

1
2 UNITED STATES DISTRICT COURT
3 CENTRAL DISTRICT OF CALIFORNIA

4 ELISSA RUBENSTEIN,) Case No. CV 13-9549 JLS (KK)
5)
6 Plaintiff,)
7 v.) ORDER DISMISSING PLAINTIFF'S
8 WHITTIER POLICE DEPARTMENT, et) THIRD AMENDED COMPLAINT WITH
9 al.,) LEAVE TO AMEND
10 Defendants.)

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12 I.

13 INTRODUCTION

14 On April 30, 2014, plaintiff, proceeding *in forma pauperis*,
15 filed a Third Amended Complaint ("TAC") alleging multiple civil
16 rights claims against defendant Whittier Police Department
17 ("WPD") and eleven named WPD officers (collectively "WPD
18 officers"). Upon screening the TAC pursuant to 28 U.S.C. §
19 1915(e)(2), the Court finds that plaintiff's allegations state a
20 claim under the Fourth Amendment, but do not state a claim in
21 regard to any of her other causes of action. **Accordingly, the**
22 **TAC is dismissed with leave to amend. If plaintiff desires to**
23 **pursue this action, she is ORDERED to file within 28 days of the**
24 **service date of this Order a Fourth Amended Complaint remedying**
25 **the deficiencies discussed below or, alternatively, a voluntary**
26 **dismissal of all claims and defendants unrelated to her**
27 **cognizable Fourth Amendment claim.**

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II.

PROCEDURAL BACKGROUND

On January 8, 2014, plaintiff Elissa Rubenstein ("plaintiff"), who is at liberty and has been granted leave to proceed *in forma pauperis*, filed a *pro se* Civil Rights Complaint ("Original Complaint") pursuant to 42 U.S.C. § 1983 ("Section 1983"). (Docket No. 1). Plaintiff sued the WPD and "Does 1-10" ("Doe Defendants"). Plaintiff sued the Doe Defendants in their individual and official capacities, and sought monetary relief from all defendants.

On January 14, 2014, this Court dismissed the Original Complaint and granted plaintiff leave to amend to the extent plaintiff could state any viable claims against the defendants. (Docket No. 8). On January 28, 2014, plaintiff filed a First Amended Complaint which alleged multiple civil rights claims against only defendant WPD—apparently predicated on most of the same misconduct alleged in the Original Complaint—and sought monetary relief from defendant WPD. (Docket No. 9). On February 25, 2014, this Court dismissed the First Amended Complaint because it failed to comply with Rule 8 ("Rule 8") and Rule 10 ("Rule 10") of the Federal Rules of Civil Procedure and failed to state a viable Section 1983 claim for municipal liability against defendant WPD. (Docket No. 11). The Court granted plaintiff leave to amend to the extent she could state any viable claims against the defendant.

On March 11, 2014, plaintiff filed a Second Amended Complaint which alleged multiple civil rights claims against

1 eleven named WPD officers¹ and defendant WPD, again apparently
2 predicated on most of the same misconduct alleged in plaintiff's
3 first two complaints. (Docket No. 12). Plaintiff sued the
4 individual defendants in their official capacities only, and
5 sought monetary relief from all defendants. On April 23, 2014,
6 this Court dismissed the Second Amended Complaint because it
7 again failed to comply with Rules 8 and 10 of the Federal Rules
8 of Civil Procedure and also failed to state a viable Section 1983
9 municipal liability claim. (Docket No. 15). The Court granted
10 plaintiff leave to amend to the extent she could state any viable
11 claims against the defendants.

12 On April 30, 2014, plaintiff filed the TAC, which alleges
13 multiple civil rights claims against defendant WPD and the same
14 eleven named WPD officers, again apparently predicated on most of
15 the same misconduct alleged in plaintiff's first three
16 complaints. (Docket No. 16). Plaintiff again sues the
17 individual defendants in their official capacities only, and
18 seeks only monetary relief. (TAC at 2-4, 25-27).

26 ¹Specifically, the Second Amended Complaint sued WPD
27 officers Nyberg, Plank, Bolanos, Karson, Jensen, Cheng, Esquivel,
Harrison, Becker, Hedgpeth, and Dineen.

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III.

FACTUAL ALLEGATIONS IN THE TAC

A. 2009 Events

On February 4, 2009, plaintiff was seriously injured in an automobile accident with a parked car. (TAC at 9). Plaintiff left the scene of the accident without contacting the police or the owner of the car, drove "the few blocks to her home," and lay down. (Id. at 9-10). Suddenly, defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng, Esquivel, Harrison, and Becker shouted at plaintiff's door and barged into her house without plaintiff's consent and without a warrant or probable cause. (Id. at 10, 24). Plaintiff was forced out of her bed and was confined to a chair. (Id. at 10). For an hour and forty-five minutes, the defendants interrogated plaintiff and searched her home. (Id.). Plaintiff was "docile and accommodating at all times." (Id.). Plaintiff was not allowed to move freely, contact another person for help, seek needed medical attention, or go to the restroom. (Id.). Defendants suspected plaintiff had been drinking or taking drugs and attempted to coerce plaintiff into confessing to the crime of driving under the influence of alcohol. (Id.).

