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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MICKAIL MYLES,
12 Plaintiff,

13 v.

14 COUNTY OF SAN DIEGO, by and
15 through the SAN DIEGO COUNTY
16 SHERIFF'S DEPARTMENT, a public
17 entity; and DEPUTY J. BANKS, an
18 individual,

19 Defendants.
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Case No.: 15-cv-1985-BEN (BLM)

ORDER:

**(1) GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT; and**

**(2) DENYING DEFENDANTS'
MOTION FOR SEPARATE TRIALS**

23
24 Plaintiff Mickail Myles has brought a civil rights action related to an incident
25 between Plaintiff and San Diego County Sheriff's Deputy Jeremy Banks in which Banks
26 used force on Plaintiff. Presently before the Court are two motions brought by
27 Defendants the County of San Diego (the "County") and Deputy Jeremy Banks ("Deputy
28 Banks" or "Banks"): (1) Defendants' Motion for Summary Judgment or, Alternatively,

1 Partial Summary Judgment (MSJ, ECF No. 55); and (2) Defendants’ Motion for Separate
2 Trials as to County Federal Liability and as to Individual Punitive Damages (Mot. to
3 Bifurcate, ECF No. 56). Plaintiff opposes both motions (Opp’n to MSJ, ECF No. 66;
4 Opp’n to Mot. to Bifurcate, ECF No. 77), and Defendants have filed replies in support of
5 their motions (Reply to MSJ, ECF No. 72; Reply to Mot. to Bifurcate, ECF No. 78).
6 After briefing closed, Defendants submitted two letters regarding new authority for the
7 Court’s consideration. (Ltrs., ECF Nos. 96, 98). Plaintiff responded to both letters.
8 (Resps. to Ltrs., ECF Nos. 97, 99).

9 The Court has considered the parties’ arguments and the law. For the reasons
10 discussed below, the Court grants in part and denies in part Defendants’ motion for
11 summary judgment and denies Defendants’ motion for separate trials.

12 **BACKGROUND**

13 **I. Factual Background¹**

14 **A. The Police Receive a Vehicle Burglary Report and Stop Plaintiff’s Car**

15 Around fifteen minutes before midnight on September 5, 2014, Fallbrook,
16 California resident Charles Sommer called 911 and reported that four young Hispanic
17 men had been trying to break into a vehicle a block from his home. (CD Recording & Tr.
18 of 911 Call, Defs.’ Ex. A (“Defs.’ Ex. A”); Decl. of Hanan Harb ¶ 1). Two of the four
19 left the scene in a white sedan. (Defs.’ Ex. A). A Sheriff’s radio dispatcher reported an
20 attempted vehicle break-in and that “there were two subjects that were running and got
21 into a white sedan, unknown DOT out of the neighborhood.” (CD Recording & Tr. of
22 Radio Dispatch Event E1930789, Defs.’ Ex. C (“Defs.’ Ex. C”); Decl. of Hanan Harb ¶
23 2). The dispatcher did not announce the suspects’ race. (Defs.’ Ex. C). A few minutes
24

25
26 ¹ The Court’s reference to certain pieces of evidence is not an indication that this is the
27 only pertinent evidence relied on or considered by the Court. The Court has reviewed
28 and considered all the evidence submitted by the parties. To the extent not otherwise
stated and not inconsistent with this Order, Defendants’ evidentiary objections are
overruled.

1 later, the dispatcher reported that individuals in the same neighborhood were ringing
2 doorbells and running away. (*Id.*) The dispatcher stated that the doorbell report may be
3 related to the vehicle report. (*Id.*)

4 Defendant Sheriff's Deputy Jeremy Banks and several other deputies responded to
5 the radio call. (Decl. of J. Banks ¶ 2 (incorporating his arrest report, Defendants' Exhibit
6 B, as part of his declaration); Banks's Arrest Report, Defs.' Ex. B ("Defs.' Ex. B")). As
7 Banks took Charles Sommer's statement, a white sedan drove past, and bystanders
8 identified it as the suspect vehicle. (*Id.*) Banks observed two males of an unknown race
9 seated in the driver's and front passenger's seats. (*Id.*) Plaintiff Mickail Myles sat in the
10 driver's seat and his brother, Elisic Sauls, sat in the passenger's seat. (*Id.*) Myles and
11 Sauls are African American. (*Id.*)

12 The deputies stopped the vehicle. (*Id.*) Banks could not see how many suspects
13 were in the vehicle, as it had darkly tinted rear windows, and decided to get his K9
14 partner, Bubo, to assist in the apprehension. (*Id.*)

15 **B. The Police Order Plaintiff Out of the Car and Into Police Custody**

16 One of the deputies on the scene, Deputy Allison, ordered Plaintiff to step out of
17 the car. (Defs.' Ex. B; Dep. of Deputy Shane Allison, Pl.'s Ex. 10 ("Pl.'s Ex. 10")).
18 Myles complied with that command. (Defs.' Ex. B).

19 What happened next is disputed. In general, the parties agree that Myles walked
20 backwards from his car to the rear of the patrol car parked behind his vehicle. They agree
21 that Bubo barked throughout the encounter. The parties also agree that once Myles
22 reached the rear of the patrol car, Banks and Bubo made physical contact with Myles.
23 But the sequence of events and whether Myles complied with the officers' commands is
24 at issue.

25 The parties present the following testimony to the Court:

26 (i) **Plaintiff Mickail Myles:** Myles testified that he stepped out of his car and
27 put his hands in the air. He heard multiple, different commands from the officers, such as
28 "get on the ground" and "put your hands in the air." He also heard the dog barking.

1 Myles was facing away from the officers. As the officers' commands were not
2 consistent, he looked over his shoulder to tell the officers he could not hear and that he
3 did not know what they wanted him to do. The officers told him to turn around and walk
4 backwards towards the patrol car, which Myles did. Myles never lowered his hands,
5 which had been in the air since he exited his vehicle, and never stopped walking
6 backwards. He did not hear any commands while he completed the backwards walk.
7 Once he reached the rear of the patrol car, the officers grabbed Myles, turned him
8 towards the trunk of the car, and then handcuffed him. As he was handcuffed, the
9 officers read Myles his *Miranda* rights. Only two to five seconds passed from the time
10 he was touched by an officer to the handcuffs being around his wrists.

11 After Myles was handcuffed, he twice asked the officers what was happening.
12 Hearing no response, he looked over his shoulder and was hit behind his left ear with
13 something made of metal and then bit by the canine on his left torso. Myles next felt the
14 handcuffs tighten around his wrists and multiple officers holding him. (*See* Dep. of
15 Mickail Myles, Pl.'s Ex. 21 ("Pl.'s Ex. 21")).

16 (ii) ***Defendant Deputy Jeremy Banks:*** Banks testified that when he arrived at
17 the scene, Deputy Allison was giving commands to Myles. Myles was facing the
18 officers. Allison ordered Myles to put his hands in the air and turn around. Myles was
19 slow to comply and said he could not hear. Banks then started giving commands,
20 ordering Myles to face away from the officers and put his hands in the air. Myles
21 complied.

22 Banks gave Myles a canine announcement, warning him that he must follow
23 Banks's orders or else the dog will bite him. Banks did not ask whether Myles heard the
24 warning. Banks ordered Myles to walk backwards towards the officers. Myles walked
25 backwards but, at some point, he turned around, put his hands down, and started walking
26 towards the officers. Banks responded to Myles by ordering him to stop, face away from
27 the officers, and put his hands in the air. Myles complied. Banks again ordered Myles to

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1 walk backwards towards his voice. Myles complied, walking backwards to Deputy
2 Allison's car trunk.

3 When Myles was three to five feet away from Banks, Banks ordered Myles to get
4 on his knees, but Myles did not comply and kept walking backwards. Banks gave the
5 order two to three times. Allison also gave the command, and Myles did not comply. No
6 one asked whether Myles heard the commands. Banks then grabbed Myles by the back
7 of his neck and started to push his head down to the ground. Myles ducked away from
8 Banks's grasp and walked out of his view. Banks feared Myles was going to attack him
9 from behind. Banks then gave Bubo the apprehension command, and Bubo bit Myles on
10 his left torso, released, and bit Myles's shirt.

11 Deputy Allison and Deputy Brumfield grabbed Myles's left and right arms,
12 respectively, and pushed him against the trunk of Allison's vehicle. In that position,
13 Myles was bent over with his head and torso lying on top of the trunk. Myles resisted
14 Allison and Brumfield's grasp. Banks then used his right fist to strike Myles twice on the
15 left side of his face and ordered him to stop resisting. Myles stopped resisting, and
16 Brumfield and Allison handcuffed Myles and placed him in the rear seat of Allison's
17 patrol vehicle. (*See* Defs.' Ex. B; Dep. of Deputy Jeremy Banks, Pl.'s Ex. 7 ("Pl.'s Ex.
18 7") & Defs.' Ex. G ("Defs.' Ex. G")).

