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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

<p>GABRIEL GONZALES, Plaintiff,  v.  CITY OF SAN JOSE and DAVID LEZAMA,  Defendants.</p>	<p>Case No. 19-cv-08195-NC  <b>ORDER GRANTING DEFENDANTS’ MOTION TO DISMISS; GRANTING LEAVE TO AMEND</b>  Re: Dkt. No. 26</p>
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Before the Court is defendants the City of San Jose and San Jose Police Department Officer David Lezama’s motion to dismiss plaintiff Gabriel Gonzales’s first amended complaint. *See* Dkt. No. 26. This case arises out of SJPD’s arrest of Gonzales when Gonzales was on his bicycle, where Officer Lezama struck Gonzales with his patrol vehicle as Gonzales biked on the sidewalk. *See* Dkt. No. 23.

The Court finds that the complaint fails to state sufficient facts to allege (1) that Officer Lezama used excessive force; (2) the City’s *Monell* liability; (3) violation of the Bane Act; or (4) intentional infliction of emotional distress. Additionally, because Gonzales failed to comply with the Government Claims Act when he filed his original complaint, he is barred from adding state law causes of action in his later amended complaint.

Accordingly, the Court GRANTS the motion to dismiss and GRANTS Gonzales leave to amend the complaint to cure these deficiencies.

1       **I. Background**

2       **A. Factual Allegations**

3           Plaintiff Gabriel Gonzales alleges the following facts in the First Amended  
4 Complaint.<sup>1</sup> Dkt. No. 24, FAC. The Court assumes these factual allegations to be true for  
5 the purpose of deciding of the motion to dismiss. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d  
6 336, 337–38 (9th Cir. 1996).

7           On December 9, 2019, Gonzales rode his bicycle to the gas station around 10:00  
8 p.m. to pick up some Gatorade. FAC ¶ 16. He had an ear bud in his left ear to listen to  
9 music but did not use his right ear bud so that he could hear surrounding noises. FAC ¶  
10 20. The ear buds were not visible because he also wore a face shield for biking that  
11 covered them. FAC ¶ 21. While he rode in the designated bike lane, San Jose Police  
12 Department Officer David Lezama drove ahead of him on the road. FAC ¶ 24. Lezama  
13 slowed down, and Gonzales eventually passed Lezama’s patrol vehicle. FAC ¶¶ 25–26.  
14 Lezama pulled up to Gonzales and started to yell at him, ordering him to pull over. FAC  
15 ¶¶ 27–29. Gonzales did not notice that Lezama was yelling until several seconds later  
16 because of his ear bud and face shield. FAC ¶¶ 26–27, 29. Gonzales was alarmed by  
17 Lezama’s facial expression and body language, which conveyed a “significant level of  
18 anger and hostility.” FAC ¶ 30. Noticing Lezama’s anger and fearful for his safety,  
19 Gonzales responded by saying, “Why, I’m not doing anything?” FAC ¶¶ 34–35. Lezama  
20 then “screamed at the top of his lungs” at Gonzales, “Because I told you to!” FAC ¶ 36.  
21 Gonzales became afraid, and responded, “No.” FAC ¶ 40. Gonzales then stopped, lifted  
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23           <sup>1</sup> The plaintiff alleged additional facts in his Opposition to the motion to dismiss:  
24 “[Gonzales] was knocked off and thrown from the bicycle; his entire torso is thrown on to  
25 the hood, his head banging off the hood.” Dkt. No. 32, Opposition, at 6. Defendants also  
26 alleged in their Reply that “[Gonzales] lurch[ed] forward off the bicycle onto the car’s  
27 hood, but he then calmly and without issue pushes off the hood and stands next to the  
28 patrol car.” Dkt. No. 35, Reply, at 4 n.2. For the purpose of deciding this motion to  
dismiss, the Court declines to review these facts as they are not alleged in the FAC. The  
Court does not rely upon any materials outside of the FAC in this order. Because the  
Court is granting Gonzales leave to amend, Gonzales can include all relevant facts in the  
amended complaint. The defendants may present their evidence at summary judgment but  
may not allege facts or present evidence on their motion under Rule 12(b)(6).

