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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 SAMUEL GILLESPIE, et al.,
8 Plaintiffs,
9 v.
10 MARCO A TORRES, et al.,
11 Defendants.

Case No. 20-cv-03735-DMR

**ORDER ON DEFENDANTS' MOTION
TO DISMISS**

Re: Dkt. No. 33

12 This case arises out of an incident on August 1, 2019 between several Alameda County
13 deputy sheriffs and Plaintiffs Samuel Gillespie and Suzanne Gillespie. On August 31, 2020, the
14 court granted Defendants' motion to dismiss Plaintiffs' initial complaint with leave to amend.
15 [Docket No. 19 ("Order on First MTD").] Plaintiffs filed an amended complaint, followed by a
16 second amended complaint by stipulation of the parties. [Docket Nos. 20, 28 ("SAC").] Defendants
17 Marco A. Torres, Matthew D. Yarborough, Leo M. Basped, S. Holland, and Micah S. Bennett now
18 move to dismiss the SAC. [Docket Nos. 33 ("Mot."), 35 ("Reply").] Plaintiffs oppose. [Docket
19 No. 34 ("Opp.").] The court determined that this motion is suitable for determination without oral
20 argument, pursuant to Civil Local Rule 7-1(b).

21 For the reasons stated below, the motion is granted in part and denied in part.

22 **I. BACKGROUND**

23 The SAC alleges the following facts. Ms. Gillespie is Mr. Gillespie's mother. SAC ¶ 15.
24 On August 1, 2019, Defendants arrived at Ms. Gillespie's residence in Castro Valley, CA. Id. ¶ 12.
25 Both Plaintiffs were present in the home. Ms. Gillespie had a "no harassment order" ("HAM")
26 against Mr. Gillespie, but the order allowed him to be on the premises as long as he did not harass
27 her. Id. ¶ 13. Defendants, led by Torres, attempted to enter Ms. Gillespie's house to speak with Mr.
28 Gillespie. Id. ¶ 12. Ms. Gillespie refused to let them enter without a warrant, which resulted in a

1 40 minute exchange between her and the officers. Id. ¶ 13. Allegedly, Defendants gave conflicting
2 statements about why they wanted to enter. Id. One officer said that they wanted to do a welfare
3 check, another stated that they were there for a probation search, and a third claimed that there was
4 a bench warrant for Mr. Gillespie's arrest.¹ Id. Torres told Ms. Gillespie that Mr. Gillespie was in
5 violation of the HAM, but Ms. Gillespie explained that the order allowed him to be in the home as
6 long as he did not harass her and that the court notified the police department about the order. Id.
7 During the exchange, Ms. Gillespie called Mr. Gillespie's defense attorney, who instructed her to
8 not allow Defendants to enter her home without a warrant. Id. Defendants threatened to arrest Ms.
9 Gillespie if she did not comply and also threatened to use K9 Officer Queen to force her compliance.
10 Id.

11 At some point, Ms. Gillespie heard Defendants break into the house through her garage.
12 SAC ¶ 14. Defendants and Queen entered the house and told Ms. Gillespie to go outside. Id. Ms.
13 Gillespie complied. Id. Defendants handcuffed her and began to search the house. Id. Mr. Gillespie
14 was in the attic, waiting for Ms. Gillespie to resolve the situation. Id. ¶ 15. He heard Defendants
15 break into the house and begin the search. Id. Yarborough eventually entered the attic and
16 immediately released Queen, who bit Mr. Gillespie on his leg and ankle. Id. Yarborough called
17 Queen off, but she did not obey and continued to attack Mr. Gillespie's leg. Id. Finally, Yarborough
18 tackled Queen and as a result, Yarborough and Queen fell through the attic ceiling and landed in the
19 living room one floor below. Id. Outside, Ms. Gillespie heard Mr. Gillespie "wailing loudly." Id.
20 ¶ 14. Soon after, Defendants led Mr. Gillespie out of the house. Id. Ms. Gillespie saw multiple
21 dog bites on his leg. Id. Mr. Gillespie was in severe pain and needed help to walk. Id.

22 Defendants brought the Gillespies to Eden Hospital in Castro Valley. SAC ¶ 16. Ms.
23 Gillespie could hear Mr. Gillespie "wailing and crying" in an adjacent room. Id. The hospital staff
24 cleared Mr. Gillespie for jail and instructed Defendants on how to care for his wounds. Id.
25 Defendants booked both Plaintiffs in Santa Rita Jail. Id. Ms. Gillespie was released the next day
26 and all charges against her were dropped. Id. ¶ 17. Mr. Gillespie developed a leg infection and,
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28 ¹ The SAC alleges that a court stayed all bench warrants against Samuel because he was due to start
a drug rehabilitation program three days later. SAC ¶ 15.

