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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PHILLIP JESSE MENDOZA,  
Plaintiff,  
v.  
COUNTY OF SAN DIEGO, et al.  
Defendants.

Case No.: 17cv1349 W (NLS)

**ORDER DENYING DEFENDANTS’  
MOTION TO DISMISS [DOC. 6]**

Defendants County of San Diego and San Diego Sheriff’s Deputy James Givens move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes.

The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the reasons that follow, the Court **DENIES** Defendants’ motion [Doc. 6].

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1 **I. BACKGROUND**

2 The following allegations are taken from the First Amended Complaint (“FAC”  
3 [Doc. 5]). On June 12, 2016, Plaintiff was a patron of the Bancroft Bar in Spring Valley,  
4 California. (FAC ¶ 20.) Plaintiff and another patron got into an argument that caused the  
5 bar’s management to remove them, and call the San Diego Sheriff’s Department. (Id.)  
6 Several other patrons followed Plaintiff as he left the bar. (Id. ¶ 21.) One of the patrons  
7 carried a pool cue, and others carried billiard balls. (Id.) Plaintiff alleges that the group  
8 of patrons started striking him with “these weapons, so the Plaintiff pulled out a knife to  
9 defend himself.” (Id.)

10 While Plaintiff was defending himself against the group of patrons, Defendant  
11 Deputy Givens arrived at the scene and drove his patrol car into Plaintiff, throwing him  
12 twenty feet in the air. (FAC ¶ 22.<sup>1</sup>) Plaintiff was then taken to Grossmont Hospital, and  
13 being released was arrested for assault with a deadly weapon. (Id. ¶¶ 22–23.)

14 On July 3, 2017, Plaintiff filed this lawsuit. On November 13, 2017, he filed the  
15 FAC alleging the following causes of action: excessive force under 42 U.S.C. § 1983  
16 against Deputy Givens; *Monell* liability under 42 U.S.C. § 1983 against San Diego  
17 County and Sheriff Gore; and state-law battery and negligence against all Defendants.  
18 (Id. ¶¶ 30–69.) Defendants now seek to dismiss, arguing Deputy Givens is entitled to  
19 qualified immunity, and the FAC fails to allege sufficient facts to support any of the  
20 causes of action. (P&A [Doc. 6-1] 1:13–20.) Plaintiff opposes the motion. (See *Opp’n*  
21 [Doc. 7].)

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27 <sup>1</sup> Defendants concur that Deputy Givens drove his patrol car into Plaintiff, but contend he was only  
28 knocked to the ground by the impact. (P&A [Doc. 6-1] 1:7–8.) But in evaluating a motion to dismiss,  
courts must accept plaintiff’s facts as true. *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007).

1 **II. LEGAL STANDARD**

2 The Court must dismiss a cause of action for failure to state a claim upon which  
3 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)  
4 tests the legal sufficiency of the complaint. See Parks Sch. of Bus., Inc. v. Symington, 51  
5 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either  
6 for lack of a cognizable legal theory or for insufficient facts under a cognizable theory.  
7 Balisteri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the  
8 motion, a court must “accept all material allegations of fact as true and construe the  
9 complaint in a light most favorable to the non-moving party.” Vasquez v. L.A. Cnty.,  
10 487 F.3d 1246, 1249 (9th Cir. 2007).

11 A complaint must contain “a short and plain statement of the claim showing that  
12 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has  
13 interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to  
14 relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555  
15 (2007). The allegations in the complaint must “contain sufficient factual matter, accepted  
16 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556  
17 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

18 Well-pled allegations in the complaint are assumed true, but a court is not required  
19 to accept legal conclusions couched as facts, unwarranted deductions, or unreasonable  
20 inferences. See Papasan v. Allain, 478 U.S. 265, 286 (1986); Sprewell v. Golden State  
21 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

22  
23 **III. DISCUSSION**

24 **A. Qualified Immunity**

25 Plaintiff’s first cause of action alleges a 42 U.S.C. § 1983 claim based on the  
26 contention that Deputy Givens used excessive force when he ran his patrol car into  
27 Plaintiff. (FAC ¶ 33.) Defendants argue the claim should be dismissed because Deputy  
28 Givens is entitled to qualified immunity. (P&A 1:12–15.)