1 his bicycle onto the sidewalk, and cycled in the opposite direction. FAC ¶¶ 40-41.

2 Lezama “punched the patrol vehicle accelerator and went up to the next light and  
3 quickly took a U-turn.” FAC ¶ 43. Lezama “came flying down” the road, shouting  
4 through the patrol car speaker “words to the effect of ‘pull over you son of a bitch,’ or ‘I’m  
5 going to get you, you son of a bitch.’” FAC ¶ 44. He then flipped another U-turn, wheels  
6 spinning and screeching as the patrol car fishtailed, and accelerated toward Gonzales.  
7 FAC ¶ 47. Lezama drove onto the sidewalk and struck Gonzales. FAC ¶¶ 43–48. When  
8 the car stopped, Gonzales was pinned in a still upright position against the metal fence of  
9 the Oak Hill Memorial Cemetery. FAC ¶ 48.

10 To arrest Gonzales, Lezama threw Gonzales against the hood of the patrol vehicle  
11 and placed him in handcuffs. FAC ¶¶ 51, 52. Moments after, Lezama threw Gonzales on  
12 the ground and started yelling at him for his failure to pull over when ordered. FAC ¶¶  
13 52–54. Gonzales was taken to Valley Medical Center in a neck brace. FAC ¶ 55. The  
14 paramedics in the ambulance noted Gonzales’s accelerated heart rate, a result of  
15 tachycardia, and upgraded the urgency level of his care. FAC ¶¶ 57, 58. Gonzales  
16 suffered severe pain and suffering and significant emotional distress, was diagnosed with a  
17 concussion, and is being evaluated for a torn anterior cruciate ligament. FAC ¶ 66.

18 **B. Procedural History**

19 On December 17, 2019, Gonzales filed a complaint, alleging a Fourth Amendment  
20 violation for the use of excessive force under 42 U.S.C. § 1983 against Officer Lezama and  
21 the City of San Jose.<sup>2</sup> Dkt. No. 1. On March 17, 2020, Defendants filed an answer. Dkt.  
22 No. 19. On April 17, 2020, Gonzales amended his complaint, adding three more claims in  
23 addition to the § 1983 excessive force claim: (1) *Monell* liability against the City of San  
24 Jose; (2) excessive force in violation of California’s Bane Act against both defendants; and  
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26 <sup>2</sup> The original complaint is unclear as to whether Gonzales meant to bring claims against  
27 the City of San Jose. The City is listed in the caption and as a party, but not under any  
28 claims for relief. The Court finds that the City of San Jose should be considered a  
defendant in the original case based on the caption and the list of parties. *See* Dkt. No. 1 at  
1, 3, 11.

1 (3) intentional infliction of emotional distress against both defendants. Dkt. No. 23. On  
2 April 24, 2020, Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6). Dkt. No. 26.  
3 The Court held a hearing on the motion on June 10, 2020. Dkt. No. 39. All parties have  
4 consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c). Dkt. Nos. 9,  
5 14.

6 **II. Legal Standard**

7 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal  
8 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Under  
9 Federal Rule of Civil Procedure 12(b)(6), a claim will not survive a motion to dismiss if it  
10 did not plead sufficient facts to “state a facially plausible claim to relief.” Fed. R. Civ. P.  
11 8(a), 12(b)(6). On a motion to dismiss, all allegations of material fact are taken as true and  
12 construed in the light most favorable to the plaintiff. *Cahill*, 80 F.3d at 337– 38. The  
13 Court, however, need not accept as true “allegations that are merely conclusory,  
14 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Secs.*  
15 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need not allege detailed  
16 factual allegations, it must contain sufficient factual matter, accepted as true, to “state a  
17 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
18 (2007). A claim is facially plausible when it “allows the court to draw the reasonable  
19 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556  
20 U.S. 662, 678 (2009).

