JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

FERMIN VINCENT VALENZUELA, **Plaintiff,** **v.** **CITY OF ANAHEIM, *et al*.,** **Defendants.**	**Case No.: SACV 17-00278-CJC (DFMx), consolidated with SACV 17-02094-CJC (DFMx)** **ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW [Dkt. 392], DENYING DEFENDANTS' MOTION FOR NEW TRIAL [Dkt. 393], AND GRANTING IN SUBSTANTIAL PART PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS [Dkt. 385]**
VINCENT VALENZUELA and XIMENA VALENZUELA by and through their guardian PATRICIA GONZALEZ, **Plaintiffs,** **v.** **CITY OF ANAHEIM, *et al*.,** **Defendants.**	

I. INTRODUCTION

On July 2, 2016, members of the Anaheim Police Department (the "APD") applied a neck restraint on Fermin Vincent Valenzuela Junior ("Mr. Valenzuela"). Mr. Valenzuela died. The principal question in the trial that resulted was whether it was appropriate for the APD officers to use a particular type of neck restraint called the "carotid hold." The carotid hold involves wrapping an officer's arm around a suspect's neck, and attempting to apply bilateral pressure only to the sides of the neck. When applied correctly, the hold temporarily restricts blood flow from the carotid arteries to the brain and causes the suspect to lose consciousness for a few seconds, allowing the officers to gain control of the suspect. The suspect then quickly regains consciousness.

In practice, however, the hold is extremely difficult to execute, especially if a suspect is panicking or otherwise resisting. An improperly applied carotid hold can morph into an "air choke hold," which obstructs the subject's airway and prevents him from breathing. Even when the carotid hold is properly applied, using it too often or too long can cause permanent brain damage or even death. Because the hold is so dangerous, many police departments have prohibited it completely, or limited its use to deadly force situations. At the time of the incident in this case, APD had a policy of permitting the carotid hold even in non-deadly force situations. APD officers used it (or at least attempted to) and Mr. Valenzuela died.

Plaintiffs Fermin Vincent Valenzuela Senior (Mr. Valenzuela's father, "Mr. Valenzuela Sr."), Vincent Valenzuela (Mr. Valenzuela's son), and Ximena Valenzuela (Mr. Valenzuela's daughter) brought this civil rights action against Defendants City of Anaheim (the "City"), Officers Daniel Wolfe, Officer Woojin Jun, and Sergeant Daniel Gonzalez. In November 2019, they presented evidence to a jury supporting their claims for excessive force, deprivation of substantive due process, municipal liability (on both

unlawful policy and failure to train theories), wrongful death (on both negligence and battery theories), and violation of the Bane Act, Cal. Civ. Code § 52.1(b). After five days of trial, the jury returned a verdict in favor of Mr. Valenzuela's children, finding, among other things, that Officers Jun and Wolfe used excessive force when they attempted to use the carotid hold, that Sergeant Gonzalez was liable as the supervising officer, and that the City's policy permitting the carotid hold in nondeadly force situations was unlawful. (Dkt. 358.) The trial proceeded to a second phase on damages. After two additional days of trial, the jury returned with a second verdict, awarding Mr. Valenzuela's children a total of $13.2 million in damages. (Dkt. 372.)

Before the Court are three post-trial motions: (1) Defendants' motion for judgment as a matter of law (Dkt. 392, hereinafter "JMOL Mot."), (2) Defendants' motion for a new trial (Dkt. 393, hereinafter "New Trial Mot."), and (3) Plaintiffs' motion for attorney fees and costs (Dkt. 385, hereinafter "Fee Mot."). For the following reasons, Defendants' motions are **DENIED** and Plaintiffs' motion is **GRANTED IN SUBSTANTIAL PART**.

II. BACKGROUND

On the morning of July 2, 2016, Valentina Moya feared a man was following her while she was walking home from work. She called her daughter, Enia Moya, and asked her to call the police. Enia called the APD and told them a Hispanic man in his late twenties carrying a blue duffel bag and wearing black pants, a black shirt, a tan beanie, and burgundy shoes was following her mother. APD Officers Jun and Wolfe responded to a broadcast regarding a "suspicious person" with this description at the corner of Magnolia Avenue and West Broadway.

When Officers Jun and Wolfe arrived to Magnolia and Broadway, they saw a man meeting Enia's description enter a laundromat. As the officers walked toward the man,

who turned out to be Mr. Valenzuela, they heard what they believed was a glass methamphetamine pipe breaking. At the time, Mr. Valenzuela's bag was on the floor in front of a washing machine, and he was moving clothing from the bag into the machine. Officer Wolfe asked him: "Howdy, you alright? You break a pipe or something?" Mr. Valenzuela seemingly did not respond.

Officer Wolfe then observed the handle of a screwdriver in Mr. Valenzuela's bag. Officer Wolfe ordered Mr. Valenzuela to put his hands behind his back. When Mr. Valenzuela did not comply, Officer Wolfe grabbed his right arm and started to pull it behind his back. A struggle ensued where all three fell to the ground, and Officer Jun attempted to control Mr. Valenzuela using a neck restraint.

The parties disputed the type of neck restraint Officer Jun used. Officer Jun testified that he applied the carotid hold. Plaintiffs asserted that Officer Jun either incorrectly applied the carotid hold or used an air choke hold. Officer Jun held the neck restraint with his right arm for twenty-two seconds, and with his left arm for another minute and twenty seconds. The body-worn camera footage clearly shows Mr. Valenzuela turning purple and screaming that he could not breathe.

The struggle continued as Mr. Valenzuela slipped out of his shirt, ran out the front door of the laundromat, overcame multiple tases, and ran across several lanes of traffic on Magnolia Avenue. As Mr. Valenzuela reached the parking lot of a 7-Eleven across the street, he tripped on a curb and fell to the ground. Officer Wolfe then got on top of Mr. Valenzuela and attempted to roll him onto his stomach. When he could not get Mr. Valenzuela on his stomach, Officer Wolfe placed his arm around Mr. Valenzuela's neck to get into position to apply another restraint hold.

APD Sergeant Daniel Gonzalez came to the scene to assist. As Officer Wolfe attempted to apply a neck restraint, Sergeant Gonzalez took hold of Mr. Valenzuela's left arm while Officer Jun still held his right. The parties again disputed the type of neck restraint applied. Sergeant Gonzalez testified that he saw Officer Wolfe apply a proper carotid hold that did not place pressure on Mr. Valenzuela's trachea. Plaintiffs contended that Officer Wolfe either improperly applied the carotid hold, or applied an air choke hold. Regardless, the video footage shows Officer Wolfe's right arm around Mr. Valenzuela's neck for at least sixty seconds.

With three officers now holding Mr. Valenzuela, Sergeant Gonzalez supervised Officer Wolfe's neck restraint. The video footage shows Mr. Valenzuela wheezing and having difficulty breathing. Nevertheless, Sergeant Gonzalez repeatedly directed Officer Wolfe to "hold that choke." Officer Wolfe did. When Officer Wolfe eventually loosened the restraint, he kept his arm around Mr. Valenzuela's neck and rolled him onto his stomach. Sergeant Gonzalez then handcuffed Mr. Valenzuela's left arm and asked Officer Wolfe, "Are you letting him breathe?" Officer Wolfe responded that he was.

Mr. Valenzuela lost consciousness. When he did not regain consciousness, Sergeant Gonzalez ordered the officers to start CPR. Their efforts were unsuccessful. Paramedics transported Mr. Valenzuela to Western Anaheim Medical Center, where he died eight days later.

On February 15, 2017, Mr. Valenzuela's father and two children filed this case, asserting claims against Officer Jun, Officer Wolfe, and Sergeant Gonzalez for excessive force, deprivation of substantive due process, wrongful death (on both negligence and battery theories), and violation of the Bane Act, and against the City for municipal liability (on both unlawful policy and failure to train theories). (*See* Dkt. 185 [Second Amended Complaint].)

On November 12, 2019, the Court impaneled a jury. (Dkt. 346.) Trial proceeded in two phases. After five days of trial, the jury returned a verdict in favor of Mr. Valenzuela's two children, Vincent and Ximena, on the issue of liability for all of their claims except deprivation of substantive due process. The jury found that Officers Jun and Wolfe used excessive force against Mr. Valenzuela, and that Sergeant Daniel Gonzalez was liable as a supervisory defendant. (Dkt. 358.) The jury also found that the three officers committed battery that was a substantial factor in causing Mr. Valenzuela's death, and that the officers were negligent and their negligence was a substantial factor in causing Mr. Valenzuela's death. (*Id.*) The jury further found that Mr. Valenzuela was contributorily negligent, and assigned 85% of fault to Officer Jun, Officer Wolfe, and/or Sergeant Gonzalez, and 15% to Mr. Valenzuela. (*Id.*) The jury also found the officers acted with sufficient intent to violate Mr. Valenzuela's rights under the Bane Act. (*Id.*) However, the jury found that none of the officers acted with a purpose to harm in violation of Plaintiffs' substantive due process rights. (*Id.*) Finally, the jury found that the City was liable because it had an unlawful official policy, practice, or custom, but that it was not liable for a failure to train. (*Id.*)

After a second phase of the trial on the issue of damages, the jury returned a verdict awarding survival damages of $3,600,000 for Mr. Valenzuela's loss of life and $6,000,000 for his pre-death pain and suffering. (Dkt. 372.) The jury also awarded $1,800,000 each to Vincent and Ximena Valenzuela for wrongful death damages for their past and future loss of Mr. Valenzuela's love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance. (*Id.*)

III. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants first move for judgment as a matter of law. A party seeking judgment as a matter of law has a "very high" standard to meet. *Costa v. Desert Palace, Inc.*, 299

F.3d 838, 859 (9th Cir. 2002), *aff'd,* 539 U.S. 90 (2003). Specifically, a court may enter judgment as a matter of law only if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [prevailing] party" as to an issue on which that party has been fully heard during trial. Fed. R. Civ. P. 50(a)–(b). The jury's verdict must be upheld if, viewing the facts in the light most favorable to the nonmoving party, there is substantial evidence for a reasonable jury to have found in the nonmoving party's favor. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001). When considering the motion, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015). The "high hurdle" this standard creates "recognizes that credibility, inferences, and factfinding are the province of the jury, not this court." *Costa*, 299 F.3d at 859.

