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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALEKSANDR BINKOVICH,)	Case No. 5:11-cv-03774-PSG
)	
Plaintiff,)	ORDER GRANTING-IN-PART
v.)	MOTION FOR JUDGMENT AS A
)	MATTER OF LAW, DENYING
OFFICER BARTHELMY, et al,)	MOTION FOR A NEW TRIAL AND
)	GRANTING-IN-PART MOTION FOR
Defendants.)	ATTORNEY’S FEES
)	(Re: Docket Nos. 86, 87)

Late one Saturday night, a bachelor party at the Hilton San Jose got out of hand. After the hotel called the police, the arriving officers confronted a number of party guests emptying out of an elevator in the hotel’s lobby. One such guest was Plaintiff Aleksandr Binkovich. Moments after stepping past the elevator doors, Binkovich was confronted by Defendant Officer Bruce Barthelmy and touched on the shoulder. When Binkovich brushed Barthelmy aside and attempted to walk past, Barthelmy took Binkovich into custody using a wristlock and leg sweep that knocked Binkovich over a planter and to the ground. Binkovich suffered a bloody nose, lost jewelry and spent a night in jail.

After a week-long trial, a jury of nine citizens found that Barthelmy’s actions toward Binkovich were excessive and awarded both compensatory and punitive damages. Barthelmy now

1 asks the court to reverse those decisions, or at least order a new trial. Because the jury's verdict
2 was supported by substantial evidence, the court GRANTS Barthelmy's motion for judgment as a
3 matter of law, but only as to punitive damages. The court also GRANTS-IN-PART Binkovich's
4 motion for attorney's fees.

5 I. BACKGROUND

6 Cases go to juries because the facts are muddled. There is no clear and decisive picture of
7 what happened that night, nor is there ever likely to be.

8
9 Everyone agrees that on the night in question, Binkovich and his friends were upstairs in a
10 hotel room at the Hilton hotel, and the hotel complained that they were too loud. After at least one
11 warning visit, the hotel asked to Binkovich's party to leave. They did not immediately do so. The
12 hotel then called the police to report the disturbance, but shortly thereafter, before the police
13 arrived, Binkovich and his friends left the room and started down the elevators. The police were
14 just walking in to the hotel lobby as the elevators opened, and Binkovich stepped out. It seems that
15 everyone agrees he saw the officers, but after that, there is consensus on little else.

16
17 Binkovich testified to having been raised with a very solid respect for law enforcement
18 officers, so when he saw the officers, he raised his hands in a signal of almost playful surrender,
19 smiled at the officers and began to calmly walk toward the hotel front desk to ask for a refund on
20 the room. This path led him past where the officers were standing. As he walked by, Barthelmy
21 reached out and – without any discernible warning – grabbed his shoulder. Binkovich does not like
22 to be touched, so he brushed the officer's hand away and told him not to touch him. Barthelmy
23 immediately responded by sweeping Binkovich's legs out from under him, shoving his face into
24 the ground, and placing him in a wristlock. His nose bleeding and jewelry missing, Binkovich was
25 then arrested and taken to the local jail, where he spent the next seven hours. He was never
26 prosecuted.
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1 The police tell a different story. Three sworn officers testified that Binkovich stumbled out
2 of the elevator, waving a belt around his head like a weapon, and reeking of alcohol. The hotel had
3 reported that one of the guests was belligerent with the security guards and had threatened to go
4 physical. Binkovich stumbled in their direction, still waving the belt, and Barthelmy touched his
5 shoulder, guided him toward the wall, and asked him to talk to them. Binkovich hit his hand away
6 and assumed an aggressive posture. Responding to this perceived threat, Barthelmy swept
7 Binkovich's legs out from under him, and the pair of them tripped over a planter. Once on the
8 ground, Barthelmy placed Binkovich in a wristlock and arrested him.
9

10 II. LEGAL STANDARDS

11 Fed. R. Civ. P. 50(b) provides that, upon a renewed motion for judgment as a matter of law,
12 the court may: (1) "allow judgment on the verdict, if the jury returned a verdict," (2) "order a new
13 trial" or (3) "direct the entry of judgment as a matter of law." To grant a Rule 50(b) motion, the
14 court must determine that "the evidence, construed in the light most favorable to the non-moving
15 party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's."¹ In
16 other words, to set aside the verdict, there must be an absence of "substantial evidence" – meaning
17 "relevant evidence that a reasonable mind would accept as adequate to support a conclusion" – to
18 support the jury's verdict.² "Substantial evidence is more than a mere" scintilla;³ it constitutes
19 "such relevant evidence as reasonable minds might accept as adequate to support a conclusion even
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23 ¹ *Callicrate v. Wadsworth Mfg.*, 427 F.3d 1361, 1366 (Fed. Cir. 2005) (quoting *Pavao v. Pagay*,
24 307 F.3d 915, 918 (9th Cir. 2002)) ("The Ninth Circuit upholds any jury verdict supported by
substantial evidence.").