21 If a court grants a motion to dismiss, leave to amend should be granted unless the  
22 pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203  
23 F.3d 1122, 1127 (9th Cir. 2000).

24 **III. Discussion**

25 **A. Excessive Force Under 42 U.S.C § 1983**

26 Plaintiff claims that Officer Lezama’s excessive use of force violated his Fourth  
27 Amendment rights under 42 U.S.C § 1983.

28 To state a constitutional violation under 42 U.S.C. § 1983, a plaintiff must allege

1 that: (1) the conduct complained of was committed by a person acting under color of state  
2 law; and (2) the conduct violated a right secured by the Constitution or laws of the United  
3 States. *Gomez v. Toledo*, 446 U.S. 635, 639 (1980).

4 Here, the conduct was committed by a police officer who was acting under color of  
5 state law. As to whether the officer’s conduct violated a constitutional right, Gonzales  
6 argues that Lezama’s use of force violated his Fourth Amendment right to be free from  
7 excessive force. FAC ¶ 70.

8 A claim that a law enforcement officer used excessive force is governed by the  
9 “reasonableness standard.” *Graham v. Connor*, 490 U.S. 386, 395 (1989). This analysis  
10 requires “careful attention to the facts and circumstances in each particular case, including  
11 the severity of the crime at issue, whether the suspect poses an immediate threat to the  
12 safety of the officers or others, and whether he is actively resisting arrest or attempting to  
13 evade arrest by flight.” *Id.* at 396. This question is also analyzed from “the perspective of  
14 a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.*

15 There are several allegations that could be construed as uses of force in the  
16 complaint. The first use of force is when Lezama’s patrol vehicle struck Gonzales as he  
17 tried to flee: “[Lezama took] the patrol vehicle up on to the sidewalk and striking  
18 [Gonzales] with such force as to cause the injuries noted below . . . . when Lezama’s  
19 vehicle came to a stop, [Gonzales] was pinned in a still upright position against the metal  
20 fence of the Oak Hill Memorial Cemetery.” FAC ¶¶ 48, 49. The second use of force  
21 occurred during the arrest, when Lezama “grabbed [Gonzales] and threw him up against  
22 the hood of the patrol vehicle . . . and placed him in handcuffs.” FAC ¶ 51. The third use  
23 of force occurred after the arrest when Officer Lezama “threw [Gonzales] on the ground . .  
24 . and begin yelling at him, again on the topic of [Gonzales] failing to stop when [Lezama]  
25 told him to.” FAC ¶ 54.

26 As to the first instance, defendants argue that Officer Lezama’s use of force during  
27 the seizure was reasonable. Motion at 5. They point out that Officer Lezama asked  
28 Gonzales to stop but Gonzales rode away, ignoring Lezama’s request, and that in order to

1 stop Gonzales, Lezama “use no more force than necessary” since Gonzales “did not even  
2 fall.” *Id.* at 6. Defendants allege that “[p]laintiff was not knocked or thrown from [sic] his  
3 bicycle—indeed, Plaintiff did not even fall when Officer Lezama’s patrol car made contact  
4 with him—evinces the minor nature of Officer Lezama’s maneuver.” *Id.* The motion to  
5 dismiss does not address whether the force used during or after the arrest was excessive.  
6 *Id.*

7 Here, plaintiff has not alleged enough facts to plead that a constitutional violation  
8 occurred. The complaint is not clear enough about the force used by the patrol vehicle that  
9 stopped Gonzales. Was Gonzales still in an upright position after the car made contact  
10 because the force of that contact was so light, or because he was pinned to the fence and  
11 could not fall over? How did Gonzales go from that upright position to being taken to the  
12 hospital in a neck brace? If Lezama used the patrol vehicle as a barricade to stop  
13 Gonzales, the level of force might not be as great as if Lezama used the vehicle as an  
14 impact weapon to hit Gonzales head-on.

