

DISCUSSION

A. Standard of Review

Summary judgment is proper where the pleadings, discovery and affidavits show that there is “no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

The moving party for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial, as is the case here, the moving party need only point out “that there is an absence of evidence to support the nonmoving party’s case.” Id.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings to demonstrate the existence of a genuine dispute of material fact by “citing to specific parts of materials in the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute.” Fed. R. Civ. P. 56(c). A triable dispute of fact exists only if there is sufficient evidence favoring the nonmoving party to allow a jury to return a verdict for that party. Anderson, 477 U.S. at 249. If the nonmoving party fails to make this showing, “the moving party is entitled to judgment as a matter of law.”

1 Celotex, 477 U.S. at 323.

2 B. Analysis

3 Captain Joyner argues that he is entitled to summary judgment on, and
4 qualified immunity from, McElroy’s Fourth Amendment excessive force claim.
5 Under Saucier v. Katz, 533 U.S. 194 (2001), the court must undertake a two-step
6 analysis when a defendant asserts qualified immunity in a motion for summary
7 judgment. The court first faces “this threshold question: Taken in the light most
8 favorable to the party asserting the injury, do the facts alleged show the officer’s
9 conduct violated a constitutional right?” 533 U.S. at 201. If the court determines
10 that the conduct did not violate a constitutional right, the inquiry is over and the
11 officer is entitled to qualified immunity.

12 If the court determines that the conduct did violate a constitutional right, it
13 then moves to the second step and asks “whether the right was clearly
14 established” such that “it would be clear to a reasonable officer that his conduct
15 was unlawful in the situation he confronted.” Id. at 201-02. Even if the violated
16 right was clearly established, qualified immunity shields an officer from suit
17 when he makes a decision that, even if constitutionally deficient, reasonably
18 misapprehends the law governing the circumstances he confronted. Brosseau v.
19 Haugen, 543 U.S. 194, 198 (2004); Saucier, 533 U.S. at 205-06. If “the officer’s
20 mistake as to what the law requires is reasonable . . . the officer is entitled to the
21 immunity defense.” Id. at 205.¹

22 Under the Fourth Amendment, officers may only use such force as is
23 “objectively reasonable” under the circumstances. Graham v. Connor, 490 U.S.

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25 ¹Although the Saucier sequence is often appropriate and beneficial, it is not
26 mandatory. A court may exercise its discretion in deciding which prong to
27 address first, in light of the particular circumstances of each case. See Pearson v.
28 Callahan, 555 U.S. 223, 236 (2009).

1 386, 397 (1989). To determine whether the force used was reasonable, courts
2 balance the nature and quality of the intrusion on the individual’s Fourth
3 Amendment interests against the countervailing governmental interests at stake.
4 Id. at 396. The “reasonableness” of a particular use of force must be judged from
5 the perspective of a reasonable officer on the scene, rather than with the 20/20
6 vision of hindsight. Id. An excessive force analysis requires evaluating “the
7 severity of the crime at issue, whether the suspect poses an immediate threat to
8 the safety of the officers or others, and whether he is actively resisting arrest or
9 attempting to evade arrest by flight.” Id.

10 In addition, the court’s consideration of “reasonableness must embody
11 allowance for the fact that police officers are often forced to make split-second
12 judgments – in circumstances that are tense, uncertain, and rapidly evolving –
13 about the amount of force that is necessary in a particular situation.” Id. at 396-
14 97. Not every push or shove, even if it may later seem unnecessary in the peace
15 of a judge’s chambers violates the Fourth Amendment. Id. at 396.

16 Captain Joyner argues that he is entitled to summary judgment because the
17 undisputed facts show that his actions were objectively reasonable under the
18 circumstances. In support, he submits declarations and documentary evidence
19 showing the following:

20 On March 16, 2013, Captain Joyner was assigned as the Patrol Division
21 Commander for District 5 in Oakland. At approximately 7:00 p.m., Captain
22 Joyner was driving a black semi-marked Chevy Tahoe police vehicle and
23 wearing his full duty police uniform with leather gun belt on International
24 Boulevard in front of the East Bay Dragons Motorcycle Club. Joyner Decl. (dkt.
25 #26-2) ¶¶3-4. Captain Joyner noticed a black Mercedes Benz that was driving in
26 front of him suddenly make a U-turn in front of the Dragons’ Clubhouse. He
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1 became suspicious of the vehicle because a similar vehicle was associated with
2 several pursuits and a robbery that occurred on January 28, 2013 in the same
3 area. Id. ¶4. Captain Joyner made a U-turn to obtain the vehicle’s license
4 plate and investigate further. He made eye contact with the driver of the
5 Mercedes and noted that the driver appeared to be startled, as his eyes widened
6 and he jumped in his seat. Id. ¶5. Captain Joyner saw the driver say something
7 to the passenger and these actions further increased his suspicions that the
8 occupants of the vehicle might be involved in the prior robbery. Id. ¶5.

