

APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 15-56548

D.C. No. 2:11-cv-08110-FMO-FFM

[Filed August 29, 2017]

JAY RUSSELL SHAFER,	)
<i>Plaintiff-Appellee,</i>	)
	)
v.	)
	)
COUNTY OF SANTA BARBARA;	)
BILL BROWN, individually and	)
as Sheriff of Santa Barbara	)
County; SANTA BARBARA	)
SHERIFF'S DEPARTMENT,	)
<i>Defendants,</i>	)
	)
and	)
	)
FREDDY PADILLA, No. 2465,	)
individually and as a peace officer,	)
<i>Defendant-Appellant.</i>	)

OPINION

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Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Argued and Submitted April 6, 2017
Pasadena, California

Filed August 29, 2017

Before: Milan D. Smith, Jr. and N. Randy Smith,
Circuit Judges, and Gary Feinerman.*

Opinion by Judge N.R. Smith

SUMMARY**

Civil Rights

The panel reversed a jury verdict and vacated damage awards in favor of the plaintiff in an action brought under 42 U.S.C. § 1983 alleging that a police officer used excessive force when he used a leg sweep maneuver to take down the plaintiff after he refused to comply with the officer's orders to drop the water balloons he was carrying.

The panel held that viewing all of the facts in the light most favorable to the jury's verdict, there was sufficient evidence to support the jury's finding that the force used by the officer was excessive. The panel

* The Honorable Gary Feinerman for the Northern District of Illinois, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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nevertheless held that the officer was entitled to qualified immunity because, at the time the incident occurred, the law was not clearly established that an officer cannot progressively increase his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver when a misdemeanant refuses to comply with the officer's orders and resists, obstructs, or delays the officer in his lawful performance of duties such that the officer has probable cause to arrest him in a challenging environment.

COUNSEL

Mary Pat Barry (argued), Senior Deputy; Michael C. Ghizzoni, County Counsel; Office of County Counsel, Santa Barbara, California; for Defendant-Appellant.

Steven B. Stevens (argued), Los Angeles, California; Thomas E. Beck, The Beck Law Firm, Los Alamitos, California; for Plaintiff-Appellee.

OPINION

N.R. SMITH, Circuit Judge:

College student Jay Russell Shafer refused to drop water balloons at the request of Santa Barbara Sheriff's Deputy Freddy Padilla. Deputy Padilla then used a leg sweep maneuver to take down and arrest Shafer. Shafer sued Deputy Padilla, asserting violations of his constitutional rights under 42 U.S.C. § 1983. Deputy Padilla asserted the defense of qualified immunity.

The jury found that Deputy Padilla violated Shafer's Fourth Amendment constitutional right to be free from

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excessive force. The evidence adduced at trial was sufficient to sustain the jury's verdict. However, Deputy Padilla is entitled to qualified immunity, because, at the time this incident occurred, the law was not clearly established that an officer cannot progressively increase his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver when a misdemeanor refuses to comply with the officer's orders and resists, obstructs, or delays the officer in his lawful performance of duties such that the officer has probable cause to arrest him in a challenging environment.

I. BACKGROUND

Students from the University of California, Santa Barbara ("UCSB") commonly congregate on Del Playa Drive, a street near the university campus. On October 4, 2009, hundreds to thousands of intoxicated students congregated on Del Playa Drive. There was loud music playing, and students were yelling, screaming, and running around.

Deputy Padilla and Sheriff's Deputy Todd LeFemine were on patrol that night on Del Playa Drive. Shortly after midnight, four students approached the deputies and said that they had just been hit with water balloons. This complaint caused Deputy Padilla concern, because water balloons had been a serious problem on Del Playa Drive and could cause injuries or start fights. Within one minute of hearing this report, Deputy Padilla identified two males—Shafer and his friend Domenico Gianola—walking with water balloons in their hands. The deputies approached Shafer and Gianola, and Deputy Padilla ordered them to drop the balloons. Gianola dropped his balloons, but Shafer did

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not. Instead, Shafer asked Deputy Padilla three or four times why he could not hold the balloons. Deputy Padilla continued to order Shafer to drop the balloons but did not answer Shafer's questions.

What happened next is disputed. According to Shafer, Deputy Padilla aggressively grabbed him by the arm and pulled him toward the curb. Shafer attempted to maintain his footing, but Deputy Padilla swung him toward the sidewalk. Shafer never tried to break free of Deputy Padilla's hold and never resisted Deputy Padilla. Once Deputy Padilla and Shafer reached the sidewalk, Deputy LeFemine grabbed Shafer's other arm. Deputy Padilla kicked Shafer's feet out from under him, and Shafer fell face first onto the pavement. The officers piled on top of him.¹ Shafer felt a knee go into his back and a boot push his head into the pavement. One of the officers handcuffed Shafer. The deputies pulled Shafer to his feet and informed him that he was going to jail. Shafer received a minor abrasion on his face and a bruise on his back as a result of the takedown.

Deputy Padilla's version of the events is much different. He testified that after Shafer refused to drop the water balloons, Shafer attempted to walk past him. Deputy Padilla grabbed Shafer's arm and escorted him approximately ten feet to the curb. Shafer resisted Deputy Padilla's grasp by pulling his arm away from Deputy Padilla. When they got to the curb, Deputy Padilla guided Shafer to sit on the curb by applying pressure to Shafer's arms. Once Shafer sat on the curb,

¹ Shafer testified that four officers were involved in the takedown, but could not identify any of the officers except Deputy Padilla.

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Deputy Padilla let go of Shafer. Instantly, Shafer attempted to stand up and run away from Deputy Padilla. Deputy Padilla quickly reached out and grabbed Shafer. Deputy LeFemine, who was on Shafer's other side, also reached out and grabbed Shafer. The momentum took Shafer, Deputy Padilla, and Deputy LeFemine to the ground. Shafer put his hands underneath his body and continued to try to get up. In an attempt to control Shafer, Deputy Padilla applied body weight pressure between Shafer's torso and legs. Two UCSB campus officers, Jeff Lupo and Christina Rauchhaus, witnessed this struggle and ran from the other side of the street to provide assistance. To control Shafer, Officer Raucchaus put her knee into Shafer's back and handcuffed him, and Officer Lupo applied pressure to Shafer's legs. After one of the officers handcuffed Shafer, they quickly pulled him off the ground. Deputy Padilla told Shafer that he was going to jail.

Trial testimony from the other witnesses varied slightly. However, the testimony was generally consistent that Deputy Padilla used a leg sweep maneuver to take down Shafer and Shafer resisted Deputy Padilla.

II. PROCEDURAL HISTORY

Shafer filed suit against Defendants pursuant to 42 U.S.C. § 1983. The district court dismissed all of the Defendants from the suit except for Deputy Padilla. Before trial, Deputy Padilla filed, and the district court denied, a motion for qualified immunity. Shafer proceeded to trial on his claims against Deputy Padilla for (1) false arrest; (2) malicious prosecution; (3) violation of his First Amendment rights; and

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(4) violation of his Fourth Amendment rights. Before the jury's deliberation, Deputy Padilla filed a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. The district court denied the motion.

The jury exonerated Deputy Padilla on every claim except the Fourth Amendment claim for using excessive force. Specifically, the jury found that Deputy Padilla had probable cause to arrest Shafer for violations of California Penal Code section 148. The jury also found that Shafer's speech was not a substantial or motivating factor for Deputy Padilla's actions against Shafer and that Deputy Padilla did not maliciously prosecute Shafer. As to Shafer's Fourth Amendment claim, the jury found that Deputy Padilla used excessive force against Shafer and that Deputy Padilla "acted with malice, oppression, or in reckless disregard" of Shafer's rights. The jury awarded Shafer \$45,000 in economic damages and \$75,000 in non-economic damages, but did not award punitive damages.

Deputy Padilla renewed his motion for judgment as a matter of law based on qualified immunity or, in the alternative, insufficient evidence of excessive force. He moved in the alternative for a new trial. Deputy Padilla also argued the district court erred by admitting prejudicial evidence.² The district court denied the motions, and Deputy Padilla now appeals those decisions.

² Because we hold Deputy Padilla is entitled to qualified immunity, we need not determine whether the district court erred by admitting prejudicial evidence.