A. Excessive Force

Defendants argue that they are entitled to judgment as a matter of law on all claims because the evidence at trial demonstrated the officers' use of force was objectively reasonable. (JMOL Mot. at 18–21.) Defendants are wrong. Under the Fourth Amendment, a police officer may use only such force as is "objectively reasonable" under all of the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). "The 'reasonableness' of a particular use of force [is] judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396; *see also Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). Factfinders assess reasonableness using several nonexhaustive factors: "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. The most important factor is whether the suspect posed an immediate threat. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011).

The evidence at trial showed that the carotid hold is extremely dangerous. (*See, e.g.*, Dkt. 409 [Transcript from Trial Day 2, 11/13/19, AM, hereinafter "Day 2 AM"] at 122–23 [Officer Wolfe]; Dkt. 410 [Transcript from Trial Day 3, 11/14/19, AM, hereinafter "Day 3 AM"] at 95 [Officer Jun]; Dkt. 411 [Transcript from Trial Day 4, 11/15/19, AM, hereinafter "Day 4 AM"] at 41 [Sergeant Gonzalez]; Dkt. 412 [Transcript from Trial Day 5, 11/18/19, AM, hereinafter "Day 5 AM"] at 74 [Joe Callanan].) It involves wrapping an officer's arm around a suspect's neck, and attempting to apply pressure only to the sides of the neck. This is very difficult even under model conditions. And if there is any level of struggle or resistance, it is even more difficult to execute the carotid hold appropriately. Moreover, just one minute of pressure on the carotid artery, even when applying the hold correctly, can cause permanent brain tissue damage. (Dkt. 428 [Transcript from Trial Day 4, 11/15/19, PM, hereinafter "Day 4 PM"] at 94 [Sergeant Ciscel].) And as this case showed, attempting to use the hold can interfere with a person's ability to breathe and kill him. Because the carotid hold is so dangerous, many police departments have prohibited its use completely, or limited its use to deadly force situations. (*See, e.g.*, Day 2 AM at 21–23 [Scott DeFoe]; Day 4 AM at 44 [Sergeant Gonzalez]; Day 4 PM at 108–09 [Sergeant Ciscel]; Day 5 AM at 74 [Joe Callanan].)

Especially troubling here was the compelling evidence that the officers did not apply this very dangerous hold in the way they were taught to—they applied it for too long, too often, and to the front of Mr. Valenzuela's neck, ignoring Mr. Valenzuela's clear symptoms of distress. Specifically, the officers applied the carotid hold for over two and a half minutes, despite statements in the Peace Officer Standards and Training ("POST") learning domain that pressure on the carotid for just 60 seconds can cause permanent brain tissue damage. *See Headwaters Forest Def. v. Cty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002), *as amended* (Jan. 30, 2002) (relying on "regional and state-wide police practice and protocol" in qualified immunity analysis); (Day 4 PM at 94 [Sergeant Ciscel]; *see* Day 5 AM at 22 [Joe Callanan testifying that a properly applied

carotid hold "should render a person unconscious briefly in a matter of seconds"].) Also contrary to POST, the officers used the carotid hold more than twice in 24 hours. (Day 2 AM at 46 [Scott DeFoe].) In addition, they applied pressure to the front of Mr. Valenzuela's neck. (*See* Day 4 PM at 109 [Sergeant Ciscel testifying that proper application of the carotid hold should not cause hyoid bone fracture]; Day 2 AM at 56 [Scott DeFoe agreeing]; Dkt. 426 [Transcript from Trial Day 2, 11/13/19, PM, hereinafter "Day 2 PM"] at 15–16 [Coroner Dr. Aruna Singhania testifying that Mr. Valenzuela's hyoid bone was broken]; Day 4 AM at 62, 65 [Dr. Bennet Omalu testifying the same].) Finally, the officers ignored numerous clear signs that Mr. Valenzuela was having trouble breathing. (*See, e.g.*, Day 2 AM at 47 [Scott DeFoe testifying that if "someone's gasping and their face is red, you should be able to look and say, 'This is not working'"]; Day 4 PM at 62–63 [Dr. Gary Vilke testifying that the neck restraint was not released until 35 seconds after snoring indicating difficulty breathing began].) Mr. Valenzuela was turning purple, wheezing, gasping for air, and screaming that he could not breathe.

The jury's finding of excessive force was further supported by evidence showing that when the officers approached Mr. Valenzuela in the laundromat, they had little to no information that he had committed any crime—only that he was a "suspicious person." *See Graham*, 490 U.S. at 396 (including "the severity of the crime at issue" as one of the factors bearing on reasonableness); (*see* Day 3 AM at 92–93 [Officer Jun testifying that they did not have any information that Mr. Valenzuela had harmed or had threatened to harm anyone]). Although Mr. Valenzuela was resisting or attempting to evade arrest at times, the most important factor is whether he posed an immediate threat to the officers or others. *See Graham*, 490 U.S. at 396; *Mattos*, 661 F.3d at 441. There was no evidence that Mr. Valenzuela was armed at any point in his interactions with the officers. (*See, e.g.*, Day 3 AM at 92–93 [Officer Jun testifying that he did not see a weapon in Mr. Valenzuela's hand or on his person]; Day 2 AM at 143 [Officer Wolfe testifying that he saw the handle of a screwdriver in Mr. Valenzuela's bag, but never indicating that Mr.

Valenzuela accessed the screwdriver or any other potential weapon].) Nor was he taking any action that posed a threat of serious bodily injury to officers or to others. And he certainly posed very little threat during the final neck restraint when Officer Wolfe was on top of him and Officer Jun and Sergeant Gonzalez were holding his arms.

Viewing the facts in the light most favorable to Plaintiffs, and drawing all reasonable inferences in their favor, there was substantial evidence that the officers used excessive force, and the jury reasonably concluded they did. *See Johnson*, 251 F.3d at 1227; *Velazquez*, 793 F.3d at 1018. The carotid hold was dangerous, and the officers knew it. But they used it anyway. They used it despite the fact that Mr. Valenzuela was not suspected of any serious crime and did not pose an immediate threat. Worse yet, they applied it in a way they were told not to—more times than they should have, for longer than they should have, and despite numerous indications that Mr. Valenzuela was in pain and distress. And they applied pressure to the center of Mr. Valenzuela's neck, making it impossible for him to even breathe. Tragically, their use of the carotid hold on Mr. Valenzuela led to his unnecessary death.

B. Qualified Immunity

Defendants argue that Officer Wolfe, Officer Jun, and Sergeant Gonzalez are entitled to qualified immunity on Plaintiffs' § 1983 claims. (JMOL Mot. at 2–8.) Qualified immunity shields public employees from § 1983 liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether qualified immunity applies, courts evaluate (1) whether the employee's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). As discussed in the preceding section, there is no question here that the first prong is met.

Rather, Defendants focus on the second prong, arguing that there was no clearly established law at the time of the incident that would make a reasonable officer aware that using the carotid hold on Mr. Valenzuela was unreasonable under the circumstances.

"To be clearly established, a right must be sufficiently clear that *every* reasonable official would have understood *what he is doing* violates that right." *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016) (quoting *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015)) (per curiam) (emphasis in *Hamby*). "Although a plaintiff need not find 'a case directly on point, existing precedent must have placed the . . . constitutional question beyond debate.'" *Id*. at 1091 (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2001)). The Court must make its inquiry "in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

Officer Jun, Officer Wolfe, and Sergeant Gonzalez are not entitled to qualified immunity. Every reasonable officer on July 2, 2016 knew the carotid hold was dangerous. Wrapping an officer's arm around a suspect's neck and attempting to apply pressure only to the sides of the neck is very difficult, especially where there is any level of struggle or resistance, as there was here. (Day 2 AM at 122–23 [Officer Wolfe]; Day 3 AM at 95 [Officer Jun]; Day 5 AM at 74 [Joe Callanan].) Even when an officer executes the hold properly, using it for just one minute can cause permanent brain tissue damage. (Day 4 PM at 94 [Sergeant Ciscel].) Because the carotid hold is so dangerous, and can cause serious injury or death, many police departments have prohibited it altogether, or limited its use to deadly force situations. (*See, e.g.*, Day 2 AM at 21–23 [Scott DeFoe]; Day 4 AM at 44 [Sergeant Gonzalez]; Day 4 PM at 108–09 [Sergeant Ciscel]; Day 5 AM at 74 [Joe Callanan].)