15 Moreover, the fact that Gonzales attempted to evade arrest cuts against a finding of  
16 excessive or unreasonable force. *See Graham*, 490 U.S. at 396. Gonzales expressly said  
17 “no” to Lezama’s order and fled by biking in the opposite direction. FAC ¶¶ 40, 41.  
18 Under these circumstances, it might be reasonable for officers to use forceful conduct to  
19 arrest the plaintiff given his resisting arrest. *Tatum v. City & Cty. of San Francisco*, 441  
20 F.3d 1090, 1096–97 (9th Cir. 2006).

21 The Court FINDS that Gonzales’s facts are insufficient to allege a violation of his  
22 constitutional rights. Gonzales may amend the complaint to allege additional facts in  
23 support of this claim.

### 24 1. Qualified Immunity

25 The “doctrine of qualified immunity protects government officials ‘from liability  
26 for civil damages insofar as their conduct does not violate clearly established statutory or  
27 constitutional rights of which a reasonable person would have known.’” *Pearson v.*  
28 *Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818

1 (1982)). The qualified immunity analysis is two-pronged, querying: (1) whether there was  
2 a deprivation of a constitutional or statutory right, and (2) whether that constitutional or  
3 statutory right was “clearly established” at the time of the incident. *See Pearson*, 555 U.S.  
4 at 232. The Court may exercise its discretion in deciding which prong to address first in  
5 light of the particular circumstances of each case. *See id.* at 236.

6 Above, the Court found that Gonzales has not alleged sufficient facts to plead a  
7 violation of his constitutional rights. This conclusion holds as to the first prong of the  
8 qualified immunity analysis. Because Gonzales has not alleged a constitutional  
9 deprivation, the Court need not decide whether the right was clearly established.  
10 Nonetheless, the Court discusses this prong of the qualified immunity analysis for the  
11 purpose of aiding the parties in the next round of pleading.

12 A right is “clearly established” if a case can be identified “where an officer acting  
13 under similar circumstances . . . was held to have violated” the Constitution. *White v.*  
14 *Pauly*, 137 S. Ct. 548, 552 (2017). The case need not be “directly on point for a right to be  
15 clearly established,” but “existing precedent must have placed the statutory or  
16 constitutional question beyond debate.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018);  
17 *see Sharp v. Cty. of Orange*, 871 F.3d 901, 911 (9th Cir. 2017) (holding that a plaintiff  
18 seeking to overcome qualified immunity must point to prior case law that articulates a  
19 constitutional rule specific enough to alert these deputies in this case that their particular  
20 conduct was unlawful). The Supreme Court has “repeatedly told courts—and the Ninth  
21 Circuit in particular—not to define clearly established law at a high level of generality.”  
22 *Id.* Moreover, the plaintiff bears the burden of proof that the right allegedly violated was  
23 clearly established. *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014).

24 Here, Gonzales has not met his burden of showing that the right implicated was  
25 clearly established at the time of the incident. The most glaring issue is that the plaintiff  
26 cites no case with comparable facts—where an officer used a patrol vehicle to strike a  
27 fleeing cyclist—where the officer was held to have violated the Constitution. FAC ¶¶ 69–  
28 71. That said, the Court points out that the cases cited by defendants in their motion are

1 equally lacking. Defendants did not cite controlling case law, but pointed to one Eleventh  
 2 Circuit case and another California District Court case to argue that a police officer may  
 3 use significant force to stop a person fleeing on a bicycle without violating the Fourth  
 4 Amendment. Motion at 6–7; *see Montanez v. City of Orlando*, 678 F. App’x 905, 906  
 5 (11th Cir. 2017); *Dulaney v. Dyer*, No. 1:14-CV-1051-LJO-BAM, 2015 WL 6081842, at  
 6 \*1 (E.D. Cal. Oct. 13, 2015). Importantly, neither case defendants cite involves patrol  
 7 vehicles; in fact, both involve officers using significant bodily force to tackle or take down  
 8 fleeing cyclists. *See id.* It seems to the Court that the amount of force from vehicular  
 9 impact could be significantly greater than mere bodily impact. *See generally, Saetrum v.*  
 10 *Vogt*, 673 F. App’x 688, 690 (9th Cir. 2016) (holding that using a patrol car as an impact  
 11 weapon to drive into a pedestrian plaintiff and knocking him to the ground violated clearly  
 12 established law); *Woodward v. D’Onofrio*, No. 14-12347, 2015 WL 6507395, at \*3 (E.D.  
 13 Mich. Oct. 28, 2015) (holding that striking a bicycle with a patrol car in order to stop or  
 14 seize a person is a violation of a clearly established right to be free from excessive force).