9 As the Mercedes drove down the street, Captain Joyner called and asked
10 the dispatcher to check the license plate of the vehicle. Captain Joyner followed
11 the vehicle eastbound on International Boulevard. The vehicle turned suddenly
12 to go southbound on 91st Avenue. Based on his training and experience, Captain
13 Joyner saw this as an evasive maneuver that suggested the driver was trying to
14 get away. Id. ¶6.

15 The vehicle stopped suddenly at 91st Avenue and B Street. Before
16 Captain Joyner was able to get a response from the dispatcher about the license
17 plate, the vehicle pulled to the curb abruptly and the passenger, who was later
18 identified to be McElroy, jumped out of the passenger seat. Id. ¶7. McElroy was
19 wearing a baseball cap, white t-shirt and blue jeans. He was large in stature,
20 weighing about 240 pounds. Captain Joyner recognized McElroy but did not
21 realize until after the incident that he knew McElroy from several contacts in the
22 area of 77th Avenue and Bancroft Street. McElroy is known to be part of the
23 “Green Side Gang,” which was involved in several weapons and drug-related
24 activities. Id. ¶8.

25 1. The Chase and McElroy’s Firearm

26 McElroy started running at full speed, westbound on the north side
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1 sidewalk. As he was running, Captain Joyner saw the brown wooden handle of a
2 firearm sticking out of McElroy's pants. McElroy attempted to pull out the
3 firearm from his pocket several times. Captain Joyner was still in his vehicle and
4 followed McElroy at a distance of approximately 15 feet, offset to his left. Id. ¶9.
5 Captain Joyner announced over his radio the direction McElroy was running so
6 that a perimeter to contain him could potentially be set-up. Captain Joyner pulled
7 his vehicle over and got out to follow McElroy. McElroy ran into a nearby
8 backyard where Captain Joyner saw him adjust his pants. Captain Joyner
9 watched McElroy pull out of his pants an assault submachine gun. This weapon
10 was later identified as a .45 caliber Thompson- type style machine gun. Id. ¶10.

11 From behind a car approximately 20 yards away, Captain Joyner saw
12 McElroy throw the submachine gun to the east with his right hand, over a six foot
13 fence, causing the gun to hit a house. Id. ¶11. After he threw the gun, McElroy
14 hopped a fence southbound and Captain Joyner heard the crack of a wood fence.
15 Captain Joyner moved closer and saw McElroy climb over the fence then run
16 through other yards. Based on these observations, Captain Joyner drew his
17 department issued Glock sidearm and readied his weapon in case he would have
18 to use deadly force should McElroy have a second firearm. Captain Joyner
19 pointed his gun at McElroy's chest area in order to gain compliance and ordered
20 him to surrender. Id. ¶12.

21 McElroy refused to comply with Captain Joyner's commands to get on the
22 ground and show his hands. Instead, McElroy looked directly at Captain Joyner,
23 paused for a second, then turned around and took off running southbound.
24 Captain Joyner holstered his firearm as McElroy was running and followed him.
25 Id. ¶13.

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1 2. McElroy Continued To Resist Arrest

2 As McElroy continued running, he became visibly tired, slowed to
3 a jog and then a walk. At this point, Captain Joyner believed he could arrest
4 McElroy by putting him in a control hold since he appeared to be tired. Id. ¶14.
5 He walked up to McElroy, approached him from behind and used his right hand
6 to grab McElroy around his left wrist. He reached up to grab McElroy's elbow to
7 put him in a control hold, ordered him to put his hand behind his back and told
8 him he was under arrest. Id. ¶15.

9 McElroy refused to comply again. Instead of following Captain Joyner's
10 commands, McElroy spun around so that he was face to face with Captain
11 Joyner. While Captain Joyner was holding onto McElroy's left hand, McElroy
12 made a fist with his right hand. McElroy then punched Captain Joyner's wrist,
13 knocking Captain Joyner's hand off his wrist. McElroy started yelling, "Don't
14 touch me! Don't touch me!" He ignored Captain Joyner's commands and
15 walked away from Captain Joyner for a third time. Id. ¶16.