Moreover, every reasonable officer on July 2, 2016 knew that using the carotid hold for more than two minutes and thirty seconds and more than twice in 24 hours,

applying pressure to the center of the neck, and continuing the hold despite clear signs that the subject could not breathe was an unreasonable use of force. *See Hamby*, 821 F.3d at 1090. Yet the officers here did exactly that. They applied the carotid hold for far longer than the period POST teaches can cause permanent brain tissue damage. (Day 4 PM at 94 [Sergeant Ciscel]; *see* Day 5 AM at 22 [Joe Callanan].) They used it more than twice in 24 hours. (Day 2 AM at 46 [Scott DeFoe explaining that POST says not do to this]); *see Headwaters*, 276 F.3d at 1131 (relying on "regional and state-wide police practice and protocol" in qualified immunity analysis). They applied pressure to the front of the neck, preventing Mr. Valenzuela from breathing. (*See* Day 4 PM at 109 [Sergeant Ciscel]; Day 2 AM at 56 [Scott DeFoe]; Day 2 PM at 15–16 [Dr. Singhania]; Day 4 AM at 62 [Dr. Omalu].) And they continued the hold despite numerous clear signs that Mr. Valenzuela was having trouble breathing—he was turning purple, wheezing, gasping for air, and screaming that he could not breathe. (*See, e.g.*, Day 2 AM at 47 [Scott DeFoe]; Day 4 PM at 62–63 [Dr. Vilke].) All of this despite the fact that Mr. Valenzuela was merely a "suspicious person," was not armed, and was not posing any immediate threat.

The circumstances in this case are similar to those in *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003). There, with Mr. Drummond on the ground and his hands cuffed behind him, officers put their knees on his back and neck and placed the weight of their bodies on him. *Id.* at 1054. He "soon fell into respiratory distress," told the officers he could not breathe and that they were choking him, and asked for a glass of water. *Id.* at 1054–55. One eyewitness said the man was "obviously" having trouble breathing. *Id.* at 1055. After the officers then used a "hobble restraint," binding his ankles, he went limp and lost consciousness. *Id.* Mr. Drummond went into a "permanent vegetative state." *Id.* The Ninth Circuit held "that, under the circumstances, a reasonable officer would have had fair notice that the force employed was unlawful, and that any mistake to the contrary would have been unreasonable." *Id.* at 1060. The Circuit further

found that the law at that time was clearly established, and "any reasonable officer would have known that the force used amounted to a constitutional violation." *Id.* at 1062.

Drummond is not the only case on point. *See, e.g.*, *Booker v. Gomez*, 745 F.3d 405, 425 (10th Cir. 2014) (finding clearly established law made qualified immunity inappropriate where carotid hold was applied for two minutes and 55 seconds, despite training to use it only for one minute, during which time the suspect was handcuffed, 50-75% of officer's body weight put on suspect's back, and tased); *Weigel v. Broad*, 544 F.3d 1143, 1154 (10th Cir. 2008) (finding clearly established law precluded qualified immunity where, "even after it was readily apparent for a significant period of time (several minutes) that [the suspect] was fully restrained and posed no danger, the defendants continued to use pressure on a vulnerable person's upper torso while he was lying on his stomach").

Simply stated, every reasonable officer on July 2, 2016 would have understood that applying the carotid hold for longer than a minute, more than once, with pressure on the front of the neck, despite clear signs the suspect could not breathe, was an excessive use of force. Qualified immunity does not apply.

C. Bane Act

Defendants argue they are entitled to judgment as a matter of law on Plaintiffs' Bane Act claim because there was no evidence that the officers had the specific intent to violate Mr. Valenzuela's rights. (JMOL Mot. at 16.) Although the elements of a Bane Act excessive force claim are similar to a § 1983 excessive force claim, the Bane Act requires an additional element of specific intent. *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1044–45 (9th Cir. 2018). To violate the Bane Act, a defendant must have "intended not only the force, but its unreasonableness, its character as more than

necessary under the circumstances." *Id.* at 1045 (quoting *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993)) (internal quotation marks omitted). "[I]t is not necessary for the defendants to have been "thinking in constitutional or legal terms at the time of the incidents, because a reckless disregard for a person's constitutional rights is evidence of a specific intent to deprive that person of those rights." *Id.*

Contrary to Defendants' assertion, there was substantial evidence that Officers Jun and Wolfe had a specific intent to use unreasonable force and that Sergeant Gonzalez had a specific intent to permit and encourage that use of unreasonable force. All three officers testified that they knew the carotid hold was dangerous. Officer Wolfe testified that at the time he used the hold, he knew he should not apply the carotid for more than 30 seconds, and that a properly applied carotid hold should not interfere with someone's ability to breathe. (Day 2 AM at 122–23.) He further knew on the day of the incident that an improperly applied carotid hold could interfere with someone's ability to breathe, and if he put pressure in the front of the neck rather than the sides, that could cause serious injury or death. (*Id.*) Officer Jun testified similarly that he was trained to be careful in applying the carotid hold because applying pressure to the front of a neck could cause serious injury or death. (Day 3 AM at 95.) Sergeant Gonzalez testified that prolonged use of the carotid hold can cause serious injury or death, and that he knew other departments had prohibited the use of the carotid hold. (Day 4 AM at 41, 44.) Nevertheless, the officers deliberately chose to apply the carotid hold on Mr. Valenzuela.

Making matters worse, the officers applied or directed its application in a way contrary to POST—for longer than 60 seconds, more than twice in 24 hours, and ignoring signs that Mr. Valenzuela was having trouble breathing. They also applied it contrary to APD policy and practice, which was to not use the carotid hold for longer than 30 seconds. (Day 4 PM at 94 [Sergeant Ciscel explaining APD training to use the hold for 30 seconds, and if a suspect has not "gone out, reassess the hold or move on to a different

force option"].) Moreover, Mr. Valenzuela was not presenting an immediate threat—indeed, for much of the final hold, Mr. Valenzuela was on his stomach, Officer Wolfe was on top of his back, and Officer Jun and Sergeant Gonzalez were holding his hands. (*See* Day 4 AM at 41–42.) Based on the substantial evidence presented, the jury reasonably inferred an intent to use unreasonable force from the fact that the officers deliberately chose to use a dangerous hold and then used it contrary to POST and APD training despite many signs that Mr. Valenzuela was in pain and distress.[1]

D. *Monell*

To prevail on their *Monell* claim on an unlawful custom, practice, or policy theory, Plaintiffs had to prove: (1) that the officers acted under color of state law, (2) that the officers deprived Mr. Valenzuela of his constitutional rights, (3) that the officers acted pursuant to an expressly adopted official policy or a widespread or longstanding practice or custom of the APD, and (4) that the APD's official policy, practice, or custom caused the deprivation of Mr. Valenzuela's rights. (Dkt. 360 [Court's Instruction No. 13].) Defendants argue that judgment as a matter of law is appropriate because "plaintiffs never articulated what the specific custom, practice or policy of the City was that led to a violation of Valenzuela's rights." (JMOL Mot. at 14.) Defendants are wrong. Defendants admitted the City had a well-established policy of directing its officers to apply the carotid hold to gain control of a suspect, even in non-deadly force situations. (*See* Day 4 AM at 34 [Sergeant Gonzalez testifying that APD policy does not classify the

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[1] Defendants also argue that the jury's verdict on the Bane Act claim was inconsistent with its verdict on the substantive due process claim. Not so. To prove a substantive due process violation, Plaintiffs had to prove that "Officer Wolfe, Officer Jun, and/or Sergeant Gonzalez acted with a *purpose to harm* Mr. Valenzuela that was not related to a legitimate law enforcement objective," which "include detention, arrest, self-defense, or the defense of others." (Dkt. 360 [Court's Instruction No. 16, emphasis added].) Based on the substantial evidence presented, the jury reasonably concluded that the officers intended to use unreasonable force, as described above, but did not act with a purpose to harm Mr. Valenzuela unrelated to any legitimate law enforcement objective. Put simply, the officers intended to use excessive force to gain complete control and arrest Mr. Valenzuela, but they did not intend to kill him.

carotid hold as deadly force]; Day 4 PM at 71, 82, 89 [Sergeant Ciscel describing the APD's policy regarding the carotid hold, and testifying that Officer Jun and Officer Wolfe's use of the carotid hold was within that policy].) There was no question at trial as to what the relevant policy was. The question was whether that policy was lawful. Based on the substantial evidence presented at trial, the jury reasonably concluded that it was not. *See Johnson*, 251 F.3d at 1227.

Specifically, Plaintiffs presented compelling evidence that the carotid hold is extremely dangerous. Even properly applied, for example, one minute on the carotid artery can cause permanent brain tissue damage. (Day 4 PM at 94 [Sergeant Ciscel testifying about what POST teaches].) Misapplication of the carotid hold—which again is very easy in situations where there is even minimal struggle—including by applying pressure to the front of the neck, can cause serious injury or death. (*See, e.g.*, Day 2 AM at 122–23 [Officer Wolfe]; Day 3 AM at 95 [Officer Jun]; Day 4 AM at 41 [Sergeant Gonzalez]; Day 5 AM at 74 [Joe Callanan testifying that improper application of the carotid hold can cause serious injury or death].)