III. DISCUSSION

We review de novo a district court's qualified immunity determination denying judgment as a matter of law. *C.B. v. City of Sonora*, 769 F.3d 1005, 1022 (9th Cir. 2014). "In doing so, we 'view all evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the non-mover, and disregard all evidence favorable to the moving party that the jury is not required to believe.'" *Id.* (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008)). A motion for judgment as matter of law may be granted if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," Fed. R. Civ. P. 50(a)(1), that is, "if, under the governing law, there can be but one reasonable conclusion as to the verdict," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Conversely, "[i]f reasonable minds could differ as to the import of the evidence," the motion should be denied. *Id.* at 250–51. Because this appeal comes after the jury's verdict, we must "construe the facts in the light most favorable to the jury's verdict." *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1064 n.1 (9th Cir. 2016); *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1245 (9th Cir. 2014). In this case, the jury's verdict was split. Thus, we draw all factual inferences and resolve all issues of credibility in favor of the jury's findings that Deputy Padilla had probable cause to arrest Shafer for resisting, delaying, or obstructing Deputy Padilla; that Shafer's protected speech was not a substantial or motivating factor for Deputy Padilla's actions; that Deputy Padilla did not maliciously prosecute Shafer; and that Deputy Padilla used excessive force against Shafer.

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Qualified immunity affords limited protection to public officials faced with liability under 42 U.S.C. § 1983, “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine whether qualified immunity applies in a given case, we must determine: (1) whether a public official has violated a plaintiff’s constitutionally protected right; and (2) whether the particular right that the official has violated was clearly established at the time of the violation. *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784, 788 (9th Cir. 2016) (en banc). These two prongs of the analysis need not be considered in any particular order, and both prongs must be satisfied for a plaintiff to overcome a qualified immunity defense. *See Pearson*, 555 U.S. at 236. We now examine both prongs of the analysis to determine whether Deputy Padilla is entitled to qualified immunity.

A. Prong One: Constitutional Violation

The first prong under the qualified immunity test determines whether Deputy Padilla violated Shafer’s constitutional right. The jury found that Deputy Padilla violated Shafer’s Fourth Amendment right to be free from excessive force. Deputy Padilla challenges the sufficiency of the jury’s verdict as to this claim.

Excessive force claims are founded on the Fourth Amendment right to be free from unreasonable seizures of the person. *See* U.S. Const. amend. IV; *Graham v. Connor*, 490 U.S. 386, 394–95 (1989). The Fourth Amendment is implicated where an officer exceeds the bounds of reasonable force in effecting “an

arrest, investigatory stop, or other seizure.” *Graham*, 490 U.S. at 395–96. We analyze excessive force claims according to the constitutional touchstone of objective reasonableness, so we do not consider an officer’s subjective “intent or motivation.” *Id.* at 397. Instead, “the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* This determination requires us to 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 (quotation marks and citations omitted). To do this, we weigh three non-exclusive factors: (1) “the severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) “whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.” *Id.* We judge the reasonableness of the force “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” *id.* at 396, because “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,” *id.* at 397.

We consider each of the *Graham* factors in turn to assess whether a reasonable jury could have found Deputy Padilla’s conduct to be excessive under the circumstances that he faced. As to the severity of the crime involved, Deputy Padilla initiated contact with Shafer based on a report that someone had thrown water balloons at four individuals. Approximately one minute later, Deputy Padilla saw Shafer walking with

water balloons in his hands. Deputy Padilla argues that, based on this information, Shafer was suspected of committing a battery, which is a crime of violence. Deputy Padilla eventually arrested Shafer for resisting, obstructing, or delaying a peace officer. *See* Cal. Penal Code § 148. Although Deputy Padilla was entitled to use some degree of force in executing Shafer's arrest, *Graham*, 490 U.S. at 396, the jury could conclude, based on the fact that Shafer was suspected of committing only a misdemeanor, that Deputy Padilla's leg sweep maneuver was excessive under the circumstances.

As to the threat Shafer posed, he never made any verbal threats toward Deputy Padilla. Shafer was noncompliant in following Deputy Padilla's orders and he did resist, obstruct, or delay Deputy Padilla when Deputy Padilla lawfully arrested Shafer. In light of the surrounding circumstances, Shafer's actions presented some threat to Deputy Padilla. However, the jury could conclude (based on Shafer's testimony) that Shafer did not say anything threatening to Deputy Padilla, and that any threat perceived by Deputy Padilla was not "immediate" or significant enough to justify a leg sweep maneuver.

As to whether Shafer was actively resisting arrest or attempting to evade arrest by flight, the jury's verdict on probable cause to arrest under California Penal Code section 148 makes clear that Shafer willfully resisted, obstructed, or delayed Deputy Padilla during his execution of Shafer's arrest.

Viewing all of the facts in the light most favorable to the jury's verdict, there is sufficient evidence to support the jury's verdict that the force used by Deputy

Padilla was excessive. The evidence presented was far from “one-sided,” *Anderson*, 477 U.S. at 252, and did not give rise to “but one reasonable conclusion as to the verdict,” *id.* at 250.

B. Prong Two: Clearly Established Law

Deputy Padilla may nonetheless be entitled to a qualified immunity defense if Shafer’s Fourth Amendment rights were not clearly established at the time Deputy Padilla committed the violation. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). For a right to be clearly established, case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant’s place, that what he is doing violates federal law. *See White*, 137 S. Ct. at 551 (explaining that “existing precedent must have placed the statutory or constitutional question beyond debate . . . [because] immunity protects all but the plainly incompetent or those who knowingly violate the law” (internal quotation marks and citation omitted)); *Dunn v. Castro*, 621 F.3d 1196, 1199–1200 (9th Cir. 2010).

We begin our inquiry into whether this constitutional violation was clearly established by defining the law at issue in a concrete, particularized manner. *See White*, 137 S. Ct. at 552; *al-Kidd*, 563 U.S. at 743 (noting the Supreme Court has repeatedly warned lower courts “not to define clearly established law at a high level of generality”). We consider this question in light of the jury’s findings that Deputy Padilla had probable cause to arrest Shafer for resisting, obstructing, or delaying arrest; that Shafer’s

protected speech was not a substantial or motivating factor for Deputy Padilla’s actions; that Deputy Padilla did not maliciously prosecute Shafer; and that Deputy Padilla used excessive force against Shafer. Defined at an appropriate level of specificity, the question at hand is whether an officer violates clearly established law when he progressively increases his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver, when a misdemeanor refuses to comply with the officer’s orders and resists, obstructs, or delays the officer in his lawful performance of duties such that the officer has probable cause to arrest him in a challenging environment. The answer is no.

We are mindful of the Supreme Court’s pronouncement in *White v. Pauly* that, to satisfy this step in the qualified immunity analysis, we generally must “identify a case where an officer acting under similar circumstances as [Deputy Padilla] was held to have violated the Fourth Amendment.”³ 137 S. Ct. at

³ There is prior precedent establishing that, in a sufficiently “obvious” case of constitutional misconduct, we do not require a precise factual analogue in our judicial precedents. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (“[I]n an obvious case, [highly generalized] standards can ‘clearly establish’ the answer, even without a body of relevant case law.”); *United States v. Lanier*, 520 U.S. 259, 271 (1997) (“[I]n [some] instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.” (internal quotation marks, alteration, and citation omitted)). However, “the bar for finding such obviousness is quite high,” *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011), and, because Shafer does not argue that this exception applies, we do not address it.

552. We are aware of no such case. Shafer cites four cases with comparable degrees of force used by officers, but none of which involved a challenging environment or an act of physical resistance or obstruction by the arrestee. See *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003); *Wall v. Cty. of Orange*, 364 F.3d 1107, 1111–12 (9th Cir. 2004); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989); *Blankenhorn v. City of Orange*, 485 F.3d 463, 478–79 (9th Cir. 2007). Shafer also cites two cases where officers used more force than Deputy Padilla used. See *Bryan v. MacPherson*, 630 F.3d 805, 832–33 (9th Cir. 2010); *Lolli v. Cty. of Orange*, 351 F.3d 410, 416 (9th Cir. 2003). Although we do not require a case to be “on all fours,” *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001), “[w]e cannot conclude . . . in light of these existing precedents, that ‘every reasonable official would have understood . . . beyond debate,’” *Mattos*, 661 F.3d at 448 (quoting *al-Kidd*, 563 U.S. at 741), that Deputy Padilla’s conduct in these circumstances constituted excessive force based on the cases cited by Shafer. In these cases, where there is a “hazy border between excessive and acceptable force,” *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)), such that the officer “reasonably misapprehends the law governing the circumstances [h]e confronted,” qualified immunity protects officers. *Id.* at 198.