16 Captain Joyner radioed for additional officers to assist with arresting
17 McElroy. After McElroy walked five to six steps away from Captain Joyner,
18 McElroy reached into his right pants pocket and pulled out a knotted plastic bag
19 of marijuana. He turned around, threw the bag of marijuana at Captain Joyner's
20 feet and said something along the lines of "Joyner, all I got is some weed, but I
21 ain't going to jail." He turned around and continued to walk away. Id. ¶17.

22 As McElroy continued to walk away from him, Captain Joyner picked up
23 the bag of marijuana and put it inside his shirt. Captain Joyner got on the radio
24 and again asked for cover units. McElroy then started running again southbound
25 on 91st Avenue. Id. ¶18. Captain Joyner chased McElroy down 91st Avenue for
26 approximately one and a half city blocks, then McElroy turned left onto D Street.

1 Throughout the entire foot chase Captain Joyner ordered McElroy repeatedly to
2 stop and get on the ground. Based on McElroy's actions, Captain Joyner had
3 probable cause to arrest McElroy for possession of a firearm, possession of
4 marijuana, resisting arrest and battery on a police officer. It was clear from
5 McElroy's actions that he was a danger to the community and must be arrested.
6 Id. ¶19.

7 3. Further Confrontation Between Captain Joyner and McElroy

8 As McElroy ran eastbound on D Street, he became tired again,
9 slowed to walking and then stopped. He turned around and looked at Captain
10 Joyner, put his hands up in balled up fists and yelled something like, "Fuck this,
11 Joyner, I'm about to beat your ass." Id. ¶20. Captain Joyner was less than 10
12 feet behind McElroy when McElroy assumed a boxer's stance and came towards
13 Captain Joyner in a shuffle step. McElroy had his hands up in fists next to his
14 face, with one foot in front of the other. He looked like he was about to assault
15 Captain Joyner. Captain Joyner had no other weapons or flashlight on his leather
16 belt besides his duty firearm. Id. 21. To defend himself, Captain Joyner put his
17 fists up around his face and assumed a fighting stance. Id. ¶22.

18 McElroy moved closer to Captain Joyner, started swinging wildly at him
19 and punching with both of his closed fists. Captain Joyner stepped back and
20 moved out of the way. The two men exchanged punches about three or four
21 times. Captain Joyner was trying to aim for McElroy's face and upper chest area
22 to keep McElroy from getting on top of and overtaking him. Captain Joyner
23 struck McElroy with a closed fist, a compliance technique Captain Joyner
24 learned at the academy for situations where an officer has to engage in a fight.
25 McElroy punched Captain Joyner on the top of the head, face and chest area. Id.
26 ¶23.

1 After striking Captain Joyner, McElroy took a step back to gather himself
2 and Captain Joyner took a step back in hopes that the fight was over. McElroy
3 took some deep breaths and put his fists up again, and again the men started
4 exchanging blows. Captain Joyner then saw in his peripheral vision that a police
5 car was quickly approaching to his right side. Id. ¶24.

6 4. Assistance from Officer Padilla

7 Officer Padilla exited his patrol car and approached McElroy and
8 Captain Joyner with his Taser in his hand. Captain Joyner instructed Officer
9 Padilla to tase McElroy. Upon exiting his patrol car, Officer Padilla activated his
10 personal data recording device (PDRD) and saw McElroy in a combative and
11 aggressive stance, engaging Captain Joyner in a fight. Padilla Decl. (dkt. #26-3)
12 ¶¶3-5. Officer Padilla was concerned that McElroy might have another weapon
13 under his clothing. McElroy turned towards Officer Padilla and said something
14 like “shoot.” Officer Padilla believed that McElroy might also try to attack him
15 and was only standing about 6 to 10 feet away. Id. ¶¶6-7.

16 Officer Padilla aimed his Taser at McElroy’s left flank. The top probe
17 struck McElroy’s upper torso and the bottom probe struck his lower abdomen.
18 As McElroy fell to the ground, Officer Padilla heard the Taser noise change in
19 pitch which indicated that it had become dislodged. Id. ¶¶8-11.