19 In addition to the parties' testimony, witnesses on the scene offer varying accounts
20 of the events. The witness testimony is consistent with parts of Plaintiff's and
21 Defendant's versions in some respects, but different in others:

22 (i) **Michael Dorsett:** Dorsett observed Myles exit the vehicle and walk
23 backwards in compliance with the officers' commands. Myles never put his hands down.
24 Dorsett heard the officers' command for Myles to get down on his knees, but noted that
25 the barking dog was closer to Myles. The first physical contact between the officers and
26 Myles was when the officers pushed Myles over the trunk of the patrol car. Myles
27 wiggled and squirmed, but Dorsett did not believe Myles resisted the officers. Dorsett
28 did not see Banks grab or attempt to grab Myles's neck and did not see Myles duck and

1 spin away from Banks. Dorsett did not recall the dog biting Myles and his excerpted
2 deposition testimony does not include any mention of Banks’s strikes to Myles. (*See*
3 Dep. of Michael Dorsett, Pl.’s Ex. 11 (“Pl.’s Ex. 11”)).

4 (ii) **Deputy Shane Allison:** Deputy Allison testified that shortly after Myles
5 exited the vehicle, Myles announced that he could not hear. Allison ordered Myles to
6 face away from the officers, and Myles complied. Allison ordered Myles to put his arms
7 in the air, with which Myles complied. Myles then turned to face the officers and Allison
8 told him again to turn around and face away. Myles complied. Allison gave commands
9 until Banks took over.

10 When Myles was near the rear of the patrol car, Banks ordered Myles to get on his
11 knees. Myles did not comply. Next, Allison and Banks ordered Myles to get on his
12 knees, but Myles did not comply. No one asked Myles whether he heard the command.
13 Myles did not make any efforts to flee the scene, and Allison did not observe any
14 weapons on Myles. Allison testified that, once Myles was near the patrol car’s trunk, the
15 only indication of noncompliance from Myles was his failure to comply with the
16 command to kneel. However, later in Allison’s deposition, he testified that Banks
17 attempted to grab Myles by the neck, and Myles ducked out of the way.

18 Allison testified that he was the first person to touch Myles. He grabbed Myles
19 on his left wrist. Allison stated that “once I put my hand on [Myles], actions he took
20 made me put him into a rear wrist lock.” Pl.’s Ex. 10 at 158. While Allison attempted to
21 gain control of Myles’s left arm, Deputy Brumfield approached and “gained control” of
22 Myles’s right arm. *Id.* at 159. At this point, Myles was bent over the trunk. “[A]fter
23 [Myles’s] hands were behind his back by [Allison] and Deputy Brumfield,” Allison “saw
24 the K-9 attempt to make contact with [Myles].” *Id.* at 160. Banks hit Myles at least once
25 while Allison and Brumfield held Myles. Allison is “almost a hundred percent certain”
26 that Myles was not handcuffed when Banks struck him. *Id.* at 162.

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1 Once the officers had Myles in custody, Allison asked Myles why he did not get on
2 his knees. Myles replied, “Because I couldn’t hear you. All three of you were yelling.”
3 *Id.* at 137. (*See generally* Pl.’s Ex. 10).

4 **(iii) Deputy Andrew Brumfield:** Brumfield testified that Myles walked toward
5 the rear of the patrol car without any physical altercation. Brumfield admitted that his
6 arrest report does not document any noncompliance by Myles, with the exception of
7 Myles’s slow compliance with exiting his vehicle. Brumfield also testified that when
8 Banks struck Myles, Deputy Allison was “trying to control [Myles’s] left hand” and that
9 Allison was “struggling to get [Myles’s left hand] behind his back.” (*See* Dep. of Deputy
10 Andrew Brumfield at p. 91, Pl.’s Ex. 8 (“Pl.’s Ex. 8”)).

11 **(iv) Deputy Ronald Bushnell:** Bushnell testified that Myles turned around at
12 least twice while he was walking backwards to the patrol car. He did not observe Myles
13 drop his hands towards his waistband or reach down for anything. He admitted that his
14 arrest report does not document any noncompliance from Myles. (*See* Dep. of Deputy
15 Ronald Bushnell, Pl.’s Ex. 9 (“Pl.’s Ex. 9”)).

16 **C. The Police Clear the Car and Arrange a Lineup of Plaintiff and Sauls**

17 With Myles in custody, Banks completed the procedures to order Sauls out of the
18 passenger side of the white sedan. (Defs.’ Ex. B). After Sauls was handcuffed and
19 placed in Deputy Brumfield’s patrol vehicle, Banks and Bubo cleared the car, which
20 contained no one else. (*Id.*) North County Fire Department officers treated Myles’s
21 puncture wounds and scrapes caused by Bubo’s teeth. (*Id.*) Myles did not need transport
22 to the hospital by ambulance. (*Id.*)

23 The officers arranged a lineup of Myles and Sauls, but a witness stated that they
24 did not match any of the suspects. (*Id.*) The officers released Sauls, but Banks arrested
25 Myles for violation of California Penal Code section 148(a)(1) for obstructing a peace
26 officer. (*Id.*)

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1 **D. The Police Interview Plaintiff at Fallbrook Hospital**

2 Deputies Brumfield and Bushnell transported Myles to Fallbrook Hospital. (Defs.’
3 Ex. B). Once there, Banks read Myles his *Miranda* rights and interviewed him. (CD
4 Recording & Tr. of Myles Interview by Dep. Banks, Defs.’ Ex. I (“Defs.’ Ex. I”). Banks
5 asked Myles if he could hear Banks’s commands. (*Id.*) Myles replied, “Yes and no.”
6 (*Id.*) Myles explained that he heard the commands “open your door,” “put your hands
7 up,” and “step back.” (*Id.*) Banks asked, “When you got closer, did you hear me tell you
8 to get on your knees?” (*Id.*) Myles responded, “I did, but – .” (*Id.*) Myles did not
9 complete his thought. Banks asked, “Is there any reason why you chose not to [get on
10 your knees]?” (*Id.*) Myles stated, “No reason. I was probably just scared.” (*Id.*)

11 Banks next asked, “Is there any . . . reason why you pulled away from me when I
12 put my hands on you?” (*Id.*) Myles responded, “I don’t really remember.” (*Id.*) At the
13 end of the brief interview, Banks asked, “[D]id you hear me give canine announcements
14 that you were going to be bit if you didn’t do as I told you?” (*Id.*) Myles answered, “Sir,
15 it was – it was kind of a blur, so – .” (*Id.*) Myles did not provide a more definitive
16 answer.

17 Following Banks’s interview, Sergeant Brian Hout of the Sheriff’s Canine Unit
18 interviewed Myles about the use of Bubo on Myles. (CD Recording & Tr. of Myles
19 Interview by Sgt. Hout, Defs.’ Ex. J (“Defs.’ Ex. J”). Hout asked, “Did you hear the
20 warning that the dog would be sent or an order to comply?” (*Id.*) Myles responded, “Sir,
21 it was all a blur.” (*Id.*) Myles added, “I mean, you know, they told me to get out of the
22 car, back up. And there was a lot of them at once, you know, yelling or whatever. I saw
23 the dog, but I don’t know.” (*Id.*) Hout next asked, “And is there a reason why you didn’t
24 comply with the specific commands?” (*Id.*) Myles answered, “Sir, I didn’t hear.” (*Id.*)
25 Hout also asked how long the dog was biting Myles, and he responded that the bite lasted
26 “[p]robably a couple of seconds.” (*Id.*)

27 The County declined to prosecute Myles for a violation of section 148. (Pl.’s Ex.
28 7).

1 **II. Procedural History**

2 Plaintiff filed his complaint on September 4, 2015 against the County of San Diego
3 and Deputy Banks. (Compl., ECF No. 1). Plaintiff brings claims for (1) assault, (2)
4 battery, (3) false arrest, (4) false imprisonment, (5) violation of California Civil Code §
5 51.7 and § 52.1, (6) violation of 42 U.S.C. § 1983, (7) violation of 43 U.S.C. § 1985, (8)
6 violation of 42 U.S.C. § 1986, (9) negligence, and (10) intentional infliction of emotional
7 distress. Every claim is alleged against the County and Deputy Banks.

8 **MOTION FOR SUMMARY JUDGMENT**

9 **I. Legal Standard**

10 Summary judgment is appropriate when “there is no genuine dispute as to any
11 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
12 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is
13 material if it might affect the outcome of the suit under the governing law. *Anderson*,
14 477 U.S. at 248. “Factual disputes that are irrelevant or unnecessary will not be
15 counted.” *Id.* A dispute is genuine if “the evidence is such that a reasonable jury could
16 return a verdict for the nonmoving party.” *Id.* In considering a summary judgment
17 motion, the evidence of the nonmovant is to be believed, and all justifiable inferences are
18 to be drawn in his or her favor. *Id.* at 255.