25 ² *Id.*

26 ³ *Chisholm Bris. Farm Equip. Co. v. Int'l Harvester Co.*, 498 F.2d 1137, 1140 (9th Cir. 1974)
27 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

1 if it is possible to draw two inconsistent conclusions from the evidence.”⁴ In reviewing a motion
2 for judgment as a matter of law, the court “must view the evidence in the light most favorable to
3 the non-moving party and draw all reasonable inferences in its favor.”⁵ “In ruling on such a
4 motion, the trial court may not weigh the evidence or assess the credibility of witnesses in
5 determining whether substantial evidence exists to support the verdict.”⁶

6 Fed. R. Civ. P. 59 states that the court “may, on motion, grant a new trial on all or some of
7 the issues.” The trial court may grant a new trial, even though the verdict is supported by
8 substantial evidence, if “the verdict is contrary to the clear weight of the evidence[,] is based upon
9 evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of
10 justice.”⁷ In reaching this conclusion, he has “the right and indeed the duty to weigh the evidence
11 as he saw it,” rather than preferencing the view of the jury or the non-moving party. The trial judge
12 has [] large judicial discretion” in making this determination.⁸

13 III. DISCUSSION

14 For all practical purposes, the court has five separate motions before it. First, Barthelmy
15 moves for judgment as a matter of law on the matter of qualified immunity. If qualified immunity
16 is not granted, he asks the court to find as a matter of law that the force he used was reasonable and
17 grant judgment as a matter of law on those grounds. If the court finds that substantial evidence in
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20 ⁴ *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987).

21 ⁵ *Transbay Auto Serv., Inc. v. Chevron U.S.A., Inc.*, Case No. 3:09-cv-04932-SI, 2013 WL 496098,
22 at *2 (N.D. Cal. Feb. 7, 2013) (quoting *Josephs v. Pacific Bell*, 443 F.3d 1050, 1062(9th Cir. 2006)
23 (“We must view the evidence in the light most favorable to the nonmoving party – here, Josephs, –
and draw all reasonable inferences in that party’s favor.”)).

24 ⁶ *Id.* (citing *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9th Cir. 1984)
25 (“Neither the district court nor this court may weigh the evidence or order a result it finds more
reasonable if substantial evidence supports the jury verdict.”)).

26 ⁷ *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999).

27 ⁸ *Vickery v. Fisher Governor Co.*, 417 F.2d 466, 470 (9th Cir. 1969).

1 fact supports the jury’s verdict, he asks the court to independently re-weigh the evidence and grant
2 him a new trial. If all of those motions fail, he asks the court at least to strike the jury’s punitive
3 damages award as unsubstantiated by the evidence. Finally and independently, Binkovich asks the
4 court to award him reasonable attorney’s fees pursuant to 42 U.S.C. Section 1988. Because the
5 necessity of a ruling on each of the above motions depends on the outcome of its predecessor, the
6 court will take them up in turn.

7
8 **A. Barthelmy Has Waived His Right To Invoke Qualified Immunity’s Protections**

9 Qualified immunity is a simple doctrine in concept. It shields government officials from
10 civil liability under Section 1983 if “their conduct does not violate clearly established statutory or
11 constitutional rights of which a reasonable person would have known.”⁹ “Qualified immunity
12 balances two important interests—the need to hold public officials accountable when they exercise
13 power irresponsibly and the need to shield officials from harassment, distraction, and liability when
14 they perform their duties reasonably.”¹⁰ The doctrine provides the police with an “entitlement not
15 to stand trial or face the other burdens of litigation,” offering “an immunity from suit rather than a
16 mere defense to liability”¹¹ and protecting “all but the plainly incompetent or those who knowingly
17 violate the law.”¹² The qualified immunity analysis requires that the court evaluate two
18 independent prongs: whether the officer’s conduct violated a constitutional right and whether that
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23 ⁹ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (government officials “performing discretionary
24 functions generally are shielded from liability for civil damages insofar as their conduct does not
25 violate clearly established statutory or constitutional rights of which a reasonable person” would
26 have known).

25 ¹⁰ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

26 ¹¹ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

27 ¹² *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

1 right was clearly established at the time of the incident.¹³ The plaintiff in a 1983 suit “bears the
2 burden of proving that the rights” he “claims were ‘clearly established’ at the time of the alleged
3 violation.”¹⁴

4 Unfortunately, the evolution of this simple doctrine has made its application more
5 complicated. Qualified immunity is an affirmative defense, so the burden of initially raising the
6 matter rests with the government,¹⁵ and trial courts have been repeatedly instructed to resolve the
7 question of qualified immunity at the “earliest possible stage in litigation.”¹⁶ Up until 2009, once
8 qualified immunity was raised, a court had to make a determination on the factual prong of the
9 analysis (ie. was there a constitutional violation) before it could proceed to the legal prong
10 (whether that violation was clearly established as unconstitutional at the time of the incident).¹⁷ As
11 a result, where there were disputed issues of material fact – as there often are in such cases – courts
12 were hard pressed to resolve the question before evidence was presented, and even then, conflicting
13 deposition testimony could mandate a trial.¹⁸ That all changed with *Pearson v. Callahan*, in which
14 the Supreme Court decided that judges could “exercise their sound discretion in deciding which of
15 the two prongs of the qualified immunity analysis should be addressed first in light of the
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18 ¹³ See *Pearson*, 555 U.S. at 232 (“Qualified immunity is applicable unless the official’s conduct
19 violated a clearly established constitutional right.”).