15 Plaintiff argues that this is one of the exceptions where the alleged violation was so  
 16 obvious that the “standard of ‘common sense’ can meet the clearly established threshold”  
 17 and that “[precedent] directly on point is not necessary.” Opp. at 5. The Court disagrees.  
 18 While it is “common sense” that a patrol vehicle is capable of producing excessive force  
 19 and inflicting injuries to a bicyclist, it is unclear to the Court whether that happened in this  
 20 case. *See Paige v. City of New Brunswick*, 680 F. App’x 107, 112 (3d Cir. 2017)  
 21 (reasoning that facts are essential to determine the reasonableness of the police action)  
 22 (“For example, whether they deliberately rammed the bicycle with their cruiser, or simply  
 23 attempted to block [plaintiff’s] flight, is a hotly contested matter.”).

24 The Court is not persuaded that either party’s cases show whether the right was  
 25 clearly established. Because it is plaintiff’s burden to make this showing, the Court finds  
 26 that the burden was not met at this stage of the case. Additionally, if Gonzales pleads  
 27 more facts in the amended complaint, the Court will consider those new facts in  
 28 determining whether a clearly established right was violated.



1           Accordingly, the Court GRANTS Defendants’ motion to dismiss Gonzales’s first  
2 claim with LEAVE TO AMEND.

3           **B. Monell Liability**

4           In a § 1983 action, a municipality is liable when the alleged actions implement a  
5 municipal policy or custom in violation of constitutional rights. *Monell v. Dep’t of Soc.*  
6 *Servs. of the City of N.Y.*, 436 U.S. 658, 690 (1978). Under the *Monell* doctrine, Gonzales  
7 must show that he was injured under an expressly adopted official policy, a long-standing  
8 practice or custom, or the decision of a final policy maker. *See Ellins v. City of Sierra*  
9 *Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013). Generally, a municipality cannot be held  
10 liable under § 1983 “solely because it employs a tortfeasor.” *Monell*, 426 U.S. at 691.  
11 Rather, § 1983 liability may be imposed only when a municipal “policy” or “custom” is  
12 the “moving force” behind a violation of federally protected rights. *Id.* at 694.

13           Here, Gonzales does not allege sufficient facts to support his claim that his injury  
14 resulted from an official policy, a long-standing practice or custom, or the decision of a  
15 final policy maker. In the FAC, Gonzales describes the city’s official policies as  
16 “unconstitutional” without citing any policy statement, ordinance, regulation, or decision  
17 officially adopted or promulgated by the City of San Jose. FAC ¶ 63. Absent a formal  
18 policy, a plaintiff must show a “longstanding practice or custom which constitutes the  
19 standard operating procedure of the local government entity.” *Trevino v. Gates*, 99 F.3d  
20 911, 918 (9th Cir. 1996). Gonzales’s vague allegations also fail here. Gonzales contends  
21 that “[the city] has had *prior incidents* of the use of a patrol vehicle to ram or strike a  
22 fleeing suspect . . . .” FAC ¶¶ 62–63 (emphasis added). However, the description of  
23 “prior incidents” is too vague to amount to a long-standing practice or custom. *See*  
24 *Clemmons v. City of Long Beach*, 379 F. App’x 639, 641 (9th Cir. 2010) (holding that  
25 improper custom may not be predicated on isolated or sporadic incidents; it must be  
26 founded upon practices of sufficient duration, frequency and consistency that the conduct  
27 has become a traditional method of carrying out policy). Gonzales mentioned two prior  
28 incidents, in which “Mr. Dameon Wright . . . was struck twice by SJP officer’s vehicles

1 nearly ten years apart . . . .” FAC ¶ 4. However, two incidents are not sufficient to  
2 establish a custom. *Meehan v. Los Angeles County*, 856 F.2d 102 (9th Cir.1988).