Plaintiffs further presented evidence that because the carotid hold is so dangerous, other police departments prohibit use of the carotid altogether, and that others, like the LAPD, prohibit it in non-deadly force situations. (*See, e.g.*, Day 2 AM at 21–23 [Scott DeFoe testifying that "[m]any departments throughout the country prohibit the use of (the carotid hold) altogether," and the LAPD puts it "on the same parallel with utilization of a firearm . . . [s]o you only can use the carotid restraint hold if . . . an imminent threat of great bodily injury or death exists, not when someone is just being resistive, like in this case"]; Day 4 AM at 44 [Sergeant Gonzalez stating that the carotid hold is not allowed in some police departments, "[b]ut it's in my policy and a lot of different policies"]; Day 4 PM at 108–09 [Sergeant Ciscel testifying that he has heard complaints about the carotid hold throughout his career and some departments classify it as deadly force]; Day 5 AM

at 74 [Joe Callanan testifying that LAPD classifies the carotid hold as deadly force].) But the APD decided that the carotid, in Sergeant Gonzalez's words, was "a good option to render someone temporarily unconscious and make them secure." (Day 4 AM at 19.)

Plaintiffs also presented substantial evidence that the APD's policy caused the deprivation of Mr. Valenzuela's constitutional rights. (*See* Day 2 PM at 26–29 [coroner Dr. Singhania testifying regarding the cause of death]; Day 4 AM at 64–65, 71–72 [Dr. Omalu testifying that cause of death was asphyxiation and that "[t]here is no scientific evidence that methamphetamine killed him or hypertension killed him"].) Indeed, it caused his tragic death.

IV. DEFENDANTS' MOTION FOR NEW TRIAL

Even where judgment as a matter of law is not appropriate because substantial evidence supports the jury's verdict, a court may grant a new trial if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001) (quoting *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999)); *see* Fed. R. Civ. P. 59(a)(1)(A) (stating that courts may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court").

A. *Monell*

Defendants argue a new trial is warranted on their *Monell* claim because the jury's verdict on that claim was contrary to the clear weight of the evidence. Defendants are wrong. The clear weight of the evidence showed that the carotid hold is extremely dangerous, even when properly applied, and that there is a serious possibility that using

the carotid hold may cause serious injury or death. (*See* Day 2 AM at 122–23 [Officer Wolfe]; Day 3 AM at 95 [Officer Jun]; Day 4 AM at 41 [Sergeant Gonzalez]; Day 5 AM at 74 [Joe Callanan].) Because the hold is so dangerous, other police departments had prohibited it or restricted its use to deadly force situations. (*See, e.g.*, Day 2 AM at 21–23 [Scott DeFoe]; Day 4 AM at 44 [Sergeant Gonzalez]; Day 4 PM at 108–09 [Sergeant Ciscel]; Day 5 AM at 74 [Joe Callanan].) The APD directed its officers to use the carotid hold despite the dangers. (*See* Day 4 AM at 34 [Sergeant Gonzalez]; Day 4 PM at 71, 82, 89 [Sergeant Ciscel].) What's more, they directed their officers to use it even in non-deadly force situations. (*See id.*)[2] The jury's verdict on Plaintiffs' *Monell* claim was not contrary to the clear weight of the evidence.

B. Bane Act

Defendants argue that the Court should grant a new trial on Plaintiffs' Bane Act claim because Plaintiffs did not present any evidence showing the officers acted with the requisite intent. (New Trial Mot. at 9–11.) The Court disagrees. The officers all testified that they knew the carotid hold was dangerous. (Day 2 AM at 122–23 [Officer Wolfe]; Day 3 AM at 95 [Officer Jun]; Day 4 AM at 41, 44 [Sergeant Gonzalez].) Nevertheless, they decided to use the hold, and further decided to use it in a way contrary to POST and APD policy. Specifically, they used the hold more times than they were taught to, for longer than they were taught to, and despite numerous signs that Mr. Valenzuela was in pain, distress, and having trouble breathing. The clear weight of the evidence showed that the officers intended to use unreasonable force.

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[2] Defendants argue that Plaintiffs failed to present evidence of deliberate indifference. (New Trial Mot. at 6–7.) However, they confuse the requirements for finding municipal liability for failure to train with liability for an unlawful official policy, practice, or custom. Deliberate indifference is an element for failure to train, but there is no such requirement for an unlawful policy. (*Compare* Dkt. 360 [Court's Instruction No. 13] *with id.* [Court's Instruction No. 14].)

C. Allocation of Fault

Defendants argue that a new trial is warranted because the jury's allocation of fault—85% to Officer Jun, Officer Wolfe, and/or Sergeant Gonzalez, and 15% to Mr. Valenzuela—was contrary to the weight of the evidence. (New Trial Mot. at 11–14.) They point to evidence that Mr. Valenzuela had a methamphetamine pipe, did not put his hands behind his back when officers instructed him to, resisted arrest, and struggled with the officers. (*Id.* at 12.) They also point to the medical examiner's determination that the cause of death was "a complication of asphyxia during the struggle with the law enforcement officer under the influence of methamphetamine and cardiomegaly [enlarged heart] as other condition contributing in the death." (Day 2 PM at 24.)

Defendants miss the point. Mr. Valenzuela was not a saint. He did not obey every command officers gave him. He ran across the street after the struggle in the laundromat. He resisted arrest. But the evidence showed it was totally unnecessary to use this extremely dangerous hold. Mr. Valenzuela was not armed. He was taking no action that threatened serious bodily injury to officers or to others. Indeed, during the final hold, Mr. Valenzuela was on the ground with one officer on top of him, one officer holding his right arm, and another officer holding his other arm. Mr. Valenzuela did not deserve to die. The jury's allocation of fault was not contrary to the clear weight of the evidence.

D. Misconduct by Plaintiffs' Counsel

Defendants next argue that a new trial is warranted because four instances of purported "misconduct" by Plaintiffs' counsel, taken together, "permeated the entire trial" and "clearly demonstrate that the verdict was the result of passion." (New Trial Mot. at 15; Dkt. 421 [New Trial Reply] at 2.) To receive a new trial because of attorney misconduct, Defendants must meet a very high standard: the misconduct must have

"substantially interfered with [Defendants'] interest," and the "flavor of [the] misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *S.E.C. v. Jasper*, 678 F.3d 1116, 1129 (9th Cir. 2012). This standard is not even close to being met here.

The first alleged act of "misconduct" Defendants argue warrants a new trial is Plaintiffs' counsel Garo Mardirossian's comment in opening statement that Mr. Valenzuela and his sister were sexually and physically abused as children by their step-grandfather. (Dkt. 425 [Transcript from Trial Day 1, 11/12/19, PM [hereinafter "Day 1 PM"] at 24.) As background, many of the Court's rulings on Plaintiffs' fourteen motions in limine and Defendants' eleven motions in limine favored Defendants. (*See* Dkt. 325.) For example, the Court ruled that in both the liability and damages phases, Defendants could introduce evidence that Mr. Valenzuela was under the influence of drugs at the time of the incident, that Mr. Valenzuela had a drug-related criminal history, that officers heard a methamphetamine pipe break in the laundromat, and that Defendants could refer to Mr. Valenzuela as an "addict." (*Id.* at 13–18.) The Court concluded that this evidence was relevant to critical questions at trial, including whether the force used was reasonable and whether the carotid hold caused Mr. Valenzuela's death. (*Id.*)

In an attempt to explain the evidence regarding Mr. Valenzuela's drug and criminal history that Defendants were going to introduce, Mr. Mardirossian referred to childhood abuse in his opening statement. (Day 1 PM at 24.) The Court immediately sustained Defendants' objection to the comment, stating that this evidence would be appropriate for the damages phase but not the liability phase. (*Id.*) Although evidence regarding childhood abuse was certainly relevant (and the jury was going to find out about it in the damages phase), during the liability phase it would have unduly delayed the trial and confused the jury. The evidence was not prejudicial to Defendants—indeed, mentioning the childhood abuse essentially confirmed that Mr. Valenzuela had a drug problem.

Defendants moved for a mistrial based on Mr. Mardirossian's comment. (Day 1 PM at 47–51.) The Court denied the motion. (*Id.* at 51.) Nevertheless, the Court agreed to instruct the jury again after opening statements that those statements are not evidence and that the jury may not consider them in deciding what the facts are. (Day 1 PM at 82; *see id.* at 11 [Court's pre-trial instruction that an opening statement is not evidence].) The Court specifically addressed Mr. Mardirossian's comment about sexual abuse:

> One of the critical issues in the liability phase is whether the force used by the officers was excessive under the totality of the circumstances. Whether Mr. Valenzuela was under the influence of methamphetamine and whether he had an enlarged heart due to methamphetamine use are relevant to whether the force used by the officers was excessive and, if so, whether that force was the substantial factor in causing Mr. Valenzuela's death. The reasons why Mr. Valenzuela may have taken methamphetamine before the encounter with the police officers or the reasons why he may have had a methamphetamine abuse problem are not relevant to the liability issues. I'm instructing you that you cannot consider those reasons during your deliberations for the first phase, liability issues.