20 Captain Joyner also heard the Taser deploy. McElroy turned away from
21 Officer Padilla and fell to the ground on his left side, approximately 12 inches
22 away from Captain Joyner. Captain Joyner noticed McElroy used his right hand
23 with open fingers to break his fall. Joyner Decl. ¶27. From his training and
24 experience, Captain Joyner knew that the Taser had a five second cycle. When
25 someone is properly incapacitated with the Taser, they are not able to move
26 their hands. McElroy’s use of his right hand to break his fall indicated to Captain
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1 Joyner that something about the Taser was not working correctly. Id. ¶28.

2 Normally when the Taser is in effect, it makes a muffled sound. In this
3 instance, after McElroy hit the ground and as he rolled towards Captain Joyner,
4 the Taser increased in volume to the point that Captain Joyner could hear the
5 charge coming out of the Taser. Based on his experience, this meant that the
6 charge was not actually going through McElroy's body. Id. ¶30. After McElroy
7 fell, Officer Padilla saw McElroy's hands balled up in fists at his
8 chest level. Padilla Decl. ¶11.

9 Captain Joyner saw one of the Taser prongs hanging out of McElroy's
10 shirt, near his abdomen. McElroy made a fist with his right hand, near his face,
11 while he was looking towards Captain Joyner. He was within striking distance,
12 approximately 12 inches away from Captain Joyner. Joyner Decl. ¶30. Captain
13 Joyner was afraid McElroy was going to try to punch him again. In accordance
14 with his training as a police officer and to gain compliance from McElroy,
15 Captain Joyner delivered two succinct open hand strikes in quick succession. Id.
16 ¶31; Padilla Decl. ¶12.

17 After Captain Joyner delivered the two hand strikes, he saw McElroy's
18 body turn rigid and McElroy's hand opened up. Captain Joyner felt his shoulder
19 and did not feel any strength or aggression in McElroy's shoulder. Captain
20 Joyner no longer perceived McElroy to be a threat, and felt that the evolving
21 situation had finally come to an end. Captain Joyner gave him verbal commands
22 to turn over and McElroy finally complied. Once McElroy turned over, Officer
23 Padilla was able to put handcuffs on him. Joyner Decl. ¶34; Padilla Decl. ¶13.

24 Notably, Captain Joyner made the conscious decision not to strike
25 McElroy with a closed fist. By implementing these two brief open hand strikes,
26 Captain Joyner used the least amount of force necessary to gain compliance from
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1 McElroy so he could be handcuffed. It was only after this minimal use of force
2 that McElroy put his hands behind his back and was placed into custody. Joyner
3 Decl. ¶32; Padilla Decl. ¶¶14-15.

4 The two open hand strikes were not punitive or retaliatory. Captain
5 Joyner was not acting out of anger. Captain Joyner did not use profanity at any
6 time during the situation. Captain Joyner felt fearful because he was aware that it
7 was possible that McElroy could overpower him, knock him out, taking Captain
8 Joyner's gun and killing him. In light of this risk, the first thing on Captain
9 Joyner's mind was to handcuff McElroy, then go back and recover the gun that
10 McElroy had discarded. Captain Joyner reasonably believed the situation would
11 not be over until McElroy was placed in handcuffs. Captain Joyner delivered the
12 two open hand strikes because they were reasonably necessary to overcome
13 McElroy's resistance. Captain Joyner never kicked McElroy at any time. Joyner
14 Decl. ¶35; Padilla Decl. ¶¶16-17.

15 By the time McElroy was handcuffed, Captain Joyner had already given
16 him approximately 20 to 30 verbal commands along the lines of "stop," "give
17 up," and "put your hands behind your back." McElroy ignored all of the
18 commands, and instead met them with physical violence, including repeatedly
19 punching and striking Captain Joyner. Joyner Decl. ¶33.

20 Captain Joyner left the scene to secure the assault weapon that McElroy
21 had discarded. Once the weapon was secured, Captain Joyner returned to the
22 scene, met with Lieutenant Souza and Sergeant Haney, and advised them of his
23 use of force. Joyner Decl. ¶36.

24 5. Expert Review of Captain Joyner's Two Open Hand Strikes

25 The use of the two open hand strikes to gain compliance from
26 McElroy was reviewed by three different police practices experts: Michael
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1 Leonesio, Sean McCann and Greg Meyer. All three experts agree that Captain
2 Joyner's two open hand strikes constituted the use of reasonable force based on
3 the totality of the circumstances facing Captain Joyner.