Shafer’s primary argument on appeal is that Deputy Padilla violated clearly established law, because he had no basis for using *any* force whatsoever. We disagree. The jury found that Deputy Padilla had probable cause to arrest Shafer for violations of California Penal Code section 148 for resisting, delaying, or obstructing an

officer. This entitled Deputy Padilla to use *some* degree of force. *See Graham*, 490 U.S. at 396 (“[T]he right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion . . .”).

Finally, Shafer argues that it is Deputy Padilla’s burden to demonstrate that he did not violate Shafer’s clearly established constitutional right. Again, we disagree. It is the plaintiff who “bears the burden of showing that the rights allegedly violated were ‘clearly established.’” *See, e.g., LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000).

Because Shafer fails to identify sufficiently specific constitutional precedents to alert Deputy Padilla that his particular conduct was unlawful, Deputy Padilla is entitled to qualified immunity.

Since we reverse and vacate the jury verdict and damages awards, the parties shall bear their own costs associated with this appeal.

REVERSED, JURY VERDICT AND DAMAGES AWARDS VACATED.

APPENDIX B

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES - GENERAL

Case No.	CV 11-8110 FMO (FFMx)	Date	September 8, 2015
Title	Jay Russell Shafer v. County of Santa Barbara, <u>et al.</u>		

Present: The Honorable	Fernando M. Olguin, United States District Judge
------------------------	--

Vanessa Figueroa	Lisa Gonzalez	None
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorney Present for Plaintiff:

Attorney Present for Defendant:

Proceedings: (In Chambers) Order Re: Pending Motions

Having reviewed and considered all the briefing filed with respect to defendant Deputy Freddy Padilla's Renewed Motion for Judgment as a Matter of Law and Alternative Motion for a New Trial ("Motion"), and plaintiff Jay Russell Shafer's Motion for Attorney's Fees, the court concludes that oral argument is not necessary to resolve the motions. See Fed. R. Civ. P. 78;

Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001).

INTRODUCTION

Plaintiff Jay Russell Shafer's ("plaintiff" or "Shafer") case arises from an arrest on Del Playa Drive near the University of California, Santa Barbara ("UCSB"). (See Reporter's Transcript ("RT"), Dec. 9, 2014, at 9-10, 15 & 112; RT, Dec. 10, 2014, at 180). Shafer, who was a student at UCSB, was walking along Del Playa Drive with several friends shortly after midnight on October 4, 2009. (See RT, Dec. 12, 2014, at 138-40). Plaintiff and one of his friends, Domenico Gianola ("Gianola"), had water balloons in their hands. (See id. at 138-41; RT, Dec. 10, 2014, at 180-84). Deputy Freddy Padilla ("Padilla" or "defendant"), who was on patrol, approached plaintiff's group, and ordered plaintiff and Gianola to drop the water balloons. (See RT, Dec. 10, 2014, at 183 & 206). Rather than dropping the balloons, Shafer asked Padilla something like, "Why can't we have water balloons?" (See id. at 183-84). After repeating the exchange three or four times, Padilla said, "I'm not going to tell you again." (See id. at 185). Padilla then grabbed Shafer by the arm, began to swing him and tried to kick Shafer's feet out from under him. (See id. at 185-86). While Shafer tried to keep his balance, Padilla was in control of the action. (See id. at 186). Padilla kicked Shafer's legs out multiple times. (See id. at 188). Additional police officers also came to help take Shafer to the ground. (See id.). Padilla proceeded to arrest Shafer for violating California Penal Code § 148. (See RT, Dec. 9, 2014, at 54).

Plaintiff filed suit pursuant to 42 U.S.C. § 1983, and went to trial against Padilla on his claims for: (1) excessive force; (2) violation of his First Amendment rights; (3) malicious prosecution; and (4) unreasonable seizure.¹ (See Final Pretrial Conference Order at 5). The jury rendered a verdict in favor of Shafer on his excessive force claim, and found that Padilla “acted with malice, oppression, or in reckless disregard” of Shafer’s rights. (See Verdict Form at 2-3). The jury also found that Shafer did not prove by a preponderance of the evidence that Padilla arrested him without probable cause. (See id. at 2). Likewise, the jury found that Shafer did not prove by a preponderance of the evidence that Shafer’s protected speech was a “substantial or motivating factor” for Padilla’s actions against Shafer, or that Padilla maliciously prosecuted Shafer in violation of his civil rights. (See id.). As for remedies, the jury awarded \$45,000 in economic damages, and \$75,000 in non-economic damages. (See id. at 3). The jury did not award punitive damages. (See id.).

**PADILLA’S RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW**

I. LEGAL STANDARD.

Federal Rule of Civil Procedure 50 permits a district court to grant judgment as a matter of law “when the evidence permits only one reasonable conclusion and the conclusion is contrary to that reached by the jury.”

¹ Before trial, Padilla filed a motion for summary judgment for qualified immunity, which the court denied. (See Court’s Order of December 9, 2014).

Ostad v. Or. Health Scis. Univ., 327 F.3d 876, 881 (9th Cir. 2003). If there is substantial evidence to support the jury's verdict, the court should deny a motion for judgment as a matter of law. See Wallace v. City of San Diego, 479 F.3d 616, 624 (9th Cir. 2007). "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." Maynard v. City of San Jose, 37 F.3d 1396, 1404 (9th Cir. 1994). "[T]he court must not weigh the evidence, but should simply ask whether the plaintiff has presented sufficient evidence to support the jury's conclusion." Wallace, 479 F.3d at 624. The court must "view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party's favor." E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009) (internal modification marks omitted). Because a post-verdict Rule 50(b) motion is "a renewed motion," it is "limited to the grounds asserted in the pre-deliberation Rule 50(a) motion." Id.

II. QUALIFIED IMMUNITY.

Padilla asserts that he is entitled to qualified immunity, because there was no violation of "clearly established law," as Shafer "actively physically resisted" Padilla. (See Motion at 10). Padilla further argues that even if there was a violation of plaintiff's clearly established rights, that Padilla is entitled to qualified immunity due to reasonable mistake. (See id. at 16-17).

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known.” Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 815 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)); Ortiz v. Jordan, 562 U.S. 180, 182, 131 S. Ct. 884, 888 (2011). “Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Pearson, 555 U.S. at 231, 129 S.Ct. at 815; see also V-1 Oil Co. v. Smith, 114 F.3d 854, 857 (9th Cir. 1997) (“Through the application of the qualified immunity doctrine, public servants avoid ‘the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.’”) (quoting Harlow, 457 U.S. at 816, 102 S.Ct. at 2737). “The protection of qualified immunity applies regardless of whether the government official’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.” Pearson, 555 U.S. at 231, 129 S.Ct. at 815 (internal quotation marks and citation omitted).

To determine whether a government official is entitled to qualified immunity, the court conducts a two-part test. See Pearson, 555 U.S. at 232, 129 S.Ct. at 815. First, do the facts alleged show the official’s conduct violated a constitutional right? See id., 129 S.Ct. at 815-16. Second, was the right “clearly

established” at the time of the alleged misconduct.² See id., 129 S.Ct. at 816. Courts may “exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” Id. at 236, 129 S.Ct. at 818.

While qualified immunity is sometimes resolved before trial, once a trial has been conducted, “the availability of official immunity should be determined by the trial record, not the pleadings nor the summary judgment record.” Ortiz, 562 U.S. at 184, 131 S.Ct at 889. Accordingly, post-trial, “the decisive question, ordinarily, is whether the evidence favoring the party seeking relief is legally sufficient to overcome the defense.” Id.

A. Violation of a Constitutional Right.

“The Fourth Amendment, which protects against excessive force in the course of an arrest, requires that we examine the objective reasonableness of a particular use of force to determine whether it was indeed excessive.” Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1090 (9th Cir. 2013), cert. denied, 134 S.Ct. 1292 (2014). To determine whether the force used was reasonable, the court balances “the nature and quality

² “Clearly established law” includes decisions of the U.S. Supreme Court and controlling authority in defendant’s jurisdiction. See Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004) (explaining that sources of “clearly established law” include decisions of the Supreme Court and Ninth Circuit); see also Hope v. Pelzer, 536 U.S. 730, 741-45, 122 S.Ct. 2508, 2516-18 (2002) (holding defendants’ conduct violated clearly established law in light of binding circuit precedent).

of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871 (1989) (internal quotation marks and citations omitted).