1 Qualified immunity shields government officials from liability for monetary  
2 damages unless the plaintiff establishes that (1) the conduct violated a constitutional  
3 right, and (2) the right was “clearly established” when the misconduct occurred. Pearson  
4 v. Callahan, 555 U.S. 223, 232, 236–42 (2009) (modifying the two-step inquiry in  
5 Saucier v. Katz, 533 U.S. 194 (2001), to allow courts discretion in deciding which prong  
6 to address first depending on the facts of the particular case).

7 Defendants argue Deputy Givens’s actions were reasonable, and therefore did not  
8 violate Plaintiff’s constitutional rights. (*P&A* 4:3–5.) Defendants further argue that even  
9 if Deputy Givens’s actions were unreasonable, Plaintiff’s right to be free from the  
10 particular use of force was not clearly established at the time. (*Id.* 4:10–13.)

11  
12 **1. The FAC’s factual allegations allege a Fourth Amendment violation.**

13 A Fourth Amendment excessive-force claim is analyzed under an objective  
14 reasonableness standard. Graham v. Connor, 490 U.S. 386, 388 (1989). In determining  
15 the reasonableness of an officer’s actions, the nature and quality of the intrusion on the  
16 suspect’s Fourth Amendment interests are balanced against the countervailing  
17 government interests. Id. at 396. All the facts and circumstances of a case are considered  
18 in establishing the government’s interest, including the severity of the crime at issue,  
19 whether the suspect poses an immediate threat to the safety of the officers or others, and  
20 whether the suspect is resisting arrest or attempting to flee from arrest. Id. (citing  
21 Tennessee v. Garner, 471 U.S. 1, 8 (1985)). In addition to the Graham factors,  
22 circumstances such as the availability of less intrusive force and the use of proper  
23 warnings are considered. Hughes v. Kisela, 862 F.3d 775, 780 (9th Cir. 2017) (citing  
24 Bryan v. MacPherson, 630 F.3d 805, 831 (9th Cir. 2010)).

25  
26 **a. Nature and quality of the intrusion.**

27 A means of force capable of inflicting significant pain and causing serious injury is  
28 considered “intermediate force” that presents a significant intrusion upon an individual’s

1 constitutional interests. In Young v. City of Los Angeles, 655 F.3d 1156, 1161 (9th Cir.  
2 2011), the Ninth Circuit found a police officer’s use of pepper spray and a baton  
3 constitutes intermediate force. See also Smith v. City of Hemet, 394 F.3d 689, 701–02  
4 (9th Cir. 2005) (use of pepper spray and police dogs also considered intermediate force).  
5 Using a patrol car to strike and subdue a suspect presents a similar, if not higher, risk of  
6 causing significant pain and injury as using pepper spray in combination with a baton or  
7 police dog. Although Defendants attempt to focus the analysis on the severity of  
8 Plaintiff’s injury, the proper analysis is whether the means of force was capable of  
9 causing serious injury. Striking a suspect with a car is objectively capable of causing  
10 serious injuries. Therefore, the government’s interest must be equally significant to  
11 justify the force used.

12  
13 **b. The government’s interest.**

14 When law enforcement encounters a suspect armed with a knife, the severity of the  
15 crime can weigh against finding excessive force. See Nehad v. Zimmerman, 2017 WL  
16 6453475 at \*4 (S.D. Cal. Dec. 18, 2017) (suspect wielding knife and advancing on  
17 officers supported a finding of a more severe crime); Pham v. City of San Jose, 2013 WL  
18 5443027 at \*6 (N.D. Cal. Sept. 30, 2013) (suspect that already injured another with a  
19 knife weighed in favor of a severe crime). But, the fact that a suspect is armed with a  
20 knife is not dispositive. Chien Van Bui v. City and Cnty. of San Francisco, 699 Fed.  
21 Appx. 614, 615 (9th Cir. 2017). Instead, the most important factor is whether the suspect  
22 poses an immediate threat to officers or others. Zion v. City of Orange, 874 F.3d 1072,  
23 1075 (9th Cir. 2017) (citing Mattos v. Agarano, 661 F.3d 433, 441 (9th Cir. 2011)).