4 Since 2002, Michael Leonesio has developed and provided training to law
5 enforcement throughout the United States and Canada, including in the areas of
6 use of force, tactical handcuffing, unarmed defensive tactics and the use of
7 electronic control devices. He is a former officer of both San Carlos, California
8 and Oakland, California. He is currently founder and president of Leonesio
9 Consulting, the largest independent, electronic control device exclusive, testing
10 laboratory in the United States and has conducted over 7,000 weapon tests.
11 Leonesio Decl. (dkt. #26-4) ¶¶1-6.

12 Sean McCann holds a master's degree in criminal justice from California
13 State University, Sacramento and has testified as an expert in the area of police
14 use of force and techniques of arrest and control before labor arbitrations, civil
15 service boards, several California state courts and the Eastern District of
16 California. He also consults regularly with both the San Francisco District
17 Attorney's Office and the Marin County Public Defendant's Office regarding
18 police use of force cases and has given opinions both favorably and unfavorably
19 in regard to law enforcement conduct. McCann Decl. (dkt. #26-5) ¶¶1-5.

20 Greg Meyer has been working as an expert witness regarding police use of
21 force cases since 1989. He has been engaged in more than 200 cases involving
22 police shootings, Tasers, arrest-related deaths and other police procedure matters.
23 He has more than 35 years of experience with Taser devices. Meyer Decl. (dkt.
24 #26-6) ¶¶1-7.

25 All three experts reviewed the video of the incident that was captured by
26 Officer Padilla's PDRD, as well as Oakland Police Department's Use of Force
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1 Policy Handbook, and reports related to the incident. Sean McCann, following
2 his review of the incident, concluded that Captain Joyner’s technique of
3 distraction strikes were reasonable to bring a situation under control such as this
4 one where the Taser was less than fully effective. McCann Decl. ¶¶7-11.
5 McCann found that “[t]here was nothing wrong with Captain Joyner’s
6 perceptions or decision-making in regard to the use of force in this incident.” Id.
7 ¶12. In particular, the techniques used by Captain Joyner were well within all
8 industry standards. McCann found that Captain Joyner’s actions were “the most
9 clearly valid use of force that [he has] ever been asked to review.” Id.

10 There are times when a suspect’s clothing can interfere with the
11 effectiveness of a Taser. When “clothing disconnect” occurs “one or more of the
12 electronic control device probes lodge into the clothing of the subject rather than
13 the skin or muscle. This probe configuration is able to complete and maintain an
14 electrical circuit through the clothing as long as the gap between the probe and
15 the skin does not exceed two cumulative inches of airgap.” Leonesio Decl.
16 ¶¶15-16. If the clothing containing the probe(s) is allowed to fall away from the
17 subject’s skin and exceed the maximum airgap, the electrical circuit will open,
18 and the flow of electrical current will stop, rendering the subject capable of
19 unencumbered free movement. “Clothing disconnect scenarios can present as
20 full, limited or intermittent circuit disconnects and are dangerous to law
21 enforcement personnel because there is an unpredictable and inherent lack on of
22 neuromuscular incapacitation effect.” Id. ¶17. In other words, depending on
23 how loose a suspect’s clothing is, he may be only partly or potentially not at all
24 affected by the Taser.

25 Here, because McElroy was not fully incapacitated by the Taser, he
26 “continued to pose an immediate threat to officers even after being hit with the
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1 electronic control device.” Id. ¶19. In his review of materials for this matter,
2 Leonesio concluded that McElroy was “experiencing a limited and probably
3 intermittent clothing disconnect as a result of his loose clothing, his horizontal
4 positioning on the ground, and the left lateral probe positioning. These
5 factors allowed McElroy to defeat the electric stimulation of the Taser device by
6 simply repositioning his body.” Id. ¶18. Consequently, Leonesio opined that
7 “Captain Joyner’s use of two open handed palm strikes to distract McElroy and
8 complete his arrest was reasonable under the totality of the circumstances.” Id.
9 ¶19.

10 Finally, Meyer reviewed the materials related to the incident between
11 Captain Joyner and McElroy. He also concluded that Captain Joyner’s use of
12 force was objectively reasonable and complied with Oakland Police Department
13 training. Meyer Decl. ¶¶9-13.