19 A moving party bears the initial burden of showing there are no genuine issues of
20 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It can do so by
21 negating an essential element of the non-moving party’s case, or by showing that the non-
22 moving party failed to make a showing sufficient to establish an element essential to that
23 party’s case, and on which the party will bear the burden of proof at trial. *Id.* The burden
24 then shifts to the non-moving party to show that there is a genuine issue for trial. *Id.* As
25 a general rule, the “mere existence of a scintilla of evidence” will be insufficient to raise
26 a genuine issue of material fact. *Anderson*, 477 U.S. at 252. There must be evidence on
27 which the jury could reasonably find for the non-moving party. *Id.*

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1 **II. Discussion**

2 Defendants move for summary judgment on all claims or, alternatively, partial
3 summary judgment on the issues of unlawful detention, unlawful force, qualified
4 immunity for Deputy Banks, and the County’s federal liability. They contend that all
5 seven state law claims and the three federal claims concern two issues: unlawful
6 detention and unlawful physical force. Defendants frame their motion in terms of these
7 two issues without addressing the actual elements of each claim or which claims are
8 affected by which issue. Plaintiff structures his response accordingly, addressing the
9 detention, force, qualified immunity, and entity liability issues raised by Defendants.
10 Both parties analyze the detention and force issues under the Fourth Amendment. The
11 Court addresses each issue in turn.

12 **A. Detention**

13 Defendants seek summary judgment on the issue of Myles’s detention. In their
14 motion, it appears they limit their argument to whether the deputies had reasonable
15 suspicion to stop Myles. Plaintiff does not appear to contest that the deputies had
16 reasonable suspicion to stop him. Instead, Myles contends that the detention became
17 unlawful when Deputy Banks continued to detain him after witnesses confirmed he was
18 not involved in the incident and chose to arrest him for a violation of California Penal
19 Code section 148.

20 Under the Fourth Amendment, a person has the right to be free from an
21 unreasonable seizure of his person. U.S. Const. amend. IV. A seizure of a person for a
22 brief investigatory stop is reasonable if, under all the circumstances known to the officers
23 at the time, the officer had reasonable suspicion that the person stopped is, is about to be,
24 or was engaged in criminal activity, and the length and scope of the stop was reasonable.
25 *See United States v. Cortez*, 449 U.S. 411, 417 (1981); *Terry v. Ohio*, 392 U.S. 1, 19-27
26 (1968). Reasonable suspicion is based on the totality of the circumstances and is a
27 particularized and objective basis for suspecting the particular person stopped of criminal
28 activity. *Cortez*, 449 U.S. at 417-18.

1 Viewing the evidence in the light most favorable to Plaintiff, the Court finds that
2 no genuine issues of material fact exist and Defendants are entitled to summary judgment
3 on any claims related to the decision to stop Myles. It is undisputed that Charles Sommer
4 called 911 to report a suspected vehicle burglary involving two teens that left the scene in
5 a white sedan. (Defs.' Ex. A). When the white sedan containing Plaintiff and his brother
6 drove past the scene, bystanders identified the car as the one involved in the suspected
7 vehicle burglary. (Defs.' Ex. B). Based on this witness identification that conformed
8 with the initial 911 call, the Sheriff's deputies had reasonable suspicion to believe that the
9 occupants of the white sedan were engaged in criminal activity. Therefore, their decision
10 to stop the car to investigate was reasonable. To the extent any of Plaintiff's claims are
11 premised on the unlawfulness of the initial investigatory stop, the Court grants summary
12 judgment in Defendants' favor on those claims.

13 However, genuine issues of material fact preclude summary judgment on Deputy
14 Banks's decision to arrest Myles for a violation of California Penal Code section
15 148(a)(1) once the officers confirmed that Myles was not among the suspects engaged in
16 the reported vehicle burglary.² To be a lawful arrest, Deputy Banks had to have probable
17 cause to arrest Myles for a violation of California Penal Code section 148(a)(1).

18 *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). “[P]robable cause’ to justify an arrest
19 means facts and circumstances within the officer’s knowledge that are sufficient to
20 warrant a prudent person, or one of reasonable caution, in believing, in the circumstances
21 shown, that the suspect has committed, is committing, or is about to commit an offense.”
22 *Id.* at 37 (citations omitted). Probable cause to arrest for a section 148(a)(1) violation
23 requires a reasonable officer to believe that (1) the criminal defendant willfully resisted,
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26 ² Because it appears that Defendants only seek summary judgment on the decision to stop
27 Plaintiff, the Court notes that summary judgment would be inappropriate on issues that
28 Defendants fail to raise. To avoid confusion, the Court considers Plaintiff's argument
about his continued detention and arrest.

1 delayed, or obstructed a peace officer, (2) when the officer was engaged in the
2 performance of his or her lawful duties, and (3) the defendant knew or reasonably should
3 have known that the other person was a peace officer engaged in the performance of his
4 or her lawful duties. *See* Cal. Penal Code § 148(a)(1); *Velazquez v. City of Long Beach*,
5 793 F.3d 1010, 1018-19 (9th Cir. 2015).

6 Ninth Circuit and California law give citizens “considerable latitude” in
7 challenging police without such conduct violating section 148. *Mackinney v. Nielsen*, 69
8 F.3d 1002, 1007 (9th Cir. 1995). Verbal challenges to police and slow compliance with
9 police orders do not violate section 148. *See Velazquez*, 793 F.3d at 1022-23 (reversing
10 district court’s grant of judgment as a matter of law on plaintiff’s unlawful arrest claim
11 where plaintiff was detained for asking officer “what’s up” and then arrested under
12 section 148 despite plaintiff’s evidence that he never resisted orders from officer);
13 *Mackinney*, 69 F.3d at 1006-07 (holding that neither plaintiff’s “refus[al] to comply for a
14 matter of seconds” with “order [] to stop writing on the sidewalk” with sidewalk chalk
15 nor plaintiff’s “refus[al] to agree to stop writing” on the sidewalk violated section 148);
16 *People v. Quiroga*, 16 Cal. App. 4th 961, 966 (1993) (“It is true that [appellant] complied
17 slowly with Officer Stefani’s orders, but it surely cannot be supposed that Penal Code
18 148 criminalizes a person’s failure to respond with alacrity to police orders.”). In
19 contrast, a suspect’s refusal to comply with lawful orders, rather than his slow
20 compliance, or his affirmative act in direct disobedience of repeated police orders is
21 sufficient for section 148 liability. *See Young v. Cnty. of Los Angeles*, 655 F.3d 1156,
22 1169-70 (9th Cir. 2011) (upholding lawfulness of section 148 arrest where plaintiff
23 refused to obey officer’s order to reenter his vehicle); *Navarro v. Sterkel*, No. 5:11-cv-
24 01700-LHK, 2012 WL 3249487, at *7 (N.D. Cal. Aug. 7, 2012) (finding that officer had
25 probable cause to arrest plaintiff for violation of section 148 where plaintiff failed to pull
26 over after seeing the officer’s lights and removed his hands from the steering wheel
27 despite the officer’s orders for plaintiff to keep his hands on the wheel).

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1 Here, the parties present three possible incidents that could give a reasonable
2 officer probable cause to arrest for a section 148 violation: (1) Plaintiff's compliance
3 with the orders to walk backwards from his car to the patrol vehicle; (2) Deputy Banks's
4 alleged neck grab and Plaintiff's evasion of his grasp; and (3) the events that occurred as
5 Plaintiff was bent over the trunk of the patrol car. Viewing the evidence in Plaintiff's
6 favor, none of these incidents create probable cause for a section 148 arrest.

7 As to Plaintiff's backwards walk from his car to the patrol vehicle, he testified that
8 he complied with all of the orders he heard. (*See* Pl.'s Ex. 21). Plaintiff's testimony is
9 supported by the testimony of Michael Dorsett and Deputy Brumfield, who observed
10 Myles walk backwards to the patrol car in compliance with the officers' orders. (*See*
11 Pl.'s Exs. 8, 11). While Dorsett and some of the police officers testified that Banks and
12 Allison commanded Myles to get on his knees, Myles testified that he only heard this
13 command when he first stepped out of his vehicle. (*See* Pl.'s Ex. 21). He said that he
14 never heard that command once he reached the rear of the patrol car. (*Id.*) Plaintiff's in-
15 custody statement to Deputy Allison that he "couldn't hear" the command to get on his
16 knees supports this deposition testimony. (Pl.'s Ex. 10 at 137). There is a genuine
17 dispute about whether Plaintiff heard and complied with the orders. If Plaintiff did not
18 hear the orders, he could not willfully resist those orders. *See* Cal. Penal Code § 7
19 (explaining that "willfully" means "a purpose or willingness to commit the act").