24 Here, although Plaintiff held a knife when Deputy Givens arrived, he contends he  
25 had the knife to defend himself against the group of bar patrons who were attacking him  
26 with billiard balls and a pool cue. (*FAC* ¶ 21.) Plaintiff also alleges he never tried to stab  
27 anyone. (*Id.* ¶ 26.) These facts support an inference that Plaintiff did not pose an  
28 immediate threat to the patrons. Additionally, a jury could also find Plaintiff did not pose

1 a threat to Deputy Givens, since the Deputy was in the patrol car when he arrived at the  
2 scene. (*Id.* ¶ 22.) Nor are there any allegations Plaintiff was trying to resist arrest or flee.  
3 (*See id.* ¶ 26.) These facts all support Plaintiffs’ excessive-force claim.

4 Finally, when evaluating an excessive-force claim, the availability of less intrusive  
5 force and the use of proper warnings may be relevant. *Kisela*, 862 F.3d at 780. When  
6 feasible, a warning should be given before the use of non-lethal force that may cause  
7 serious injury. *Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001). In *Deorle*, the  
8 officers failed to give a warning before using a bean-bag gun as a suspect was advancing  
9 on them with a can or bottle in hand. *Id.* at 1277–78. Failing to give a warning in such  
10 circumstances weighed in favor of finding excessive force. *Id.* at 1285. Similarly, the  
11 court found officers who failed to give a warning before shooting a knife-wielding  
12 suspect, who stood six to eight feet from the officers, supported a finding of excessive  
13 force. *Hayes v. County of San Diego*, 736 F.3d 1223, 1234–35 (9th Cir. 2013).

14 Here, no warning was given before Deputy Givens struck Plaintiff with his patrol  
15 car. The failure to warn Plaintiff before using a method of force that could cause serious  
16 injury also supports Plaintiff’s excessive-force claim.

17  
18 **c. Balancing the parties’ interests.**

19 Viewing the facts in the light most favorable to Plaintiff, Deputy Givens arrived on  
20 the scene to find Plaintiff brandishing a knife while being threatened or attacked by a  
21 crowd of bar patrons armed with a pool cue and billiard balls. Instead of warning  
22 Plaintiff, Deputy Givens ran his car into Plaintiff, causing him to fly 20 feet in the air.  
23 Under these facts, Plaintiff has pled a violation of his Fourth Amendment rights.

24  
25 **2. The right was clearly established.**

26 “Clearly established” means “[t]he contours of the right must be sufficiently clear  
27 that a reasonable official would understand what he is doing violates that right” with  
28 careful consideration to the facts of the particular case. *Anderson v. Creighton*, 483 U.S.

1 635, 640 (1987). In determining whether a right is clearly established, courts “may look  
2 at unpublished decisions and the law of other circuits, in addition to Ninth Circuit  
3 precedent.” Prison Legal News v. Lehman, 397 F.3d 692, 702 (9th Cir. 2005); Sorrels v.  
4 McKee, 290 F.3d 965, 970 (9th Cir. 2002) (looking to “decisions of our sister Circuits,  
5 district courts, and state courts” in evaluating if law was clearly established).

6 Officers can still be on notice that their conduct violated established law in novel  
7 factual circumstances, because the salient issue is whether the state of the law gives  
8 notice that the conduct at issue was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 741  
9 (2002). However, the general excessive force principles set forth in Graham, while not  
10 inherently incapable of giving fair and clear warning to an officer, do not by themselves  
11 create clearly established law outside an obvious case. S.B. v. County of San Diego, 864  
12 F.3d 1010, 1015 (9th Cir. 2017) (citing White v. Pauly, 552 S.Ct. 548, 552 (2017)).