20 ¹⁴ *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir. 1998) (citing *Davis v. Scherer*, 468 U.S. 183,
21 197 (1984)).

22 ¹⁵ *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)).

23 ¹⁶ *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

24 ¹⁷ See *Mitchell*, 472 U.S. at 553; see also *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

25 ¹⁸ See, e.g., *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003) (holding that where a
26 constitutional violation turns on the objective reasonableness of an officer’s actions, the qualified
27 immunity question depends on the jury’s version of the facts); see also *Willingham v. City of San
28 Leandro*, Case No. 3:06-cv-003744 MMC, 2008 WL 753908, at *1 (finding that there were
disputed issues of material fact, such that the question of qualified immunity must be left to a jury)
(N.D. Cal. Mar. 19, 2008).

1 circumstances in the particular case at hand.”¹⁹ Under this new framework, courts are free to
2 address the legal prong first and resolve the question of qualified immunity as early as a motion to
3 dismiss or by judgment on the pleadings.²⁰

4 Given that qualified immunity was designed to provide immunity from the burden, expense
5 and hassle of a lawsuit, rather than simply from liability, one might reason that defendants should
6 be required to raise it at the earliest stage possible. Case after case describes their “entitlement” to
7 the immunity’s protection from the very beginning of the suit, and repeatedly, courts have been
8 instructed to resolve the matter at the earliest stage possible. The Supreme Court has repeatedly
9 held that its protections are “effectively lost if a case is erroneously permitted to go to trial,”²¹ so
10 perhaps defendants who proceed to trial have waived their immunity from suit. Not necessarily.
11 It turns out that the key word in the Supreme Court’s language is “effectively.”

12 Under Ninth Circuit case law, a defendant does not automatically waive qualified immunity
13 by allowing a case to proceed beyond the earliest possible stage at which it could be asserted.²²
14 Courts have allowed it to be raised for the first time at summary judgment, at trial and in fact as
15 late as five years after litigation begins. Such late assertions, however, are only permissible “[i]n
16 the absence of a showing of prejudice.”²³

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21 ¹⁹ *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

22 ²⁰ *See, e.g. Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 965 (9th Cir. 2010).

23 ²¹ *Mitchell*, 472 U.S. at 526.

24 ²² *See Norwood v. Vance*, 591 F.3d 1062, 1076 (9th Cir. 2010) (granting qualified immunity on
25 appeal despite the fact that defendants had neither argued nor preserved it at trial because plaintiffs
had not raised waiver on appeal).

26 ²³ *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993); *see also Norwood v. Vance*, 591 F.3d
27 1062, 1076 (9th Cir. 2010) (allowing the assertion of qualified immunity for the first time at
summary judgment only where it did not prejudice the plaintiff).

1 The Ninth Circuit has recognized that an unreasonable delay in asserting new theories,
2 whether due to gamesmanship or simple oversight, can constitute prejudice if the delay “imposed
3 potentially high, additional litigation costs” on the other party that “could have easily been
4 avoided” by asserting the theory earlier.²⁴ Although Barthelmy’s brief reference to qualified
5 immunity as a stock defense in his answer could arguably qualify as “asserting” the theory, he
6 never mentioned it again until trial. The Ninth Circuit has rejected that precise tactic in the context
7 of other affirmative defenses:

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9 The statement of a defense in [] general terms suffices where ‘a single, definite,
10 and certain question’ is thereby presented. But [where such a question] was not
11 apparent, [] the defense should have been supported with sufficient particularity
12 to apprise the court of the defect. The failure of appellee to bring to the trial
13 court's attention the particulars upon which it relied in its assertion that the
14 complaint failed to state a claim upon which relief could be granted constitutes a
15 waiver of its right to rely on that defense.²⁵

16 Although the Ninth Circuit has never addressed this cursory pleading style in the context of
17 qualified immunity, other circuits have held that when it is raised “in a perfunctory manner,
18 unaccompanied by some effort at developed argumentation” by the summary judgment stage “are
19 deemed waived.”²⁶ They also have affirmed a trial court’s discretion to find qualified immunity
20 waived where “a defendant has failed to exercise due diligence,” “has asserted the defense for
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22 ²⁴ *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 954 (9th Cir. 2006).

23 ²⁵ *Smeed v. Carpenter*, 274 F.2d 414, 418 (9th Cir. 1960) (“The failure to give notice could have
24 been raised under the Federal Rules of Civil Procedure either by motion or answer. Rule 12(b), 28
25 U.S.C.A. Appellee claims that it did raise the defense by the fourth defense in its answer by the
26 allegation ‘That the complaint fails to state a claim upon which relief may be granted,’ which is the
27 language suggested by Form 20 accompanying the Federal Rules of Civil Procedure.”).

