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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
EUREKA DIVISION

MICHAEL IZELL SEALS,

No. C 04-03764 NJV

Plaintiff,

ORDER DENYING PLAINTIFF'S MOTION  
TO STRIKE THE FIRST AFFIRMATIVE  
DEFENSE (Doc. No. 135)

v.

OFFICER RODNEY K. MITCHELL, ET AL.,

Defendants.

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Plaintiff Michael Izell Seals brought a 42 U.S.C. § 1983 action against Defendants John Rynhart and Lyle Thomas alleging use of excessive force during Plaintiff's arrest on February 5, 2003. Plaintiff moves to strike the First Affirmative Defense of Defendants' Second Amended Answer to the Second Amended Complaint. The Court held a hearing on Plaintiff's motion on November 30, 2010, at which counsel for Plaintiff and Defendants appeared. Having considered the arguments of the parties and the papers submitted, and for good cause shown, the Court DENIES Plaintiff's motion to strike without prejudice.

**I. BACKGROUND**

On February 5, 2003, Deputy John Rynhart and Deputy Lyle Thomas arrested Plaintiff on charges of violation of California Health & Safety Code sections 11350(a) (possession of cocaine) and 11352 (possession of cocaine with intent to sell), violation of California Penal Code section 3056 (violation of California Department of Corrections parole status), and violation of California

1 Vehicle Code section 12500(c) (driving without a license). The parties' descriptions of the incident  
2 giving rise to Plaintiff's claim are detailed in the Court's September 28, 2007 Order Granting  
3 Defendants' Motion for Summary Judgment (Doc No. 71) (Judge Sandra Brown Armstrong), *rev'd*  
4 *by Seals v. Mitchell*, No. 07-16951, slip op. (9th Cir. May 26, 2009) (Doc. No. 90). Plaintiff alleges  
5 that, in the course of the arrest, the deputies used excessive force in violation of his Fourth  
6 Amendment rights.

7 On September 8, 2004, Plaintiff, appearing *pro se*, filed this civil rights action seeking  
8 damages under 42 U.S.C. § 1983. In the complaint, Plaintiff named twenty-two Defendants and  
9 asserted eight claims alleging Fourth Amendment, equal protection, and due process violations. In  
10 an Order dated May 23, 2007, the Court found that Plaintiff stated a cognizable Fourth Amendment  
11 claim against two Lake County Sheriff's Officers, Defendants Rynhart and Thomas, for alleged use  
12 of excessive force during Plaintiff's arrest on February 5, 2003. Doc. No. 55. The Court dismissed  
13 all other claims against the remaining Defendants for failure to state a claim upon which relief may  
14 be granted. *Id.* Plaintiff's claims for injunctive relief were dismissed as moot.

15 Defendants Rynhart and Thomas filed a motion for summary judgment on the grounds that  
16 Defendants were entitled to qualified immunity and that no triable issue of material fact existed  
17 because the force used was objectively reasonable under the circumstances. Doc. No. 61. Plaintiff  
18 filed a cross-motion for summary judgment. Doc. No. 68. On September 28, 2007, the Court denied  
19 Plaintiff's motion for summary judgment and granted Defendants' motion for summary judgment on  
20 the grounds of qualified immunity and the absence of a genuine issue as to the reasonableness of  
21 force. Doc. No. 71.

22 Plaintiff appealed the Court's entry of summary judgment for Defendants. The Ninth Circuit  
23 reversed this Court's grant of summary judgment and remanded. Doc. No. 90. Following remand,  
24 the action was reassigned to the undersigned judge upon the parties' consent to proceed before a  
25 United States Magistrate Judge. Counsel for Plaintiff was appointed by order dated April 20, 2010.  
26 Doc. No. 117. Pursuant to stipulation, Plaintiff filed a Second Amended Complaint on June 29,  
27 2010. Doc. No. 124. Defendants filed an answer to the Second Amended Complaint on June 29,  
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1 2010, an amended answer on July 30, 2010, and, pursuant to stipulation, a Second Amended Answer  
2 on August 31, 2010. Doc. Nos. 126, 131 and 134.