1 after his public defender noted the injury in a court hearing, the court ordered the jail to provide
2 medical care. *Id.* Mr. Gillespie was transported back to Eden Hospital, where the doctors considered
3 amputating his leg because the infection was so severe. *Id.* Mr. Gillespie stayed in the hospital for
4 six weeks, and received treatment for a staph infection, infection-related heart damage, and mitral
5 valve prolapse with regurgitation. *Id.* Mr. Gillespie had been charged with resisting arrest but the
6 charges were subsequently dropped. *Id.*

7 Both Plaintiffs bring a claim for excessive force in violation of the Fourth Amendment. Mr.
8 Gillespie's claim is brought only against Yarborough, while Ms. Gillespie's claim is brought against
9 all Defendants. Mr. Gillespie also brings a claim for deliberate indifference to medical needs in
10 violation of the Fourteenth Amendment against Doe Defendants. Defendants move to dismiss all
11 claims.

12 **II. LEGAL STANDARD FOR RULE 12(B)(6) MOTIONS**

13 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in
14 the complaint. See *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).
15 When reviewing a motion to dismiss for failure to state a claim, the court must "accept as true all
16 of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)
17 (per curiam) (citation omitted), and may dismiss a claim "only where there is no cognizable legal
18 theory" or there is an absence of "sufficient factual matter to state a facially plausible claim to
19 relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing
20 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
21 2001)) (quotation marks omitted). A claim has facial plausibility when a plaintiff "pleads factual
22 content that allows the court to draw the reasonable inference that the defendant is liable for the
23 misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged
24 must demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of
25 a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing
26 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); see *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir.
27 2001), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir.
28 2002).

1 As a general rule, a court may not consider “any material beyond the pleadings” when ruling
 2 on a Rule 12(b)(6) motion. *Lee*, 250 F.3d at 688 (citation and quotation marks omitted). However,
 3 “a court may take judicial notice of ‘matters of public record,’” *id.* at 689 (citing *Mack v. S. Bay*
 4 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)), and may also consider “documents whose
 5 contents are alleged in a complaint and whose authenticity no party questions, but which are not
 6 physically attached to the pleading,” without converting a motion to dismiss under Rule 12(b)(6)
 7 into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), overruled
 8 on other grounds by *Galbraith*, 307 F.3d at 1125-26. The court need not accept as true allegations
 9 that contradict facts which may be judicially noticed. See *Mullis v. U.S. Bankr. Court*, 828 F.2d
 10 1385, 1388 (9th Cir. 1987).

11 **III. DISCUSSION**

12 **A. First Claim**

13 **1. Excessive Force**

14 A claim of excessive force in the context of an arrest or investigatory stop implicates the
 15 Fourth Amendment right to be free from “unreasonable . . . seizures.” U.S. Const. amend.
 16 IV; see *Graham v. Connor*, 490 U.S. 386, 394 (1989). Courts analyze claims of excessive force
 17 under an “objective reasonableness” standard. *Bryan v. MacPherson*, 630 F.3d 805, 817 (9th Cir.
 18 2010) (citing *Graham*, 490 U.S. at 395). “Determining whether the force used to effect a particular
 19 seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and
 20 quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing
 21 governmental interests at stake.” *Id.* at 396 (citations and internal quotation marks omitted).

22 **a. Ms. Gillespie**

23 Ms. Gillespie’s claim for excessive force is premised on Defendants “seiz[ing] her phone
 24 and plac[ing] her in handcuffs.” SAC ¶ 21. She does not allege that she suffered any pain or injury
 25 as a result. While she asserts that she was detained and arrested without probable cause, she does
 26 not appear to bring a claim for unlawful detention or arrest.² Defendants move to dismiss Ms.

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 28 ² Plaintiffs’ first claim is entitled “1983 – Fourth Amendment – Excessive Force.” The court interprets this to mean that Plaintiffs’ sole claim for violation of the Fourth Amendment is that

1 Gillespie’s claim on the basis that handcuffing, without allegations of injury, is not sufficient to state
2 a claim for excessive force.