3 Inadequacy of training may also “serve as the basis for § 1983 liability,” but only  
4 when a plaintiff can prove “deliberate indifference”—a “stringent standard of fault,  
5 requiring proof that a municipal actor disregarded a known or obvious consequence of his  
6 action.” *Board of Comm’rs of Bryan County. v. Brown*, 520 U.S. 397, 410 (1997)  
7 (requiring a pattern of similar constitutional violations under a failure-to-train theory).  
8 Under this theory, Gonzales alleges that “[the city] failed to adequately supervise and train  
9 [d]efendants to refrain from striking a fleeing suspect . . . with a police patrol vehicle” and  
10 “[defendant city] has demonstrated deliberate indifference to this patten and practice of  
11 Constitutional violations by its employees by failing to take necessary . . . measures . . . .”  
12 FAC ¶¶ 76–77. Similarly here, Gonzales has not alleged enough facts to show that the city  
13 acted with deliberate indifference as to its officers striking fleeing suspects because these  
14 are mere conclusory statements.

15 Because Gonzales’s *Monell* claim contains conclusory legal statements rather than  
16 specific facts, the Court finds that the *Monell* claim is insufficiently pleaded, and  
17 GRANTS the motion to dismiss the § 1983 claim against San Jose with LEAVE TO  
18 AMEND.

19 **C. The Bane Act (California Civil Code § 52.1)**

20 To bring a claim under California’s Bane Act, the plaintiff must satisfy two distinct  
21 elements: (1) intentional interference or attempted interference with a state or federal  
22 constitutional or legal right, and (2) that the interference or attempted interference was by  
23 threats, intimidation, or coercion. *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 67  
24 (2015); see also Cal Civ. Code § 52.1. Qualified immunity does not apply to claims under  
25 the Bane Act, because qualified immunity is a federal doctrine that does not extend to state  
26 tort claims against government employees. *Venegas v. Cnty. of Los Angeles*, 153 Cal.  
27 App. 4th 1230, 1244–46 (2007). “[T]he elements of [an] excessive force claim under Civil  
28 Code § 52.1 are the same as under § 1983.” *Chaudry v. City of Los Angeles*, 751 F.3d

1 1096, 1105 (9th Cir. 2014). Thus, if a plaintiff cannot prove a constitutional violation  
2 under § 1983, he cannot bring a cause of action under a Bane Act violation either. *Pryor v.*  
3 *City and Cty. of San Francisco*, 671 F. App’x 751, 752 (9th Cir. 2017).

4 In their motion to dismiss, defendants argue that a Bane Act claim requires a  
5 showing of threats, intimidation or coercion in addition to an underlying constitutional  
6 violation. Motion at 15. Defendants cite *Shoyoye v. Cty. of Los Angeles*, in which the  
7 court ruled that the Bane Act requires showing that the defendant used coercion or  
8 violence to interfere with a constitutional right in addition to the coercion inherent in the  
9 detention itself. 203 Cal. App. 4th 947, 958 (Cal. Ct. App. 2012) (citations omitted);  
10 Motion at 21. Plaintiff counters with *Reese v. County of Sacramento*, 888 F. 3d 1030 (9th  
11 Cir. 2018), in which the court ruled that the use of excessive force can be enough to satisfy  
12 the “coercion” element of § 52.1. Opp. at 19. Here, *Reese* is the controlling case as the  
13 Ninth Circuit has reasoned that “reliance on *Shoyoye* is misplaced” when the claim is about  
14 excessive force. *Reese* 888 F. 3d at 1042. In *Reese*, the Ninth Circuit held that “[n]othing  
15 in the test of [§ 52.1] requires that the offending ‘threat, intimidation or coercion’ be  
16 ‘independent’ from the constitutional violation alleged.” *Reese v. Cty. of Sacramento*, 888  
17 F.3d 1030, 1043 (9th Cir. 2018) (quoting *Cornell v. City & Cty. of San Francisco*, 17 Cal.  
18 App. 5th 766, 801 (Cal. App. 2017)).