3 On September 23, 2010, Plaintiff filed the present motion to strike the first affirmative  
4 defense. Doc. No. 135. Defendants timely filed an opposition and Plaintiff timely filed a reply.  
5 The Court held a hearing on Plaintiff’s motion on November 30, 2010.

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7 **II. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 12(f) provides that a court may strike an affirmative defense  
9 if it presents “an insufficient defense, or any redundant, immaterial, impertinent, or scandalous  
10 matter.” Fed. R. Civ. P. 12(f). The purpose of a Rule 12(f) motion is to avoid spending time and  
11 money litigating spurious issues. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993),  
12 *rev’d on other grounds*, 510 U.S. 517 (1994). A matter is immaterial if it has no essential or  
13 important relationship to the claim for relief pleaded. *Id.* A matter is impertinent if it does not  
14 pertain and is not necessary to the issues in question in the case. *Id.* “While a Rule 12(f) motion  
15 provides the means to excise improper materials from pleadings, such motions are generally  
16 disfavored because the motions may be used as delaying tactics and because of the strong policy  
17 favoring resolution on the merits.” *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*,  
18 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010) (citation omitted).

19 As this Court has previously recognized, “[a]lthough the Ninth Circuit has not ruled on the  
20 proper use of a Rule 12(f) motion to strike an affirmative defense, three other circuits have ruled that  
21 the motion is disfavored and should only be granted if the asserted defense is clearly insufficient as a  
22 matter of law under any set of facts the defendant might allege.” *McArdle v. AT & T Mobility LLC*,  
23 657 F. Supp. 2d 1140, 1149-50 (N.D. Cal. 2009) (citations omitted); *accord Williams v. Jader Fuel*  
24 *Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991) (motion to strike affirmative defense is disfavored unless it  
25 appears certain that plaintiffs would succeed despite any facts that would support defendants that are  
26 inferable from the pleadings). “Accordingly, once an affirmative defense has been properly pled, a  
27 motion to strike which alleges the legal insufficiency of an affirmative defense will not be granted  
28 ‘unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which

1 could be proved in support of the defense.” *Barnes*, 718 F. Supp. 2d at 1170 (quoting *William Z.*  
2 *Salcer, Panfeld, Edelman v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984) (internal  
3 citation omitted), *vacated on other grounds by Salcer v. Envicon Equities Corp.*, 478 U.S. 1015  
4 (1986)); *see also Securities & Exchange Comm’n v. Sands*, 902 F. Supp. 1149, 1165 (C.D. Cal.  
5 1995) (“To strike an affirmative defense, the moving party must convince the court ‘that there are no  
6 questions of fact, that any questions of law are clear and not in dispute, and that under no set of  
7 circumstances could the defense succeed.’” (quotation omitted)).

8 A motion to strike is a matter of discretion for the court and may be appropriate where it will  
9 streamline the ultimate resolution of the action. *Federal Savings and Loan Insurance Corp. v.*  
10 *Gemini Management*, 921 F.2d 241, 244 (9th Cir. 1990); *Fogerty*, 984 F.2d at 1528. If the defense  
11 asserted is invalid as a matter of law, the court should determine the issue prior to a needless  
12 expenditure of time and money. *Hart v. Baca*, 204 F.R.D. 456, 457 (C.D. Cal. 2001). Motions to  
13 strike, however, are generally not granted unless it is clear that the matter sought to be stricken could  
14 have no possible bearing on the subject matter of the litigation. *See LeDuc v. Ky. Cent. Life Ins. Co.*,  
15 814 F. Supp. 820, 830 (N.D. Cal. 1992).

### 17 III. DISCUSSION

18 Plaintiff moves to strike the first affirmative defense from Defendants’ Second Amended  
19 Answer asserting qualified immunity on the ground that upon reversal of summary judgment for  
20 Defendants, the Ninth Circuit ruled that “defendants are not entitled to qualified immunity because it  
21 was clearly established at the time that ‘force is only justified when there is a need for force.’” Doc.  
22 No. 90. Plaintiff contends that the law of the case doctrine bars Defendants from raising qualified  
23 immunity on remand and moves to strike that affirmative defense from the pleadings.

