand" on individual liability claims. Nor is the  
17 jury barred from considering decisions found by the Ninth Circuit to  
18 be in good faith. Even if a City Council vote to indemnify a single  
19 punitive damages award was taken good faith, a pattern of  
20 indemnification votes might constitute an unconstitutional custom.  
21 Accordingly, the official capacity claims against the City Council and  
22 its legal adviser, the City Attorney, may proceed.

23 Municipal liability may also attach when a final policymaker  
24

25 \_\_\_\_\_  
26 <sup>28</sup>(...continued)

26 Parks, would have been written in his official capacity. Second, the  
27 report was authored after the incident and so could not have **caused**  
28 the use of excessive force. The report might be relevant to the  
official capacity claim against Chief Parks for ratification of the  
shooting, which does survive summary judgment.

1 ratifies both a subordinate's unconstitutional decision or action and  
2 the subordinate's basis for that decision or action. See City of St.  
3 Louis v. Praprotnik, 485 U.S. 112, 127 (1988); see also Gillette v.  
4 Delmore, 979 F.2d 1342, 1348 (9th Cir. 1992). Because it is  
5 undisputed that former Chief Parks and the Board of Police  
6 Commissioners approved the shooting in this case as "in policy,"  
7 see supra, the Court concludes that the official capacity claims may  
8 proceed against the Board of Police Commissioners and the Police Chief  
9 on a ratification theory.<sup>29</sup>

10 **J. Bifurcation of the Monell Claims**

11 Lastly, Defendants have filed a second motion to bifurcate the  
12 "individual capacity" claims from the Monell and punitive damages  
13 claims. Plaintiffs oppose, primarily on the ground that the  
14 Monell evidence would be repetitive of the evidence presented at the  
15 first phase of the trial. The Court disagrees. Individual liability  
16 evidence as to the City Council members is limited to the Trevino  
17 indemnification vote (as influenced by the Gomez vote). All other  
18 indemnification votes would be admissible only in the Monell phase.  
19 The Court finds that allowing evidence of the other votes would be  
20 confusing to the jury and unfairly prejudicial to the individual City  
21 Council members.<sup>30</sup>

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22  
23 <sup>29</sup>Although the Monell claim for ratification may proceed, the  
24 Court finds that there is no evidence of an unconstitutional policy or  
25 custom with regard to the Board and the Police Chief. Plaintiffs have  
26 certainly alleged that there is an unconstitutional custom. But they  
27 have provided no evidence of prior votes upon which a jury could  
28 conclude such a custom exists. The Court also finds that there is no  
Monell evidence as to the Mayor. The official capacity claims  
asserted against the Mayor will be dismissed.

<sup>30</sup>Defendants' request to try the individual liability claims  
(continued...)

1 Pursuant to this Order, there are no individual liability claims  
2 remaining against the Board of Police Commissioners and Chief Parks.  
3 The only remaining claim against the Board and Chief Parks is for the  
4 ratification of this particular shooting. The Court finds that the  
5 issues presented by the question of whether this vote was  
6 unconstitutional are distinct from any of the questions involved in  
7 the individual liability claims. Furthermore, if the officers are  
8 found to be not liable, then there would be no need to proceed to the  
9 Monell and punitive damages questions, as they are premised on a  
10 finding of unconstitutional action by the shooting officers. See City  
11 of Los Angeles v. Heller, 475 U.S. 796, 799 (1986).<sup>31</sup> Accordingly,  
12 the Court exercises its discretion to bifurcate the individual  
13 liability claims from the Monell claims. See Fed. R. Civ. P. 42(b);  
14 Amato v. City of Saratoga Springs, 170 F.3d 311, 320 (2<sup>nd</sup> Cir. 1999).<sup>32</sup>

15 \_\_\_\_\_  
16 <sup>30</sup>(...continued)  
17 against the City Council members at the second phase would **cause**  
18 prejudice to those individuals, as the jury would hear not only about  
19 the Trevino vote, but the previous indemnification votes as well.