3 While “[a] significant injury is not a threshold requirement for stating
4 an excessive force claim,” *Aguilera v. Ducart*, No. 18-cv-03389-HSG, 2019 WL 4168892, at *3
5 (N.D. Cal. Sept. 3, 2019), Plaintiffs provide no authority that handcuffing, without more, constitutes
6 excessive force. Ninth Circuit excessive force cases uniformly consider the amount of force used
7 in handcuffing a detainee. See, e.g., *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003) (use of
8 force could be unreasonable when officers “grabbed [the plaintiff] by her arms, forcibly threw her
9 to the ground, and, twist[ed] her arms”); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989)
10 (unreasonably injuring a person’s wrists while applying handcuffs constitutes use of excessive
11 force). Even tight handcuffing can constitute excessive force. *LaLonde v. Cty. of Riverside*, 204
12 F.3d 947, 960 (9th Cir. 2000). Here, however, Ms. Gillespie simply alleges that she was handcuffed
13 and that her phone was taken. She does not allege that Defendants were unnecessarily rough in
14 applying handcuffs, that the handcuffs were too tight, or that she suffered any pain or injury as a
15 result. These allegations are insufficient to state a claim for excessive force. See *Hupp v. City of*
16 *Walnut Creek*, 389 F. Supp. 2d 1229, 1233 (N.D. Cal. 2005) (granting summary judgment on
17 excessive force claim where there was no “evidence of a physical manifestation of injury or of a
18 complaint about tight handcuffs that was ignored”); *Dillman v. Tuolumne Cty.*, 2013 WL 1907379,
19 at *8 (E.D. Cal. May 7, 2013) (“The Ninth Circuit has held that excessively tight handcuffing can
20 constitute a Fourth Amendment violation, but only where a plaintiff claims to have been
21 demonstrably injured by the handcuffs or where complaints about the handcuffs being too tight were
22 ignored.”); *Hughey v. Drummond*, 2017 WL 590265, at *8 (E.D. Cal. Feb. 14, 2017) (granting
23 motion to dismiss excessive force claim where plaintiff did not allege physical injury or “unheeded
24 complaints about excessive tightness”).

25 To the extent that Ms. Gillespie argues the force used was excessive because the arrest was
26 unlawful, that argument fails. The Supreme Court has explicitly rejected the proposition that a

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28 Defendants used excessive force against each of them. If Plaintiffs’ labeling of this claim is in error,
they must immediately move to correct it.

1 different constitutional violation can render an otherwise reasonable use of force unconstitutional.
2 See *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1547 (2017) (“An excessive force claim
3 is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force
4 that was not justified under the relevant circumstances. It is not a claim that an officer used
5 reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable
6 entry”).

7 Accordingly, Ms. Gillespie has not adequately pleaded that Defendants’ use of force was
8 unreasonable and her claim for excessive force is dismissed.

9 **b. Mr. Gillespie**

10 Mr. Gillespie alleges that Yarborough’s use of the K9 officer in securing his arrest
11 constitutes excessive force. Defendants move to dismiss the claim on the basis that the use of force
12 was reasonable under the circumstances. They cite a series of Ninth Circuit opinions affirming
13 district court decisions that found the use of canine officers reasonable under the circumstances. See
14 *Lowry v. City of San Diego*, 858 F.3d 1248, 1260 (9th Cir. 2017); *Mendoza v. Block*, 27 F.3d 1357,
15 1363 (9th Cir. 1994), as amended (May 31, 1994); *Monzon v. City of Murrieta*, 966 F.3d 946, 956
16 (9th Cir. 2020); *Miller v. Clark Cty.*, 340 F.3d 959, 968 (9th Cir. 2003). Except for *Mendoza*, each
17 of the cited cases was decided at summary judgment.³

18 The court’s task at this stage is to determine whether Plaintiff adequately has pleaded his
19 claim for unreasonable use of force, not to decide whether the use of force was unreasonable.
20 Because the reasonableness standard is not capable of precise definition or mechanical application,
21 “its proper application requires careful attention to the facts and circumstances of each particular
22 case, including the severity of the crime at issue, whether the suspect poses an immediate threat to
23 the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade
24 arrest by flight.” *Id.* Mr. Gillespie’s allegations, taken as true, state that Yarborough entered the
25 attic where Mr. Gillespie was present and immediately released the dog, who then repeatedly bit

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27 ³ In *Mendoza*, the defendants filed an in limine motion for judgment as a matter of law where the
28 court heard testimony and decided questions of fact. 27 F.3d at 1359. The propriety of that unique
procedure was not before the Ninth Circuit.

1 Mr. Gillespie despite Yarborough's verbal commands to stop. This is sufficient to plead a claim for
2 use of unreasonable force.⁴

3 2. Qualified Immunity

4 Defendants move to dismiss Mr. Gillespie's excessive force claim on the basis that
5 Yarborough is entitled to qualified immunity. The doctrine of qualified immunity protects
6 government officials "from liability for civil damages insofar as their conduct does not violate
7 clearly established statutory or constitutional rights of which a reasonable person would have
8 known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For the right to be clearly established,
9 "[t]he contours of the right must be sufficiently clear that a reasonable official would understand
10 that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
11 Therefore, "the relevant, dispositive inquiry in determining whether a right is clearly established is
12 whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he
13 confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (internal quotation marks omitted).