20 Defendants ascribe significant weight to Plaintiff's post-arrest statement to Deputy
21 Banks while in Fallbrook Hospital. When asked whether Plaintiff "hear[d] [Banks] tell
22 [him] to get on [his knees]" once he "got closer," Plaintiff replied that he "did, but --."
23 (Defs.' Ex. I). Defendants contend this statement is an admission from Myles that he
24 heard the order. The Court is not persuaded. At this stage, the Court does not weigh
25 evidence or resolve issues of credibility. In the face of the contrary evidence discussed
26 above, such a short, incomplete sentence is insufficient to take the issue away from the
27 jury. A jury could give more weight to Plaintiff's contemporaneous statement to Deputy

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1 Allison than to his later statement to Deputy Banks. Triable issues exist whether Myles
2 complied with the officers' commands.

3 As to the second circumstance that could create probable cause, the record is
4 entirely unclear whether Banks grabbed, or attempted to grab, Myles's neck, causing
5 Myles to duck out of Banks's grasp. Deputy Banks contends the neck grab and duck
6 occurred, but according to Plaintiff's and Michael Dorsett's versions of events, it did not.
7 This difference alone is sufficient to find a genuine issue of material fact. Going further,
8 a reasonable jury could discredit Deputy Allison's testimony and find that the deposition
9 testimony of Deputies Brumfield and Bushnell tends to corroborate Plaintiff's account.
10 When Deputy Allison first recounted the events, he made no mention of the neck grab.
11 Allison only corrected his testimony at the end of his deposition. The most Bushnell and
12 Brumfield could say regarding Myles's noncompliance was that he was slow to exit his
13 vehicle, that Myles turned around at least twice while walking backwards to the patrol
14 car, and that Deputy Allison had difficulty getting Myles's left hand behind his back.
15 (*See* Pl.'s Ex. 8 & 9). Their testimony does not mention the purported neck grab and
16 evasion.

17 The final possible event that might create probable cause for a section 148 arrest is
18 what occurred while Plaintiff was bent over the trunk of the patrol vehicle. According to
19 Plaintiff, he allowed the officers to handcuff him, asked what was happening, and then
20 was hit by something and bit by the dog. (Pl.'s Ex. 21) His deposition testimony does
21 not shed any light on whether he moved or "resisted" the handcuffing. Witness Michael
22 Dorsett testified that Plaintiff wiggled and squirmed when the officers placed their hands
23 on him, but Dorsett refused to characterize Plaintiff's movements as resistance. (*See* Pl.'s
24 Ex. 11). Deputies Banks, Allison, and Brumfield testified that there was some struggle
25 between the officers. Whether Myles was combative during the handcuffing, and exactly
26 when the handcuffing occurred in connection with the use of force, are triable issues of
27 fact. A reasonable jury could credit Plaintiff's and Dorsett's testimonies and find that
28 Plaintiff's actions did not rise to the level of willful resistance, delay, or obstruction.

1 Construing the facts and all reasonable inferences in Plaintiff’s favor, a reasonable
2 jury could conclude that Deputy Banks did not have probable cause to arrest Plaintiff for
3 willfully resisting, delaying, or obstructing the officers’ exercise of their lawful duties.
4 Thus, Defendants are not entitled to summary judgment on this aspect of Plaintiff’s
5 unlawful detention claims.

6 **B. Use of Force**

7 Plaintiff contends that Deputy Banks employed excessive force on him three times:
8 (1) when Banks grabbed Plaintiff’s neck and tried to force him to the ground, (2) when
9 Banks ordered Bubo to bite Plaintiff, and (3) when Banks hit Plaintiff. Defendants argue
10 that Banks’s “actions were proportional to the suspected offense” of vehicle burglary.
11 (Opp’n at 23).

12 Claims for excessive force are analyzed under the Fourth Amendment’s
13 prohibition against unreasonable seizures using the framework articulated in *Graham v.*
14 *Connor*, 490 U.S. 194, 201 (2001). The relevant question is “whether the officers’
15 actions are ‘objectively reasonable’ in light of the facts and circumstances confronting
16 them, without regard to their underlying intent or motivation.” *Id.* at 397. “This
17 determination requires [the Court] to balance the ‘nature and quality of the intrusion on
18 the individual’s Fourth Amendment interests against the countervailing governmental
19 interests at stake.’” *Shafer v. Padilla*, No. 15-56548, slip op. at 9 (9th Cir. Aug. 29,
20 2017) (citing *Graham*, 490 U.S. at 396).

21 **1. Nature and Quality of the Intrusion**

22 The Court first must assess the severity of the intrusion on the individual’s Fourth
23 Amendment rights by evaluating the type and amount of force inflicted. *Lowry v. City of*
24 *San Diego*, 858 F.3d 1248, 1256 (9th Cir. 2017). Each case must be evaluated on its own
25 facts. *Id.*

26 In this case, the parties dispute whether Deputy Banks grabbed Plaintiff’s neck but
27 agree that Myles was bitten by the dog and hit in the face or head in some manner.
28 Triable issues of fact exist regarding whether the neck grab even occurred. How a jury

1 resolves this issue might impact its analysis of whether Banks used excessive force in
2 punching Plaintiff and ordering Bubo to bite him.

3 With respect to the dog bite, Ninth Circuit “precedent establishes that
4 characterizing the quantum of force with regard to the use of a police dog depends on the
5 specific factual circumstances.” *Lowry*, 858 F.3d at 1256. Here, it is undisputed that
6 Bubo bit and released Plaintiff. Bubo did not drag Plaintiff over the ground. While the
7 dog did puncture Plaintiff’s skin, he did not shred Plaintiff’s muscles. Plaintiff was
8 treated at the scene and did not require emergency transport to the hospital. In this case,
9 “the risk of harm posed by this particular use of force, and the actual harm caused, was
10 moderate.” *Id.* at 1257. Nevertheless, a jury might still find it excessive in light of the
11 need for the use of force.

12 As to the head or face strike, Plaintiff contends he was hit in the back of the head
13 with something metal, possibly a baton. Defendants argue that Banks punched Plaintiff
14 with a closed fist on the side of the face. The Court need not resolve how and where
15 Myles was hit, as either use of force may be considered a significant use of force. “A
16 police officer’s use of baton blows . . . presents a significant use of force that is capable
17 of causing pain and bodily injury, and therefore, baton blows . . . are considered a form of
18 ‘intermediate force.’” *Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1162 (9th Cir.
19 2011). Closed fist punches, while generally less dangerous than baton strikes, are still
20 capable of inflicting serious bodily injury. *See Blankenhorn v. City of Orange*, 485 F.3d
21 463, 480 (9th Cir. 2007) (concluding that the officer’s punches “were not reasonably
22 justified” because there was no “need for any use of force” under plaintiff’s version of
23 events); *Lopez v. City of Imperial*, No. 13-CV-00597-BAS WVG, 2015 WL 4077635, at
24 *7 (S.D. Cal. July 2, 2015). The head or face strikes are “a sufficiently serious intrusion”
25 upon Plaintiff’s liberty interests to require the justification “by a commensurately serious
26 state interest.” *Young*, 655 F.3d 1162-63.

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1 **2. Governmental Interest in the Use of Force**

2 Next, the Court must evaluate the government’s interest in the use of force. That
3 interest is assessed by considering three, non-exclusive factors: (1) the severity of the
4 crime at issue, (2) whether the suspect posed an immediate threat to the safety of the
5 officers or others, and (3) whether the suspect actively resisted arrest or attempted to
6 escape. *Graham*, 490 U.S. at 396. “Of all these factors, the ‘most important’ one is
7 ‘whether the suspect posed an immediate threat to the safety of the officers or others.’”
8 *S.B. v. Cnty. of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017) (citing *George v. Morris*,
9 736 F.3d 829, 838 (9th Cir. 2013)).

10 There is a genuine issue of material fact whether Deputy Banks used force on
11 Plaintiff before or after he was under police control. Given this dispute, the Court must
12 credit Plaintiff’s version of events and draw all reasonable inferences in his favor.
13 According to Plaintiff, he was handcuffed and being held by two officers over the trunk
14 of a vehicle when he was hit and bitten. At that point, the officers suspected him of
15 vehicle burglary and had not yet patted him down. Vehicle burglars might have tools on
16 them for use in the burglary that could be used as weapons. *See Lowry v. City of San*
17 *Diego*, 858 F.3d 1248, 1257-58 (9th Cir. 2017) (“Burglary and attempted burglary are
18 considered to carry an inherent risk of violence.”). But this threat was not immediate.
19 Plaintiff’s hands were immobilized in handcuffs and his upper body was being held
20 against the trunk of the patrol vehicle by two officers. Plaintiff never attempted to flee or
21 strike any of the officers or the canine. Viewing the facts in favor of Plaintiff, there was
22 little to no need to use any force.