19 <sup>31</sup>The Court is not persuaded by the concerns identified by  
20 Douglas L. Colbert in Bifurcation of Civil Rights Defendants:  
21 Undermining Monell in Police Brutality Cases, 44 Hastings L.J. 499  
22 (1993). The Court does not believe that Plaintiffs' counsel is likely  
23 to fail to pursue the Monell claims as a result of bifurcation.  
24 See id. at 575, 577. The other concern, that the Monell claim would  
25 not proceed if the jury finds the individual officers not liable, see  
26 id. at 577-78, can be alleviated through the use of a special verdict  
27 form that asks the jury whether a constitutional violation was proven.

24 <sup>32</sup>This ruling is not intended to express any agreement with  
25 Defendants' assertion that evidence of prior incidents would be  
26 inadmissible against the shooting officers. Bifurcation of the  
27 remaining Monell claims is made without prejudice to further  
28 evidentiary rulings at the time of trial.

27 Defendants' argument that the individual claims against the City  
28 Council members should be tried at the second phase is largely  
dependent on an assumption that no evidence about prior shootings will  
(continued...)

1 The Court also exercises its discretion to bifurcate the punitive  
2 damages claim. It will promote convenience and efficiency to try the  
3 individual liability issues first. In their opposition, Plaintiffs  
4 request that compensatory damages be bifurcated from the individual  
5 liability claims and tried with the punitive damages claim.  
6 Defendants have not opposed this suggestion. Accordingly, the Court  
7 rules that all damages will be tried in a second phase of the trial,  
8 if necessary, along with the Monell claims.

9 For these reasons, Defendants' motion to bifurcate trial is  
10 granted.

#### 11 12 V. CONCLUSION

13 Based on the foregoing, Defendants' Motion for Summary Judgment  
14 is GRANTED IN PART and DENIED IN PART.<sup>33</sup> The claims against  
15 Defendants Freia, Koenig, Brooks, Helms, Wixon, Toma, Holbrook,  
16 Harris, Kraus, Guiza, Kilgore, Kreig, Tortorici, Bennett, Davis, and  
17 Callian in their individual and official capacities are hereby  
18 DISMISSED. The claims against former Police Chiefs Williams and Gates  
19 in their individual capacities are hereby DISMISSED. The claims  
20 against former Mayor Riordan in his individual and official capacities  
21 are hereby DISMISSED. The claims against Defendants Ruth Galanter,  
22

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23 <sup>32</sup>(...continued)  
24 be admitted against the officers. The Court is unwilling to make such  
25 an assumption at this stage.

26 <sup>33</sup>Plaintiffs' request for Chuman certification is GRANTED IN  
27 PART. The motion for summary judgment on the basis of qualified  
28 immunity is denied as to the claims asserted against the shooting  
officers and the individual members of the City Council. The law  
imposing liability on these Defendants is clear. The motion is denied  
based on genuine disputes of material fact.



1 Richard Alarcon, and Mark Ridley-Thomas in their individual capacities  
2 are hereby DISMISSED. The claims against Defendant James Hahn in his  
3 individual capacity are hereby DISMISSED. The individual capacity  
4 claims against the current and former members of the Board of Police  
5 Commissioners and Chief Parks are hereby DISMISSED.<sup>34</sup>

6 Defendants' Motion to Bifurcate Trial is hereby GRANTED. The  
7 first phase of the trial will consist of the individual liability  
8 claims against the four shooting officers and the members of the City  
9 Council and City Attorney's office, except Defendants Galanter,  
10 Alarcon, and Ridley-Thomas. The second phase of the trial, if  
11 necessary, will consist of the Monell claims against the City Council  
12 and City Attorney's office, as well as the Board of Police  
13 Commissioners and Chief Parks, and determination of all damages  
14 awards.

15  
16 **DATED:** \_\_\_\_\_

17 \_\_\_\_\_  
18 **AUDREY B. COLLINS**  
19 **UNITED STATES DISTRICT JUDGE**  
20  
21  
22  
23  
24 \_\_\_\_\_

25 <sup>34</sup>The following claims remain: the claims against the four  
26 shooting officers (Gizzi, Rodriguez, Spelman, and Winston); the  
27 individual capacity claims against the current and former members of  
28 the City Council (except Galanter, Alarcon, and Ridley-Thomas); the  
official capacity claims against the City Council and the City  
Attorney's office; and the official capacity claims against the Police  
Chief and the Board of Police Commissioners.