14 Here, Mr. Gillespie adequately alleges that Yarborough's use of force violated a clearly
15 established constitutional right. According to the SAC, Yarborough entered the attic and
16 "immediately" released the K9 officer. The pleadings do not suggest that Mr. Gillespie was armed
17 or otherwise presented a safety threat to Yarborough or the other Defendants. There is clearly
18 established law prohibiting the use of canines where the arrestee poses no threat to the safety of the
19 arresting officer. See *Mendoza*, 27 F.3d at 1362 ("[N]o particularized case law is necessary for a
20 deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed
21 arrestee who has fully surrendered and is completely under control."); *Smith v. City of Hemet*, 394
22 F.3d 689, 702 (9th Cir. 2005) (holding that a jury could find using a canine to effect an arrest
23 constituted excessive force where "[t]he record does not reveal any basis for believing that [the
24 plaintiff] was armed or that he posed an immediate threat to anyone's safety."). Under the facts as

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⁴ Defendants' Request for Judicial Notice includes documents purporting to show that there was an active warrant for Mr. Gillespie's arrest at the time of the incident and that his terms of probation allowed warrantless searches. [Docket No. 33-1.] This evidence is immaterial. Even if Defendants' search and arrest were lawful, the amount of force they used to arrest Mr. Gillespie may not have been. Defendant's RJN is accordingly denied as moot.

1 alleged, Defendants are not entitled to qualified immunity. Discovery may reveal additional facts
2 to support Defendants' qualified immunity defense, but the allegations in the SAC do not permit
3 that decision at the pleadings stage.

4 Accordingly, Defendants' motion to dismiss is denied as to Mr. Gillespie's claim for
5 excessive force.

6 **B. Second Claim**

7 Defendants move to dismiss Mr. Gillespie's second claim for deliberate indifference to
8 medical needs because it is pleaded only against fictitious Doe Defendants. "As a general rule, the
9 use of 'John Doe' to identify a defendant is not favored." *Gillespie v. Civiletti*, 629 F.2d 637, 642
10 (9th Cir. 1980). But in circumstances where "the identity of alleged defendants will not be known
11 prior to the filing of a complaint. . . . the plaintiff should be given an opportunity through discovery
12 to identify the unknown defendants" *Id.* Even in those circumstances, however, a plaintiff
13 must still meet the pleading requirements of *Twombly* and *Iqbal*.

14 Mr. Gillespie alleges that Doe Defendants (medical staff at Santa Rita Jail) had actual and
15 constructive notice of his medical needs but failed to treat him and that he developed a severe leg
16 infection as a result. SAC ¶¶ 17, 25. While sparse, these allegations are sufficient to raise a plausible
17 inference that the medical staff at Santa Rita Jail unconstitutionally denied Mr. Gillespie necessary
18 medical care. Further, Mr. Gillespie explains that he has attempted to obtain the names of the state
19 actors who denied him medical attention through a pre-litigation records request to the County of
20 Alameda, but the County has not provided those names. Mot. at 10. Under these circumstances, it
21 is appropriate to allow Mr. Gillespie to conduct discovery to identify the additional defendants and
22 to promptly amend his complaint to name them.⁵

23 Defendants' motion to dismiss Mr. Gillespie's claim is therefore denied.
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27 ⁵ Defendants suggest that Mr. Gillespie could simply look at his own medical records to find the
28 names of the responsible individuals, but it is far from clear that Mr. Gillespie has access to medical
records from Santa Rita Jail.

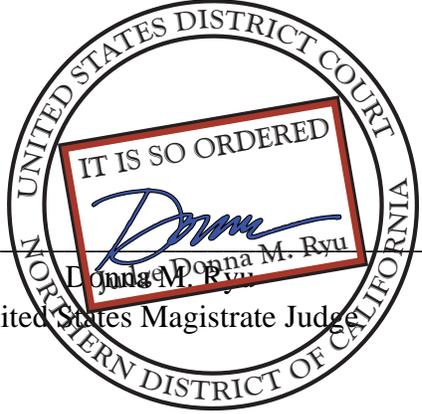
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IV. CONCLUSION

For the reasons stated above, Defendants’ motion is granted as to Ms. Gillespie’s claim for excessive force. The court previously dismissed Ms. Gillespie’s excessive force claim as inadequately pleaded and admonished Plaintiffs that their amended complaint must “plead their best case.” Order on First MTD at 13. Ms. Gillespie’s claim is therefore dismissed without leave to amend. Defendants’ motion is denied as to Mr. Gillespie’s claims.

IT IS SO ORDERED.

Dated: November 16, 2020



Donna M. Ryu
United States Magistrate Judge

United States District Court
Northern District of California