28 ²⁶ *Guillemard-Ginorio v. Contreras-Gomez*, 490 F.3d 31, 37 (1st Cir. 2007) (citing *De Araujo v. González*, 457 F.3d 146, 153 (1st Cir. 2006)) (holding that the district court did not abuse its discretion in finding defendants had waived their qualified immunity defense).

1 dilatory purposes”²⁷ or otherwise failed to demonstrate “a reasonable modicum of diligence in
2 raising the defense.”²⁸

3 Here, Binkovich would be severely prejudiced by Barthelmy’s unreasonable delay in
4 asserting qualified immunity if he were allowed to assert it now. This case ran for two years and
5 eight months, from complaint to jury verdict. In that time, Binkovich’s costs and expenses in
6 pursuing the suit escalated dramatically as trial approached. In the first year of the suit,
7 Binkovich’s attorney spent a just under seven hours total on the case.²⁹ Barthelmy did not seek to
8 dismiss the suit based on qualified immunity. By the time discovery was over 29 months later,
9 he’d still only invested another 17.4 hours of attorney time, though the cost of taking five
10 depositions had been incurred.³⁰ Even with all the evidence before him, Barthelmy still did not
11 invoke the protection of qualified immunity to get out of the expense of trial; no summary
12 judgment motion was filed. By the end of trial, however, 32 months after the complaint was filed,
13 Binkovich had invested 209.4 hours of attorney time and thousands of dollars in costs to vindicate
14 his constitutional rights.
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16 Barthelmy’s present argument for qualified immunity is a purely legal one that could have
17 been made at any stage of this litigation. In the light most favorable to Binkovich, the facts have
18 not substantially changed from complaint through today, and the law at issue was fixed in 2009. It
19 thus was within the Barthelmy’s power and ability to invoke qualified immunity at any time. Had
20 he done so at any point before trial and prevailed, Binkovich’s costs would have been minimal. Yet
21 Barthelmy proceeded to litigate the matter through trial, imposing substantial burden and expense
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24 ²⁷ *English v. Dyke*, 23 F.3d 1086, 1090 (6th Cir. 1994).

25 ²⁸ *Eddy v. Virgin Islands Water & Power Auth.*, 256 F.3d 204, 210 (3d Cir. 2001).

26 ²⁹ See Docket No. 87-8.

27 ³⁰ See *id.*

1 not only on Binkovich but also on the court and nine members of the community, who were called
2 to abandon their daily lives for over a week to resolve this dispute. Those costs must factor into the
3 court's analysis. Because Binkovich has been prejudiced to the tune of over a hundred thousand
4 dollars, and because the protection from suit afforded by qualified immunity has been "effectively
5 lost" given the week-long trial,³¹ Barthelmy has waived his right to invoke qualified immunity and
6 denies his motion for judgment as a matter of law on this basis.³²

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8 **B. Substantial Evidence Supports The Jury's Finding That Barthelmy's Force Was Excessive**

9 Even if he is not entitled to qualified immunity, Barthelmy argues that he "used force
10 permitted by the Constitution to overcome Plaintiff's physical resistance to the detention."³³ This
11 characterization takes for granted that Binkovich had in fact been detained at the time of his
12 "physical resistance," an assumption that is undermined by substantial evidence in this record. He
13 also argues that the amount of force he used in detaining Binkovich was objectively reasonable as a
14 matter of law in the Ninth Circuit. Because an evaluation of excessive force requires "careful
15 attention to the facts and circumstances of each particular case"³⁴ and because none of the cases
16 cited present an analogous set of circumstances, this argument is unsupported. Barthelmy's motion
17 for judgment as a matter of law on these grounds must therefore be denied as well.
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22 ³¹ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

23 ³² *See also Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994) (finding that on a motion for
24 judgment as a matter of law, there was no reason to believe that a judge's opinion as to an officer's
25 likely motivation and understanding of "clearly established law" would have been superior to that
of a jury, such that allowing the issue to go to the jury was either not error or harmless).

26 ³³ Docket No. 86 at 1.

27 ³⁴ *Graham v. Connor*, 490 U.S. 386, 396 (1989)

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1. The Jury Heard Substantial Evidence That Barthelmy Was Not Been Seized At The Time He Encountered Barthelmy

A seizure has only been effectuated when “in view of all the circumstances, a reasonable person would have believed that he was not free to leave.”³⁵ In making that determination, a factfinder must decide if “taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”³⁶ Such conduct may include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.”³⁷ Absent such circumstances, “otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.”³⁸

In view of all the circumstances here, the jury could reasonably have concluded that the police conduct did not communicate to Binkovich that he was not free to ignore the police presence, but rather was required to submit to Barthelmy’s grasp. In the version of the facts most favorable to Binkovich, Barthelmy did not give Binkovich any verbal commands before he reached out to touch him.³⁹ The officer’s placement, in the lobby on the way to the hotel exit, would not necessarily have been considered threatening. No one testified that weapons were displayed, and

³⁵ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

³⁶ *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ The jury was free to credit Binkovich’s testimony and disregard Barthelmy’s alternative version of events. *Cf. Guy v. City of San Diego*, 608 F.3d 582, 588 (9th Cir.2010) (“[I]t has long been held that a jury may properly refuse to credit even uncontradicted testimony.”) (citing *Quock Ting v. United States*, 140 U.S. 417, 420–21 (1891)).