23 **3. Balancing the Competing Interests**

24 The final step of the excessive force inquiry requires the Court to balance the
25 gravity of the intrusion on Plaintiff’s Fourth Amendment rights against the government’s
26 need for that intrusion. *Lowry*, 858 F.3d at 1260. Here, a reasonable jury could conclude
27 that, in light of the degree of danger Plaintiff posed once handcuffed, the degree of force
28 used was excessive. *See Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d

1 1052, 1059 (9th Cir. 2003) (“[A]fter [plaintiff] was handcuffed and lying on the ground,
2 the force that the officers then applied was clearly constitutionally excessive when
3 compared to the minimal amount that was warranted.”); *Tucker v. Las Vegas Metro.*
4 *Police Dep’t*, 470 F. App’x 627, 629 (9th Cir. 2012) (concluding that summary judgment
5 on excessive force claim was not warranted where officers used force on plaintiff after he
6 was handcuffed and face down on a bed); *Ross v. City of Toppenish*, 104 F. App’x 28,
7 28-29 (9th Cir. 2004) (finding triable issues of fact whether officers’ actions after
8 plaintiff was handcuffed constituted excessive force). A trier of fact could find that
9 Deputy Banks violated Plaintiff’s Fourth Amendment right against excessive force.

10 Therefore, the Court denies Defendants summary judgment on the issue of
11 excessive force.

12 **C. Qualified Immunity**

13 Deputy Banks seeks qualified immunity from liability under federal law. He
14 contends that “it is not beyond debate that a reasonably competent officer in Deputy
15 Banks’[s] position would have acted as he did.” (Opp’n at 25). Plaintiff objects to
16 granting Deputy Banks qualified immunity. He contends that qualified immunity is not
17 appropriate because triable issues of fact remain regarding Banks’s use of force and arrest
18 of Plaintiff following the field line-up.

19 Qualified immunity serves to shield government officials “from liability for civil
20 damages insofar as their conduct does not violate clearly established statutory or
21 constitutional rights of which a reasonable person would have known.” *Harlow v.*
22 *Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether an officer is entitled to
23 qualified immunity, the court considers (1) whether there has been a violation of a
24 constitutional right, and (2) whether that right was clearly established at the time of the
25 officer’s alleged misconduct. *C.V. by & through Villegas v. City of Anaheim*, 823 F.3d
26 1252, 1255 (9th Cir. 2016). Both prongs must be present for the officer to be liable;
27 otherwise, he is entitled to immunity.

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1 Here, the Court has already determined that, taking the facts in the light most
2 favorable to Plaintiff, a reasonable jury could find that Deputy Banks violated Myles’s
3 Fourth Amendment rights to be free from unlawful arrest and from the use of excessive
4 force. Thus, the only question remaining is whether the Fourth Amendment rights at
5 issue were clearly established at the time of the violation. The relevant inquiry is
6 “whether the state of the law at the time of the official conduct complained of was such
7 as to give the defendant[] ‘fair warning’ that [his] conduct was unconstitutional.” *Young*,
8 655 F.3d at 1167 (internal citation omitted). The Court must continue to view the
9 disputed facts in favor of Plaintiff. *Blankenhorn*, 485 F.3d at 477 (where parties dispute
10 material facts, “summary judgment is appropriate only if Defendants are entitled to
11 qualified immunity on the facts as alleged by the non-moving party”).

12 As to the section 148 arrest, it was well-settled by the time of the incident that a
13 section 148 violation requires an affirmative act of disobedience or resistance. *Young*,
14 655 F.3d at 1170. Under Plaintiff’s version of events, the decision to arrest him for a
15 section 148 violation is clearly unreasonable. Plaintiff complied with all of the officers’
16 orders that he heard. He did not physically resist Banks or the other officers. A
17 reasonable officer could not believe that probable cause existed to arrest Plaintiff for a
18 violation of section 148 under such circumstances. *Cf. Mackinney*, 69 F.3d at 1006
19 (denying qualified immunity because “[n]o reasonable officer could have thought that
20 complying with a police order slowly could be a violation of § 148”).

21 Similarly, the Court declines to grant qualified immunity to Deputy Banks on the
22 excessive force issue. Existing law at the time of the incident recognized a Fourth
23 Amendment violation where police officers used force against a handcuffed, compliant
24 individual who poses no serious safety threat. *See Drummond*, 343 F.3d at 1061-62
25 (denying qualified immunity); *Tucker*, 470 F. App’x at 629 (denying qualified immunity
26 based on *Drummond*, even though plaintiff “continued to resist the officers after
27 handcuffs were applied”); *Ross*, 104 F. App’x at 29 (denying qualified immunity).

28 ///

1 Accordingly, viewing the facts in favor of Plaintiff, Deputy Banks is not entitled to
2 qualified immunity for his arrest of and use of force on Plaintiff.

3 **D. County of San Diego’s Federal Liability**

4 Plaintiff’s complaint alleges three federal claims against the County of San Diego:
5 a claim for violation of 42 U.S.C. § 1983, a claim for violation of 42 U.S.C. § 1985(2)
6 and (3), and a claim for violation of 42 U.S.C. § 1986. Both the County’s argument in its
7 motion, and Plaintiff’s argument in opposition, address the County’s liability under
8 section 1983 pursuant to *Monell v. Department of Social Services of the City of New*
9 *York*, 436 U.S. 658 (1978). The Court addresses *Monell* liability first.

10 **1. *Monell* Liability**

11 Municipalities, like the County of San Diego, can be held directly liable for
12 constitutional violations under 42 U.S.C. § 1983, but they “cannot be held liable . . . on a
13 *respondeat superior* theory.” *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978).
14 A local government entity cannot be liable under 42 U.S.C. § 1983 unless a policy,
15 custom, or practice of the entity is shown to be the moving force behind the constitutional
16 violation. *Id.* at 694.

17 Plaintiff advances several theories of *Monell* liability. Those theories are (1) that
18 the County has a pattern and practice of ignoring and failing to investigate officers
19 accused or suspected of excessive use of force, (2) that the County’s use of force policy
20 fails to provide deputies with direction regarding how to make use of force decisions, and
21 (3) that the County has failed to train, monitor, and supervise its employees, such that its
22 failure constitutes deliberate indifference to citizens’ lives. The Court finds that there is
23 insufficient evidence of a policy, pattern, or practice to support any of Plaintiff’s *Monell*
24 theories.

25 **a. Pattern and Practice Claim**

26 Plaintiff argues that the County has a pattern and practice of ignoring use of force
27 incidents and failing to investigate those incidents properly. (Opp’n at 19-24). The
28 County of San Diego may be liable under 42 U.S.C. § 1983 for “a longstanding practice

1 or custom which constitutes the standard operating procedure.” *Trevino v. Gates*, 99 F.3d
2 911, 918 (9th Cir. 1996). The practice or “custom must be so ‘persistent and widespread’
3 that it constitutes a ‘permanent and well settled . . . policy.’” *Id.* (citing *Monell*, 436 U.S.
4 at 691). “A custom or practice can be inferred from . . . evidence of repeated
5 constitutional violations for which the errant municipal officers were not discharged or
6 reprimanded.” *Velazquez*, 793 F.3d at 1027 (internal citation omitted). “Evidence of
7 ‘identical incidents’ to that alleged by the plaintiff may establish that a municipality was
8 put on notice of its agents’ unconstitutional actions, while general evidence of
9 departmental treatment of complaints and of the use of force can support the plaintiff’s
10 theory that . . . disciplinary and complaint processes contributed to the police excesses
11 complained of because the procedures made clear to the officer that . . . he could get
12 away with anything.” *Id.* (internal citations omitted). If the plaintiff can prove a custom
13 or practice, he or she still must prove that the custom or practice was the cause of the
14 constitutional deprivation. *Trevino*, 99 F.3d at 918.

15 Notwithstanding evidentiary issues regarding the admissibility of some of
16 Plaintiff’s evidence, none of his proffered evidence demonstrates a pattern or practice of
17 ignoring and failing to properly investigate uses of force. Plaintiff supports his pattern
18 and practice claim by pointing to how the Myles incident was investigated as well as
19 seven other use of force incidents, some of which involved Deputy Banks. But there is
20 no evidence that these incidents required a certain type of investigation that the Sheriff’s
21 Department failed to complete. Nor is there any evidence that the alleged inadequacy of
22 the use of force investigations led to a violation of Plaintiff’s rights. The Court briefly
23 discusses the Plaintiff’s evidence below.

24 Plaintiff first contends that the Sheriff’s Department’s internal investigation of the
25 Myles matter was inadequate. Plaintiff’s expert Jeffrey Noble declares that the Sheriff’s
26 Department “did not conduct any inquiry into the serve [sic] use of force by its deputies
27 in the Myles matter other than to conduct a K9 review by the K9 sergeant. Neither an
28 Internal Affairs investigation, nor a Use of Force investigation were conducted. There is

1 no evidence that . . . the department conducted a meaningful internal investigation even
2 though Mr. Myles was grabbed by the neck, punched on the head and bitten by a police
3 dog, receiving injuries that required medical attention.” (Decl. of J. Noble ¶ 27).