19 Additionally, the Bane Act requires “a specific intent to violate the arrestee’s right  
20 to freedom from unreasonable seizure.” *Id.* In other words, it must be that the officer  
21 “intended not only the force, but its unreasonableness, its character as more than necessary  
22 under the circumstances.” *Id.* at 1045 (internal quotation omitted) (quoting *United States v.*  
23 *Reese*, 2 F.3d 870, 885 (9th Cir. 1993)).

24 Here, Gonzales’s complaint falls short of alleging a Bane Act violation because  
25 Gonzales does not allege enough facts to show Lezama intended not only the force, but  
26 also its unreasonableness when he struck Gonzales. Gonzales only alleges that “Lezama  
27 sped up coming out of the U-turn and accelerated towards the oncoming [Gonzales],”  
28 which at most shows Lezama intended the contact. Moreover, because Gonzales did not

1 allege enough facts for a constitutional violation under § 1983, he has not pled a cause of  
2 action for a constitutional violation under the Bane Act either. *Pryor*, 671 F. App'x 752.

3 Accordingly, the Court GRANTS Defendants' motion to dismiss Gonzales's Bane  
4 Act violation claim with LEAVE TO AMEND.

5 **D. Intentional Infliction of Emotional Distress (IIED)**

6 Plaintiff brings claims for intentional infliction of emotional distress against both  
7 officer Lezama and against the City of San Jose under a theory of respondeat superior.  
8 FAC ¶¶ 90–91.

9 A claim for intentional infliction of emotional distress requires a plaintiff to show:  
10 (1) extreme and outrageous conduct by the defendant with the intent of causing, or reckless  
11 disregard of the probability of causing, emotional distress; (2) the plaintiff actually  
12 suffering severe or extreme emotional distress; and (3) actual or proximate causation.

13 *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993). Severe or extreme  
14 emotional distress “may consist of any highly unpleasant mental reaction such as fright,  
15 grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry.”

16 *Fletcher v. Western National Life Ins. Co.*, 10 Cal. App. 3d 376, 396 (1970).

17 Here, Gonzales's claim for IIED is insufficiently pleaded. First, Gonzales's  
18 allegation “Lezama [had] the specific intent to inflict severe mental and emotional distress  
19 upon the Plaintiff, to wit, the anticipation of being struck by a moving vehicle” amounts to  
20 a legal conclusion. FAC ¶ 89. Second, because the IIED claim alleges the same facts as  
21 an excessive force claim, the Court will defer the IIED claim to the determination of the  
22 excessive force claim. *See, e.g. Dillman v. Tuolumne Cnty.*, 1:13–CV–00404 LJO, 2013  
23 WL 1907379 (E.D. Cal. May 7, 2013); *C.B. v. Sonora Sch. Dist.*, 691 F. Supp. 2d 1170,  
24 1186 (E.D. Cal. 2010) (illustrating that courts have deferred dismissal of the IIED claim  
25 when the excessive force claim has yet to be decided). Because there are not enough facts  
26 alleged as to the constitutional violation, the Court is not convinced that Lezama engaged  
27 in “extreme and outrageous conduct” with an “intent of causing, or reckless disregard of  
28 the probability of causing emotional distress.” *Potter*, 6 Cal. 4th at 1001.