1 there was conflicting evidence about the degree of authority asserted prior to Binkovich going to
2 the ground. In this context as any many others, “evaluating the reasonableness of human conduct
3 is undeniably within the core area of jury competence.”⁴⁰ As a group of average citizens, the jury
4 is uniquely situated to evaluate whether Binkovich would reasonably have understood from
5 Barthelmy’s conduct that he was not free to leave. Here, they decided that he would not,⁴¹ and the
6 court “may not substitute its view of the evidence for that of the jury.”⁴²

7
8 Because substantial evidence supports a finding that Binkovich was not detained, then he,
9 like any other citizen, had the right to “ignore his interrogator and walk away.”⁴³ As a result,
10 Barthelmy had no right to touch Binkovich, and a jury could conclude that Barthelmy used
11 excessive force by taking Binkovich down for exercising his right to walk away.

12 **2. The Amount Of Force Barthelmy Used Was Not Objectively Reasonable As** 13 **A Matter Of Law**

14 Even if Barthelmy had initiated a lawful detention of Binkovich, the cases he cites do not
15 establish that in light of the circumstances Barthelmy faced, the force he used was reasonable as a
16 matter of law. An excessive force analysis requires “careful attention to the facts and
17 circumstances of each particular case,”⁴⁴ including “the severity of the crime at issue, whether the
18 suspect poses an immediate threat to the safety of the officers or others, and whether he is actively
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21 ⁴⁰ *Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir. 1994); *see also Jackson v. City of Bremerton*,
268 F.3d 646, 651 (9th Cir. 2001) (“reasonableness is often a question for the jury”).

22 ⁴¹ This view is reinforced by the fact that the jury found that Barthelmy had reasonable suspicion to
23 detain Binkovich. *See* Docket No. 80 at 2. They simply contested whether he communicated that
24 intent to Binkovich before taking him to the ground.

25 ⁴² *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir.2001).

26 ⁴³ *United States v. Baroni*, 14 F. App’x 815, 820 (9th Cir. 2001) (quoting *Terry v. Ohio*, 392 U.S. 1,
32–33 (1968)).

27 ⁴⁴ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

1 resisting arrest or attempting to evade arrest by flight.”⁴⁵ Each of the cases proffered by Barthelmy
2 differs from the facts at hand with respect to at least one important consideration: the arrestee had
3 been presented with a direct order from the police and refused to comply.

4 In *Forrester v. City of San Diego*, both a district judge and a jury found that the San Diego
5 Police Department’s “pain compliance” policy was constitutional. Under the policy, officers were
6 required “first to give [non-violent] protesters an opportunity to avoid arrest by leaving the
7 premises after a verbal warning. The police were then to arrest those who refused to leave and give
8 them another opportunity to move voluntarily. Finally, the police were to remove the remaining
9 demonstrators with ‘pain compliance techniques’ involving the application of pain as necessary to
10 coerce movement.”⁴⁶

11
12 In *Arpin v. Santa Clara Valley Transportation Agency*, the Ninth Circuit was asked to
13 review the district court’s decision to grant summary judgment in the face of undisputed facts
14 provided by a police officer.⁴⁷ According to the officer’s undisputed testimony, a 60-year-old
15 woman stopped for using an expired ID “refused to cooperate and provide her Transit
16 Identification when requested.”⁴⁸ The officer “warned [the woman] that she would be arrested if
17 she did not cooperate,” but she still refused.⁴⁹ After the woman refused the officer’s direct request
18 to allow him to search her purse, he “grabbed [the woman’s] right hand and attempted to handcuff
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23 ⁴⁵ *Id.* at 388.

24 ⁴⁶ *Forrester v. City of San Diego*, 25 F.3d 804, 805 (9th Cir. 1994).

25 ⁴⁷ *See* 261 F.3d 912 (9th Cir. 2001).

26 ⁴⁸ *Id.*

27 ⁴⁹ *Id.*

1 [her]. [The woman] stiffened her arm and attempted to pull free. In response, [the officer] used
2 physical force to handcuff Arpin,” and succeeded in doing so “without injury.”⁵⁰

3 Finally, in *Henderson v. City of Simi Valley*, the Ninth Circuit was again asked to review
4 the district court’s decision to grant summary judgment where the plaintiff failed to raise a material
5 question of fact on her excessive force claim.⁵¹ The officers in that case presented a valid court
6 order to a yelling and screaming woman, who refused to comply with its provisions.⁵² She began
7 to release two Rottweilers on the officers, who were forced to stop here by force.⁵³ The woman
8 continued to fight even after being restrained, and eventually suffered some minor bruising.⁵⁴

9
10 In each of these cases, the police only used force after the arrestee had directly refused a
11 verbal instruction. The arrestees also each continued to resist after the officers began to use force
12 to induce compliance. Neither factor is present here, when accepting the facts in the light most
13 favorable to Binkovich. Binkovich testified that he did not hear a command of any sort, and
14 Barthelmy dedicates much of his motion to arguing that none was required.⁵⁵ While the court
15 agrees that Binkovich has failed to identify a per se requirement that police provide a verbal
16 warning before using force, under *Graham*, the jury was entitled to consider the failure to do so as
17 one aspect of whether the arrestee was “actively resisting arrest.”⁵⁶ Here, the jury was asked to
18 evaluate the conduct of an officer faced with a suspect who may (or may not) have been involved
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⁵⁰ *Id.*

22 ⁵¹ *See Henderson v. City of Simi Valley*, 305 F.3d 1052, 1061 (9th Cir. 2002).

23 ⁵² *See id.* at 1055.

24 ⁵³ *Id.*

25 ⁵⁴ *Id.*

26 ⁵⁵ *See* Docket No. 86 at 9-11.

27 ⁵⁶ *Graham*, 490 U.S. at 296.

1 in a non-violent disturbance of the peace, who had not been given any instructions of any kind.
2 They concluded that sweeping his legs out from under him was excessive, in light of the totality of
3 the circumstances. Once again, in light of the supporting substantial evidence, the court cannot
4 substitute its own evaluation of the facts for the jury's.

5 **C. The Jury's Award Of Punitive Damages Cannot Stand**

6 Despite the fact that the jury's verdict must stand, its punitive damage award cannot. In a
7 case such as this, a jury may only award punitive damages upon a finding of "evil motive or
8 intent," "reckless or callous indifference" to the constitutional rights of others or "oppression."⁵⁷
9 On a motion for judgment as a matter of law, the court must determine whether there is "substantial
10 evidence" to support such a finding by the jury. The overall constitutionality of a punitive damage
11 award is to be evaluated in light of three factors: (1) the degree of reprehensibility; (2) the disparity
12 between the harm suffered and the punitive damages award; and (3) the difference between the
13 remedy and the civil penalties authorized or imposed in comparable cases.⁵⁸ These many factors
14 ultimately reduce to one fairly basic question: based on the evidence presented at trial, could a
15 reasonable jury have concluded that Barthelmy did not just make a mistake, but rather go out of his
16 way to hurt Binkovich?
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19 It could not. Not a single witness testified as to any overt cruelty by Barthelmy. In every
20 version of the facts, Barthelmy used methods of apprehension that had been vetted and approved
21 by the police department writ large. The closest that Binkovich can come to identifying the
22 requisite "cruelty" from Barthelmy is the fact that he allowed Binkovich to get within arms' reach
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26 ⁵⁷ *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005).

27 ⁵⁸ *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).

1 before attempting to engage with him, and thus “provoked” the confrontation.⁵⁹ Yet Binkovich
2 cites to no case law indicating that such a minor oversight constitutes provocation, and the court’s
3 own research has uncovered several cases in which more serious involvement was found not to
4 constitute provocation.⁶⁰ Having listened to the entire trial and reviewed the record, and
5 particularly in the absence of any direct evidence or caselaw citations from Binkovich, the court
6 cannot allow the jury’s punitive damage award to stand.

7
8 **D. Barthelmy Is Not Entitled To A New Trial**

9 As an alternative, Barthelmy makes a general motion for a new trial under Rule 59.⁶¹
10 Under Rule 59, the court has “the right and indeed the duty to weigh the evidence as he saw it, and
11 to set aside the verdict of the jury, even though supported by substantial evidence where, in his
12 conscientious opinion, the verdict is contrary to the clear weight of the evidence,”⁶² the verdict
13 represents a “miscarriage of justice,”⁶³ or where the court is “left with the definite and firm
14 conviction that a mistake has been committed by the jury.”⁶⁴ “The trial judge has [] large judicial
15 discretion” in making this determination.⁶⁵
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⁵⁹ Docket No. 90 at 14-15.

18 ⁶⁰ See, e.g., *Doi v. Aoki*, Case No. 10-cv-00639-LEK, 2012 WL 3100179, at *18 (D. Haw. July 27,
19 2012) (finding that the police did not provoke a confrontation by waiting outside a residence for
20 half an hour, entering unannounced and engaging the plaintiff physically); *Bartsch v. City of*
21 *Yakima*, 04-cv-3100-RHW, 2006 WL 211793, at *5 (E.D. Wash. Jan. 23, 2006) (rejecting the
notion that police had provoked a confrontation simply because they should have used less forceful
tactics, taken more time to plan, retreated, etc.).

22 ⁶¹ See Docket No. 288.

23 ⁶² *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990).