(*Id.*) After trial, the Court again instructed the jury that both opening statements and closing arguments are not evidence. (Dkt. 360 [Court's Instruction No. 4].)

The second instance of purported "misconduct" are two questions by Plaintiffs' counsel Dale Galipo. Specifically, Mr. Galipo asked Officer Wolfe and Officer Jun whether they were trained on how to deal with people with post-traumatic stress disorder. (Day 2 AM at 141; Dkt. 427 [Transcript from Trial Day 3, 11/14/19, PM] at 31.) Defendants objected to these questions based on relevance and under Federal Rule of Civil Procedure 403. The Court overruled the objections. The testimony Mr. Galipo elicited was relevant to at least two issues: first, whether the force used was reasonable, including because the video of the incident made clear that Mr. Valenzuela had mental health issues, and second, whether the APD failed to train its officers, especially given

the possibility that individuals with mental health issues may not submit to police authority as a rational person would. In response to Mr. Galipo's question, Officer Wolfe testified that officers learn about "a variety of conditions," but the focus of training "is behavior, how to keep them safe, and how to keep the public safe," and the questioning then moved to safety. (Day 2 AM at 141–142.) Officer Jun testified that he did not remember whether he was trained on post-traumatic stress disorder specifically, and the questioning quickly turned to what force is reasonably necessary. (*Id.* at 31–32.) The Court instructed the jury that questions and objections by lawyers are not evidence. (*Id.*)

The third occurrence of supposed "misconduct" is that during his closing argument at the damages phase, Mr. Galipo mentioned (accurately) that the City of Anaheim was a defendant in the case. (Dkt. 414 [Transcript from Trial Day 7, 11/20/19, hereinafter "Day 7"] at 40.) Defendants did not object. (*Id.*) However, Defendants now contend that this isolated statement "violat[ed] their agreement and the Court's subsequent order that there be no mention that the City would pay any judgment entered against the officers." (New Trial Mot. at 16.) But Mr. Galipo never said the City would pay any judgment. His statement did not violate any Court order, nor did it prejudice the Defendants in any way. Moreover, the Court instructed the jury on what it could and could not consider in deciding how much to award damages. (Dkt. 377 [Court's Instruction Nos. 1–4].)

The fourth instance of asserted "misconduct" is that Plaintiffs introduced during the damages phase a letter that Plaintiffs did not produce in discovery. (New Trial Mot. at 17; *see* Dkt. 430 [Transcript from Trial Day 6, 11/19/19, PM, hereinafter "Day 6 PM"] at 16–19.) This was a handwritten letter Mr. Valenzuela wrote to the mother of his children, Patricia Gonzalez. (Day 6 PM at 16.) Ms. Gonzalez testified that in the letter, Mr. Valenzuela asked how "little Vince" was doing in school. (*Id.*) He wrote, "Man, I'm so proud of him for being such a good boy and attending [the 'Cops for Kids'] program." (*Id.* at 17.) He continued, "I love him. Miss him. He's always going to be my big guy."

(*Id.*) Turning to his daughter, Mr. Valenzuela wrote, "My Little Ximena. How is she doing in school? Oh, my baby girl. She's still a baby I love her to heck." (*Id.*) He added, "it's cool when she sings." (*Id.* at 18.) This evidence showed the relationship Mr. Valenzuela had with his children and was therefore directly relevant to the jury's determination of what dollar value to put on Vincent and Ximena Valenzuela's loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance. The Court overruled Defendants' hearsay objection to the letter because the evidence was relevant to show Mr. Valenzuela's state of mind and his relationship with and feelings toward the children. (*Id.* at 135.) The Court also overruled Defendants' Rule 403 objection because there was no prejudice.

The contention that a comment in opening statement regarding childhood abuse, two questions about police training on post-traumatic stress disorder, an accurate statement in closing argument that the City was a Defendant, and the use of a highly relevant letter amounted to misconduct that sufficiently "permeated" this entire trial and unfairly prejudiced Defendants so severely as to warrant throwing out a jury verdict rendered after two phases and seven days of trial is simply not credible. The jury was properly instructed on what evidence it could consider in determining liability and damages, and none of the purported misconduct was the type that would appeal to jurors' passions and make them unable to follow Court instructions. It is absolutely implausible that these issues led the jury to be "influenced by passion and prejudice in reaching its verdict." *See Jasper*, 678 F.3d at 1129.

E. Excessive Damages Award

Defendants argue that a new trial is warranted because the jury's damages award was excessive. (New Trial Mot. at 17–19.) "Doubts about the correctness of the verdict are not sufficient grounds for a new trial: the trial court must have a firm conviction that

the jury has made a mistake." *Landes Const. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987) (citing *Tennant v. Peoria & Pekin Union Ry.,* 321 U.S. 29, 35 (1944) ("Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.")).

Defendants specifically take issue with Plaintiffs' counsel's statements in closing argument regarding the value of a B-1 bomber, a Picasso painting, or LeBron James' basketball contract. It is somewhat disingenuous for Defendants to complain about these statements. Defendants' counsel himself in closing argument explicitly asked the jury to tie the children's loss of love, companionship, comfort, care, protection, affection, society, moral support, training, and guidance to something improper—the cost of going to college. He told the jury that Plaintiffs' attorneys want them "to award millions and millions of dollars to these kids," but he instead suggested that "we should take care of their college." (Day 7 at 35.) He then outlined the cost of going to a California State University or a University of California school. (*Id.*) There had been, of course, no evidence presented during trial about the cost of a college education. Indeed, there was not even any evidence that Mr. Valenzuela would have paid for the children's college education had he lived.

Nevertheless, Defendants contend that Plaintiffs' counsel improperly asked the jury to use the value of a B-1 bomber, a Picasso pointing, or Lebron James' Lakers contract "as benchmarks." (New Trial Mot. at 17.) Plaintiffs' counsel did not. Rather, he used these items in the context of his argument that all life has value. (*See* Day 7 at 22 ["Next. Now, how do we value things in society? Things like a B-1 bomber, almost a billion dollars. You know, you look at a painting by Picasso, beautiful painting, $155 million. This is our life. This is how we value things. Life is far more important."].) This was not improper.

In any event, Defendants suffered no prejudice from Plaintiffs' counsel's brief and isolated statements during closing argument. "[N]o citation is required for the elementary proposition that attorneys are allowed wide latitude in their closing arguments to juries." *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1288 (9th Cir. 1984) (Ely, J., concurring). Bringing up the value of a B-1 bomber or a Picasso painting did not have any tendency to so appeal to jurors' passions that they would not have been able to follow the Court's instructions. Indeed, the jury's verdict was nowhere near the values Mr. Mardirossian placed on the plane or the painting.

The Court is not left with any conviction—much less a firm one—that the jury made a mistake. *See Landes Const. Co.*, 833 F.2d at 1372. It is very difficult to assign a dollar value to an individual's life. It is very difficult to quantify the pain and suffering involved in being choked to death. It is very difficult to quantify children's loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance when they lose their father. In the context of the jury's attempt to put a dollar value on the love and support of a father, Plaintiffs' counsel's statements were hyperboles and, quite frankly, inconsequential.

F. Duplicative Damages Award

Defendants argue that a new trial is warranted because the jury's damages award was duplicative. (New Trial Mot. at 19–20.) They contend that the jury awarded a particular damages amount for each category of love, companionship, comfort, care, protection, affection, society, moral support, training, and guidance, and the award is duplicative because those categories overlap. (*Id.* [citing Day 7 at 23–24].) But the jury did no such thing. In fact, the jury asked questions about these categories that show the jury purposely *avoided* awarding overlapping damages. Specifically, the jury asked the Court for the legal definition of "society." (Dkt. 364.) The Court responded that

"society" means "the love, companionship, comfort, care, protection, affection, moral support, training and guidance that a child receives from a father's continued existence." (Dkt. 365.) The jury then asked: "'Society' was one of the components of the list of 11 'areas' on the verdict sheet. Your answer implies that 'society' is not a 'stand alone' area. Is this correct or is society to be looked at on its own? Is 'society' a stand alone or a summation of the entire list of 11?" (Dkt. 367.) The Court responded, "It is a combination of all the other words on the list." (Dkt. 369.) The jury's questions show that the jury understood the potential overlap in the categories in the jury instruction, and wanted to ensure that it did *not* award overlapping damages.

G. Bifurcation

Defendants argue that a new trial is warranted because the Court erred in refusing to bifurcate individual liability claims from supervisory and municipal liability claims. (New Trial Mot. at 20–21.) The evidence presented at trial confirmed the Court's reasoning that the individual, supervisory, and municipal liability issues were all inextricably linked and the evidence to prove them overlapped substantially. (*See* Dkt. 325 at 7–8.) The evidence showed that the officers attempted to apply the carotid hold because they were trained to use it in non-deadly force situations to control and arrest a suspect. To bifurcate liability the way Defendants suggested would have unfairly prejudiced Plaintiffs, the Court, the jury, and the individual officers. And it would also have created undue delay, wasted time, and resulted in the needless presentation of duplicative evidence. Specifically, evidence relating to supervisory and municipal liability was directly relevant to the individual officers' liability, because the jury had to decide whether the officers used excessive force and acted with a purpose to harm Mr. Valenzuela, as Plaintiffs alleged, or whether the neck restraint was reasonably applied in

conformity with their supervision by Sergeant Gonzalez, their training, and APD policy, as Defendants contended.[3]

H. Damages for Loss of Life Under 42 U.S.C. § 1983

Finally, Defendants argue that the Court erred in allowing the jury to award damages for Mr. Valenzuela's loss of life. (New Trial Mot. at 21–22.) But failing to award damages for Mr. Valenzuela's loss of life would undermine the vital constitutional right against excessive force—perversely, it would incentivize officers to aim to kill a suspect, rather than just harm him.