The court must "first assess the quantum of force used to arrest [the plaintiff] and then measure the governmental interests at stake by evaluating a range of factors[.]" Davis v. City of Las Vegas, 478 F.3d 1048, 1054 (9th Cir. 2007) (internal quotation marks and citation omitted) (first alteration in original), 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 396, 109 S.Ct. at 1872; Gravelet-Blondin, 728 F.3d at 1091.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396, 109 S.Ct. at 1872; see Saucier v. Katz, 533 U.S. 194, 205, 121 S.Ct. 2151, 2158 (2001). In other words, "[t]he calculus of reasonableness 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, 109 S.Ct. at 1872; Fisher v. City of San Jose, 558 F.3d 1069, 1081 (9th Cir. 2009) (en banc).

Here, the jury found in favor of Padilla regarding probable cause and lawful arrest. (See Verdict Form).

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The arrest and probable cause determinations were based on California Penal Code § 148, for willful resistance, obstruction, or delay of a peace officer's lawful performance of his duties. (See RT, Dec. 9, 2014, at 54; Jury Instructions at 17 & 26). Instruction No. 23, which discusses California Penal Code § 148, explains that "it is a crime to willfully resist, obstruct, or delay a peace officer in the lawful performance or attempted performance of any of his duties as a peace officer." (*Id.*). The Instruction also states that "[v]erbal challenges to an officer, standing alone, do not violate California Penal Code § 148. In addition, failure to immediately comply with an officer's command does not violate California Penal Code § 148." (*Id.*).

Padilla asserts that Shafer cannot show a violation of his constitutional rights, because "Shafer actively physically resisted Padilla." (See Motion at 10). Padilla contends that the "jury's verdict allows the Court to infer that Shafer . . . was actively physically resisting Padilla so that Padilla had probable cause to arrest him for violating California Penal Code section 148." (*Id.*). According to Padilla, "[b]ecause the jury found Shafer's arrest was lawful, the force the jury found excessive must have been applied after Padilla concluded he had probable cause to arrest Shafer for violating California Penal Code section 148." (*Id.*). Defendant's assertions are unpersuasive.

First, defendant concedes that it is generally "not inconsistent for there to be a finding of excessive force where there is also a finding of a lawful arrest." (Reply of Defendant to Plaintiff's Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law and Alternative Motion for a New Trial ("Def.'s Reply") at

3); see Blankenhorn v. City of Orange, 485 F.3d 463, 477 (9th Cir. 2007) (“Because the excessive force and false arrest factual inquiries are distinct, establishing a lack of probable cause to make an arrest does not establish an excessive force claim, and vice-versa.”). While a violation of California Penal Code § 148 may not be based on the failure to immediately comply with an officer’s commands, it may still be based on disobeying an officer’s orders. See, e.g., People v. Quiroga, 16 Cal.App.4th 961, 965 (1993) (affirming § 148 conviction based on failure to comply with booking interview procedures). Accordingly, the jury’s findings regarding probable cause and lawful arrest may be based on Shafer’s failure to obey Padilla’s orders, including Shafer’s refusal to drop the water balloons. Indeed, at trial, Gianola testified that Padilla had ordered Shafer to get rid of the water balloons “three or four times” and that Shafer did not comply with any of the instructions. (RT, Dec. 10, 2014, at 206). Thus, the jury’s verdict does not implicitly require a finding that Shafer actively physically resisted Padilla. Moreover, the jury’s verdict as to probable cause and lawful arrest may be based on Shafer’s pre-takedown conduct, while the excessive force finding is based on Padilla’s conduct during the takedown. See Hooper v. Cnty. of San Diego, 629 F.3d 1127, 1134 (9th Cir. 2011) (“a conviction under California Penal Code § 148(a)(1) does not bar a § 1983 claim for excessive force . . . when the conviction and the § 1983 claim are based on different actions during ‘one continuous transaction.’”). In short, the jury’s findings of probable cause and lawful arrest are not internally inconsistent with its finding of excessive force.

The court proceeds to evaluate whether there was sufficient evidence to show a violation of a constitutional right. During trial, plaintiff presented significant evidence of a substantial intrusion. For instance, Mallory Carrillo Gianola (“Carrillo”),³ Shafer’s former classmate who witnessed the arrest, (see RT, Dec. 10, 2014, at 223), testified that after Padilla repeatedly ordered Shafer to “drop the water balloons,” Shafer responded “something similar to the fact of ‘We can’t have water balloons?’” (*Id.* at 230). Carrillo further testified that at that point, “before Jay [Shafer] could really do anything, [Padilla] had put his hands on Jay” and “tried to pull him.” (*Id.* at 230-31). According to Carrillo, Shafer did not resist the officers. (See, e.g., *id.* at 236) (Q: “And in that period of time while Mr. Shafer was on the floor, did you see him do anything to fight, resist, or overcome whatever was going on with the officers above him?” A: “He really couldn’t.”).

Likewise, Ryen Flint (“Flint”), a third-party witness, testified that Shafer was “grabbed by the officer and brought to the ground,” that Shafer was “forcefully being moved” by the officer, that the officer was pulling Shafer “out of the street and bringing him down to the ground.” (See RT, Dec. 10, 2014, at 154-56). Although Padilla claims that Shafer physically resisted, Flint testified that Shafer was going “limp” during the encounter, and that he allowed the police to “handle him as there was a knee on his cheekbone.” (*Id.* at 158). In short, Shafer, Carrillo and Flint all provided

³ At the time of the incident, Ms. Mallory Carillo Gianola was unmarried. Accordingly, the court refers to her by her maiden name.

testimony that plaintiff did not resist or ceased his resistance after Padilla began his physical intrusion.

The court next considers the seriousness of the offense being investigated. At the onset of the encounter, Padilla stopped Shafer and Gianola based on Shafer's possession of water balloons. (See RT, Dec. 9, 2014, at 62-63). Padilla's probable cause for arrest was based on California Penal Code § 148, a misdemeanor. (See RT, Dec. 15, 2014, at 7; Final Jury Instructions at 17) (undisputed fact that Padilla arrested Shafer pursuant to California Penal Code § 148). In addition, plaintiff was an unarmed, 135-pound, 19-year-old who did not pose an "immediate threat to the safety of the officers or others." Graham, 490 U.S. at 396, 109 S.Ct. at 1872. (See RT, Dec. 11, 2014, at 45; RT, Dec. 10, 2014, at 77). Finally, there was evidence that Shafer did not resist arrest, and went "limp" during the encounter, and let the police "handle him as there was a knee on his cheekbone." (RT, Dec. 10, 2014, at 158). Under the circumstances, the trial record adequately demonstrates a violation of Shafer's constitutional rights.

B. Clearly Established Constitutional Right.

"An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate." City and Cnty. of San Francisco v. Sheehan, 135 S.Ct. 1765, 1774 (2015) (internal quotations, citations and alterations omitted); see Mattos v. Agarano, 661 F.3d 433, 442 (9th Cir. 2011) (en banc), cert. denied, 132

S.Ct. 2682 (2012), (quoting Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2083 (2011)) (internal quotation marks omitted) (“For the second step in the qualified immunity analysis – whether the constitutional right was clearly established at the time of the conduct – [the court] ask[s] whether its contours were sufficiently clear that every reasonable official would have understood that what he is doing violates that right.”); Tamas v. Dep’t of Social & Health Servs., 630 F.3d 833, 846 (9th Cir. 2010) (“The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. This inquiry is wholly objective.”) (internal quotation marks and citation omitted). “For a legal principle to be clearly established, it is not necessary that the very action in question has previously been held unlawful, but rather that in light of pre-existing law the unlawfulness is apparent.” Carrillo v. Cnty. of Los Angeles, 2015 WL 5024010, *15 (9th Cir. 2015) (internal quotation marks and brackets omitted). “In other words, the contours of the legal right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” Id. (internal quotation marks and brackets omitted).