24 ⁶³ *Id.*

25 ⁶⁴ *Landes Const. Co. Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371-72 (9th Cir. 1987).

26 ⁶⁵ *Vickery v. Fisher Governor Co.*, 417 F.2d 466, 470 (9th Cir. 1969).

1 This case did not represent a “miscarriage of justice.” The court heard all the evidence
2 from all the witnesses, and the picture was muddled. Everyone seemed to agree that things
3 happened fairly quickly, but as is common in cases of eyewitness testimony, people remembered
4 things differently. The jury, in its wisdom, took all of that into consideration and determined that
5 overall, the picture painted by Binkovich seemed the most plausible. Given the muddled testimony
6 with which they were presented, this outcome represents no more and no less of a “miscarriage of
7 justice” than any other. “The cases in which courts have granted new trials in the face of
8 conflicting witness testimony have typically involved objective evidence that completely
9 impeaches a witness’ credibility, such that the court is justified in disregarding that testimony.”⁶⁶
10 The only area in which the court was left with a “definite and firm conviction” that something went
11 awry was the jury’s award of punitive damages, which was addressed in the motion for judgment
12 as a matter of law above.

14 If plaintiffs in a Section 1983 case were required to meet the “beyond a reasonable doubt”
15 burden of proof, the court would have serious reservations about the jury’s decision. However,
16 given Binkovich simply needed to demonstrate that his version of events was more likely than not,
17 the court cannot say it has a definite or firm conviction that the jury was mistaken in accepting
18 Binkovich’s version of events.

20 **E. Binkovich Is Entitled To Receive His Full Fee Award, But Not A Multiplier Due**
21 **To The Undesirability Of The Case.**

22 In a separate motion, Binkovich asks the court to award reasonable attorney’s fees pursuant
23 to Section 1988.⁶⁷ He has provided the court with detailed breakdowns of his attorney’s time,⁶⁸ his

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25 ⁶⁶ *Carrethers v. Bay Area Rapid Transit*, Case No. 3:09-cv-1101-EMC, 2012 WL 1004847 (N.D.
26 Cal. Mar. 26, 2012) (citing *Tortu v. Las Vegas Metropolitan Police Dept.*, 556 F.3d 1075 (9th
27 Cir.2009); *Jennings v. Jones*, 587 F.3d 430, 443 (1st Cir.2009); *Ruffin v. Fuller*, 125 F.Supp.2d
28 105, 109–10 (S.D.N.Y. 2000)).

⁶⁷ See Docket No. 87.

1 attorney's background and experience,⁶⁹ and evidence of the prevailing rates in the area.⁷⁰

2 Barthelmy argues that the fees requested are unreasonable for three reasons: (1) the hourly rate
3 requested by Binkovich's attorney is too high; (2) Binkovich's attorney spent too many hours in an
4 unjustifiably odd pattern on this case and (3) Binkovich's attorney's fees should be reduced to
5 because he only succeeded against one of the six defendants he initially sued.⁷¹ As described in
6 more detail below, each of these arguments is unpersuasive, but the court nonetheless must adjust
7 the fee request to strike Binkovich's unsubstantiated request for a 50% "multiplier" due to the
8 "undesirability of the case."
9

10 **1. \$450 Is A Reasonable Hourly Rate For A Veteran Attorney**

11 Binkovich's requested hourly rate of \$450 is reasonable for an attorney with nearly two
12 decades of civil rights litigation experience in the Bay Area. Barthelmy complains that the hourly
13 rate should be set at \$320 – the rate at which Binkovich's attorney bills his clients in other areas of
14 the law – or, at most, \$400 per hour, to account for his additional experience.⁷² Yet he provides
15 neither evidence nor case law to support this proposition. As Binkovich points out in his reply,
16 "reasonable fees" under 42 U.S.C. Section 1988 are to be calculated according to the prevailing
17 market rates in the relevant community," not an individual attorney's usual billing practices.⁷³ In
18 addition to his own experience, Binkovich has provided the sworn declaration of a managing
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21 ⁶⁸ See Docket Nos. 87-2; 87-3

22 ⁶⁹ See Docket No. 87-7.

23 ⁷⁰ See Docket No. 87-5.

24 ⁷¹ See Docket No. 90.

25 ⁷² See Docket No. 89 at 2.

26 ⁷³ *Blum v. Stenson*, 465 U.S. 886, 895 (1984); see also *Van Skike v. Dir., Office of Workers' Comp.*
27 *Programs*, 557 F.3d 1041, 1049 (9th Cir. 2009) (noting that a fee award should be calculated using
28 prevailing market rates rather than an attorney's normal billing rate).

1 partner of a law firm in the area, who has a great deal of experience in civil rights cases.⁷⁴ The
2 declaration discloses that firm’s billing rates, which far exceed the \$450 per hour requested by
3 Binkovich’s attorney, and opines that the requested rate is “well within the rates customarily
4 charged in this market for comparable services.”⁷⁵ Based on this evidence, and the court’s own
5 knowledge of hourly rates for legal services in this community, the court finds that \$450 is a
6 reasonable hourly rate for the legal services rendered here.

7 **2. Binkovich’s Timekeeping Records Adequately Support His Request**

8 Barthelmy next argues that “the assumption that 227 hours of time was incurred in the
9 prosecution of this matter is wrong.”⁷⁶ He offers no evidence in support of this argument, opting
10 instead to cast unsupported aspersions on Binkovich’s timekeeping records. Much of his
11 skepticism seems to stem from the fact that Binkovich’s counsel put in the bulk of his time in the
12 build-up to and interval of trial.⁷⁷ Yet Binkovich’s counsel acknowledge this pattern and explained
13 in the declaration submitted with his request that he adopts this strategy intentionally, to keep costs
14 low early in a case and encourage the possibility of settlement. The court has no reason to doubt
15 this sworn declaration or the billing records supporting it.

16 **3. Binkovich Prevailed On Every Cause Of Action**

17 In his third argument, Barthelmy asks the court to cut Binkovich’s fee award by 75% in
18 light of his “limited success.”⁷⁸ The Supreme Court has explained that lower courts have the
19 discretion to reduce a fee award where “the plaintiff’s claims are based on different facts and legal
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23 ⁷⁴ See Docket No. 87-12.

24 ⁷⁵ *Id.* at ¶ 13.

25 ⁷⁶ Docket No. 89 at 3.

26 ⁷⁷ See *id.* at 4.

27 ⁷⁸ *Id.*

1 theories, and the plaintiff has prevailed on only some of those claims.”⁷⁹ That is not the case here.
2 Binkovich’s claims were based on a single incident and a single legal theory, on which he was
3 successful; that theory was simply alleged against multiple defendants, all of whom played some
4 role. Many cases that Barthelmy cites in support of his proposed reduction involved a plaintiff
5 succeeding only on some portion of the wrongs they alleged.⁸⁰ In the single case cited addressing
6 a downward adjustment due to failure to prevail against individual defendants on a set of
7 interrelated claims, *Cabrales v. County of Los Angeles*, the Ninth Circuit affirmed that adjustments
8 to the lodestar calculation rest solely within the discretion of the trial court.⁸¹ The trial judge in
9 *Cabrales* reduced the plaintiff’s fee award by 25% because although he prevailed against the
10 county, he failed to prove the liability of any of the twenty individual defendants named in the
11 case.⁸² In his opinion, to award full compensation would “exaggerate plaintiff’s overall success.”⁸³
12 The court has no such concerns here. Binkovich went to trial with against four defendants,
13 prevailed against one, and was awarded full compensation for his injuries. An award of just over
14 \$100,000 does not exaggerate that success, particularly in light of the fact that all of the same
15 discovery and witness preparation would have been required, even if he had only brought the claim
16 against the single defendant against whom he eventually prevailed. Accordingly, the court declines
17 to exercise its discretion to decrease Binkovich’s fee award.
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21 ⁷⁹ *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789-90 (1989).

22 ⁸⁰ *See Hensley v. Eckerhart*, 461 U.S. 424, 427 (1983) (remanding for further consideration of fees
23 in light of the plaintiff’s success on only one constitutional theory); *Harman v. City & Cnty. of San*
24 *Francisco*, 158 Cal. App. 4th 407, 417 (2007) (requiring apportionment between “successful and
25 unsuccessful claims”).

26 ⁸¹ *See* 864 F.2d 1454, 1466 (9th Cir. 1988).

27 ⁸² *See id.*

28 ⁸³ *Id.*

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4. Binkovich Is Not Entitled To A 50% Enhancement Of The Lodestar


The court will not, however, exercise its discretion to increase the award due to the case's undesirability. While it may be true that few attorneys would have accepted this case and litigated it all the way to trial, that hesitancy does not arise because the case was especially risky or complex. It is a low dollar value case, as many injury cases are, yet the Bay Area is replete with lawyers who handle such matters on a contingency basis. Section 1988's fee award was specifically designed to incentivize attorneys to take cases of constitutional import, even where the contingency recovery was low. Thus, the "undesirability" of this case due to its low dollar value has already been accounted for in Binkovich's fee award. Under a standard fee agreement, his counsel would be entitled to perhaps 40% of the recovery, or about \$20,000. Here, he will receive over \$100,000. Binkovich cites to no cases indicating that significant multipliers are common in cases such as this,⁸⁴ nor has the court's own research uncovered any. Binkovich is entitled to the full lodestar amount of \$103,396.82, but no more.

IV. CONCLUSION

Barthelmy's motions for judgment as a matter of law and for a new trial are denied, but his motion to strike the jury's punitive damage award is granted. Binkovich's motion for attorney's fees is granted in the amount of \$103,396.82.

IT IS SO ORDERED.

Dated: August 15, 2014



PAUL S. GREWAL
United States Magistrate Judge

⁸⁴ *But see Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir. 1996) (doubling the fees awarded to an attorney willing to challenge the island's abortion laws in light of the fact that no other attorney on the island's small community would take the case).