4 Plaintiff asserts that an Internal Affairs (“IA”) investigation was required, citing to
5 deposition testimony from Lieutenant Jeffrey Duckworth and Sergeant James Pucillo,
6 designated as Persons Most Knowledgeable in the Sheriff’s Department.

7 Plaintiff’s position is not supported by the record. To start, Plaintiff glosses over
8 the County’s procedures for opening use of force investigations. He does not submit any
9 documents evidencing an administrative complaint to the Sheriff’s Department, nor does
10 he explain why an investigation was warranted in this case. While Plaintiff complains
11 that the Sheriff’s Department only performed a K9 review, his own evidence belies that
12 assertion. The Sheriff’s Department conducted a claims investigation at the command
13 level. (*See* Dep. of Robert Kanaski, Pl.’s Ex. 37 (“Pl.’s Ex. 37”); Dep. of James Pucillo,
14 Pl.’s Ex. 40 (“Pl.’s Ex. 40”). A claims investigation is one type of investigation that the
15 Sheriff’s Department may conduct. (Pl.’s Exs. 37, 40; Dep. of Jeffrey Duckworth, Vol.
16 II, Pl.’s Ex. 17 (“Pl.’s Ex. 17”). But Plaintiff provides no evidence that a different type
17 of investigation was required.

18 On that point, Plaintiff miscites deposition testimony from Lieutenant Duckworth
19 and Sergeant Pucillo for the proposition that an IA investigation should have been
20 conducted. But neither Duckworth nor Pucillo made that statement. Lieutenant
21 Duckworth answered a hypothetical question (Dep. of Jeffrey Duckworth, Vol. I, Pl.’s
22 Ex. 39 at 57 (“Pl.’s Ex. 39”). And the citation to the Pucillo answer lacks the question
23 asked and is thus incomplete and unreliable. (Pl.’s Ex. 40 at 45).

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1 In addition to the Myles matter, Plaintiff presents evidence from five use of force
2 incidents involving Banks and two involving other officers, all of which allegedly
3 involved inadequate internal investigations.³ The first incident occurred in May 2013.
4 Banks detained a Hispanic juvenile for jaywalking and kicked him in the chest. The
5 juvenile filed a citizens' complaint, to which the Sheriff's Department IA Unit responded,
6 stating that it "conducted a preliminary investigation," "found the matter described does
7 not rise to the level of misconduct by Sheriff's personnel," and that "no formal
8 investigation will be opened at this time." (May 2013 Incident Compl. and Resp., Pl.'s
9 Ex. 14 ("Pl.'s Ex. 14")). Lieutenant Duckworth testified that an IA investigation was not
10 required. (Pl.'s Ex. 17). He explained that the receipt of a citizen complaint does not
11 mean that the IA Unit always opens an investigation. *Id.*

12 The second incident happened in June 2013, during which four officers, including
13 Deputy Banks, struck, tased, and deployed Banks's canine on a 36-year-old Hispanic
14 man, Hugo Barragan, after he had fled the scene of a traffic stop and ran into his home.
15 Barragan died at the scene. Plaintiff complains that IA did not conduct an investigation
16 of his matter. But, Plaintiff ignores his own evidence that the Homicide Unit conducted a
17 complete investigation, interviewing every officer at the scene, as is the procedure when
18 someone dies while in custody. (*See* Barragan Documents, Pl.'s Ex. 16 ("Pl.'s Ex. 16");
19 Dep. of Yancey Mayordeleon, Vol. II, Pl.'s Ex. 44 ("Pl.'s Ex. 44")).

20 The third incident involved Banks tasing, striking, and attempting a neck control
21 hold on a Hispanic juvenile runaway. Plaintiff cites to a YouTube video and television
22

23
24 ³ Plaintiff discusses the five Banks incidents in his Statement of Additional Facts in
25 Dispute. In his Notice of Lodgment, he includes evidence of a sixth incident involving
26 Deputy Banks from 2014, during which Banks deployed his canine partner Bubo to
27 apprehend a suspect. (*See* Canine Deployment Report, Pl.'s Ex. 20). Plaintiff does not
28 develop or discuss any facts regarding this incident. Given that, the Court does not
discuss the incident, but it has considered the exhibit and finds that it does not support
Plaintiff's pattern and practice claim.

1 news website to explain the facts of the case and argue that “there is no evidence that the
2 use of force was ever actually investigated.” (Pl.’s Add’l Facts in Dispute ¶ 148). These
3 websites are not evidence that the incident was not investigated. Nor are they evidence
4 that the County has a pattern of ignoring use of force incidents. Furthermore, in
5 deposition testimony, Plaintiff’s attorney appears to concede that no citizen complaint
6 was filed regarding this incident. *See* Pl.’s Ex. 17.

7 The fourth incident occurred in September 2015. Banks and another officer used
8 force on a Hispanic man who had fled from his vehicle after a traffic stop. The other
9 officer had a canine partner that he used on the suspect. Plaintiff presents no evidence
10 that a citizen’s complaint was filed, that an investigation was required, or that an
11 investigation occurred but was inadequate.

12 The fifth incident happened in October 2016 between Banks and Erin Valdez,
13 during which Banks allegedly handcuffed Valdez and forced her arms behind her back to
14 extract a confession. Plaintiff relies on a videotaped, sworn statement by Valdez. (Tr. of
15 Statement of Erin Valdez, Pl.’s Ex. 49 (“Pl.’s Ex. 49”). Valdez’s statement was not
16 made in the presence of defense counsel and was taken after the discovery cutoff.
17 Plaintiff also submits a letter to the IA Unit that Valdez allegedly wrote, complaining
18 about the incident. (Ltr. from Erin Valdez, Pl.’s Ex. 50 (“Pl.’s Ex. 50”). Both the
19 recorded statement and letter are hearsay. *See* Fed. R. Evid. 801 (defining hearsay as an
20 out of court statement offered to prove the truth of the matter asserted in the statement).
21 Plaintiff has no evidence that the letter was mailed to the Sheriff’s Department. In fact,
22 his counsel declares that the County claims to have never received the letter. (Decl. of J.
23 Dicks ¶ 7). Plaintiff has no evidence that the County received Valdez’s complaint and
24 chose to ignore it.

25 Finally, Plaintiff identifies two other incidents, not involving Banks, that
26 purportedly demonstrate the Sheriff’s Department’s failure to investigate uses of force.
27 One incident occurred in January 2013 and involved Officer Ertz’s alleged punches and
28 five-second application of a carotid restraint hold. (*See* Complaint 2013-C-239, Pl.’s Ex.

1 47 (“Pl.’s Ex. 47”). The second incident concerned Deputy Jeffrey Guy, who allegedly
2 unlawfully detained, pepper-sprayed, and beat a young Hispanic pedestrian with Down’s
3 Syndrome. (See Press Article, Pl.’s Ex. 48 (“Pl.’s Ex. 48”). Plaintiff’s only evidence is
4 the victim’s complaint in the Ertz case and a newspaper article regarding a settlement in
5 the Guy case. (Pl.’s Exs. 47, 48). Neither the complaint nor the newspaper article are
6 evidence of whether the Sheriff’s Department conducted a proper investigation.

7 Plaintiff tries to develop an argument that Sheriff’s deputies do not adequately
8 document use of force and that the Sheriff’s Department tolerates this alleged
9 inadequacy. Thus, it appears that part of Plaintiff’s theory is that “departmental treatment
10 of . . . the use of force . . . contributed to the police excesses complained of because the
11 procedures made clear to the officer that . . . he could get away with anything.”
12 *Velazquez*, 793 F.3d at 1027. Use of force supplement forms and canine reports usually
13 must be completed when an officer uses force or deploys a canine. Pl.’s Ex. 17. Plaintiff
14 contends that some of these required forms are missing entirely or are missing
15 information.

16 But the failure to complete these forms is not evidence of a pattern or practice of
17 ignoring use of force incidents. Indeed, there is evidence that the Sheriff’s Department
18 has procedures in place to ensure that the forms are completed properly. Lieutenant
19 Duckworth explained that when a form is missing, IA inquires with the command. *Id.*
20 The Department samples ten percent of the use of force reports completed each month to
21 ensure the forms are completed properly. Pl.’s Ex. 37. If an error is found, the form is
22 sent back to the appropriate party to complete. *Id.* These procedures do not “ma[k]e
23 clear” that officers can “get away” with failing to document use of force. *Velazquez*, 793
24 F.3d at 1027. There is no evidence that missing or incomplete forms “contributed to”
25 Banks’s alleged misconduct. *Id.* Plaintiff’s evidence is insufficient to establish a pattern
26 or practice of ignoring and failing to investigate officers’ use of force.