Here, the principles governing the Fourth Amendment violation were clearly established in October 2009, and a reasonable officer would have known that his conduct was unlawful under the circumstances here, *i.e.*, possession of water balloons by a suspect who posed no immediate threat and did not physically resist. *See Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1168 (9th Cir. 2011) (“The principle that

it is unreasonable to use significant force against a suspect who was suspected of a minor crime, posed no apparent threat to officer safety, and could be found not to have resisted arrest, was . . . well-established in 2001, years before the events at issue in this case.”) (citing Blankenhorn, 485 F.3d at 481); see also Headwaters Forest Defense v. Cnty. of Humboldt, 240 F.3d 1185, 1199 (9th Cir. 2000, as amended Jan. 31, 2001), vacated, 534 U.S. 801, 122 S.Ct. 24 (2001)⁴ (“[W]here there is no need for force, any force used is constitutionally unreasonable.”) (emphasis in original); Lolli, 351 F.3d at 416-17 (finding no justification for defendants’ use of force where plaintiff testified “that he never kicked anyone, that he didn’t do anything to anybody in there, and that the only thing he did was tense up his body to protect himself from the blows[]”) (internal quotation marks omitted). Based on the foregoing, a reasonable officer “would have understood that what he was doing violated that right.” Meredith v. Erath, 342 F.3d 1057, 1060-61 (9th Cir. 2003).

Defendant argues that even if he violated clearly established law, he is entitled to qualified immunity due to a reasonable mistake. (See Motion at 16-17). Again, defendant’s argument is based on its flawed premise that Shafer was “physically resistant.” (See id. at 17). In order to find that Padilla’s force was unreasonable, i.e., excessive, the jury had to conclude that defendant’s conduct – even if defendant mistakenly believed plaintiff was “physically resisting”

⁴ “Headwater[s]’ excessive force holding remains good law, notwithstanding that the opinion was vacated and the case remanded.” Lolli v. Cnty. of Orange, 351 F.3d 410, 417 n.5 (9th Cir. 2003).

– exceeded reasonable limits under the totality of circumstances. See Espinosa v. City & Cnty. of San Francisco, 598 F.3d 528, 537 (9th Cir. 2010), cert. denied, 132 S.Ct. 1089 (2012) (“To determine if a Fourth Amendment violation has occurred, we must balance the extent of the intrusion on the individual’s Fourth Amendment rights against the government’s interests to determine whether the officer’s conduct was objectively reasonable based on the totality of the circumstances.”). Here, the jury found not only that defendant’s force was unreasonable, but also that defendant’s conduct was malicious and oppressive and showed a conscious disregard of plaintiff’s rights. (See Verdict Form at 2). In short, a reasonable officer would have known that his conduct was unlawful as to the investigation of a minor crime, where the suspect posed no immediate threat and did not physically resist. See Young, 655 F.3d at 1168. Therefore, Padilla did not make a reasonable mistake.

III. SUFFICIENCY OF THE EVIDENCE.

Padilla asserts that he is entitled to judgment as a matter of law, because the evidence purportedly does not support the jury’s verdict on the excessive force claim. (See Motion at 18-23). Defendant’s assertion is unpersuasive.

“Because the excessive force inquiry nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth Circuit has] held on many occasions that . . . judgment as a matter of law in excessive force cases should be granted sparingly.” Avina v. United States, 681 F.3d 1127, 1130 (9th Cir. 2012). As before, Padilla’s argument, which the court has rejected, is based on the

faulty premise that Shafer was non-compliant and actively resisted his commands. (See Motion at 18-23). Moreover, as noted above, there was more than sufficient evidence to support the verdict on excessive force. See Gravelet-Blondin, 728 F.3d at 1093 (“The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008.”). In short, defendant’s motion for judgment as a matter of law based on the sufficiency of evidence is denied.

PADILLA’S POST-VERDICT RULE 59 MOTION

A motion for a new trial under Federal Rule of Civil Procedure 59(a) may be granted “only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice.” Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007). “[T]he district court’s denial of the motion for a new trial is reversible only if the record contains no evidence in support of the verdict.” Id. The court has “the duty to weigh the evidence as the court saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in the court’s conscientious opinion, the verdict is contrary to the clear weight of the evidence . . . [or] to prevent, in the sound discretion of the trial judge, a miscarriage of justice[.]” Tortu v. Las Vegas Metro. Police Dep’t, 556 F.3d 1075, 1087 (9th Cir. 2009) (internal quotation marks omitted).

Padilla seeks a new trial to “prevent a miscarriage of justice,” again based on the notion that Shafer “actively resisted” him. (See Motion at 23-24). Padilla focuses on Shafer’s lack of credibility as a witness. (See

id.). As discussed above, third party witnesses such as Flint and Carrillo testified that Shafer did not actively resist Padilla. Also, there is no requirement that the entirety of a witness's testimony be accepted or rejected by the jury. The jury could have believed certain portions of Shafer's testimony and rejected other portions and still found for plaintiff based on the portions of his testimony they believed. In any event, Shafer presented sufficient evidence – even without his own testimony – to support the jury verdict of excessive force. Accordingly, Padilla's motion for a new trial is denied.

SHAFER'S MOTION FOR ATTORNEY'S FEES

Title 42 U.S.C. § 1988 provides that “the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.” 42 U.S.C. § 1988(b). “The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances. Accordingly, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.” Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933 (1983) (internal quotation marks and citations omitted). In applying the “special circumstances” exception, the court focuses on two factors: (1) whether allowing attorney's fees would further the purpose of the statute, and (2) whether the balance of equities favors or disfavors the denial of fees. See Gilbert v. City of Westminster, 177 F.3d 839, 870 (9th Cir. 1999).

Where a fee award is appropriate and available, “the fee applicant bears the burden of establishing entitlement to an award and documenting the

appropriate hours expended and hourly rates.” Hensley, 461 U.S. at 437, 103 S.Ct. at 1941. “The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party and submitted affidavits.” Gates v. Gomez, 60 F.3d 525, 534-35 (9th Cir. 1995).

The court has an independent duty to determine whether the hours and hourly rates submitted by the fee applicant are “reasonable,” and to reach its own “lodestar” value, which is “the number of hours reasonably expended . . . multiplied by a reasonable hourly rate.” Hensley, 461 U.S. at 433, 103 S.Ct. at 1939. “[L]odestar amount hours that are not reasonably expended because they are excessive, redundant, or otherwise unnecessary” should be excluded. Van Gerwen v. Guar. Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000). In Hensley, the Supreme Court set forth factors that may be considered in determining both the lodestar value and the multiplier.⁵ Id. at 430, 103 S.Ct. at 1938. However, the lodestar amount is “presumed to be the reasonable fee contemplated by

⁵ The twelve factors identified are: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service properly; (4) whether accepting the case precluded the attorney from taking other work; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Hensley, 461 U.S. at 430 n. 3.

§ 1988.” Riverside v. Rivera, 477 U.S. 561, 568, 106 S.Ct. 2686, 2691 (1986), and should be adjusted upward or downward by a multiplier in “rare” or “exceptional” cases only. Van Gerwen, 214 F.3d at 1045.

Shafer moves for attorney’s fees as the prevailing party on the excessive force claim. (See Plaintiff’s Motion for Attorney’s Fees and Costs (“Attorney’s Fees Joint Br.”)).⁶ Plaintiff seeks \$243,992 in attorney’s fees for the services of Thomas E. Beck (“Beck”), \$4,920 for Ellen Ellison, \$4,200 for Matthew Garcia, and \$13,457.42 in costs. (See Attorney’s Fees Joint Br. at 3). In a supplemental declaration, plaintiff requests an additional \$14,630 in attorney’s fees for Beck’s services from February 3, 2015, through March 13, 2015, and \$29.90 in costs for those dates. (See Supplemental Declaration and Exhibit 3 to Motion for Award of Attorney’s Fees and Costs (“Suppl. Fees Decl.”) (Document No. 209)). Padilla challenges the requested billing rates, disputes various time entries, and seeks a downward departure of 70 percent. (See, e.g., Attorney’s Fees Joint Br. at 4).