24 Defendants respond that Plaintiff misconstrues the Ninth Circuit ruling. Defendants argue  
25 that the Ninth Circuit reversed summary judgment because Plaintiff placed material facts in dispute  
26 as to whether the amount of force used against Plaintiff was unreasonable or excessive. Defendants  
27 further argue that the disputed facts regarding Plaintiff’s excessive force claim are also facts  
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1 disputed for the qualified immunity defense. Thus, Defendants argue that the Ninth Circuit’s  
2 reversal does not preclude Defendants from asserting qualified immunity.

3 **A. Law of the Case and Rule of Mandate**

4 “Under the ‘law of the case’ doctrine, a court is ordinarily precluded from reexamining an  
5 issue previously decided by the same court, or a higher court, in the same case.” *Richardson v. U.S.*,  
6 841 F.2d 993, 996 (9th Cir. 1988). In particular, “[a] trial court may not [on remand] reconsider a  
7 question decided by an appellate court.” *U.S. v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986). The  
8 Ninth Circuit recognizes three exceptions to the law of the case doctrine when “(1) the decision is  
9 clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling  
10 authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a  
11 subsequent trial.” *Minidoka Irrigation Dist. v. Department of Interior of U.S.*, 406 F.3d 567, 573  
12 (9th Cir. 2005) (quoting *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002)); *see also*  
13 *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc), *overruled on other grounds by*  
14 *Lindh v. Murphy*, 521 U.S. 320 (1997). District courts are also bound by the rule of mandate.  
15 “Although broader than the law of the case doctrine, the so-called rule of mandate allows a lower  
16 court to decide anything not foreclosed by the mandate.” *Herrington v. County of Sonoma*, 12 F.3d  
17 901, 904-05 (9th Cir. 1993).

18 **B. Qualified Immunity**

19 “The doctrine of qualified immunity protects government officials ‘from liability for civil  
20 damages insofar as their conduct does not violate clearly established statutory or constitutional  
21 rights of which a reasonable person would have known.’” *Pearson v. Callahan*, --- U.S. ---, 129 S.  
22 Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). As the Ninth Circuit  
23 has recognized, *Pearson* modified the two-step sequence for resolving government officials’  
24 qualified immunity claims set forth in *Saucier v. Katz*, 533 U.S. 194, 198 (2001). *See Delia v. City*  
25 *of Rialto*, 621 F.3d 1069, 1074-75 (9th Cir. 2010); *James v. Rowlands*, 606 F.3d 646, 650-51 (9th  
26 Cir. 2010). The two-step protocol under *Saucier* required courts considering a qualified immunity  
27 claim to first determine “whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc.  
28 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right,” and then,

1 “if the plaintiff has satisfied this first step, [ ] decide whether the right at issue was ‘clearly  
2 established’ at the time of defendant’s alleged misconduct.” *Pearson*, 129 S. Ct. at 815-16. *Pearson*  
3 did not dispose of the two-prong qualified immunity inquiry established by *Saucier*, but overruled  
4 *Saucier* to the extent that *Saucier* required courts to proceed sequentially through the two-step  
5 analysis, thus giving courts discretion ““in deciding which of the two prongs of the qualified  
6 immunity analysis should be addressed first.” *Delia*, 621 F.3d at 1075 (quoting *Pearson*, 129 S. Ct.  
7 at 818); see *James*, 606 F.3d at 650-51 (*Pearson* “gave courts discretion to grant qualified immunity  
8 on the basis of the ‘clearly established’ prong alone, without deciding in the first instance whether  
9 any right had been violated.”).