13 Although the parties have not cited an excessive-force case involving similar facts,  
14 cases evaluating uses of force capable of causing serious injury against armed suspects  
15 appear to clearly require an officer to warn the suspect, if possible. See Deorle v.  
16 Rutherford, 272 F.3d at 1285; Hayes v. County of San Diego, 736 F.3d at 1234-35.  
17 Based on these cases and under Plaintiff’s version of events, the Court finds the law was  
18 clearly established that Deputy Givens could not drive his patrol car into Plaintiff,  
19 without any warning, at a speed sufficient to throw him twenty feet in the air.

## 21 **B. Municipal Liability**

22 Plaintiff’s second cause of action alleges municipal liability pursuant to 42 U.S.C.  
23 §1983 under two theories: (1) Plaintiff’s injuries were caused by the County’s alleged  
24 policy, custom, or practice of using excessive force in effectuating arrests as well as  
25 failing to monitor, train, and supervise deputies; and (2) Sheriff Gore or other supervisory  
26 officials ratified Deputy Givens’ alleged use of excessive force. (*FAC* ¶¶ 13, 38–44, 47–  
27 49.) In their motion, Defendants attack only the first theory. Specifically, they argue the  
28 claim must be dismissed because Plaintiff fails to allege facts establishing a policy or

1 longstanding practice or custom that caused Deputy Givens to pursue the allegedly  
2 unconstitutional conduct. (*P&A* 5:26–27, 6:8–9.) Defendants do not challenge Plaintiff’s  
3 second theory of ratification.

4 In moving to dismiss, Defendants bear the burden to show no set of Plaintiff’s  
5 allegations support a claim for relief. Terracom v. Valley Nat’l Bank, 49 F. 3d 555, 558  
6 (9th Cir. 1995); See Vasquez, 487 F.3d at 1249. Because Defendants have not  
7 challenged Plaintiff’s ratification theory, even if they prevail in challenging the policy,  
8 custom or practice theory, they will not have demonstrated that no set of allegations  
9 support Plaintiff’s second claim. Therefore, Defendants’ motion to dismiss this claim  
10 must be denied.

### 11 12 **C. State Law Battery and Negligence**

13 Plaintiff’s third and fourth claims allege state-law battery and negligence against  
14 Deputy Givens for striking Plaintiff with his car, and vicarious liability against the  
15 County under California Government Code § 815.2. (*FAC* ¶¶ 53, 55, 59, 61.)  
16 Defendants argue Deputy Givens is immune from liability under California Government  
17 Code § 820.2 and, therefore, the County cannot be vicariously liable when its employee  
18 is immune. (*P&A* 8:27–28, 9:22–23, 10:11–14.)

19 Under section 820.2, a public employee is not liable for an injury caused by an act  
20 or omission that was the result of the exercise of the discretion vested in the employee,  
21 whether or not such discretion is abused. Discretionary acts are basic policy decisions  
22 that have been expressly committed to coordinate branches of government, such that  
23 judicial interference would be unseemly. Conway v. Cnty. of Tuolumne, 231 Cal. App.  
24 4th 1005, 1014 (2014). However, as a matter of public policy, discretionary immunity  
25 does not apply to cases of excessive force in effectuating arrests. Id. at 1015; Scruggs v.  
26 Haynes, 252 Cal. App. 2d 256, 267–68 (1967). Therefore, Deputy Givens and the  
27 County are respectively not immune under California Government Code §§ 820.2 and  
28 815.2(b).

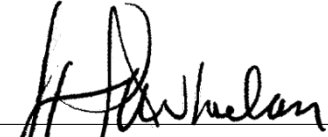


1 Defendants also argue that regardless of statutory immunity, the state-law claims  
2 should be dismissed because Deputy Givens acted reasonably under the circumstances.  
3 (*P&A* 9:12-27; *Reply* [Doc. 8] 9:6–8.) In short, Defendants argue the state-law claims  
4 should be dismissed because there was no excessive force. Because the Court has found  
5 Plaintiff has stated an excessive-force claim, Defendants’ alternative argument also fails.

6  
7 **IV. CONCLUSION & ORDER**

8 For the foregoing reasons, the Court **DENIES** Defendants’ motion to dismiss  
9 [Doc. 6].

10 Dated: March 7, 2018

11  
12   
13 Hon. Thomas J. Whelan  
United States District Judge