Because federal law is silent on the measure of damages in § 1983 actions, state law governs unless it is inconsistent with the policies of § 1983. *See* 42 U.S.C. § 1988; *Robertson v. Wegmann*, 436 U.S. 584, 589–90 (1978). California law does not allow a decedent's estate to recover for the decedent's loss of life. Cal. Civ. Proc. Code § 377.34. Instead, state law limits recovery to pre-death economic damages in an action brought by a decedent's successor-in-interest. *Id.*

A primary goal driving Congress's enactment of § 1983 was to provide for killings unconstitutionally caused or acquiesced in by state governments. *See Monroe v. Pape*, 365 U.S. 167, 172–76 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 690 (1978). There are two policies underlying § 1983: (1) to compensate persons injured when officials deprive them of federal rights, and (2) to prevent abuses of power by those acting under color of state law. *Robertson*,

[3] Defendants argue that the Court should have bifurcated the liability issues to "protect the individual officer defendants from the prejudice that might result if a jury heard evidence regarding the municipal defendant's allegedly unconstitutional policies." (New Trial Mot. at 21 [quoting *Green v. Baca*, 226 F.R.D. 624, 633 (C.D. Cal. 2005)].) But as explained, the evidence of APD's allegedly unconstitutional policies was central to the individual officers' defense.

436 U.S. at 590–91. Whether California's bar on loss of life damages applies in § 1983 actions depends on whether this limit is inconsistent with § 1983's twin goals of compensation and deterrence. *See id.* at 591–92.

Neither the Supreme Court nor the Ninth Circuit has addressed this issue directly. The Ninth Circuit came closest to the question in *Chaudhry v. City of Los Angeles*, where it considered whether California's bar on survival damages for pre-death pain and suffering was inconsistent with § 1983. 751 F.3d 1096, 1103 (9th Cir. 2014). It held that it was. By limiting damages in survival actions to the victim's pre-death economic losses, "[t]he practical effect of [California Code of Civil Procedure] § 377.34 is to reduce, and often to eliminate, compensatory damage awards for the survivors of people killed by violations of federal law." *Id.* at 1104. In cases where the victim dies quickly, there will often be no remedy at all. *Id.* And "[e]ven in cases of slow death where pre-death economic damages might be available, § 377.34's limitation will often be tantamount to a prohibition, for the victims of excessive police force are often low-paid or unemployed." *Id.* Prohibiting recovery for pre-death pain and suffering therefore creates a perverse effect: it is more economically advantageous for a defendant to kill rather than injure his victim. *Id.* Consequently, the Ninth Circuit held that California's prohibition on pre-death pain and suffering damages limits recovery too severely to be consistent with § 1983's deterrence policy. *Id.* at 1105.

Chaudhry cited with approval an out-of-circuit decision, *Bell v. City of Milwaukee*, which held that a Wisconsin statute barring damages for loss of life was inconsistent with § 1983. 746 F.2d 1205, 1239 (7th Cir. 1984), *overruled in part on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005). In *Bell*, a Milwaukee police officer shot and killed the decedent, planted a knife on his body, and then lied about the circumstances of the killing. *Id.* at 1215–18. The decedent's siblings and estate sued under § 1983. In rejecting the Wisconsin law precluding recovery of damages for loss of life in survival

actions, *Bell* concluded that "if Section 1983 did not allow recovery for loss of life notwithstanding inhospitable state law, deterrence would be further subverted since it would be more advantageous to the unlawful actor to kill rather than injure." *Id.* at 1239.

Other courts have reached the same conclusion. A majority of district courts considering the issue have held that § 377.34's bar on loss of life damages is inconsistent with the policies of § 1983. *See, e.g.*, *T.D.W. v. Riverside Cty.*, 2009 WL 2252072, at *7 (C.D. Cal. July 27, 2009) (finding excluding damages for loss of enjoyment of life would be inconsistent with the purposes of § 1983); *Guyton v. Phillips*, 532 F. Supp. 1154, 1167–68 (N.D. Cal. 1981) (finding § 1983's deterrent purpose "is hardly served when the police officer who acts without substantial justification suffers a harsher penalty for injuring or maiming a victim than for killing him"); *see also Thomas v. Cannon*, 2017 WL 2954920, at *3 (W.D. Wash. July 10, 2017) (finding Washington's limit on damages for loss of life inconsistent with § 1983's policies). And since *Chaudhry*, no court has held otherwise. *See Estate of Casillas v. City of Fresno*, 2019 WL 2869079, at *16 (E.D. Cal. July 3, 2019) (collecting cases).

The Court agrees with the weight of authority holding that California's bar on loss of life damages is inconsistent with the policies behind § 1983. Foreclosing recovery for loss of life creates a backwards incentive: officers should aim to kill, not injure. Even more, they should kill quickly, lest the decedent's estate recover damages for pre-death pain and suffering, now available under *Chaudhry*. Incentivizing the use of executioner-style force is clearly inconsistent with § 1983's policy of deterrence. It also trivializes our fundamental right against excessive force. The Constitution demands more from those the government entrusts to use deadly force. They must do so only when necessary to protect themselves and others from serious physical injury.

Damages for loss of life also provide compensation for individuals killed by a violation of their constitutional rights. Every life has value. This platitude rings true even if someone is unemployed, homeless, a drug addict, and broke. In the name of tort reform, California law subverts this principle by limiting damages in survival actions to the victim's pre-death economic losses. Consider how this limit impacts § 1983 actions where an officer unjustifiably uses deadly force. Victims of excessive force are often low paid or unemployed. They are more likely to be persons of color, and thus statistically likely to be paid less on the dollar. These lives have worth beyond economic loss. Barring recovery for the innate value of a life, particularly where a law enforcement officer has unlawfully killed someone, conflicts with § 1983's policy of compensation.

It would be a great injustice to allow a perpetrator of excessive force to get away with paying no damages just because the victim is dead and penniless. Loss of life damages are necessary to promote the important policies underlying § 1983 and the fundamental American value that every life matters.

V. PLAINTIFFS' MOTION FOR ATTORNEY FEES

"The general rule in our legal system is that each party must pay its own attorney's fees and expenses." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010). In an action brought under 42 U.S.C. § 1983, however, "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). Attorney fees are also recoverable under the Bane Act. Cal. Civ. Code § 52.1(i) ("In addition to any damages, injunction, or other equitable relief awarded . . . the court may award the . . . plaintiff reasonable attorney's fees."). Under this authority, Plaintiffs seek an award of $1,333,355 in fees and $51,639.07 in costs, in addition to the costs allowable under 28 U.S.C. §1920. (Fee Mot. at 2.)

A. Prevailing Party

Plaintiffs may be considered prevailing parties if they succeed on any significant issue in litigation that achieves some of the benefit sought in bringing the lawsuit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Plaintiffs Vincent and Ximena Valenzuela prevailed on their claims when the jury found that the officers used excessive force, that Sergeant Gonzalez was liable as a supervisory defendant, and that the City was liable based on an unlawful policy, practice, or custom, and awarded a total of $13.2 million in damages. As the prevailing party on the pivotal issue of whether the use of the neck restraint was reasonable, they are entitled to their reasonable attorney fees. Specifically, Vincent and Ximena Valenzuela prevailed on the issues of unreasonable force, supervisory liability, municipal liability on an unlawful policy, practice, or custom theory, battery, negligence, and liability under California's Bane Act.

Defendants argue that Mr. Valenzuela Sr. was not a prevailing party because the jury found against Plaintiffs on his only claim—violation of substantive due process. This matters because Plaintiffs seek fees for the work of Dale Galipo, who appeared in this case for the first time on October 30, 2019, on behalf of Mr. Valenzuela Sr. only. (*See* Dkt. 324 [Notice of Appearance of Counsel].) Then, on November 18, 2019—after the jury found for Defendants on Mr. Valenzuela Sr.'s claim but before the damages phase began—Mr. Galipo was added as counsel of record for Vincent and Ximena Valenzuela as well. (Dkt. 352.) Defendants argue that all of Mr. Galipo's work before November 18, 2019[4] is not compensable as "time incurred while representing a non-prevailing party." (Dkt. 404 [Defendants' Opposition to Fee Motion, hereinafter "Fee Opp."] at 5–6; Dkt. 404-1 [Defendants' objections to Mr. Galipo's time].)

[4] Although Mr. Galipo worked on this case "from its inception," Plaintiffs seek reimbursement only for time incurred beginning August 24, 2019. (Dkt. 385-5 [Declaration of Garo Mardirossian] ¶ 14.)