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1 **b. Use of Force Policy**

2 Plaintiff argues that the San Diego “Sheriff’s Department’s use of force policy fails
3 to provide deputies with direction regarding how to make use of force decisions, and as
4 such, further supports a *Monell* claim against the County.” (Opp’n at 23). Under the
5 *Monell* doctrine, Plaintiff may recover if the policy “causes” the constitutional violation.
6 *Lowry*, 858 F.3d at 1255 (citing *Chew v. Gates*, 27 F.3d 1432, 1439 (9th Cir. 1994)).

7 Plaintiff has not included the County’s written use of force policy in its opposition
8 papers. However, one does exist, as Plaintiff’s expert reviewed it and opines on it: “The
9 San Diego County Sheriff’s Department use of force policy offers no guidance on the K9
10 as a use of force implement. . . . Instead, the policy refers to the department K9 manual. .
11 . . The San Diego County Sheriff’s Department use of force policy and K9 manual do not
12 provide any direction on when the use of a K9 would be appropriate. Absent any
13 direction on when to use a force implement that is considered a severe use of force . . .
14 renders the Sheriff’s Department use of force policy unreasonable.” (Prelim. Expert Rpt.
15 of Jeffrey J. Noble, Pl.’s Ex. 4 at 51 (“Pl.’s Ex. 4”); *see also* Decl. of J. Noble ¶ 19
16 (stating same opinion)). Although Plaintiff contends that the County’s policy fails to
17 provide guidance on how to use any type of force, Plaintiff’s expert’s opinion is limited
18 to the use of canine force.

19 Summary judgment on this particular *Monell* theory is appropriate for at least two
20 reasons. First, other than Noble’s opinion about the use of canine force, Plaintiff offers
21 no other evidence that the County’s policy fails to provide guidance as to other types of
22 force. Absent the actual policy, the Court cannot determine what guidance the policy
23 does or does not provide to its officers and, accordingly, whether Deputy Banks followed
24 that guidance. As such, there is no evidence that the County’s use of force policy caused
25 the alleged constitutional violation.

26 Second, Noble’s opinion that the policy does “not provide any direction” on when
27 to use a canine is contradicted by his own statement. In his report, Noble admits that the
28 County’s K9 manual states that a canine may be used “[f]or the protection of the handler,

1 other law enforcement officers and citizens; to locate, apprehend or control a felony
2 suspect when it would be unsafe for the deputies to proceed into the area; to locate,
3 apprehend or control armed misdemeanor suspects; to search for narcotics; for crowd
4 control; for the protection of detention deputies during prisoner movement; article
5 searches.” (Pl.’s Ex. 4 at 51). Thus, the policy does provide guidance. Plaintiff fails to
6 explain how this guidance is insufficient and how the policy, as written, caused the
7 alleged violation.

8 **c. Failure to Train and Supervise**

9 Plaintiff’s final *Monell* theory is that “municipal liability may also be based on
10 constitutional violations resulting from its failure to supervise, monitor or train its
11 employees, where its failure amounts to ‘deliberate indifference’ to the rights of the
12 people with whom the local government comes into contact.” (Opp’n at 23-24). He
13 contends that the “County had actual knowledge of a long series of misconduct by
14 Deputy Banks and failed to take reasonable steps to investigate and address the numerous
15 allegations against him.” (Opp’n at 24).

16 Under *Monell*, a municipality may be liable under § 1983 for policies of inaction,
17 such as a failure to train and supervise. *See Connick v. Thompson*, 563 U.S. 51, 61
18 (2011) (“In limited circumstances, a local government’s decision not to train certain
19 employees about their legal duty to avoid violating citizens’ rights may rise to the level of
20 an official government policy for purposes of § 1983.”); *Jackson v. Barnes*, 749 F.3d
21 755, 763 (9th Cir. 2014) (considering allegations of failure to supervise). In inaction
22 cases, the plaintiff alleges that the government body has failed to “implement procedural
23 safeguards to prevent constitutional violations.” *Id.* (internal citations omitted). To
24 prove such a policy, Plaintiff must first show that the municipality’s failure “amount[s] to
25 deliberate indifference to the rights of persons with whom the untrained [or unsupervised]
26 officers come into contact.” *Connick*, 563 U.S. at 61 (internal citations omitted). This
27 requires showing that the County was “on actual or constructive notice that a particular
28 omission . . . causes . . . employees to violate citizens’ constitutional rights” and instead

1 of fixing the issue, disregarded the problem. *Id.* “Only then can such a shortcoming be
2 properly thought of as a [municipal] policy or custom that is actionable under § 1983.”
3 *Id.* (internal citations and quotation marks omitted). Second, Plaintiff must show that the
4 policy caused his constitutional injury in the sense that his injury could have been
5 avoided had the County trained and supervised Deputy Banks. *See Jackson*, 749 F.3d at
6 763.

7 In support of his claim, it appears that Plaintiff relies on the use of force incidents
8 involving Deputy Banks and other officers that the Court outlined above. But Plaintiff’s
9 evidence does not create a genuine issue of material fact as to whether the County
10 deliberately chose not to train and supervise its employees. The mere existence of these
11 other incidents does not reflect a pattern of similar constitutional violations. Not only are
12 those incidents not similar, *see Connick*, 563 U.S. at 62 (“A pattern of similar
13 constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate
14 deliberate indifference for purposes of failure to train.”), but there is no evidence that
15 those incidents amounted to constitutional violations. There is no evidence of any failure
16 to train or supervise, nor any evidence that the County made a deliberate choice to avoid
17 adequate training and supervision. Viewing the evidence in a light most favorable to
18 Plaintiff, no reasonable jury could find that the County was deliberately indifferent to the
19 need to train and supervise its deputies.

20 In conclusion, the County is entitled to summary judgment on all three theories of
21 Plaintiff’s *Monell* claim under 42 U.S.C. § 1983.

22 **2. County’s Liability under 42 U.S.C. §§ 1985 and 1986**

23 Plaintiff’s complaint alleges violations of 42 U.S.C. § 1985(2), § 1985(3), and §
24 1986. Section 1985(2) applies to conspiracies to obstruct justice,⁴ section 1985(3) applies
25

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27 ⁴ 42 U.S.C. § 1985(2) states: “If two or more persons in any State or Territory conspire
28 to deter, by force, intimidation, or threat, any party or witness in any court of the United
States from attending such court, or from testifying to any matter pending therein, freely,

1 to conspiracies to deprive a person of any right or privilege,⁵ and section 1986 applies to
2 the failure to prevent conspiracies to obstruct justice or deprive someone of “equal
3 protection of the laws, or of equal privileges and immunities under the laws.”⁶ A section
4

5 fully, and truthfully, or to injure such party or witness in his person or property on
6 account of his having so attended or testified, or to influence the verdict, presentment, or
7 indictment of any grand or petit juror in any such court, or to injure such juror in his
8 person or property on account of any verdict, presentment, or indictment lawfully
9 assented to by him, or of his being or having been such juror; or if two or more persons
10 conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner,
11 the due course of justice in any State or Territory, with intent to deny to any citizen the
12 equal protection of the laws, or to injure him or his property for lawfully enforcing, or
13 attempting to enforce, the right of any person, or class of persons, to the equal protection
14 of the laws.”

15 ⁵ 42 U.S.C. § 1985(3) states: “If two or more persons in any State or Territory conspire
16 or go in disguise on the highway or on the premises of another, for the purpose of
17 depriving, either directly or indirectly, any person or class of persons of the equal
18 protection of the laws, or of equal privileges and immunities under the laws; or for the
19 purpose of preventing or hindering the constituted authorities of any State or Territory
20 from giving or securing to all persons within such State or Territory the equal protection
21 of the laws; or if two or more persons conspire to prevent by force, intimidation, or
22 threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in
23 a legal manner, toward or in favor of the election of any lawfully qualified person as an
24 elector for President or Vice President, or as a Member of Congress of the United States;
25 or to injure any citizen in person or property on account of such support or advocacy; in
26 any case of conspiracy set forth in this section, if one or more persons engaged therein
27 do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby
28 another is injured in his person or property, or deprived of having and exercising any
right or privilege of a citizen of the United States, the party so injured or deprived may
have an action for the recovery of damages occasioned by such injury or deprivation,
against any one or more of the conspirators.”

⁶ 42 U.S.C. § 1986 states: “Every person who, having knowledge that any of the wrongs
conspired to be done, and mentioned in section 1985 of this title, are about to be
committed, and having power to prevent or aid in preventing the commission of the same,
neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party
injured, or his legal representatives, for all damages caused by such wrongful act, which
such person by reasonable diligence could have prevented; and such damages may be
recovered in an action on the case; and any number of persons guilty of such wrongful

1 1985 claim requires the existence of a conspiracy, and a successful section 1986 claim is
2 predicated upon a violation of section 1985. 42 U.S.C. §§ 1985, 1986; *Delta Sav. Bank v.*
3 *United States*, 265 F.3d 1017, 1024 (9th Cir. 2001).