I. ATTORNEY’S FEES.

A. Reasonableness of Hourly Billing Rates.

To determine the appropriate lodestar amount, the court assesses the reasonableness of the hourly billing rate. See Credit Managers Ass’n of S. Cal. v. Kennesaw Life and Accident Ins. Co., 25 F.3d 743, 750 (9th Cir. 1994). In doing so, the court must look to the prevailing

⁶ The parties do not dispute that Shafer is a “prevailing party” within the meaning of 42 U.S.C. § 1988. (See Attorney’s Fees Joint Br. at 4-5).

market rates in the relevant community for similar work by attorneys of comparable skill, experience, and reputation. See Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 979 (9th Cir. 2008). Generally, the relevant community is the forum where the district court sits. Id.

1. Thomas E. Beck.

Plaintiff's lead trial counsel, Beck, has been in practice since 1978, focusing primarily in police misconduct litigation. (See Declaration of Thomas E. Beck ("Beck Decl.") at ¶ 3) (Document No. 201-1). Beck has worked on over 900 police misconduct cases, and completed over 235 jury trials in police misconduct cases. (See id.).

Beck requests a billing rate of \$700.00 per hour. (See Beck Decl. at ¶ 6). In support, Beck provides several declarations from several experienced attorneys in the relevant area of law. See Bouman v. Block, 940 F.2d 1211, 1235 (9th Cir. 1991) (submission of declarations stating that requested rate was the prevailing rate in the relevant community was "sufficient to establish the appropriate rate for lodestar purposes"). For instance, John Burton ("Burton") cites the Los Angeles Daily Journal, which stated that the average partner billing rate in Los Angeles in 2012 was \$797 per hour, and the National Law Journal Billing Survey which reports multiple instances of Los Angeles billing rates for partners above \$795 per hour. (See Declaration of John Burton at ¶ 24) (Document 201-6).

Defendant argues that Beck's hourly rate is excessive, because Beck's supporting materials include declarations from several plaintiffs' attorneys. (See

Attorney's Fees Joint Br. at 10). Defendant also argues – with no supporting authority – that the requested hourly rate does not really represent the market rate, because civil rights plaintiffs' attorneys do not do “work of similar complexity” to attorneys from large law firms.⁷ (See id.) (“An average large law firm billing rate offers almost no value to the calculation required to be made here, where the Court is to determine an appropriate rate in the Central District for civil rights plaintiffs' attorneys doing work of similar complexity to that of this case.”). Finally, defendant argues that several clerical entries should not be charged at an attorney's hourly rate.⁸ (See id. at 15).

Under the circumstances, the court is not persuaded that any reduction in the requested hourly rate for Beck is warranted. As an initial matter, there is no reason to discount or otherwise not consider the declarations submitted by Beck because the declarants are plaintiffs' counsel. Defendant was free – but apparently chose not to – retain and submit a declaration from an experienced expert in the relevant field to contradict the opinions of plaintiff's experts. In any event, the issue is whether or not the declarants are qualified to give their opinions with respect to the attorney's fees issues in the case and there is no doubt

⁷ Defendant also points to a case from a court in this district that awarded a \$300 hourly rate for Beck. (See Attorney Fee's Joint Br. at 8-10). The court has reviewed the case and finds it unpersuasive and inapplicable to the circumstances of this case.

⁸ In response to the argument relating to clerical entries, Shafer has reduced most of the entries to 0.01 hours, effectively reducing the rate to \$70.00 per hour. (See, e.g., Beck Decl., Exh. 3, at 20).

that all the declarants are well-qualified to opine on the various attorney's fees issues. In short, the court is persuaded that the rate of \$700 per hour requested by Beck is reasonable in light of the market for attorneys with similar experience. See Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011) (agreeing with other circuit courts that "it is proper for a district court to rely on its own familiarity with the legal market" in determining a reasonable rate). As for the clerical entries, the court adopts Shafer's \$70 hourly rate.

2. Matthew Garcia.

Matthew Garcia ("Garcia") entered an appearance and represented Shafer during jury deliberations. Shafer seeks to apply an hourly rate of \$350 per hour. Garcia, who has been an attorney since October 2013, has worked on over 25 police misconduct cases. (See Declaration of Matthew R. Garcia at ¶¶ 2-3) (Document No. 201-2). In addition, he has second-chaired two civil rights trials, and drafted numerous motions in § 1983 litigation. (See id. at ¶ 3). In further support, Garcia cites a National Law Journal survey from 2014, which purportedly states that the average hourly associate billing rate for large Los Angeles firms in 2013 was \$401 per hour. Defendant challenges the billing rate as excessive and inadequately supported. (See Attorney's Fees Joint Br. at 16-17). Defendant further argues that Garcia served as a "place holder for Beck," and "did no complex work." (Id. at 17).

The court is not persuaded that any reduction in the hourly rate is warranted for Garcia. Also, Garcia's requested hourly rate is largely supported by billing rates in this district and by his experience as a civil rights attorney.

3. **Ellen H. Ellison.**

Ellen H. Ellison (“Ellison”) also entered an appearance for Shafer during jury deliberations and helped respond to jury questions. Ellison has practiced law in California since 1989, and has tried over 100 cases, approximately two-thirds of which have been § 1983 cases. (See Declaration of Ellen Hammill Ellison) (Document No. 201-2). Plaintiff requests an hourly rate of \$600 per hour for Ellison’s work.

Defendant challenges the requested \$600 hourly billing rate for the same reasons presented as to Garcia. (See Attorney’s Fees Joint Br. at 18-20). Defendant also challenges Ellison’s billing rate, because she was suspended from practice for 90 days in July 2014, and was on probation when she entered an appearance in December 2014. (See *Id.* at 19; Request for Judicial Notice⁹ at 2). Padilla also points to another fee request several years ago, in which Ellison purportedly sought \$550 per hour and was awarded \$412.50 per hour. (See Attorneys’ Fees Joint Br. at 19). Under the circumstances, the court is persuaded that Ellison’s requested rate should be reduced from \$600 to \$500 per hour.

B. Number of Hours Billed.

To determine the appropriate lodestar amount, the court also assesses the “number of hours reasonably expended on the litigation.” See Credit Managers Ass’n of S. Cal., 25 F.3d at 750.

⁹ Defendant’s Request for Judicial Notice (Document No. 202), Item Nos. 2-3, is **granted**. Otherwise, defendant’s Request for Judicial Notice is **denied as moot**.

1. Beck.

Beck billed 348.56 hours from the inception of the case through February 2, 2015,¹⁰ and an additional 20.9 hours for work from February 3, 2015, through March 13, 2015. (See Attorney's Fees Joint Br. at 5; Suppl. Attorney's Fees Decl. at 2). Defendant challenges approximately 18 time entries. (See Attorney's Fees Joint Br. at 15-16; Defendant's Opposition to Plaintiff's Supplement to Motion for Attorney's Fees ("Opp. to Suppl. Decl.")). Defendant contends that: (1) seven entries comprise clerical activities that should not be billed at an attorney's rate; (2) several entries are duplicative or include vague entries; (3) one entry is directed to a stricken filing; (4) another entry appears unrelated to the instant case; and (5) one entry is directed to the collection of exhibits. (See Attorney's Fees Joint Br. at 15-16). Last, defendant challenges (6) two billing entries regarding a post-trial discovery dispute. (See Opp. to Suppl. Decl. at 2).

As for the seven clerical entries (1), plaintiff has reduced six entries to \$7.00 each, which appears to be based on a \$70.00 hourly rate (x 0.1 hours each). Plaintiff did not reduce one entry from January 23, 2012 ("Got the POS's for the defs from the atty service"). The court adjusts the billing rate for this entry to \$70.00 per hour, thereby reducing the charge from \$70.00 to \$7.00. (See Beck Decl., Exh. 3 at 18). Thus, for the seven clerical entries, the court applies a \$70.00 billing rate to each entry for 0.1 hours.

¹⁰ The court notes that 0.06 hours are based on clerical entries, where Shafer apparently reduced the effective hourly rate.

With respect to the (2) duplicative and vague entries, plaintiff has already cut two duplicative entries, (June 5, 2012 (“Mediator assigned Constance Komoroski”) and June 12, 2012, (“Protective order arrived and approved”)), from the fee request. (See, generally, Beck Decl., Exh. 3). Accordingly, there is no pending dispute about duplicative entries. As for the two vague entries regarding the “IME,” these entries appear to be related to an independent medical examination for this case. (See Beck Decl., Exh. 3 at 22) (“Email from def counsel about an IME”). Accordingly, the court will overrule defendant’s objections to these entries.