The Court is not persuaded. The work Mr. Galipo performed on behalf of Mr. Valenzuela Sr. is not separable from Vincent and Ximena Valenzuela's case. Mr. Galipo questioned every witness in the liability phase. He performed the closing argument for all Plaintiffs. The work he performed preparing for trial clearly served all Plaintiffs, not just Mr. Valenzuela Sr. There was no evidence or argument at trial that went *only* to Mr. Valenzuela Sr.'s substantive due process claim—indeed, any evidence relevant to that claim was also relevant to Vincent and Ximena Valenzuela's substantive due process claim. Accordingly, the evidence Mr. Galipo reviewed, the arguments he developed, the strategy he contributed, and the other work Mr. Galipo performed was all relevant to Vincent and Ximena Valenzuela's claims and was related to their ultimate success. *Cf Hensley*, 461 U.S. at 435 (analyzing treatment of fees on unsuccessful claims, and explaining that the correct analysis hinges on whether the plaintiff's work on the other claims was related to the plaintiff's ultimate success). Simply put, Mr. Galipo's stellar advocacy was key to Vincent and Ximena's success.

B. Reasonableness of the Fee

The customary method of determining fees is known as the lodestar method. *Morales v. City of San Rafael*, 96 F.3d 359, 364 (9th Cir. 1996). The lodestar amount is the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. There is a strong presumption that the lodestar figure represents a reasonable fee. *Morales*, 96 F.3d at 363 n.8; *see also Harris v. Marhoerfer*, 24 F.3d 16, 18 (9th Cir. 1994) ("Only in rare instances should the lodestar figure be adjusted on the basis of other considerations."). The lodestar approach captures the factors that courts have traditionally considered in assessing the reasonableness of a fee award: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to the acceptance of the case, (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." *Morales*, 96 F.3d at 364 & n.9 (citing *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976)).

1. Hourly Rates

The Court first determines Plaintiffs' attorneys' reasonable hourly rates. "The hourly rate for successful civil rights attorneys is to be calculated by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by counsel, and fee awards in similar cases." *Moreno v. City of Sacramento*, 534 F.3d 1106, 114 (9th Cir. 2008). Courts also are guided by "the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996); *see also Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005). "The fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan v. Multnomah Cty.*, 815 F.2d 1258, 1263 (9th Cir. 1987). Once the party claiming fees presents evidence supporting the claimed rate, the burden shifts to the party opposing fees to present countervailing evidence that persuasively rebuts the fee seeker's proof of a reasonable hourly rate. *See Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992).

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a. Dale Galipo

Dale Galipo, the lead trial lawyer in this case, requests an hourly rate of $1,000. (Fee Mot. at 8.) When it comes to police excessive force cases in Los Angeles, Mr. Galipo is without question at the top of his field. In a recent case similar to this one, this Court found that an hourly rate of $1,000 for Mr. Galipo is reasonable and consistent with the prevailing rate in the Central District for attorneys of comparable skill, experience, and reputation. (*See Craig et.al. v. County of Orange et.al.*, Case No. SACV 17-00491-CJC (KESx), Dkt. 245.) The Court again finds that $1,000 is a reasonable hourly rate for Mr. Galipo.

b. Garo Mardirossian

Garo Mardirossian seeks an hourly rate of $900. Mr. Mardirossian graduated from Whittier College School of Law and was admitted to the California Bar in 1981. He has managed his own law firm ever since, and has litigated numerous police excessive force cases. (Dkt. 385-5 [Declaration of Garo Mardirossian] ¶¶ 6–8.) In 2006, he was selected as one of the "Best Lawyers in America" by ABOTA, and in 2012, he was recognized by the Daily Journal as one of the top 100 California lawyers. (*Id.* ¶ 12.)

Defendants submit that a more reasonable hourly rate for Mr. Mardirossian is $650. (Fee Opp. at 11.) They rely principally on *R.S., et al v. City of Long Beach, et al.*, Case No. SACV11-536-AG, Dkt. 221 (C.D. Cal. Jan. 31, 2014), another case where Mr. Mardirossian conducted a trial with Mr. Galipo, where another court in this district determined that a reasonable hourly rate for Mr. Mardirossian was $550. (*See id.*)

The Court agrees that $650 is a reasonable hourly rate for Mr. Mardirossian, and is more in line with the prevailing rate for attorneys with his experience performing the

services he performed here. *See Novel v. L.A. Cty. Sheriff's Dep't*, 2019 WL 6448955, at *3 (C.D. Cal. Aug. 20, 2019) (finding that $690 per hour was a reasonable hourly rate for a partner working under another partner in a Los Angeles § 1983 trial); *Smith v. Cty. of Riverside*, 2019 WL 4187381, at *6 (C.D. Cal. June 17, 2019) (relying in § 1983 case on evidence that the median rate for partners with more than 21 years of experience across all-sized law firms and all practice areas in Los Angeles was $688).

Plaintiffs have not met their burden of showing that $900 is in line with the prevailing rates in the community for lawyers who perform the type of services Mr. Mardirossian performed in this case. In asserting that a $900 rate is reasonable, Plaintiffs argue that "[f]or many decades [Mr. Mardirossian] has been one of the top attorneys in California and it is impossible to find an attorney with his resume whose reasonable rate is $650/hour." (Dkt. 422 [Plaintiffs' Reply in Support of Fee Motion, hereinafter "Fee Reply"] at 3.) But Plaintiffs miss the point. It is not enough to say that other attorneys with 38 years of experience have hourly rates around $900. (Fee Mot. at 9 [citing *McKibben v. McMahon*, 2019 WL 1109683, at *14 (C.D. Cal. Feb. 28, 2019), where the court relied on a compilation of fee awards in civil rights cases stating that civil rights litigation attorneys with 26–49 years of experience bill $887-$1230 per hour].)[5] Mr. Mardirossian was not the lead lawyer in this case. He conducted no witness examination during the liability phase of trial, and played only a minor role in the damages phase. The services he performed simply did not require the skill and experience of an attorney with 38 years of experience. (*See* Dkt. 385-6 [Mr. Mardirossian's timesheets].) Mr. Galipo's representation and stellar advocacy were what led to the multi-million dollar verdict, not those of Mr. Mardirossian.

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[5] Nor is Mr. Galipo's declaration supporting Mr. Mardirossian's request for $900 per hour enough to tip the balance. (*See* Fee Mot. at 10; Dkt. 385-1 ¶ 22 ["I believe that given his accomplishments, the length of time he has been an attorney and his significant contributions and excellent work on this case, Mr. Mardirossian should be awarded $900 per hour."].)

c. Lawrence Marks

Lawrence Marks seeks an hourly rate of $750. Mr. Marks graduated from University of the Pacific, McGeorge School of Law and was admitted to the California Bar in 1991. (Dkt. 385-7 [Declaration of Lawrence D. Marks] ¶ 3.) He spent about ten years defending attorneys and doctors for malpractice, and has spent about 18 years representing plaintiffs in personal injury matters, including civil rights matters. (*Id.* ¶¶ 4–5.) He has tried or second-chaired more than 20 jury trials, taken thousands of depositions, and participated in several civil rights police excessive force cases. (*Id.* ¶¶ 6–8.) Defendants argue that a more reasonable hourly rate is $400 per hour, again citing *R.S.*, Case No. SACV11-536-AG, Dkt. 221, and the fact that the only support for this rate are the attorneys' own declarations. (Fee Opp. at 8.)

The Court finds that $550 is a reasonable hourly rate for Mr. Marks. Mr. Marks did not present any evidence at trial. The work he performed was akin to an associate behind the scenes, including obtaining evidence and drafting briefing and discovery. (Dkt. 385-8 [Mr. Marks' timesheets]). Plaintiffs have not met their burden to show that a $750 hourly rate is in line with the prevailing community rates for lawyers with Mr. Marks' experience who perform the types of services Mr. Marks performed in this case (which did not require the skill of an attorney with 28 years' experience). A $550 rate accounts for the role Mr. Marks played supporting Mr. Galipo and Mr. Mardirossian, and what appears to be the prevailing rate for similar associate work in Los Angeles § 1983 cases. *See, e.g.*, *Novel*, 2019 WL 6448955, at *3 (finding that $550 per hour was a reasonable hourly rate for an associate working under two partners in a Los Angeles § 1983 trial); *Smith*, 2019 WL 4187381, at *6 (relying in § 1983 case on evidence that the median rate for associates with more than 7 years of experience across all-sized law firms and all practice areas in Los Angeles was $524); *Mkay Inc. v. City of Huntington Park*,

2019 WL 1751823, at *3 (C.D. Cal. Mar. 7, 2019) (noting that associates from the Greenberg Gross and D.R. Welch firms billed at rates between $325 and $395 per hour).

d. John Fattahi

To oppose Defendants' post-trial motions, Plaintiffs added new counsel, John Fattahi. (*See* Dkt. 403 [January 31, 2020 Notice of Association of Counsel]; Fee Reply at 17.) Plaintiffs seek an hourly rate of $725 per hour for Mr. Fattahi's work.