1           Accordingly, the Court GRANTS the motion to dismiss the IIED claim with  
2 LEAVE TO AMEND.

3           **E. The Government Claims Act**

4           For claims brought under state (rather than federal) law, California’s Government  
5 Claims Act requires a plaintiff to exhaust administrative remedies with a public entity  
6 before filing a lawsuit against that entity for damages based on the same claim. *State of*  
7 *California v. Superior Court*, 32 Cal. 4th 1234, 1237 (2004). In his complaint, a plaintiff  
8 must allege compliance with the GCA to sufficiently plead his claim. *Mangold v.*  
9 *California Public Utilities Comm’n*, 67 F.3d 1470, 1477 (9th Cir. 1995). To exhaust  
10 administrative remedies under the GCA, the plaintiff must both file an administrative  
11 claim and the claim must have been rejected by the public entity. Cal. Gov. Code § 945.4  
12 (2014); Cal. Gov. Code § 912.4 (2002). Rejection can come in the form of notice from the  
13 entity or from 45 days with no response. *Id.* The California Supreme Court has held that  
14 the exhaustion requirement is not merely a procedural requirement; rather, exhaustion  
15 constitutes an element of every state law cause of action against a public entity. *State of*  
16 *California*, 32 Cal. 4th at 1244 (rejecting the holding of *Cory v. City of Huntington Beach*,  
17 43 Cal. App. 3d 131 (1974) that compliance with the GCA is a procedural requirement  
18 rather than an element of any state law claim). This means that until a plaintiff’s  
19 government claim has been rejected, his state law causes of action have not arisen because  
20 one element does not exist. A cause of action must arise before a case is filed—a plaintiff  
21 may not amend a complaint to add causes of action that arise later. *Walton v. Kern Cty.*,  
22 39 Cal. App. 2d 32, 34 (1940). So, if plaintiff has not exhausted administrative remedies  
23 under the GCA when he files a complaint, his state law causes of action cannot later be  
24 added to an amended complaint.

25           Such is the case here. The incident with Officer Lezama occurred on December 9,  
26 2019. FAC ¶ 1. Plaintiff filed his government claim with the City of San Jose on  
27 December 16, 2019. FAC ¶ 10. Plaintiff filed this case on December 17, 2019. Dkt. No.  
28 1. His original complaint brought only one federal claim under § 1983. *Id.* His amended

1 complaint, which he filed on April 17, 2020, included state law claims for violation of the  
2 Bane Act and for intentional infliction of emotional distress. Dkt. No. 24. In the  
3 opposition to the motion to dismiss, Plaintiff acknowledges that his state law causes of  
4 action had only accrued under the GCA when his claim with the City of San Jose had been  
5 rejected—that is, after he filed the original complaint. Opp. at 15.

6 At the hearing on this motion, Plaintiff argued that the requirements of the GCA  
7 have now technically been met and that the state law claims should thus proceed. Dkt. No.  
8 39. But compliance with the GCA is more than a mere technicality. The purpose behind  
9 the statute is to encourage would-be litigants to settle their cases with public entities before  
10 the government has incurred the costs of defending a lawsuit. *Le Mere v. Los Angeles*  
11 *Unified Sch. Dist.*, 35 Cal. App. 5th 237, 247 (2019). The public entity is not afforded  
12 time to investigate and resolve a claim that is filed the day before a lawsuit is filed.  
13 Allowing the plaintiff to do so would be clearly out of step with the legislature’s intent in  
14 enacting the GCA.

15 The motion to dismiss the state law claims for failure to comply with the  
16 Government Claims Act is therefore GRANTED. The Court suspects that amendment to  
17 cure this deficiency is futile. However, given Plaintiff’s leave to amend the rest of the  
18 complaint, the Court grants LEAVE TO AMEND as to the GCA compliance to give the  
19 plaintiff opportunity to allege further facts to show that his state law claims should not be  
20 dismissed.

21 **IV. Conclusion**

22 The Court GRANTS Defendants’ motion to dismiss and GRANTS the plaintiff  
23 LEAVE TO AMEND. If Gonzales chooses to amend, he must file his amended complaint  
24 by July 10, 2020. If Gonzales does not file a timely amended complaint the Court will  
25 enter judgment for defendants. The amended complaint may not add additional claims or  
26 defendants without leave of Court.

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**IT IS SO ORDERED.**

Dated: June 15, 2020

  
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NATHANAEL M. COUSINS  
United States Magistrate Judge