10 In its discussion of the protection of qualified immunity in *Pearson*, the Supreme Court  
11 explained as follows:

12 Because qualified immunity is “an immunity from suit rather than a mere  
13 defense to liability ... it is effectively lost if a case is erroneously permitted  
14 to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Indeed, we  
15 have made clear that the “driving force” behind creation of the qualified  
immunity doctrine was a desire to ensure that “‘insubstantial claims’  
against government officials [will] be resolved prior to discovery.”  
*Anderson v. Creighton*, 483 U.S. 635, 640 n. 2 (1987).

16 *Pearson*, 129 S. Ct. at 815. The Supreme Court pointed out that ““we repeatedly have stressed the  
17 importance of resolving immunity questions at the earliest possible stage in litigation.”” *Id.* (quoting  
18 *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). “Qualified immunity is applicable unless  
19 the official’s conduct violated a clearly established constitutional right.” *Id.* at 816. The second  
20 prong under *Saucier*, that the right against excessive force was clearly established at the time of the  
21 violation, is a “purely legal” question for the court. *Serrano v. Francis*, 345 F.3d 1071, 1080 (9th  
22 Cir. 2003).

### 23 C. Analysis

24 The Court first examines Judge Armstrong’s order granting Defendants’ motion for summary  
25 judgment and the Ninth Circuit’s reversal of this order. On Defendants’ motion for summary  
26 judgment, Judge Armstrong granted summary judgment on two grounds. First, on the merits of the  
27 excessive force claim, Judge Armstrong held that, resolving all factual disputes in Plaintiff’s favor,  
28 Defendants’ use of force under the totality of the circumstances was objectively reasonable such that

1 there was no genuine issue for trial concerning the excessiveness of force. Doc. No. 71 at 13.  
2 Second, Judge Armstrong held, as an alternative ground for summary judgment, that Defendants  
3 were entitled to qualified immunity with respect to Plaintiff’s underlying excessive force claim. *Id.*  
4 at 17.

5 Both grounds were challenged on appeal to the Ninth Circuit. The Ninth Circuit reversed  
6 this Court’s grant of summary judgment on both grounds. First, as to the underlying constitutional  
7 claim, the Ninth Circuit held that Plaintiff had placed a material fact in dispute by stating that  
8 Defendants, “without any provocation, choked him until he lost consciousness.” Doc. No. 90 at 2.  
9 The Ninth Circuit held that this evidence could support a finding of excessive force.

10 Second, the Ninth Circuit held that Defendants were not entitled to qualified immunity  
11 because the constitutional right against excessive force was clearly established under *Blankenhorn v.*  
12 *City of Orange*, 485 F.3d 463, 481 (9th Cir. 2007) (per curiam). The Ninth Circuit stated: “Further,  
13 defendants are not entitled to qualified immunity because it was clearly established at the time that  
14 ‘force is only justified when there is a need for force.’” Doc. No. 90 at 2-3.

15 The Ninth Circuit did not expressly address Judge Armstrong’s determination under the first  
16 prong of *Saucier* that Plaintiff failed to show a violation of a constitutional right. The Court infers,  
17 however, that the Ninth Circuit reversed Judge Armstrong’s ruling on both *Saucier* prongs because  
18 had Judge Armstrong’s determination under the first prong of *Saucier* been upheld, qualified  
19 immunity would bar Plaintiff’s suit altogether. This is because if **either** *Saucier* prong is  
20 established, the defendant is entitled to qualified immunity. *See James*, 606 F.3d at 650-51 (“we  
21 may grant qualified immunity if ‘the facts that a plaintiff has alleged or shown [do not] make out a  
22 violation of a constitutional right’ **or** if ‘the right at issue was not ‘clearly established’”) (emphasis  
23 added) (quoting *Pearson*, 129 S. Ct. at 816, 818); *see also Brooks v. City of Seattle*, 599 F.3d 1018,  
24 1022 (9th Cir. 2010) (“If the Officers’ actions do not amount to a constitutional violation, the  
25 violation was not clearly established, **or** their actions reflected a reasonable mistake about what the  
26 law requires, they are entitled to qualified immunity.”) (emphasis added); *Hopkins v. Bonvicino*, 573  
27 F.3d 752, 762 (9th Cir. 2009); *Skoog v. County of Clackamas*, 469 F.3d 1221, 1229 (9th Cir. 2006).

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1 Furthermore, the Ninth Circuit held that a material fact was in dispute and that the evidence could  
2 support Plaintiff’s underlying excessive force claim. Doc. No. 90 at 2.

3 In reversing the grant of summary judgment based on qualified immunity, the Ninth Circuit  
4 did not foreclose the possibility that based on the evidence presented at trial, a reasonable jury could  
5 find that Defendants’ use of force was not excessive. Therefore, the Ninth Circuit also did not  
6 foreclose Defendants’ ability to later renew their qualified immunity defense.

7 In addition, the Ninth Circuit did not decide the first *Saucier* prong as a matter of law. *Cf.*  
8 *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) (recognizing as law of the case earlier  
9 appellate court’s legal determination regarding the second *Saucier* prong that defendants were not  
10 entitled to qualified immunity because right was clearly established and reasonable officials would  
11 have known that the challenged conduct infringed that right). Neither the law of the case doctrine,  
12 nor the rule of mandate, precludes this Court from trying the genuine dispute of material fact  
13 regarding the excessiveness of Defendants’ use of force. *See Serrano*, 345 F.3d at 1077 (“If a  
14 genuine issue of material fact exists that prevents a determination of qualified immunity at summary  
15 judgment, the case must proceed to trial.”).

16 If the jury finds that Defendants did not use excessive force in violation of Plaintiff’s Fourth  
17 Amendment rights, Defendants would be entitled to qualified immunity. Plaintiff is correct that  
18 practically speaking, if the jury finds that Defendants did not use excessive force, the Defendants  
19 will have won on the merits and will not need the protection of the qualified immunity defense. But  
20 not needing an affirmative defense after a victory on the merits does not justify prematurely *striking*  
21 the defense.

22 Under Plaintiff’s argument, the denial of summary judgment based on qualified immunity  
23 would preclude defendants from raising the defense during or after trial. Defendants can and often  
24 do, however, raise the qualified immunity defense in Rule 50(a) motions after the end of the  
25 plaintiff’s case before the matter is submitted to the jury, and renew the defense in Rule 50(b) post-  
26 trial motions. *See, e.g., Johnson v. Breeden*, 280 F.3d 1308, 1317-18 (11th Cir. 2002) (“Defendants  
27 who are not successful with their qualified immunity defense before trial can re-assert it at the end of  
28 the plaintiff’s case in a Rule 50(a) motion. That type of motion will sometimes be denied because

1 the same evidence that led to the denial of the summary judgment motion usually will be included in  
2 the evidence presented during the plaintiff's case, although sometimes evidence that is considered at  
3 the summary judgment stage may turn out not to be admissible at trial. Where there is no change in  
4 the evidence, the same evidentiary dispute that got the plaintiff past a summary judgment motion  
5 asserting the qualified immunity defense will usually get that plaintiff past a Rule 50(a) motion  
6 asserting the defense, although the district court is free to change its mind."').

7 Because Plaintiff has failed to show that Defendants' qualified immunity defense  
8 is clearly insufficient as a matter of law under any set of facts, the Court DENIES Plaintiff's motion  
9 to strike this affirmative defense from the pleadings. *See McArdle*, 657 F. Supp. 2d at 1149-50. As  
10 a practical matter, the triable issues of fact presented in this case prevent Defendants from enjoying  
11 the protection of qualified immunity against the burdens of discovery, pre-trial procedures, and trial.  
12 *See Pearson*, 129 S. Ct. at 815, 819.

13  
14 **CONCLUSION**

15 Plaintiff's motion to strike the first affirmative defense from the Second Amended Answer is  
16 DENIED.

17 IT IS SO ORDERED.

18  
19 Dated: December 8, 2010

  
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NANDOR J. VADAS  
United States Magistrate Judge