14 Under the circumstances described by the facts set forth by Captain
15 Joyner, Captain Joyner’s use of force in the course of arresting McElroy was
16 objectively reasonable. McElroy was resisting arrest and attempting to flee. In
17 the course of doing so, McElroy removed a submachine gun from his waist area
18 and threw it over a fence, threw a bag of marijuana directly at Captain Joyner,
19 ignored repeated verbal commands to stop running and get on the ground, and
20 punched Captain Joyner’s hand after Captain Joyner had managed to grab
21 plaintiff’s waist. The encounter escalated even further when McElroy took a
22 fighting stance and began throwing punches at Captain Joyner. When Officer
23 Padilla arrived on the scene he found McElroy assaulting Captain Joyner and
24 tased McElroy. But the Taser did not incapacitate McElroy because he still had
25 his hand in a fist as he fell to the ground and rolled towards Captain Joyner.
26 Under these circumstances, Captain Joyner’s use of two open hand strikes to
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1 McElroy's face/head to promptly subdue and handcuff him was lawful. See, e.g.,
2 Saman v. Robbins, 173 F.3d 1150, 1155-57 (9th Cir. 1999) (finding officer's
3 split-second judgment to administer a single kick to subdue plaintiff in tense,
4 uncertain and dangerous situation in which one officer had already been shot
5 objectively reasonable as a matter of law). The burden lies with McElroy to go
6 beyond the pleadings to demonstrate the existence of a genuine dispute of
7 material fact by "citing to specific parts of materials in the record" or "showing
8 that the materials cited do not establish the absence or presence of a genuine
9 dispute." Fed. R. Civ. P. 56(c). He does not.²

10 The only facts McElroy has set forth are the brief allegations in his
11 unverified FAC. There, McElroy simply alleges that Captain Joyner used
12 excessive force during the course of his arrest because Captain Joyner struck his
13 face and kicked him in the abdomen after he was "tased" and "subdued" on the
14 ground. FAC (dkt. #17) at 1. These unsworn and largely conclusory allegations
15 are insufficient to defeat Captain Joyner's motion for summary judgment. They
16 do nothing to put Captain Joyner's version of the facts into question and show
17 that there is a genuine issue for trial on McElroy's Fourth Amendment claim
18 against Captain Joyner. See Arpin v. Santa Clara Valley Trans. Agency, 261
19 F.3d 912, 922 (9th Cir. 2001) (unsworn and conclusory allegations of excessive
20 force during arrest insufficient to defeat defense motion for summary judgment).

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22 ²McElroy was advised pursuant to Rand v. Rowland, 154 F.3d 952 (9th
23 Cir. 1998) (en banc), in a notice filed concurrently with Captain Joyner's motion
24 for summary judgment, that to prevent summary judgment in favor of Captain
25 Joyner he "must set out specific facts in declarations, depositions, answers to
26 interrogatories, or authenticated documents, as provided in Rule 56(e), that
27 contradicts the facts shown in the defendant's declarations and documents and
28 show that there is a genuine issue of material fact for trial." Notice (dkt. #27) at
2. "If you do not submit your own evidence in opposition, summary judgment, if
appropriate, may be entered against you." Id.

1 This conclusion is further supported by the fact that McElroy has set forth no
 2 medical evidence whatsoever in support of his claim of injury from Captain
 3 Joyner's use of force. Cf. id. (claim of injury cannot survive summary judgment
 4 where plaintiff provides no medical records to support claim that she was injured
 5 as a result of being handcuffed). Captain Joyner is entitled to summary judgment
 6 as a matter of law because McElroy has not set forth any evidence showing that
 7 there is a genuine issue for trial on his Fourth Amendment claim against
 8 Captain Joyner. See Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986); Arpin,
 9 261 F.3d at 922.³

10 CONCLUSION

11 For the foregoing reasons, Captain Joyner's motion for summary judgment
 12 (dkt. #26) is GRANTED. The clerk shall enter judgment in favor of Captain
 13 Joyner and close the file.

14 SO ORDERED.

15 DATED: May 18, 2015

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 17 CHARLES R. BREYER
 18 United States District Judge

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 23 ³At minimum, Captain Joyner is entitled to qualified immunity because a
 24 reasonable officer could have believed that his conduct was lawful under the
 25 circumstances described by the uncontroverted facts in the record. See Saucier,
 26 533 U.S. at 201-02. A reasonable officer could have believed that administering
 27 two open hand strikes to McElroy's face/head to promptly subdue and handcuff
 28 him after a Taser did not incapacitate him, and after McElroy had assaulted the
 officer in the course of resisting arrest, was an objectively reasonable use of force
 under the Fourth Amendment.