4 Defendants state, in conclusory fashion, that they move for summary judgment on
5 these claims, but they do not present any argument regarding why summary judgment is
6 warranted. Although the Court cannot discern any evidence of a conspiracy, it is
7 reluctant to grant summary judgment on claims that Defendants do not fairly raise for
8 response by Plaintiff. Accordingly, the Court denies summary judgment on Plaintiff's
9 section 1985 and 1986 claims without prejudice. However, as explained further below,
10 the Court provides notice that it is considering entering summary judgment on these
11 claims pursuant to Federal Rule of Civil Procedure 56(f) and gives Plaintiff an
12 opportunity to respond.

13 **III. Conclusion**

14 Triable issues of fact exist as to whether Deputy Banks had probable cause to
15 arrest Plaintiff for a section 148 violation and whether he used excessive force in
16 detaining Plaintiff. But there are no genuine issues of fact on the reasonableness of the
17 decision to stop Plaintiff's car and whether the County had a policy, pattern, or practice
18 of ignoring use of force incidents, failing to provide deputies with direction in how to use
19 force, and failing to supervise and train deputies.

20 Accordingly, the Court denies Defendants' motion for summary judgment on
21 Plaintiff's claims for assault, battery, false arrest, false imprisonment (to the extent the
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24 neglect or refusal may be joined as defendants in the action; and if the death of any party
25 be caused by any such wrongful act and neglect, the legal representatives of the deceased
26 shall have such action therefor, and may recover not exceeding \$5,000 damages therein,
27 for the benefit of the widow of the deceased, if there be one, and if there be no widow,
28 then for the benefit of the next of kin of the deceased. But no action under the provisions
of this section shall be sustained which is not commenced within one year after the cause
of action has accrued."

1 claim is premised on Plaintiff's arrest), and violation of Plaintiff's Fourth Amendment
2 rights under 42 U.S.C. § 1983 as to Defendant Deputy Banks (to the extent the claim is
3 premised on the lack of probable cause to support the arrest and the use of excessive
4 force). The Court also denies Deputy Banks qualified immunity.

5 The Court grants Deputy Banks summary judgment on the false imprisonment and
6 42 U.S.C. § 1983 claim insofar as those claims are based on the reasonableness of the car
7 stop. The Court also grants the County summary judgment on the 42 U.S.C. § 1983
8 *Monell* claim. Because Plaintiff's claim of negligence is based on *Monell* liability, *see*
9 Compl. ¶ 90 ("Defendants breached their duty to Plaintiff by failing to properly screen,
10 hire, retain, supervise, report, discipline, monitor, control, terminate, or prosecute (when
11 justified) its law enforcement officers, including the individual Defendants herein."), the
12 Court also grants Defendants summary judgment on the negligence claim.

13 That leaves Plaintiff's fifth claim for violation of California Civil Code §§ 51.7
14 and 52.1, his seventh claim for violation of 42 U.S.C. §§ 1985(2) and 1985(3), his eighth
15 claim for violation of 42 U.S.C. § 1986, and his tenth claim for intentional infliction of
16 emotional distress. The Court will briefly address these four claims.

17 Plaintiff's fifth claim alleges that a "motivating reason for Defendants threatening
18 violence was their perception of Plaintiff's race and color as a member of a minority
19 group." (Compl. ¶ 64). California Civil Code § 51.7 "declares that all persons have the
20 right to be free from violence or intimidation because of their race, color, religion,
21 ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or
22 position in a labor dispute, or because they are perceived by another to have any of these
23 characteristics." *Venegas v. Cnty. of Los Angeles*, 32 Cal. 4th 820, 841-42 (2004).
24 California Civil Code § 52.1 provides a private right of action where a "person or
25 persons, whether or not acting under color of law, interferes by threats, intimidation, or
26 coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise
27 or enjoyment by any individual . . . of rights secured by the Constitution." Cal. Civ.
28 Code § 52.1(a), (b).

1 Plaintiff's seventh claim alleges that Defendants "engaged in the obstruction of
2 justice, conspired to obstruct justice, and conspired to effectuate the deprivation of
3 Plaintiff's rights under the Fourth, Fifth, Sixth, and 14th Amendments of the U.S.
4 Constitution." (Compl. ¶ 75). Plaintiff's eighth claim alleges that Defendants "having
5 the power to prevent or to aid in preventing the commission of the acts more specifically
6 set forth above, and having neglected and refused to take such means available and
7 necessary to so prevent or aid in preventing said acts, have violated" 42 U.S.C. § 1986.
8 (Compl. ¶ 82). As explained above, 42 U.S.C. §§ 1985 and 1986 claims require the
9 existence of a conspiracy.

10 Plaintiff's tenth cause of action pleads a claim for intentional infliction of
11 emotional distress. An intentional infliction of emotional distress claim requires Plaintiff
12 to prove (1) extreme and outrageous conduct by Defendants with the intention of causing,
13 or reckless disregard of the probability of causing, emotional distress, (2) that Plaintiff
14 suffered severe or extreme emotional distress; and (3) actual and proximate causation of
15 the emotional distress by Defendants' outrageous conduct. *Hughes v. Pair*, 46 Cal. 4th
16 1035, 1050 (2009).

17 Federal Rule of Civil Procedure 56(f) provides that after giving notice and a
18 reasonable time to respond, the Court may "consider summary judgment on its own after
19 identifying for the parties material facts that may not be genuinely in dispute." Fed. R.
20 Civ. P. 56(f)(3); *Celotex*, 477 U.S. at 326 (noting district court's power to enter summary
21 judgment sua sponte). The Court has reviewed all the evidence submitted in this case.
22 Now, pursuant to Rule 56(f), the Court gives notice that it is considering entering
23 summary judgment on the fifth, seventh, eighth, and tenth claims on the grounds that
24 there is insufficient evidence to prove those claims. The Court notes the following
25 deficiencies: (1) the Court sees no evidence that Defendants' conduct was motivated by
26 "their perception of Plaintiff's race and color" such that Plaintiff can prevail on his fifth
27 claim for violation of California Civil Code §§ 51.7 and 52.1, (2) the Court sees no
28 evidence of a conspiracy to do any of the wrongs identified in 42 U.S.C. §§ 1985 and

1 1986 such that Plaintiff can prevail on his seventh and eighth claims, and (3) the Court
2 sees no evidence that Defendants acted with the intention of causing, or reckless
3 disregard of the probability of causing, emotional distress and no evidence that Plaintiff
4 suffered severe and extreme emotional distress such that Plaintiff can prevail on his tenth
5 claim for intentional infliction of emotional distress.

6 Plaintiff may file additional briefing, not to exceed 15 pages, to address these
7 issues no later than 21 days after the entry of this Order. Defendants may file a response,
8 not to exceed 15 pages, no later than seven days after Plaintiff's filing. Thereafter, the
9 Court will take the matter under submission.

10 **MOTION FOR SEPARATE TRIALS**

11 Defendants seek to bifurcate trial. They ask the Court to conduct a separate trial
12 on the issues of the County's federal liability and punitive damages against Deputy
13 Banks. Defendants' concern arises from Plaintiff's anticipated introduction of evidence
14 about other use of force incidents involving Deputy Banks, which this Court has
15 discussed above. Defendants also believe that Plaintiff may try to characterize Deputy
16 Banks as a sadist or racist.

17 The Court has broad discretion to bifurcate trial "for convenience, to avoid
18 prejudice, or to expedite and economize" proceedings. Fed. R. Civ. P. 42(b); *Hangarter*
19 *v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004). In this case,
20 the Court exercises its discretion and denies Defendants' motion. The Court has granted
21 Defendants summary judgment on the 42 U.S.C. § 1983 claim against the County, and it
22 has provided notice that it is considering granting summary judgment on the remaining
23 federal claims against the County and on the state law claim alleging that racial basis
24 motivated Deputy Banks's actions. Even if the Court ultimately does not enter summary
25 judgment on those claims, appropriate limiting instructions can remedy Defendants'
26 concerns.

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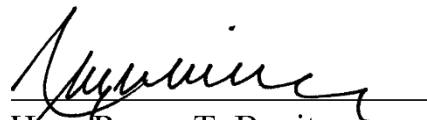
1 **CONCLUSION**

2 The Court grants in part and denies in part Defendants’ motion for summary
3 judgment. (ECF No. 55). The Court denies Defendants’ motion for separate trials. (ECF
4 No. 56).

5 As explained above, the Court notifies Plaintiff that it is considering entering
6 summary judgment on Plaintiff’s fifth, seventh, eighth, and tenth claims for relief.
7 Should Plaintiff seek to respond, it may file a brief consistent with the time and page
8 limits set forth above. Once the Court has considered these additional issues, it will set a
9 new date and time for a pretrial conference.

10 **IT IS SO ORDERED.**

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12 Dated: September 20, 2017

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14 Hon. Roger T. Benitez
15 United States District Judge
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