

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
LAKEVILLE DIVISION

SHERYL JORDAN, as Personal  
Representative of the Estate of  
DAVID JORDAN, JR.,

Case No. 2:20cv15994

Plaintiff,

vs.

SHERIFF DEREK MICHAELS in his  
official Capacity as Sheriff of Midland  
County, and ERIC WATSON, an  
individual,

Defendants.

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**DEFENDANTS MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S  
MOTION TO STRIKE AND IN SUPPORT OF DEFENDANT'S *MOTION IN  
LIMINE***

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## INTRODUCTORY STATEMENT

This Court is asked to grant the Defendant's *Motion in Limine* to exclude expert testimony and deny the Plaintiff's Motion to Strike the Defendant's Affirmative Defense of Qualified Immunity.

- I. The Plaintiff, Sheryl Jordan, as Personal Representative of the Estate of David Jordan, Jr., hereinafter "Jordan" has filed a Motion to Strike the Defendant Eric Watson's Affirmative Defense of Qualified Immunity. Deputy Watson's defense is sufficient, material, and pertinent. Deputy Watson acted in good faith as a reasonable officer would have under the same circumstance. At no time did Deputy Watson commit any act in derogation of Plaintiff's civil rights of which a reasonable officer would have had knowledge and at all times acted accordingly relying on statutes, policies, and procedures as authority for his actions. This Court should rule that Deputy Watson is entitled to the Affirmative Defense of Qualified Immunity because Deputy Watson did not violate any clearly established statutory or constitutional rights of which a reasonable officer would have known.
- II. The Plaintiff is seeking to introduce the testimony of Frank Edwards Ph.D., regarding the alleged racial bias present at Midland County Sheriff's Office and the impact that such racial bias had on Deputy Watson's actions on February 14, 2009. Mr. Edwards testimony centers on facts that will not assist the jury in understanding the case or deciding the facts at issue and instead risks confusing the jury. The testimony would unfairly prejudice Deputy Watson and would suggest a jury decision on an improper basis and therefore, should be excluded pursuant to Federal Rule of Evidence 403.

## STATEMENT OF FACTS

At 3:00pm on February 14, 2019, Deputy Watson started his shift for the Midland County Sheriff's Office. Watson Aff. ¶ 12. Shortly after the beginning of his shift Deputy Watson received a call regarding a noise disturbance in an area near Fort Hampton Elementary School. Watson Aff. ¶ 12 The caller, Lee McDonald, stated that the music was extremely vulgar, and that she was concerned that the students of the elementary school, who ranged in age from six to eleven years old, would hear it. McDonald Aff. ¶ 14.

McDonald was getting ready to line up the students for parent pick up. McDonald Aff. ¶ 6. During the lineup, McDonald could hear the loud and vulgar music. McDonald Aff. ¶ 6. The music was coming from the residence located directly across from the elementary school, 1501 58<sup>th</sup> Street South. McDonald Aff. ¶ 5. McDonald then proceeded to make the noise complaint call to the police. McDonald Aff. ¶ 4.

Upon arriving at 1501 58<sup>th</sup> Street South, Deputy Watson did not conduct a call history of the address. Watson Aff. ¶ 45. Deputy Watson also did not conduct a background investigation on the resident of the address, Jordan, and was unaware that fifteen years prior, while working for a different police department, he had arrested Jordan on a curfew violation. Watson Aff. ¶ 44-46.

When Deputy Watson and his assigned partner for the day, Deputy Rivera, arrived at 1501 58<sup>th</sup> Street South at 3:15 PM, the music was extremely loud and could be heard through the deputies' car windows. Watson Aff. ¶ 18. The music was vulgar and full of obscene, inappropriate language. Watson Aff. ¶ 19. Deputy Watson notified dispatch of his arrival at the address and parked his vehicle in front of the residence. Watson Aff. ¶ 20.

Deputy Watson and Deputy Rivera, while wearing their uniform and badge of authority, knocked on the front door but they did not get an initial response. **Watson Aff. ¶** 21. Deputy Rivera stayed at the front door while Deputy Watson went over to the side door to try and make contact with the resident of the home. **Watson Aff. ¶** 22. Deputy Watson used the end of his baton to knock, due to the high volume of the music, but this was a futile effort resulting in no response from the resident of the home. **Watson Aff. ¶** 23. Eventually the door began to open and Deputy Rivera announced himself stating in an effectively loud manner that he was with the sheriff's office. **Rivera Aff. ¶** 24. Deputy Watson began walking back toward the front door and noticed the music had gotten louder due to the front door having opened. **Watson Aff. ¶** 24.

Deputy Rivera observed a male, who was later identified as Jordan, wearing a dark t-shirt and jean shorts. **Rivera Aff. ¶** 25. Deputy Rivera observed a small black handgun in Jordan's right hand, which prompted him to shout "gun, gun, gun, drop the gun, drop the gun, drop the gun". **Rivera Aff. ¶** 27. Jordan then raised his right arm and pointed the gun at Deputy Rivera. **Rivera Aff. ¶** 28. Fearing for his life and anticipating being shot, Deputy Rivera started to draw his service weapon and retreat. **Rivera Aff. ¶** 32. Deputy Watson heard Deputy Rivera's desperate pleas for Jordan to drop the gun and headed towards the front door. **Watson Aff. ¶** 27. Deputy Watson observed Jordan's full face and body and proceeded to draw his service weapon aiming it at Jordan. **Watson Aff. ¶** 28.

Deputy Watson yelled "hey," which prompted Jordan to drift his attention away from Deputy Rivera and direct his sights towards Deputy Watson. **Watson Aff. ¶** 28. Deputy Watson observed Jordan raise his right hand, while holding what Deputy Watson

believed to be a gun. **Watson Aff. ¶ 32.** Jordan was almost directly in front of Deputy Rivera when Jordan began raising the gun in Deputy Rivera's direction. **Rivera Aff. ¶ 33.** Deputy Watson feared that Jordan was going to shoot his partner and possibly harm the children at the elementary school located directly behind the residence. **Watson Aff. ¶ 33.**

The situation had changed from a noise complaint to a potentially armed suspect threatening a law enforcement officer and Deputy Watson was trying to eliminate the threat of an armed suspect potentially harming his partner **Watson Aff. ¶ 38** Deputy Watson rapidly fired his service weapon four times at which point Jordan then started to close the door. **Watson Aff. ¶ 36.** Deputy Rivera observed the door begin to close after the first shots were fired. **Rivera Aff. ¶ 27.** Following the gun shots being fired Deputies Watson and Rivera took cover behind Deputy Rivera's police vehicle and notified dispatch that shots had been fired. **Rivera Aff. ¶ 36.**

Following the shooting, both Deputy Watson and Deputy Rivera were put on administrative leave for ten days. Deputy Watson and Deputy Rivera both visited the psychologist to receive clearance to resume their official duties. **Watson Aff. ¶ 52.** Deputy Watson later learned that the gun found in Jordan's shorts was a stolen weapon, but it had not been loaded **Watson Aff. ¶ 56.**

## **ARGUMENT**

### **I. Deputy Watson is entitled to the Affirmative Defense of Qualified Immunity.**

In the United States, the doctrine of qualified immunity grants government officials performing discretionary functions immunity from civil suits unless the plaintiff can show that the government official violated "clearly established statutory or constitutional

rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The United States Supreme Court first introduced the qualified immunity doctrine in an attempt to protect government officials from frivolous and unfounded lawsuits stemming from situations where the officer acted in good faith and where their life and the lives of others were imminently endangered. *Id.* The good faith of government official defendants claiming qualified immunity is tested on a purely objective standard and police officers are immune to the extent that their conduct does not violate clearly established rights. *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012).

To establish whether the affirmative defense is one that shall be awarded to the defendant the court should look at facts within the knowledge and control of the defendant and decide whether the surrounding circumstances afford a basis for qualified immunity as an affirmative defense. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The Supreme Court established a two-part test for whether a government official is entitled to qualified immunity: a court must look at (1) whether the facts indicate that a constitutional right was violated, and (2) whether that right was clearly established at the time of the alleged conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

A few years later the Supreme Court held that while the *Saucier* test is helpful, the court deciding the issue has discretion as to whether the test is necessary in deciding the question of whether qualified immunity is a proper defense for the defendant. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

**A. Deputy Watson's actions did not violate Jordan's constitutional rights because his actions were pursuant to those of a reasonable officer in the same circumstance.**

The analysis of an excessive force claim must begin isolating the specific constitutional right that has allegedly been violated by the use of force. *Graham*, 490 U.S. at 394. The soundness of the excessive force claim must then be judged with respect to the “specific constitutional standard which governs the right, rather than some generalized “excessive force” standard.” *Id.*

***1. Plaintiff’s Fourth Amendment claim is unsubstantiated.***

Police use of deadly force violates the Fourth Amendment prohibition against unreasonable seizures, unless the suspect poses a threat of death or serious harm to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). To determine if there has been a Fourth Amendment violation courts look at the seriousness of the crime, whether the suspect was attempting to flee and, most importantly, whether the suspect posed an imminent threat to the officer’s safety or that of civilians. *Graham*, 490 U.S. at 396. The facts are reviewed based on how a reasonable officer in the same circumstance would have perceived the situation. *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). The qualified immunity framework allows for error in officer perception and honest mistakes as long as they were objectively reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 185-186 (1990). Whether the officer could reasonably have believed that the level of force used did not violate the Fourth Amendment is relevant to the availability of the qualified immunity defense. *Anderson v. Creighton*, 483 U.S. 635, 636 (1987).

In *Smith v. Freland*, the court found that an officer acted reasonably and did not violate the deceased plaintiff’s Fourth Amendment rights when he used deadly force because the armed suspect posed a threat of physical injury to others when he tried to flee

the scene in his vehicle. 954 F.2d 343, 347 (6th Cir. 1992). The court noted that the officer had reason to believe that the suspect posed a threat of physical harm to others and thus it was not constitutionally unreasonable for the officer to use deadly force, even though the suspect was surrounded by several armed police officers and was not confirmed to have had a gun. *Id.*

As in *Smith*, Deputy Watson acted reasonably under the circumstances and did not violate Jordan's Fourth Amendment rights because Deputy Watson reasonably believed Jordan posed a threat of serious physical harm to the deputies and innocent children. Furthermore, Jordan had a gun and was not surrounded by several other armed officers, making it even more reasonable that deadly force would be used to eliminate the threat. The threat was clearly imminent because Deputy Rivera stated that he was standing directly in front of Jordan as Jordan raised his weapon and thus it was objectively reasonable for Deputy Watson to use deadly force.

It is reasonable for Deputy Watson to have believed that Jordan was armed due to Deputy Rivera's repeated pleas for Jordan to drop his weapon and seeing Jordan holding an object in his hand which Deputy Watson believed to be a gun. When looking at the events from Deputy Watson's perspective, it is evident that Deputy Watson acted objectively reasonable under the circumstances and, therefore, did not violate Jordan's Fourth Amendment rights and

## ***2. Plaintiff's Fourteenth amendment claim is unsubstantiated.***

In order to appraise the constitutionality of a law enforcement official's conduct the courts apply a "shock the conscience" test. *Moreland v. Las Vegas Metro. Police*

*Dep't*, 159 F.3d 365, 372 (9th Cir. 1998). When a law enforcement officer makes a snap judgment because a situation is escalating quickly, his conduct may only be found to shock the conscience, and therefore be considered unconstitutional, if he acts with a purpose to harm, unrelated to legitimate law enforcement objectives. *Id.* For example, a purpose to harm might be found where an officer uses force to bully a suspect or to "get even." *Id.* at 1140.

In *Wilkinson v. Torres*, the court held that the officer's use of force did not violate the deceased suspects Fourteenth Amendment rights because the suspect was attempting to accelerate his vehicle in reverse and posing a threat of serious harm towards the officer and innocent bystanders. 610 F.3d 546, 552 (9th Cir. 2010). Even construing the facts in the light most favorable to the plaintiffs, the officer had probable cause to believe that the suspect posed an immediate threat to the safety of himself and his partner. *Id.* at 554. The court found that there was no evidence that the officer had acted with purpose to harm the suspect for any reason that fell outside of legitimate law enforcement objectives. *Id.* at 555. Furthermore, the court stated that the officer was caught in an unpredictable, rapidly evolving situation requiring him to make split-second judgments, and that the officer made the right decision to minimize the risk to his own safety and the safety of others. *Id.*

Deputy Watson had no reasonable choice other than to respond to Jordan's threats with deadly force. Jordan was an armed suspect threatening the lives of innocent civilians and that of his partner, Deputy Rivera, making deadly force the only reasonable choice. As in *Wilkinson*, no one could have predicted that a noise complaint would escalate into a

serious threat of physical injury. Furthermore, there is no evidence that Deputy Watson acted with a purpose to harm Jordan, as the situation transpired in a matter of seconds leaving Deputy Watson no other choice but to use force in order to effectuate the legitimate law enforcement objective of protecting himself and others from harm. Although Jordan's injuries were fatal, Deputy Watson's actions and intentions were at all times in good faith, objectively reasonable and performed under his official capacity.

**B. There is no clearly established law holding Deputy Watson's actions unconstitutional.**

For the second prong of a qualified immunity inquiry, the court must look at whether the right the officer is alleged to have violated was clearly established at the time of the officer's conduct. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). The right must be sufficiently clear and fixed at the time of the officer's conduct that a reasonable officer would recognize that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. at 640. If the right was not clearly established the officer in question could not reasonably be expected to have known that his conduct was a violation of said right. *Wilson*, 526 U.S. at 609.

In *McClish v. Nugent*, the officer violently pulled the plaintiff outside of his house and placed him under arrest without a warrant. 483 F.3d 1231, 1236 (11th Cir. 2007). The plaintiff sued the officer, claiming the officer had violated his constitutional rights. *Id.* The court held that a constitutional right had not been violated because at the time of the arrest the state of the law, as to warrantless doorway arrests, was not

clearly established and, therefore, the second prong of the qualified immunity inquiry could not be satisfied. *Id.* at 1238.

As in *Mclish*, at the time that the use of force occurred there was no clearly established law deeming it unconstitutional for an officer to act as Deputy Watson had acted during the events that ultimately lead to Jordan's death. There is no clearly established law under claims of excessive force, illegal seizure or deprivation of due process of law that would hold that Deputy Watson's actions were those of an unreasonable officer who transcended upon the rights of the deceased. Furthermore, there is no binding authority holding that a police officer using deadly force on a suspect who was holding a gun and raising it towards the officer's partner is a violation of the suspect's constitutional rights because such a use of force would be considered objectively reasonable.

## **II. Frank Edwards, Ph.D. should not be permitted to testify as an expert witness.**

A witness who is qualified as an expert may testify as to their opinion or otherwise if that experts "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . ." *Fed. R. Evid. 702*. The trial judge has an obligation to act as a gate keeper to ensure that all expert testimony rests on a reliable foundation and is relevant to the matter at hand. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148 (1999).

**A. Mr. Edwards testimony is not relevant to the matter at hand and therefore will not help the trier of fact to determine a fact at issue.**

If evidence is not relevant to the issue being determined by the trier of fact, such evidence cannot be helpful in determining a fact at issue. *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985). Evidence is not relevant unless it is likely to make a fact, which is of consequence in determining the issue, more or less probable than it would be without the evidence. Fed. R. Evid. 401.

Mr. Edwards testimony seeks to show how the alleged racial biases held throughout the Midland Sheriff's Office affected Deputy Watsons decision to shoot Jordan. A use of force is reasonable if the officers actions are objectively reasonable, when taken in consideration of the facts and circumstances confronting them. *Graham v. Connor*, 490 U.S. at 397. The underlying intent or motivation of an officer is irrelevant to the jury's proper inquiry. *Id.* Accordingly, any underlying reason that may have played a part in Deputy Watsons decision making the day of the shooting, such as alleged racial bias, is not relevant to the jury's determination of whether the use of force was objectively reasonable under the surrounding circumstances.

In *Kenney v. Head*, the court held that testimony regarding the officers alleged aggressive and inappropriate statements prior to the arrest and use of force was not relevant because it was offered to show a potential alternative explanation for why the officer arrested the plaintiff. 670 F.3d 354, 358 (1st Cir. 2012). The court reasoned that the inquiry into whether the officer had probable cause for the arrest (like an inquiry into whether a use of force was excessive) is based on an objective standard. *Id.* at 359. Therefore, any subjective alternative explanation as to why the officer arrested the

plaintiff would not make the existence of any fact relating to the issue of whether the officer's belief of probable cause was objectively reasonable more or less probable. *Id.*

Similarly, in the present case, any testimony concerning a subjective explanation for why Deputy Watson may have used force against Jordan could not help the jurors determine if Deputy Watson's actions were objectively reasonable under the circumstances. Therefore, the testimony concerning racial bias is irrelevant and could not help the jurors to determine the fact at issue, which is solely whether an objectively reasonable officer under the same circumstance would have used deadly force against Jordan.

**B. Even if Mr. Edwards testimony is relevant, the probative value of Mr. Edwards testimony is outweighed by the adverse effect such testimony would have on the effectiveness and integrity of the fact-finding process.**

Relevant evidence may be excluded "if its probative value is substantially outweighed by . . . unfair prejudice, confusing the issues, misleading the jury...." Fed. R. Evid. 403.

Expert witness testimony can be powerful and at times quite misleading because of the difficulty jurors have in evaluating such testimony. Therefore, due to the risk, the judge must exercise greater control over experts than over lay witnesses when weighing possible prejudice against the probative value of the evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

1. *Mr. Edwards Testimony would confuse the jury because it would imply that the officer's intent is an element the jury must consider when determining whether a use of force is objectively reasonable under the circumstances.*

Testimony that could confuse the jurors and thereby induce the jury to base their determination on something outside the essential elements of the offense, should be

excluded. *Kerr v. Miami-Dade County*, 856 F.3d 795, 813 (11th Cir. 2017). In an excessive force claim the officers “evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force.” *Tanberg v. Sholtis*, 401 F.3d 1151, 1168 (10th Cir. 2005).

The jury must only decide whether Deputy Watsons use of force was objectively reasonable given the circumstances surrounding the use of force. Mr. Edwards testimony as to the impact that the alleged racial bias present at the Midland County Sheriff’s Office had on Deputy Watsons actions the day he shot Jordan while trying to protect himself and others is outside the purview of what the jurors must consider. Allowing jurors to hear evidence that is outside the purview of the issue they are to determine creates a substantial risk that the jurors could become confused as to what they must base their decision on.

In *Kerr v. Miami-Dade County*, the court held that there was no abuse of discretion in excluding evidence that the officers allegedly violated standard pursuit policy when they engaged the plaintiff, which ultimately lead to a use of force. 856 F.3d at 813. This evidence was excluded because of the substantial risk that it would “confuse the jurors by leading them to believe that they could find liability based on a violation of the pursuit policy rather than on a violation of the Fourth Amendment.” *Id.* The court reasoned that even if the officers conduct leading up to the deadly confrontation was imprudent, inappropriate, or even reckless, the jury’s determination of the issue should only be based on whether they found that the officers use of force was objectively reasonable. *Id.*

Similarly, in the present case, allowing testimony concerning alleged racial bias in the Midland Country Sheriff's Office could confuse the jury by leading them to believe that Deputy Watson's state of mind during the use of force is an element that they must consider when making their determination.

In *Thompson v. City of Chicago*, the court held that the expert witness's testimony regarding his opinion as to whether and why the officer used excessive force must be excluded due to its potential for confusing the jury. 472 F.3d 444, 458, (7th Cir. 2006). The court reasoned that the question of whether a use of force was excessive is a fact intensive inquiry and any testimony that seeks to explain whether and why the officer used force that is not based on the particular officer's actions in light of the specific circumstance of the situation would only serve to confuse the jury. *Id.*

As in *Thompson*, Mr. Edwards seeks to testify as to why Deputy Watson may have used force but his testimony is not centered around Deputy Watson's particular actions in light of the specific circumstance. Rather, Mr. Edwards' testimony centers around the actions of other officers in other situations and imposes those findings onto the particular circumstance at issue. Any testimony concerning the possibility of why Deputy Watson used force in his altercation with Jordan, other than by showing the surrounding circumstances in which Deputy Watson found himself, would confuse the jury and could lead them to believe their decision should be based on something other than the "objectively reasonable" standard.

2. *Mr. Edwards' testimony would be unfairly prejudicial because the implication that racial bias played a part in Officer Watson's use of force would tend to suggest a decision on an improper basis.*

Evidence is unfairly prejudicial under Federal Rule of Evidence 403, if the relevant evidence tends to lure the factfinder to base its decision on grounds other than the legal theory relevant to the case. *Old Chief v. United States*, 519 U.S. 172, 180 (1997). The risk that the jury will make its determination based on bad acts not relevant to the matter at hand or the defendants alleged poor character creates a prejudicial effect that outweighs probative value. *Id.* at 181.

The probative value of Mr. Edwards testimony concerning racial bias would be outweighed by the danger of unfair prejudice against Deputy Watson. Considering the mounting tension erupting across the nation concerning police shootings of African-Americans, the mere mention that the shooting may have involved a racial motivation could have a severe prejudicial effect and would likely cause some jurors to base their decision on outrage and sympathy rather than whether the use of force was objectively reasonable. Furthermore, such testimony's prejudicial effect could not be outweighed by its probative value because the nature of the case is not one in which racial bias would be an obvious subject that should be addressed.

In *Price v. Kramer*, a police officer had followed and ultimately pulled over two young black boys because they had been driving in a "white part of town"; during the interaction, the officer referred to them as "two young blacks," told them they did not belong in that part of town, and used force with no apparent reason. 200 F.3d 1237, 1240-1243 (9th Cir. 2000). The court held that even though officer subjective intent isn't relevant in an excessive force claim due to the nature of the case "racial bias was an

obvious and appropriate subject to explore. . . .” and that, based on the surrounding circumstances of the case, the probative value of racial bias evidence outweighed the potential for undue prejudice. *Id.* at 1251.

There is a stark contrast between *Price* and the case at hand. In *Price*, there was suspected racial profiling, no perception of a threat, nor anybody crying out “gun.” Thus, these facts would naturally lead an individual to assume racial bias had played a part in the officer stopping the boys because there was no other explanation for why the officer would have instigated the situation. Therefore, the probative value of testimony concerning racial bias would not be outweighed by unfair prejudice.

In the case at hand, Deputy Watson did not instigate the investigation, he was called to that location for a noise complaint. There is no indication that Deputy Watson was even aware of Jordan’s race until just moments before Deputy Rivera yelled “gun.” Deputy Watson heard his partner screamed “gun, drop the gun.” Deputy Watson saw a dark object which he believed to have been a weapon and he knew that if he did not act himself, his partner and children across at the elementary school the street, could be in danger. Moreover, Deputy Watson made no statements during the altercation that would lend support to the idea that his actions were impacted by supposed racial biases. There is no indication that racial bias played a role in Deputy Watsons actions and would thus be a natural topic to explore. Therefore, any testimony alleging that racial bias may have impacted Deputy Watsons actions would be unfairly prejudicial.

## **CONCLUSION**

For the reasons set out above, the Defendant respectfully requests that the Court prohibit the testimony at trial of Plaintiffs expert witness Frank Edward, Ph.D., and allow the Defendants Qualified Immunity Affirmative Defense and therefore requests that the Court grant the Defendants *Motion in Limine*, and deny the Plaintiffs Motion to Strike.

DATED: September 10, 2020

Respectfully submitted,

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Team 1000  
Counsel for Defendant