As for issues (3), (4), and (5), plaintiff has removed these entries from the fee request, rendering these disputes moot. (See, generally, Beck Decl., Exh. 3). Finally, with respect to (6) the supplemental request totaling 20.9 hours, the court agrees with defendant’s argument that post-trial discovery disputes should not be included in the fee calculations, so the court does not include these entries for February 12, 2015 (3.5 hours) and February 13, 2015 (0.4 hours).

Based on the foregoing, the court finds 365.40 hours (348.4 hours from original motion and 17 hours from supplemental request) is reasonable. The court also finds that 0.7 hours in clerical work is reasonable, where the time is billed at a reduced rate of \$70 per hour.

2. Garcia.

Garcia billed 12 hours based for his attendance at trial and his corresponding travel time. (See Attorney’s Fees Joint Br. at 16-18). Defendant asserts that

Garcia's services were largely devoted to "jury watch," so his time should not be compensated at an hourly rate, and he should not be compensated for his travel time. Defendant further argues that Garcia was probably paid a fixed fee by Beck, so plaintiff would obtain a "windfall" by seeking fees. (See Defendant's Supplemental Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Attorney's Fees and Costs at 4) (Document No. 207). Accordingly, defendant requests that the court award a flat fee of \$250 for Garcia's time. (See Attorney's Fees Joint Br. at 17). Defendant's assertions are unpersuasive.

First, the court required an attorney for all parties to be available for jury deliberations and due to Beck's scheduling conflict, *i.e.*, a trial before another judge of this court in the Riverside Division, Beck could not be available. Second, defendant's "windfall" argument is based on speculation about Garcia's billing arrangement, so the court declines to give it any weight. Indeed, to the extent it was necessary for an attorney to be available to the court during jury deliberations, *i.e.*, on jury watch, defendant saved money by having an attorney with a lower billing rate cover for Beck. Third, Garcia's travel time is plainly reasonable and compensable. See Stark v. PPM Am., Inc., 354 F.3d 666, 674 (7th Cir. 2004) ("[T]ravel time and expenses are compensable."); Rodriguez v. Cnty. of Los Angeles, 2014 WL 8390755, *10 (C.D. Cal. 2014) ("Reasonable travel time by the attorney is compensable, at full rates, if that is the practice in the community."). In short, the court finds that Garcia's billing of 12 hours is reasonable.

3. Ellison.

Ellison billed 8.2 hours. (See Attorney's Fees Joint Br. at 3). Defendant argues that Ms. Ellison's office is four miles from the court house, so she "could have been working" in her office instead. (See id. at 20). Defendant further argues that Ellison did not do substantial work in trial. (See id. at 21).

For the reasons set forth in the previous section relating to Garcia, the court rejects defendant's arguments. Moreover, defendant concedes that Ellison addressed a jury note. (See Attorney's Fees Joint Br. at 21). Finally, the court is not persuaded by the speculative argument that Ellison "could have been working" at her office instead. In short, the court finds the hours requested by Ellison are reasonable.

C. Requested Reduction Based on Results Obtained.

Defendant contends that a 70 percent reduction in fees is warranted, due to the results obtained. See Attorney's Fees Joint Br. at 28). Specifically, defendant contends that plaintiff was awarded only 11 percent of non-economic damages requested (\$75,000 awarded, with request for \$700,000), and that plaintiff prevailed on only one of several constitutional violations alleged in the complaint. (See id. at 4). Defendant's contentions are unpersuasive.

First, "it is well established that failure to recover on all theories of liability is not a bar to recovery of attorney's fees." Mendez v. Cnty. of San Bernardino, 540 F.3d 1109, 1125 (9th Cir. 2008) (emphasis in original) (internal quotation marks and modification marks omitted). Second, the parties do not dispute that

plaintiff's successful excessive force claim arose from the common core of facts associated with Shafer's arrest on October 4, 2009. (See Attorney's Fees Joint Br. at 22); McCown v. City of Fontana, 565 F.3d 1097, 1103 (9th Cir. 2008) ("[W]here the plaintiff presents different claims for relief that involve a common core of facts . . . the district court should not attempt to divide the request for attorney's fees on a claim-by-claim basis.") (internal quotation marks omitted). Under these circumstances, the hours spent pursuing non-successful claims cannot be segregated from the time spent on the successful claims. See, e.g., Rivera, 477 U.S. at 580-81, 106 S.Ct. at 2697 (although plaintiffs named city and 31 individual officers as defendants, and ultimately prevailed only as to city and five officers, attorney's fees properly awarded for all time claimed, and exoneration of other officers did not require reduction due to factual relation of claims); LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 761-63 (2nd Cir. 1998) (reversing district court denial of attorney's fees where plaintiffs obtained injunction against a municipality but lost all claims against individual defendants, court noted that individual defendants were alleged participants in a conspiracy with the municipality, so that the hours expended in pursuing those defendants could not be segregated from the time spent on the unsuccessful claims against the municipality). In other words, defendant's rigid pro-rata deduction of 70 percent is improper under the circumstances of this case. Cf. Cunningham v. Cnty. of L.A., 879 F.2d 481, 485 (9th Cir. 1988), cert. denied, 493 U.S. 1035 (1990) ("We agree with [the plaintiff]'s legal premise that courts may not adopt rigid mathematical formulas tying the lodestar figure to the

ratio of defendants remaining at trial to defendants served in the complaint.”).

The lodestar amount is “presumed to be the reasonable fee contemplated by § 1988.” Riverside, 477 U.S. at 568, 106 S.Ct. at 2691, and it should be adjusted upward or downward by a multiplier in “rare” or “exceptional” cases only. See Van Gerwen, 214 F.3d at 1045. Here, plaintiff’s counsel obtained an excellent result for his client. Shafer was fully compensated for his economic injuries (\$45,000 award), and was further awarded \$75,000 in non-economic damages. (See Verdict Form; Attorney’s Fees Joint Br. at 24). Based on the court’s review of the trial record and billing materials, the court is persuaded that plaintiff achieved a level of success that makes the hours expended generally a “satisfactory basis” for the fee award. See McCown, 565 F.3d at 1103. Thus, the court declines the request for a downward adjustment of attorney’s fees.

D. Summary of Attorney’s Fees.

In sum, the court awards the following reasonable attorney’s fees:

Beck (attorney rate): \$255,780 (\$700 hourly rate x 365.40 hours)

Beck (clerical rate): \$49 (\$70 hourly rate x 0.7 hours)

Garcia: \$4,200 (\$350 hourly rate x 12 hours)

Ellison: \$4,100 (\$500 hourly rate x 8.2 hours)

Total attorney’s fees = **\$264,129.00.**

II. COSTS.

Under § 1988, Shafer “may recover as part of the award of attorney’s fees those out-of-pocket expenses that would normally be charged to a fee paying client.” Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994) (internal quotation marks omitted); see also United Steelworkers of Am. v. Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990) (“Out-of-pocket litigation expenses are reimbursable as part of the attorneys’ fee, distinct from the costs already awarded to plaintiffs under 28 U.S.C. § 1920.”).

On January 30, 2015, Shafer filed an application to the clerk to tax costs in the amount of \$11,653.21, (see Application to the Clerk to Tax Costs (“Costs Application,” Document No. 199)), to which defendant filed an objection. (See Defendant’s Objections to Items in Application to the Clerk to Tax Costs (“Objs. to Appl. for Costs,” Document No. 204). However, Shafer’s Attorney’s Fees Joint Brief, which was filed three days later on February 2, 2015, seeks largely the same costs as well as some additional costs, for a total of \$13,457.42,¹¹ as of February 2, 2015, to which defendant objected. (Compare Costs Application with Attorney’s Fees Joint Br. at 32). Accordingly, the court will consider the arguments raised by defendant both in the Objections to Application for Costs and in the Attorney’s Fees Joint Brief and apply any necessary deductions to Shafer’s itemization of costs on February 2, 2015 in the Attorney’s Fees Joint Brief.

¹¹ In his supplemental briefing, Shafer seeks an additional \$29.90 in costs for services rendered between February 3, 2015 and March 13, 2015. (See Suppl. Fees Decl. at Exh. 3).

In the Objections to Application for Costs, defendant objects to \$650 in costs for the service of trial subpoenas on October 19, 21, and 22, 2013 because, on October 7, 2013, the court took the trial, originally scheduled for October 22, 2013, off calendar.¹² (See Objs. to Appl. for Costs at 2-3; see also Beck Decl., Exh. 3 at 21; Document No. 199-1 at 15, 17 & 18 (costs for service of process: Sinno, \$175; Czescik, \$200; Bell, \$275)). The court agrees that these costs should be deducted as plaintiff had an obligation to stop attempting to serve the subpoenas after he learned that the trial had been taken off calendar.

In the Attorney's Fees Joint Brief, defendant also objects to certain witness fees on the ground that Shafer "indiscriminately subpoenaed witnesses for trial[.]" (Attorney's Fees Joint Br. at 34). A party may recover witness fees provided the witnesses have been "summoned and are in necessary attendance on the court, in readiness to testify." Hurtado v. United States, 410 U.S. 578, 584, 93 S.Ct. 1157, 1162 (1973). Defendant's claim that Shafer "indiscriminately" subpoenaed witnesses, however, is only supported by the fact that certain witnesses, primarily medical doctors, did not appear or testify at trial. However, that certain witnesses did not testify does not mean that they were "unnecessary." Shafer may have subpoenaed these witnesses in the event that defendant raised factual disputes about his medical condition following

¹² In the Objections to Application for Costs, defendant also objects to other costs on the ground that they "are not authorized under 28 U.S.C. § 1920" or Federal Rule of Civil Procedure 54(d), (see Objs. to Appl. for Costs at 2 & 6), but tacitly acknowledges that they may be properly sought under § 1988.

the incident with Padilla. (See Attorney's Fees Joint Br. at 34 (identifying Aleazer, Aziz, Lanz and five doctors, Drs. Allen, Micon, Guddal, Baser, and Tomaneng as witnesses that did not appear or testify)). The court agrees, however, that witness fees for Dr. Mark Allen should be deducted, as plaintiff's notations indicate that Dr. Allen returned the witness fee of \$40.00. Accordingly, Shafer is entitled to costs in the amount of **\$12,797.32** (\$13,457.42 + \$29.90 - \$650 - \$40).

III. PRE- AND POST-JUDGMENT INTEREST.

The parties do not dispute, and the court agrees, that Shafer is entitled to post-judgment interest. (See Attorney's Fees Joint Br. at 35) (citing 28 U.S.C. § 1961).

As for pre-judgment interest, "the ultimate decision whether to award prejudgment interest lies 'within the court's sound discretion, to be answered by balancing the equities[.]'" Barnard v. Theobald, 721 F.3d 1069, 1078 (9th Cir. 2013). Here, plaintiff did not set forth the equities that favor the award of pre-judgment interest, (see, generally, Attorney's Fees Joint Br.), and, therefore, the court denies Shafer's request for pre-judgment interest.

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Renewed Motion for Judgment as a Matter of Law and Alternative Motion for a New Trial (**Document No. 189**) is **denied**.
2. Plaintiff's Motion for Attorney's Fees (**Document No. 200**) is **granted in part** and **denied in part**. Plaintiff shall be awarded **\$276,926.32** in reasonable attorney's fees and costs and post-judgment interest. Judgment shall be entered accordingly with respect to the attorney's fees.
3. Plaintiff's Application to the Clerk to Tax Costs (**Document No. 199**) is **denied as moot**.

Initials of Preparer vdr

APPENDIX C

JS-6

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No: 2:11-cv-08110-FMO-FFM

[Filed December 22, 2014]

JAY RUSSELL SHAFER,	)
	)
Plaintiff,	)
	)
v.	)
	)
COUNTY OF SANTA BARBARA,	)
BILL BROWN, individually and as	)
Sheriff of Santa Barbara County,	)
SANTA BARBARA SHERIFF'S	)
DEPARTMENT, DEPUTY FREDDY	)
PADILLA, #2465 individually and as a	)
peace officer, DOES 1-10, inclusive,	)
	)
Defendants.	)

**FINAL JUDGMENT REGARDING DEFENDANT
DEPUTY FREDDY PADILLA**

[Fed. R. Civ. P. 54 & 58]

Judge: Hon. Fernando M. Olguin
Courtroom: 22 – 5th Floor Spring St.

This action was tried by a jury in Courtroom 22 of the United States District Court for the Central District of California, the Honorable Fernando M. Olguin, United States District Judge Presiding; the plaintiff JAY RUSSELL SHAFER appearing by attorney Thomas E. Beck, and the defendant DEPUTY FREDDY PADILLA appearing by attorney Mary Pat Barry, Senior Deputy County Counsel for the County of Santa Barbara. Trial commenced on December 9, 2014 and the jury returned a verdict on December 17, 2014.

As to Plaintiff JAY RUSSELL SHAFER's Fourth Amendment claim of unlawful arrest, brought under 42 U.S.C. § 1983, the jury rendered a verdict finding that Defendant DEPUTY FREDDY PADILLA's arrest of Plaintiff JAY RUSSELL SHAFER was lawful.

As to Plaintiff JAY RUSSELL SHAFER's Fourth Amendment claim of excessive force, brought under 42 U.S.C. § 1983, the jury rendered a verdict finding that Defendant DEPUTY FREDDY PADILLA used excessive force against Plaintiff JAY RUSSELL SHAFER.

As to Plaintiff JAY RUSSELL SHAFER's claim that Defendant DEPUTY FREDDY PADILLA violated his First Amendment right to free speech, brought under 42 U.S.C. § 1983, the jury rendered a verdict finding that Defendant DEPUTY FREDDY PADILLA did not violate Plaintiff JAY RUSSELL SHAFER's First Amendment right.

As to Plaintiff JAY RUSSELL SHAFER's Fourth Amendment claim that Defendant DEPUTY FREDDY PADILLA maliciously prosecuted him, brought under 42 U.S.C. § 1983, the jury rendered a verdict finding

that Defendant DEPUTY FREDDY PADILLA did not maliciously prosecute Plaintiff JAY RUSSELL SHAFER.

The jury further rendered its verdict that Plaintiff JAY RUSSELL SHAFER suffered damages as follows: economic damages in the amount of forty-five thousand dollars (\$45,000) and non-economic damages in the amount of seventy-five thousand dollars (\$75,000).

The jury further rendered its verdict that Defendant DEPUTY FREDDY PADILLA acted with malice, oppression, or in reckless disregard of Plaintiff JAY RUSSELL SHAFER's rights. The jury assessed zero dollars (\$0) in punitive damages against Defendant DEPUTY FREDDY PADILLA.

THEREFORE, IT IS HEREBY ORDERED as follows:

1. That final judgment, pursuant to Federal Rules of Civil Procedure, Rule 54, be entered in favor of Plaintiff JAY RUSSELL SHAFER on his Fourth Amendment claim for excessive force brought against Defendant DEPUTY FREDDY PADILLA;
2. That final judgment, pursuant to Federal Rules of Civil Procedure, Rule 54, be entered in favor of Defendant DEPUTY FREDDY PADILLA on Plaintiff JAY RUSSELL SHAFER's Fourth Amendment claims for unlawful arrest and malicious prosecution and on Plaintiff JAY RUSSELL SHAFER's First Amendment claim for violation of free speech;
3. That Plaintiff JAY RUSSELL SHAFER take damages pursuant to the jury's verdict; and

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4. That Plaintiff JAY RUSSELL SHAFER recover his costs of suit other than attorney's fees.

IT IS SO ORDERED.

Dated: December 22, 2014

/s/

HONORABLE FERNANDO M. OLGUIN
United States District Judge
Central District of California

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 15-56548

**D.C. No. 2:11-cv-08110-FMO-FFM
Central District of California, Los Angeles**

[Filed December 4, 2017]

JAY RUSSELL SHAFER,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
COUNTY OF SANTA BARBARA;	)
et al.,	)
	)
Defendants,	)
	)
and	)
	)
FREDDY PADILLA, No. 2465,	)
individually and as a peace officer,	)
	)
Defendant-Appellant.	)

ORDER

Before: M. SMITH and N.R. SMITH, Circuit Judges,
and FEINERMAN.*

The panel has voted to deny the petition for panel rehearing. Judge M. Smith and Judge N.R. Smith vote to deny the petition for rehearing en banc, and Judge Feinerman so recommends.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Gary Feinerman for the Northern District of Illinois, sitting by designation.