Mr. Fattahi graduated from UCLA School of Law and was admitted to the California Bar in 2006. (Dkt. 422-7 [Declaration of John Fattahi] ¶ 6.) He served for one year as a law clerk to Chief U.S. District Judge Virginia A. Phillips in the Central District of California, and was then a litigation associate for two years at Quinn Emanuel Urquhart & Sullivan, LLP. (*Id.*) He then worked for about two and a half years in Mr. Galipo's office, and opened his own solo practice in July 2011. (*Id.* ¶ 7.) Mr. Fattahi has been selected as a Rising Star of Southern California by Super Lawyers magazine each year between 2015 and 2019. (*Id.*) Mr. Fattahi represents that a court has awarded him a $550 hourly rate for second-chairing a police excessive force trial, and that he has also obtained fee settlements resulting in $540 and $550 hourly rates. (*Id.* ¶ 5.)

Defendants respond that $550 is a more appropriate rate for Mr. Fattahi. (Dkt. 423 at 1.) They cite cases where courts determined that a reasonable hourly rate for Mr. Fattahi was $400, $350 (2 cases), $320 (2 cases), and $280 per hour. (*Id.* at 2–4.) "[A]n attorney's prior fee award may bear on the selection of a reasonable fee in a later case, particularly when the award was for work performed in the relevant community." *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 908 (9th Cir. 1995). However, it is not alone sufficient to support the rate's reasonableness.

The Court finds that Plaintiffs have not carried their burden to show that $725 per hour is the prevailing rate in the community for similar services of lawyers of reasonably comparable skill and reputation. The more novel and difficult legal issues and the impressiveness of the results obtained by the Plaintiffs happened before and during trial, not after trial when Mr. Fattahi participated. Moreover, the prevailing rate in the community for attorneys of similar experience does not appear to be as high as Mr. Fattahi seeks. *See McKibben*, 2019 WL 1109683, at *14 (collecting awards between $485 and $665 for attorneys with 13 to 14 years of experience); *Mkay Inc.*, 2019 WL 1751823, at *4 (concluding that $525 was a reasonable hourly rate for a 2006 UCLA Law graduate in Los Angeles § 1983 case). Considering these factors, the skill required to file the oppositions Mr. Fattahi filed, and awards other courts have found reasonable for Mr. Fattahi, the Court determines that $500 is a reasonable hourly rate for Mr. Fattahi.

2. Billed Hours

The Court now determines whether the billed hours are reasonable. A court may award fees only for the number of hours it concludes were reasonably expended on the litigation. *See Hensley*, 461 U.S. at 434. "[T]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of th[e] hours worked." *Deukmejian*, 987 F.2d at 1397–98.

In support of Plaintiffs' fee motion, each attorney submitted time records detailing the work they performed. Defendants argue various categories of hours should be excluded. One category of hours Plaintiffs' counsel spent that Defendants argue is not reasonable are what Defendants call "duplicative" hours. For example, Defendants object that it is duplicative to award fees for multiple attorneys to prepare witnesses for depositions and attend depositions. (Dkt. 404-2 at 6 [objecting that Mr. Mardirossian and Mr. Marks both billed to prepare for and attend depositions of Dr. Omalu and Mr.

DeFoe]; Dkt. 404-3 at 16 [objecting to recovery of Mr. Marks' time spent preparing an outline for Dr. Singhania's direct examination where Mr. Galipo did the examination].) However, it is not uncommon for multiple attorneys to participate in depositions or for one attorney to prepare materials for another attorney's preparation, and the Court does not see how the number of hours billed for these tasks was unreasonable.

Defendants further object to many of Mr. Marks' time entries as "duplicate work" because the entries have the same text as prior days' entries. (*See, e.g.*, Dkt. 404-3 at 16 [objecting to entry for "Prepare Index Of Portions Of Deposition Of Witness/Defendant Sgt. Daniel Gonzalez Plaintiffs Intend To Offer At Trial, Per Local Rule 16-2.7" because it reflects "[d]uplicate work, same as task performed on 10/20/19"].) However, it is not unusual for an attorney to spread one task across multiple days, and the Court has no evidence that these billing entries represent the same work.

Defendants also object to certain entries reflecting what they argue is excessive time. (*See, e.g.*, Dkt. 404-3 at 3, 6 [objecting to "[e]xcessive amount of time for legal research"]; *id.* at 5 [objecting that time spent reviewing certain document and photos was excessive].) As to most of these objections, the Court disagrees that the amount billed appears excessive. However, Defendants request very limited reductions for Plaintiffs' re-filing of various motions in limine, arguing that the time Plaintiffs spent reviewing, updating, and re-filing those nearly identical motions is excessive. (Dkt. 404-3 at 12.) The Court will make those few requested reductions, which result in a total of 7.5 hours' reduction from Mr. Marks' time.

Next, Defendants object to hours Mr. Mardirossian billed for conversations with the children's mother on issues regarding their behavior at school because these are not "litigation-related activity." (Dkt. 404-2 at 2 [0.8 hours on July 11, 2016 for "[t]elephone conversation with Ms. Gonzalez re: Vincent Valenzuela having fainted at school"]; *id.* at

5 [0.3 hours on January 9, 2019 for conversation "re: Ximena's behavior at school, and need to bring stuffed animal to class with her"].) The Court disagrees that this time was not related to the litigation. In the damages phase, the jury had to decide whether Vincent and Ximena Valenzuela lost love, companionship, comfort, care, protection, affection, society, moral support, training, and guidance, and if they did, how much money that loss was worth. The information Mr. Mardirossian obtained in those conversations was directly relevant to those damages issues, and some was presented at trial. (*See, e.g.*, Day 6 PM at 62–63 [Ximena's first grade teacher testifying about how Ximena brought a stuffed animal to school and hugged it when she felt sad about her dad].) Accordingly, the Court does not exclude these hours from Plaintiffs' attorney fee recovery.

Defendants further argue that one task Mr. Marks performed at the very beginning of the case is "paralegal work" and thus the time spent (2.4 hours) should be reduced by half. Though the Court agrees in principle that nonattorney work should not be reimbursed at attorney rates, the Court finds that Plaintiffs' counsel did not improperly bill for nonattorney work here.

Defendants also object that the 99.3 hours Mr. Fattahi billed was excessive for preparing two oppositions to post-trial motions. (*See* Dkt. 423.) For example, Defendants contend that "given Mr. Fattahi's representation of his considerable skill and experience in civil rights litigation, particularly police use of force cases," the over 50 hours he spent on legal research on excessive force, qualified immunity, and similar issues is excessive. (*Id.*) The Court agrees that the amount of time spent by a lawyer who did not participate in the case previously does not appear reasonable. Under the circumstances, the Court finds that 70 hours were reasonably expended on Plaintiffs' responses to Defendants' post-trial motions.

The parties agree that 4 hours of time should be deducted from both Mr. Mardirossian and Mr. Marks' time because they billed for an "MSC with Judge Otero" on May 29, 2019, when the settlement conference occurred on May 30, 2019, and they also billed time on that date. (Dkt. 404-2 at 7; Dkt. 404-3 at 11; Fee Reply at 9.) Accordingly, the Court will exclude these hours.

For the reasons discussed, the Court reduces the hours billed by Mr. Mardirossian by 4 hours, the hours billed by Mr. Marks by 11.5 hours, and the hours billed by Mr. Fattahi by 29.3 hours.

3. Lodestar Calculation

Based on the above analysis, the lodestar amounts for Plaintiffs' counsel are as follows:

Attorney	**Hourly Rate**	**Hours**	**Lodestar**
Dale Galipo	$1,000	284.1	$284,100
Garo Mardirossian	$650	404.7[6]	$263,055
Lawrence Marks	$550	910.5[7]	$500,775
John Fattahi	$500	70	$35,000
Total		1,669.3	**$1,082,930**

[6] This number is calculated by subtracting 4 from the 404.7 hours requested for Mr. Mardirossian's time, as reflected in the table on page 17 of Plaintiff's Fee Reply.

[7] This number is calculated by subtracting 11.5 from the 922 hours requested for Mr. Marks' time, as reflected in the table on page 17 of Plaintiff's Fee Reply. The Court notes that Defendants calculate the total number of hours Mr. Marks billed to be higher than the number of hours Plaintiffs request. (Dkt. 404-3 at 18.) The Court relies on Plaintiffs' lower calculation.

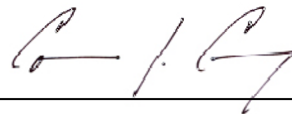
C. Costs

Section 1988 also allows for recovery of reasonable out-of-pocket expenses that "would normally be charged to a fee paying client." *Woods v. Carey*, 722 F.3d 1177, 1180 n.1 (9th Cir. 2013). Plaintiffs seek $51,639.07 in such costs for photocopying, travel, and various costs associated with depositions and trial. (Fee Mot. at 16–18.) Defendants argue the Court should not award such costs because "[t]his is not a situation where neither the attorneys who incurred the costs, nor the plaintiff cannot afford to pay." (Fee Opp. at 13–14.) Defendants present no argument or evidence that these expenses would not normally be charged to a fee-paying client, and the Court concludes that awarding these costs is appropriate here. *See Woods*, 722 F.3d at 1180 n.1.

VI. CONCLUSION

For the foregoing reasons, Defendants' motions for judgment as a matter of law and for a new trial are **DENIED**. Plaintiffs' motion for attorney fees is **GRANTED IN SUBSTANTIAL PART**. Based on the Court's lodestar calculation, Plaintiffs are awarded $1,082,930 in attorney fees, and $51,639.07 in out-of-pocket costs.

DATED: March 11, 2020



CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE