DAVID D. LAWRENCE, State Bar No. 123039
dlawrence@lbaclaw.com
DENNIS M. GONZALES, State Bar No. 59414
dgonzales@lbaclaw.com
NATHAN A. OYSTER, State Bar No. 225307
noyster@lbaclaw.com
LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone No. (818) 545-1925
Facsimile No. (818) 545-1937

Attorneys for Defendant
Burbank Police Department Officer Gunn

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PRESTON SMITH, an individual; Plaintiff, vs. CITY OF BURBANK; BURBANK POLICE DEPARTMENT; BURBANK POLICE DEPARTMENT OFFICER GUNN; BURBANK POLICE DEPARTMENT OFFICER BAUMGARTEN; BURBANK POLICE DEPARTMENT OFFICER EDWARDS; AND DOES 1 THROUGH 100, INCLUSIVE Defendants.	Case No. CV 10-08840 R (AGRx) Honorable Manuel L. Real **NOTICE OF OFFICER GUNN'S MOTION AND MOTION FOR SUMMARY JUDGMENT** *[Declarations and Exhibits, Separate Statement, and [Proposed] Judgment filed concurrently herewith]* Date: July 2, 2012 Time: 10:00 a.m. Courtroom: 8

TO THE HONORABLE COURT, ALL PARTIES, AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 2, 2012 at 10:00 a.m., or as soon as thereafter as counsel may be heard, in Courtroom 8 of the above-referenced Court located at 312 North Spring Street, Los Angeles, California 90012, Defendant

0.4

OFFICER NEIL GUNN, JR. (hereinafter "Officer Gunn") will and does hereby move this Court, pursuant to Federal Rules of Civil Procedure, Rule 56, for an order granting summary judgment in favor of Officer Gunn and against Plaintiff as to all claims for relief on the basis that there is insufficient evidence to create a triable issue of material fact.

Officer Gunn's Motion is made on the following grounds:

1. Plaintiff's Section 1983 claim against Officer Gunn is barred because Plaintiff pled guilty to the same facts and actions violating California Penal Code § 148(a)(1) that Plaintiff is asserting in his Section 1983 claim. *Heck v. Humphrey*, 512 U.S. 477, 486-487, 114 S.Ct. 2364 (1994); *Hooper v. County of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011);

2. Plaintiff's state law claims are barred because of his prior conviction for violating California Penal Code § 148(a)(1), *Yount v. City of Sacramento*, 43 Cal.4th 885, 902 (2008);

3. The force used against Plaintiff was reasonable and not excessive, precluding § 1983 liability against Officer Gunn;

4. Officer Gunn is entitled to qualified immunity;

5. Plaintiff's claim under California Civil Code § 52.1 against Officer Gunn fails because Plaintiff has not alleged a separate conduct causing threats, interference or coercion;

6. Plaintiff's claim for intentional infliction of emotional distress against Officer Gunn is barred because Officer Gunn's conduct was not extreme and outrageous and because Plaintiff did not suffer severe emotional distress; and

7. Plaintiff's claim for assault and battery against Officer Gunn is barred because Officer Gunn's actions were reasonable throughout the incident.

This Motion will be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities filed and served herewith, the Separate Statement of Uncontroverted Facts and Conclusions of Law, filed and served

concurrently herewith, the Declaration of Nathan A. Oyster and Exhibits thereto filed and served concurrently herewith, the pleadings, documents and records on file herein, and upon such other further oral or documentary matters as may be presented at the hearing of this motion.

Dated: June 4, 2012

LAWRENCE BEACH ALLEN & CHOI, PC

By /s/ Nathan A. Oyster
Nathan A. Oyster
Attorneys for Defendant
Burbank Police Department Officer Gunn

TABLE OF CONTENTS

Page

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION. 1

II. STATEMENT OF FACTS 1

A. Plaintiff's Version Of The Incident. 1

B. Plaintiff's Conviction. 2

III. PARTIES AND CLAIMS FOR RELIEF 3

IV. STANDARD FOR MOTION FOR SUMMARY JUDGMENT. 3

V. PLAINTIFF'S SECTION 1983 CLAIM IS BARRED BY HIS CONVICTION FOR VIOLATING PENAL CODE § 148. 3

VI. PLAINTIFF'S STATE LAW CLAIMS ARE ALSO BARRED BY HIS CONVICTION FOR VIOLATING CALIFORNIA PENAL CODE § 148(a)(1). 7

VII. EVEN ASSUMING *HECK V. HUMPHREY* DOES NOT APPLY IN THE INSTANT CASE, OFFICER GUNN USED REASONABLE FORCE THROUGHOUT THE SUBJECT INCIDENT AND THEREFORE, IS ENTITLED TO SUMMARY JUDGMENT OF PLAINTIFF'S EXCESSIVE FORCE CLAIM UNDER § 1983. 7

VIII. OFFICER GUNN IS ENTITLED TO QUALIFIED IMMUNITY FROM PLAINTIFF'S § 1983 CLAIM. 9

IX. PLAINTIFF'S CLAIMS UNDER CALIFORNIA CIVIL CODE § 52.1 FAIL AS A MATTER OF LAW BECAUSE PLAINTIFF HAS NOT SEPARATELY SHOWN INTERFERENCE OR COERCION APART FROM HIS EXCESSIVE FORCE CLAIM. 11

X. PLAINTIFF CANNOT STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE PLAINTIFF DID NOT SUFFER SEVERE EMOTIONAL DISTRESS. 14

XI. PLAINTIFF'S STATE LAW CLAIM FOR ASSAULT AND BATTERY FAILS BECAUSE OFFICER GUNN USED REASONABLE FORCE. 16

XII. CONCLUSION. 17

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Liberty Lobby,
477 U.S. 242, 106 S.Ct. 2505 (1986) 3

Austin B. v. Escondido Union School Dist.,
149 Cal.App.4th 860 (2007) 11

Barsamian v. City of Kingsburg,
597 F.Supp.2d 1054 (E.D.Cal. 2009) 11

Blankenhorn v. City of Orange,
485 F.3d 463 (9th Cir. 2007) 7

Bryan v. MacPherson,
630 F.3d 805 (9th Cir. 2010) 10

City and County of San Francisco v. Ballard,
136 Cal. App. 4th 381 (2006) 11

Edson v. City of Anaheim
(1998) 63 Cal.App.4th 1269 16

Fowler v. Varian Associates, Inc.,
196 Cal.App.3d 34, 44 (1987) 14

Franklin v. County of Riverside,
971 F.Supp. 1332 (C.D.Cal. 1997) 6

Gant v. County of Los Angeles
(C.D.Cal. 2011) 765 F.Supp.2d 1238 ..... 13, 14

Graham v. Connor,
490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) 7, 8

Haynes v. City and County of San Francisco,
2010 WL 2991732 at *6 (N.D. Cal. 2010) 11

Heck v. Humphrey 2, 4, 6

Hooper v. County of San Diego,
629 F.3d 1127 (9th Cir. 2011) 2, 4

Johnson v. Bay Area Rapid Transit,
790 F.Supp.2d 1034 (N.D. Cal. 2011) 11

Justin v. City and County of San Francisco, 2008 WL 1990819, at *9 (N.D. Cal. 2008) 12

Lanier v. City of Fresno
2011 WL 149802 (E.D.Cal. 2011) 13

Mattos v. Agarano,
661 F.3d 433 (9th Cir. 2011) 10

McMurray v. County of Sacramento,
2011 WL 4709876, *19-20 (E.D. Cal. 2011) 10

Nuno v. County of San Bernardino,
58 F.Supp.2d 1127 (C.D.Cal. 1999) 6

Pearson v. Callahan,
555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) 9, 10

People v. Curtis,
70 Cal.2d 347 (1969) 5

People v. Olguin,
119 Cal.App.3d 39 (1981) 5

Rodriguez v. City of Fresno
2011 WL 1883195, *12 (E.D.Cal. 2011) 12

Scott v. Harris,
550 U.S. 372, 127 S.Ct. 1769 (2007) 9

Shoyoye v. County of Los Angeles
203 Cal.App.4th 947 (2012) 14

Simo v. Union of Needletrades, Industrial & Textile Employees,
322 F.3d 602, 621-22 (9th Cir. 2003) 15

Smith v. Hemet, 394 F.3d 689, 695 (2005) 4

Smithart v. Towery,
79 F.3d 951 (9th Cir. 1996) 4

Susag v. City of Lake Forest,
94 Cal.App.4th 1401 (2002) 5

Tennessee v. Garner,
471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) 7

Valiavicharska v. Celaya,
2011 WL 6370059, *11 (N.D. Cal. 2011) 16

Wong v. Tai Jing,
189 Cal.App.4th 1354 (2010) 15

Yount v. City of Sacramento,
43 Cal.4th 885 (2008) 2, 7

Statutes

42 U.S.C. § 1983 3

Cal. Pen. Code § 242; 5 16

California Civil Code § 52.1 ..... passim
California Penal Code § 148(a)(1) ..... passim
Penal Code § 835a 16

Rules

Federal Rules of Civil Procedure, Rule 56 3

Treatises

5 Witkin, Summary of California Law (9th ed. 1988), Torts, § 346, p. 436 16

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This case stems from the April 10, 2009 arrest of Plaintiff Preston Smith (hereinafter "Plaintiff"), who has previously been convicted of approximately 13 felonies. Following his arrest, Plaintiff pled guilty to violating California Penal Code § 148(a)(1) – interfering with a peace officer in the lawful performance of his duties. Plaintiff also pled guilty to the possession of a controlled substance.

Despite his acknowledged guilt and the criminal court's final adjudication of the matter, Plaintiff now attempts to reframe the incident with the benefit of hindsight to claim civil and monetary damages against Officer Gunn and other officers involved in the underlying incident that occurred three years ago. Yet, as discussed below, Plaintiff's version of the incident directly contradicts the admissions he made in his criminal case. Furthermore, the facts in this case prove that Officer Gunn acted reasonably throughout the incident in response to Plaintiff's criminal behavior.

Officer Gunn respectfully moves for summary judgment as to all of Plaintiff's claims.

II. STATEMENT OF FACTS.

A. Plaintiff's Version Of The Incident.

On April 10, 2009, Plaintiff and Mario Champieux ("Mr. Champieux") were being questioned by Officer Gunn near a liquor store in the City of Burbank. Defendants' Uncontroverted Material Facts ("DF") 1. Officer Gunn asked Plaintiff and Mr. Champieux to stand in front of his patrol vehicle. Officer Gunn exited his vehicle, illuminated his flashlight on the ground, and began searching the nearby grounds. DF 2. At this time, Plaintiff ran away from Officer Gunn despite orders to stop. DF 3.

Officer Gunn engaged in foot-pursuit of Plaintiff which allegedly lasted about 30 to 40 seconds. DF 4. At the end of the foot chase, Plaintiff jumped over

a wall in a dark residential neighborhood alley and into a residential backyard. DF 5.

While Plaintiff was in the residential backyard, a struggle ensued which allegedly lasted between three to four minutes. DF 6. During this struggle, Plaintiff used his elbows, hands, arms, and legs against Officer Gunn and other responding Burbank Police Department Officers who were trying to lawfully detain Plaintiff. DF 7. Despite acknowledging these actions in his plea during the criminal matter, Plaintiff denies having used any force against Officer Gunn and the other responding Officers. DF 8.

At the end of the incident in the residential backyard, Plaintiff was placed in handcuffs and transported via ambulance to St. Joseph's Hospital for medical treatment. DF 9-10.

B. <u>Plaintiff's Conviction.</u>

On April 14, 2009, a four-count misdemeanor complaint was filed against Plaintiff in the Los Angeles Superior Court. DF 11. Count II of the complaint alleged that Plaintiff "did willfully and unlawfully resist, delay or obstruct a public officer discharging or attempting to discharge any duty of his office or employment" – a violation of California Penal Code § 148(a)(1). DF 12. Specifically, the criminal complaint alleged that Plaintiff committed the following acts of resistance:

- Plaintiff ran from Officer Gunn during a lawful detention and despite orders to stop. DF 13.
- Plaintiff used his elbows and hands in a fist to strike Officer Baumgarten, Officer Edwards, Officer Joel Rodriguez, and Officer Gunn during the officers' attempt to lawfully restrain Plaintiff. DF 14.
- Plaintiff flailed his arms and kicked his legs when Officer Baumgarten, Officer Edwards, Officer Joel Rodriguez, and Officer Gunn tried to detain him. DF 15.

On April 29, 2009, Plaintiff plead guilty to violating Count II of the complaint – California Penal Code § 148(a)(1). DF 16. Plaintiff signed a four-page document entitled "Misdemeanor Advisement of Rights, Waiver, and Plea Form", which freely acknowledges his guilty plea. DF 17. Plaintiff's plea was approved by the Court. DF 18. Plaintiff admits that the conviction has not been expunged, withdrawn, or overturned. DF 19.

III. PARTIES AND CLAIMS FOR RELIEF.

Plaintiff in this action is Preston Smith. Defendants in this action are the City of Burbank, the Burbank Police Department, Burbank Police Department Officer Baumgarten, Officer Edwards, and Officer Gunn.

Plaintiff's Complaint contains four claims for relief – (1) a violation of his Fourth Amendment rights pursuant to 42 U.S.C. § 1983, (2) California Civil Code § 52.1, (3) intentional infliction of emotional distress, and (4) assault and battery.

IV. STANDARD FOR MOTION FOR SUMMARY JUDGMENT.

Summary judgment must be rendered when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure, Rule 56 (c); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Further, if summary judgment is not granted on the entire action, a court may render partial summary judgment on individual issues as to which there remains no genuine issue of material fact. Federal Rules of Civil Procedure, Rule 56 (b), (d). "If the evidence is merely colorable, or is **not significantly probative**, summary judgment may be granted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-250, 106 S.Ct. 2505 (1986) (emphasis added).

V. PLAINTIFF'S SECTION 1983 CLAIM IS BARRED BY HIS CONVICTION FOR VIOLATING PENAL CODE § 148.

Plaintiff's Section 1983 claim against Officer Gunn is barred by the long-standing doctrine that a civil rights plaintiff cannot pursue a claim that could call

into question his criminal conviction. In *Heck v. Humphrey*, the Supreme Court held that:

> "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.... A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is *not* cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed...."

Heck, 512 U.S. 477, 486-487, 114 S.Ct. 2364 (1994).

Heck says that "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." *Smith v. Hemet*, 394 F.3d 689, 695 (2005); *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996); *see Hooper v. County of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) ("we conclude that a conviction under California Penal Code §148(a)(1) does not bar a § 1983 claim for excessive force under *Heck* when the conviction and the § 1983 claim are based on different actions during one continuous transaction.") (internal quotation marks omitted).

For a Penal Code § 148(a)(1) conviction to be valid, the criminal defendant must resist, delay, or obstruct the officer in the **lawful** exercise of his duties.

Smith, 394 F.3d at 695. The lawfulness of the officer's conduct is an essential element of the crime. See *People v. Curtis*, 70 Cal.2d 347, 354-356 (1969); *Susag v. City of Lake Forest*, 94 Cal.App.4th 1401, 1409 (2002). Therefore, if the officer was not performing his or her duties at the time of the arrest, the arrest is unlawful and the arrestee cannot be convicted under Penal Code § 148(a)(1). *Smith*, 394 F.3d at 695.

"Excessive force used by a police officer *at the time of the arrest* is not within the performance of the officer's duty." *Smith*, 394 F.3d at 695 (emphasis in original); citing *People v. Olguin*, 119 Cal.App.3d 39, 45-46 (1981). If Officer Gunn had been using excessive force against Plaintiff, then Plaintiff could not have been convicted of violating California Penal Code § 148(a)(1). Because Plaintiff pled guilty to the violation, a finding in his favor on his Section 1983 claim against Officer Gunn would be inconsistent and necessarily invalidate his conviction.

Here, Plaintiff's section 1983 claim is based on the same facts and actions as considered under his conviction. Count II in the misdemeanor complaint specifically delineates multiple instances where Plaintiff willfully and unlawfully resisted Officer Gunn's attempt to discharge his lawful duty to detain and arrest Plaintiff. DF 16. Not only did Plaintiff run away from Officer Gunn, but he used his elbows, hands, arms, and legs to resist and obstruct Officer Gunn from performing his lawful duties. DF 7. As explained above, Plaintiff pled guilty to these charges. DF 20. These are the same facts and actions upon which Plaintiff brings forth his section 1983 claim.

Plaintiff has argued in previous filings with the Court that he only resisted arrest by fleeing the officers. Docket No. 27 at 14. In fact, Plaintiff explicitly states that he was not resisting arrest. *Id.* Yet, this statement flies in the face of the misdemeanor complaint he pled guilty to which clearly states that he used force with his elbows, hands, arms, and legs against the officers. In this action,

Plaintiff's criminal record and conviction prevents him from making the same argument to obtain civil damages. The criminal record demonstrates that Plaintiff violated Penal Code § 148(a)(1) during the entire period of time that he interacted with Officer Gunn. Neither Plaintiff nor his criminal counsel limited the scope of the factual basis for Plaintiff's guilty plea. DF 21. The criminal record, therefore, precludes a finding that Officer Gunn used excessive force. Accordingly, the Court should not rely upon Plaintiff's over mischaracterization of the facts in this case.

Further, Plaintiff's own testimony during his deposition upon which he brings forth this present suit unavoidably contradicts his prior criminal conviction. When asked whether he pled guilty to charges arising out of his arrest on April 10, 2009, Plaintiff answered affirmatively. DF 8. Yet, when asked whether he "[u]sed elbows and hands and a fist to strike Officer Edwards, Officer Joel Rodriguez, and Officer Gunn during an attempt to lawfully restrain the defendant," Plaintiff responded that "[he] didn't plead guilty to that". DF 8. Similar to Plaintiff's declaration, Plaintiff's emphatic denial and contradiction of the facts underlying his criminal matter during his deposition is **"fundamentally inconsistent"** with Plaintiff's prior criminal conviction. This is the circumstance that falls within the *Heck* preclusion doctrine.

Additionally, federal district courts have held that *Heck v. Humphrey* bars a plaintiff's Section 1983 action for excessive force absent proof that a conviction under Penal Code § 148(a) has been invalidated by appeal or other proceeding. *Franklin v. County of Riverside*, 971 F.Supp. 1332, 1336 (C.D.Cal. 1997); *Nuno v. County of San Bernardino*, 58 F.Supp.2d 1127, 1133-1134 (C.D.Cal. 1999). Because Plaintiff's conviction has not been invalidated, his Section 1983 claim against Officer Gunn should be dismissed.

///

///

VI. PLAINTIFF'S STATE LAW CLAIMS ARE ALSO BARRED BY HIS CONVICTION FOR VIOLATING CALIFORNIA PENAL CODE § 148(a)(1).

The California Supreme Court has applied the *Heck* principle to claims brought under California law. *Yount v. City of Sacramento*, 43 Cal.4th 885, 902 (2008). "[W]e cannot think of a reason to distinguish between section 1983 and a state tort claim arising from the same alleged misconduct..." *Id.* Accordingly, Plaintiff's state law claims for California Civil Code § 52.1, intentional infliction of emotional distress, and assault and battery should be dismissed as well.

VII. EVEN ASSUMING *HECK V. HUMPHREY* DOES NOT APPLY IN THE INSTANT CASE, OFFICER GUNN USED REASONABLE FORCE THROUGHOUT THE SUBJECT INCIDENT AND THEREFORE, IS ENTITLED TO SUMMARY JUDGMENT OF PLAINTIFF'S EXCESSIVE FORCE CLAIM UNDER § 1983.

"The Fourth Amendment requires police officers making an arrest to use only an amount of force that is objectively reasonable in light of the circumstances facing them." *Blankenhorn v. City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007), *citing Tennessee v. Garner*, 471 U.S. 1, 7-8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). "Neither tackling nor punching a suspect to make an arrest necessarily constitutes excessive force." *Id.*, *citing Graham v. Connor*, 490 U.S. 386 , 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("Not every push or shove, even if it may seem unnecessary in the peace of the judge's chambers, ... violates the Fourth Amendment") (internal quotation marks omitted). The question in all cases is whether the use of force was "objectively reasonable in light of the facts and circumstances confronting" the arresting officers. *Graham*, 490 U.S. at 397, 109 S.Ct. 1865 (internal quotation marks omitted).

"To determine whether a specific use of force was reasonable, [the court] must balance the nature and quality of the intrusion on the individual's Fourth

Amendment interests against the countervailing government interests at stake." *Blankenhorn*, 485 F.3d 463, 477 (internal quotation marks and citation omitted). Relevant factors to this inquiry include, but are not limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. The reasonableness determination must also make "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Here, the facts are undisputed that Plaintiff ran away from Officer Gunn during a lawful detention. DF 3. Plaintiff ran away into a dark residential alley and continued to evade Officer Gunn as Plaintiff tried to disappear into a residential backyard. DF 5. Realizing the uncertain and lurking dangers of running after an unidentified person through unfamiliar dark alleys, Officer Gunn discharged his taser in an effort to gain control of the situation before any further escalation.

Officer Gunn's application of force was necessary and reasonable since Plaintiff unlawfully resisted arrest. As indicated above, while Officer Gunn and other responding officers tried to detain Plaintiff, Plaintiff used his elbows, arms, hands, and legs to strike the officers. DF 7.

Any reasonable officer in Officer Gunn's position would have deployed a similar, or greater, amount of force given the underlying circumstances. Therefore, any force used by Officer Gunn during the subject incident was not excessive.

///

///

///

Moreover, as fully explained above, Plaintiff's version of the facts is blatantly contradicted by the record in the criminal matter.[1] Plaintiff's attempt to rewrite the facts in his favor is "utterly discredited by the record that no reasonable jury could [ ] believe him." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). Accordingly, the Court should not rely upon Plaintiff's version of the facts.

VIII. OFFICER GUNN IS ENTITLED TO QUALIFIED IMMUNITY FROM PLAINTIFF'S § 1983 CLAIM.

The Supreme Court has explained that "[t]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (internal quotation marks omitted). "Qualified immunity shields an officer from liability even if his or her action resulted from "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* (internal quotation marks omitted).

To determine whether an officer is entitled to qualified immunity, courts employ a two-step test: "first, [courts] decide whether the officer violated a plaintiff's constitutional right; if the answer to that inquiry is yes, [courts] proceed to determine whether the constitutional right was clearly established in light of the specific context of the case at the time of the events in question." *Mattos v.*

---

[1] Judge Fairbank previously granted Officer Gunn's Request for Judicial Notice of documents related to Plaintiff's criminal matter. (*See* May 13, 2011 Civil Minutes, pg. 2, fn. 1.)

Agarano, 661 F.3d 433, 440 (9th Cir. 2011); *see Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

As set forth above in Section VIII, Officer Gunn did not violate Plaintiff's constitutional right under the Fourth Amendment. Assuming *arguendo*, that the Court does find that Officer Gunn violated Plaintiff's constitutional right, Officer Gunn is still entitled to qualified immunity as the law surrounding Officer Gunn's actions during the subject incident was not clearly established.

In determining this second prong of the qualified immunity test, "[courts] ask whether [the constitutional rights'] contours were sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mattos*, 661 F.3d at 442 (internal quotation marks omitted). Here, it is clear that the only physical contact applied by Officer Gunn on Plaintiff was the use of his Taser first and then subsequent, limited application of force with his flashlight.

In regard to Officer Gunn's use of his Taser, the law was not clearly established at the time of the subject incident on April 10, 2009. *See Bryan v. MacPherson*, 630 F.3d 805, 833 (9th Cir. 2010) (due to recent statements regarding the use of tasers and the dearth of prior authority, the court held that the officer could have made a reasonable mistake of law regarding the constitutionality of taser use in July 2005 and therefore the officer is entitled to qualified immunity); *see also Mattos v. Agarano*, 661 F.3d 433, 452 (9th Cir. 2011). Until 2010, the Ninth Circuit of the Court of Appeals had not clearly delineated the use of taser weapons and the quantum of force entailed by a taser strike. *McMurray v. County of Sacramento*, 2011 WL 4709876, *19-20 (E.D. Cal. 2011); *see also Johnson v. Bay Area Rapid Transit*, 790 F.Supp.2d 1034,

1040; 1060-1061 (N.D. Cal. 2011) ("At the time of the incident here [on January 1, 2009], the law was not clearly established that threatening to tase in order to gain compliance with orders would be an unconstitutional use.").

Similarly, in regard to Officer Gunn's focused application of his flashlight on Plaintiff's right shoulder, any reasonable officer would not be on notice that such action would amount to a constitutional violation. Given the circumstances, any reasonable officer would rather deem such force appropriate when a person continued to resist and struggle with officers during a lawful arrest.

Since the law surrounding Officer Gunn's use of force was not clearly established at the time of the underlying incident and nor would any reasonable officer be put on notice that such use of force would be in violation of a person's constitutional right, Officer Gunn is entitled to qualified immunity.

IX. PLAINTIFF'S CLAIMS UNDER CALIFORNIA CIVIL CODE § 52.1 FAIL AS A MATTER OF LAW BECAUSE PLAINTIFF HAS NOT SEPARATELY SHOWN INTERFERENCE OR COERCION APART FROM HIS EXCESSIVE FORCE CLAIM.

To state a claim under California Civil Code § 52.1, a plaintiff cannot merely show that Defendants violated his or her rights under state or federal law; a plaintiff must also show that the interference with his or her rights was accomplished through "**threats, intimidation, or coercion.**" Cal. Civ. Code § 52.1(a) (emphasis added); *see Austin B. v. Escondido Union School Dist.*, 149 Cal.App.4th 860, 882-883 (2007); *City and County of San Francisco v. Ballard*, 136 Cal. App. 4th 381 (2006); *Haynes v. City and County of San Francisco*, 2010 WL 2991732 at *6 (N.D. Cal. 2010).

The requirement that Plaintiff plead and prove "threats, intimidation or coercion", however, is distinct from the requirement that Plaintiff prove a violation of his state or federal constitutional rights. *Barsamian v. City of Kingsburg*, 597 F.Supp.2d 1054, 1064 (E.D.Cal. 2009) ("[W]hether a

constitutional violation occurred and whether that violation was accompanied by any threats, intimidation or coercion are separate analytical inquiries."). In other words, courts have found that a showing of an interference with a legal right must be **shown separately** from an excessive force claim. *See, Justin v. City and County of San Francisco*, 2008 WL 1990819, at *9 (N.D. Cal. 2008) (finding that the plaintiff's excessive force claim did not establish a violation of an interference with a state or federal constitutional right).

Several courts that have interpreted § 52.1 have held that a plaintiff cannot bring a § 52.1 claim only alleging that a defendant "used force to interfere with [the plaintiff's] right to be free from bodily restraint." *Justin v. City and County of San Francisco* 2008 WL 1990819, *9 (N.D. Cal. 2008). In *Justin*, the plaintiff alleged that the defendants interfered with the decedent's "right to be free from violence and the threat of violence" and failed "to provide timely and adequate medical assistance." *Id.* The District Court dismissed the Civil Code § 52.1 cause of action under that theory, noting that "a claim under Section 52.1 cannot be predicated on allegations that [the defendants] used force to interfere with [the decedent's] right to be free from bodily restraint or harm." *Id.* "Section 52.1 is only applicable when a defendant intends by his or her conduct to interfere with a separate, affirmative right enjoyed by a plaintiff; it does not apply to a plaintiff's allegation of use of excessive force absent a showing that the act was done to interfere with a separate state or federal constitutional right." *Id.*

Thus, although Plaintiff alleges excessive force, he cannot prevail on a cause of action under Civil Code § 52.1 because he did not allege that the force was used to interfere with a state or federal constitutional right ***separate and apart*** from the alleged excessive force itself.

More recent case law authority supports this position. In *Rodriguez v. City of Fresno*, 2011 WL 1883195, *12 (E.D.Cal. 2011), the District Court analyzed this issue and similarly agreed. "The text of the Bane Act and such case authority

as the court can find indicates that a cause of action under the act requires a predicate – the application of threat, intimidation or coercion – and an object – interference with a constitutional or statutory right." *Id.* The District Court concluded "that in order to maintain a claim under the Bane Act, the coercive force applied against a plaintiff must result in an interference with a separate constitutional or statutory right. *Id.* at *13. **It is not sufficient that the right interfered with is the right to be free of the force or threat of force that was applied.**" *Id.* (emphasis added).

Similarly, in *Lanier v. City of Fresno*, 2011 WL 149802 (E.D.Cal. 2011), a District Court denied a plaintiff's motion for reconsideration of the dismissal of his Section 52.1 claim against a police officer who shot him. In the operative pleading, the plaintiff alleged that he attempted to surrender to a police officer moments after fleeing from a vehicle that the officer was pursuing. *Id.* at *1. The plaintiff alleged that the officer shot him multiple times in the back even though the plaintiff "posed no threat of death or serious physical harm to anyone and lacked a weapon." *Id.*

The court ruled that a Civil Code § 52.1 claim "requires misconduct with accompanying threats, intimidation, or coercion." *Id.* at *5. Finding no such allegation, the Court dismissed the plaintiff's Civil Code § 52.1 claim at the pleading stage. *Id.* The Court explained, "[a]lthough the FAC alleges facts that Officer Castillo interfered with [the plaintiff's] Fourth Amendment rights, there are no allegations that Officer Castillo did so with threats, intimidation, or coercion or interfered with the rights separate from those under the Fourth Amendment." *Id.*

In *Gant v. County of Los Angeles* (C.D.Cal. 2011) 765 F.Supp.2d 1238, the court explained the unsettled nature of the law on this issue before ultimately concluding that "a wrongful arrest and detention, without more, cannot constitute 'force, intimidation, or coercion' for purposes of Section 52.1." *Gant v. County*

of Los Angeles (C.D.Cal. 2011) 765 F.Supp.2d 1238; *see Shoyoye v. County of Los Angeles*, 203 Cal.App.4th 947, 959 (2012) ("we conclude that where coercion is inherent in the constitutional violation alleged, i.e., an over-detention in County jail, the statutory requirement of threats, intimidation, or coercion is not met. The statue requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.") (internal quotation marks omitted).

Here, Plaintiff has failed to make a sufficient showing on an essential element of his § 52.1 claim for which he has the burden of proof. Plaintiff has not alleged an act of interference separate from the alleged excessive force and therefore, Officer Gunn is entitled to summary judgment as a matter of law.

X. PLAINTIFF CANNOT STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE PLAINTIFF DID NOT SUFFER SEVERE EMOTIONAL DISTRESS.

The California Supreme Court in *Hughes v. Pair*, 46 Cal.4th 1035, 1050-51 (2009), reiterated the elements that a plaintiff is required to prove on an intentional infliction of emotional distress ("IIED") claim: "(1) outrageous conduct by the defendant; (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress." *Id.* at 1376 (internal quotation marks omitted).

First, Officer Gunn's conduct was not extreme and outrageous. Whether behavior is extreme and outrageous is a legal determination to be made by the court, in the first instance. *Fowler v. Varian Associates, Inc.*, 196 Cal.App.3d 34, 44 (1987). Plaintiff has failed to make a sufficient showing on this essential element because Officer Gunn's actions were a reasonable and incremental response to Plaintiff's use of physical force against law enforcement officers and repeated failure to follow law enforcement commands. Therefore, Officer

Gunn's conduct cannot be considered "extreme and outrageous" as required to prove an IIED claim.

Second, Plaintiff's IIED claim fails on the additional ground that Plaintiff did not suffer severe emotional distress. "Severe emotional distress [is] emotional distress **of such substantial quantity or enduring quality that no reasonable man [or woman] in a civilized society should be expected to endure it.**" *Fletcher v. Western Life Insurance Co.*, 10 Cal.App.3d 376, 397 (1970) (emphasis added.) Thus, evidence to prove an IIED claim requires more than what is at issue in the instant case, *i.e.*, a minor amount of transitory emotional distress over a reasonable use of force.

As recently as November 9, 2010, the California Court of Appeal cited *Hughes* and reiterated that there is a "high bar" for what can constitute severe distress. *Wong v. Tai Jing*, 189 Cal.App.4th 1354 (2010).

> "Although 'emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry' *Fletcher v. Western National Life Insurance Company*, 10 Cal.App.3d 376, 397 (1970), to make out a claim, the plaintiff must prove that emotional distress was *severe* **and not trivial or transient**."

Wong, 189 Cal.App.4th at 1376 (italics in original; bold emphasis added).

The Ninth Circuit has also held that feeling "emotionally hurt," experiencing nervousness and tension, and feeling threatened or scared did not rise to the level of severe emotional distress. *Simo v. Union of Needletrades, Industrial & Textile Employees*, 322 F.3d 602, 621-22 (9th Cir. 2003). Despite this clear case law, Plaintiff only generally alleges that he suffered emotional distress due to the use of force against him. In fact, Plaintiff has indicated that his normal and usual functions and duties have not been impacted as a result of any injuries he allegedly suffered during the subject incident. *Id.* Since Plaintiff's

general claims do not rise to the level of severe emotional distress, Officer Gunn is entitled to summary judgment on this claim.

XI. PLAINTIFF'S STATE LAW CLAIM FOR ASSAULT AND BATTERY FAILS BECAUSE OFFICER GUNN USED REASONABLE FORCE.

Plaintiff's claim for relief for assault and battery fails because Officer Gunn used reasonable force. Assault and battery are crimes as well as torts, and the statutory definition is in the California Penal Code. "An assault is an unlawful *attempt*, coupled with a present ability, to commit a violent injury on the person of another." Cal. Pen. Code § 240; 5 Witkin, *Summary of California Law* (9th ed. 1988), Torts, § 346, p. 436. "A battery is any willful and unlawful use of *force or violence upon the person* of another." Cal. Pen. Code § 242; 5 Witkin, *Summary of California Law* (9th ed. 1988), Torts, § 346, p. 436.

In a civil action for assault and battery against a police officer, the plaintiff must prove that the officer used unreasonable force as an element of the tort. *See Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272 (1998); *Valiavicharska v. Celaya*, 2011 WL 6370059, *11 (N.D. Cal. 2011). It is well established that a police officer in California may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance. *See* Penal Code § 835a. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight. *Graham*, 490 U.S. at 397.

Because Plaintiff's Fourth Amendment claim fails, his assault and battery claim also fails as a matter of law. *Miller v. Clark County*, 340 F.3d 959. 968 n. 14 (9th Cir. 2003).

///

///

///

XII. CONCLUSION.

For all the foregoing reasons, Officer Gunn respectfully requests that the Court grant summary judgment in his favor and against Plaintiff as to all claims for relief.

Dated: June 4, 2012

LAWRENCE BEACH ALLEN & CHOI, PC

By /s/ Nathan A. Oyster
Nathan A. Oyster
Attorneys for Defendant
Burbank Police Department Officer Gunn

Arutyunyan, Lusine

From: cacd_ecfmail@cacd.uscourts.gov
Sent: Monday, June 04, 2012 5:15 PM
To: ecfnef@cacd.uscourts.gov
Subject: Activity in Case 2:10-cv-08840-R-AGR Preston Smith v. City of Burbank et al Motion for Summary Judgment

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Oyster, Nathan on 6/4/2012 at 5:15 PM PDT and filed on 6/4/2012
Case Name: Preston Smith v. City of Burbank et al
Case Number: 2:10-cv-08840-R-AGR
Filer: Gunn
Document Number: 62

Docket Text:
NOTICE OF MOTION AND MOTION for Summary Judgment as to Plaintiff's Claims filed by Defendant Gunn. Motion set for hearing on 7/2/2012 at 10:00 AM before Judge Manuel L. Real. (Attachments: # (1) Declaration, # (2) Supplement, # (3) Proposed Order)(Oyster, Nathan)

2:10-cv-08840-R-AGR Notice has been electronically mailed to:

Carol Ann Humiston chumiston@ci.burbank.ca.us, larutyunyan@ci.burbank.ca.us, lrosoff@ci.burbank.ca.us

David D Lawrence dlawrence@lbaclaw.com, bmoyer@lbaclaw.com

Dennis Michael Gonzales dgonzales@lbaclaw.com, dard@lbaclaw.com

Manuel H Miller miller4law@msn.com

Max A Sauler msauler@miller4law.com

Nathan A Oyster noyster@lbaclaw.com, clynch@lbaclaw.com

2:10-cv-08840-R-AGR Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

Dennis A Barlow
Burbank City Attorney Office
275 E Olive Ave
Burbank, CA 91502

Juli C Scott
Burbank City Attorney Office
275 E Olive Ave
Burbank, CA 91502

Michael Anthony Coletti
Stoll Nussbaum & Polakov
11601 Wilshire Blvd
Suite 200
Los Angeles, CA 90025-1738

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:C:\fakepath\P. Smith MSJ.pdf
Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=6/4/2012] [FileNumber=13736974-0] [9ada635d10b5bc874b4094869feac55291c0f63c1eee87153f75758371b943fe023f 8f3ed622fa65db9facca488ef111cfa9c23cf0cc994b979b6b64503d6046]]
Document description: Declaration
Original filename:C:\fakepath\P. Smith Decl.pdf
Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=6/4/2012] [FileNumber=13736974-1] [07352f751b4c2847f74c64898fa39db17a4cb8442f2ad98d1c3b0ce37f3b0ecf3a9d a6410dbce3afdb2f969908a5bc7281016c647594774a1851614f6aab31b0]]
Document description: Supplement
Original filename:C:\fakepath\P. Smith Sep. Stmt..pdf
Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=6/4/2012] [FileNumber=13736974-2] [b07353d8d5f02fac7c3c3211c0cf69a40bf729f5e8f87c9ef86c4d18aae90530937f e880b056d9b905ffbc204dd43050a3ff417f6518b419ffb9d2754faadf38]]
Document description: Proposed Order
Original filename:C:\fakepath\P. Smith Pro Judg.pdf
Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=6/4/2012] [FileNumber=13736974-3] [7311eabc4d0bb5ed66e7efddc25aa6684d86d3325f330abb2753b4885bc10eaed876 09b4196661ca598454ab2b84a2f8a55e372ab21f3404d00876f831f03355]]