After an hour and forty-five minutes, defendants finally called an ambulance and plaintiff was taken to Whittier Hospital Medical Center. (Id. at 11). At the hospital, defendants interrogated plaintiff for another forty-five minutes and again attempted to coerce plaintiff into confessing to drunk driving. (Id.). At the end of the interrogation, defendants performed a

1 blood test upon plaintiff, "seemingly without doctor or nurse
2 supervision," and determined that plaintiff was not drunk.
3 (Id.). Plaintiff was later convicted in California Superior
4 Court of "leaving the scene of an accident." (Id. at 23).

5 Soon after the events of February 4, 2009, defendants
6 contacted the Whittier Planning Department and reported that
7 there were code violations in plaintiff's home. (Id. at 11, 16).
8 Plaintiff, in turn, was notified by the Planning Department that
9 there were code violations in her home. (Id.). Plaintiff was
10 frightened by the notification, and "felt she might be being
11 punished by defendants because of their belief that Plaintiff was
12 a drunk driver and/or a drug taker." (Id. at 11).

13 In addition, defendants also contacted the Los Angeles
14 County Social Services Department ("SSD") and reported suspected
15 elder abuse in plaintiff's household. (Id. at 11, 18). The SSD
16 notified plaintiff that someone would be coming to plaintiff's
17 home to investigate this report. (Id. at 11). Plaintiff and her
18 fiancé were subsequently investigated for their treatment of the
19 fiancé's elderly mother who lived in the front house on the same
20 property as plaintiff. (Id.).

21 **B. 2010 Incident**

22 On September 20, 2010, plaintiff called the Whittier Police
23 Department to report she heard a neighbor screaming in distress.
24 (Id. at 4, 11, 23). Defendants Hedgpeth and Dineen (who were not
25 among the WPD officers involved in the search of plaintiff's home
26 and her arrest in 2009) responded to the call. (Id.).
27 Defendants Hedgpeth and Dineen refused to talk to plaintiff,

1 refused to take plaintiff's complaint, and instead defamed her by
2 telling plaintiff's fiancé plaintiff was hysterical and that she
3 should lie down and take her pills. (Id. at 11-12, 20-21).

4 Since defendants Hedgpeth and Dineen were "not involved with
5 [plaintiff's] problems in 2009" and otherwise had "[no] personal
6 knowledge of Plaintiff's mental state," plaintiff believes they
7 learned about her mental condition "probably from a dossier being
8 kept on file at [Whittier] police headquarters put together by
9 the Defendants who originally arrested and injured Plaintiff" in
10 2009. (Id. at 23-24).

11 **C. Claims**

12 Construed liberally, the TAC's five claims allege defendants
13 violated five federal constitutional provisions:

14 (1) Claim One: Fourth Amendment Violations: Plaintiff claims
15 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng,
16 Esquivel, Harrison, and Becker deprived her of her Fourth
17 Amendment right to be free from unreasonable searches and
18 seizures by:

19 (a) entering and searching her home without a warrant; and

20 (b) seizing her without a warrant and without probable
21 cause. (TAC at 13-16).

22 (2) Claims Two and Three: Ninth Amendment Violations:
23 Plaintiff claims defendants Nyberg, Plank, Bolanos, Karson,
24 Jensen, Cheng, Esquivel, Harrison, and Becker deprived plaintiff
25 of her constitutional right, inferred from the Ninth Amendment,
26 essentially to be free from further police harassment and police
27 injury after a lawful arrest, by:

1 (a) notifying the Whittier City Planning Department of code
2 violations at plaintiff's house (Claim Two); and

3 (b) defaming plaintiff by calling the SSD and suggesting
4 that it conduct an investigation of elder abuse at
5 plaintiff's house (Claim Three). (TAC at 16-19).

6 (3) Claim Four: Fourteenth Amendment Violations: Plaintiff
7 claims defendants deprived plaintiff of three separate categories
8 of rights under the Fourteenth Amendment:

9 (a) Procedural Due Process violation: Plaintiff claims the
10 defendants deprived her of her procedural due process rights
11 by engaging in conduct that "set up their own separate
12 system of 'justice' . . . apart from her [own] arrest and
13 subsequent trial" and by "punishing, injuring, humiliating,
14 defaming, and harassing Plaintiff, and invading her privacy,
15 outside the normal legal process" (TAC at 21).

16 (b) Substantive Due Process violation: Plaintiff claims
17 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng,
18 Esquivel, Harrison, and Becker violated her substantive due
19 process rights by searching her home, interrogating her, and
20 defaming her before the Whittier City Planning Department
and the SSD. (TAC at 20).

21 (c) Equal Protection Clause violation: Plaintiff claims
22 defendants Hedgpeth and Dineen violated the Equal Protection
23 Clause of the Fourteenth Amendment by refusing to
24 investigate her September 20, 2010, police complaint. (TAC
25 at 21).

26 (4) Claim Five: Eighth Amendment Violation: Plaintiff claims
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1 defendants Hedgpeth and Dineen deprived plaintiff of her Eighth
2 Amendment right to be free from cruel and unusual punishment by
3 refusing to investigate her September 20, 2010, police complaint,
4 refusing to talk to plaintiff, and instead defaming plaintiff by
5 telling her fiancé that plaintiff was hysterical, needed to lie
6 down, and needed to take a pill. (TAC at 23-25).

7 As a result of defendants' actions, plaintiff's fiancé moved
8 out and ended the couple's lengthy engagement, and plaintiff
9 entered "a downward spiral" which "caus[ed] her to slowly begin
10 to lose her planned marital bond, her love, her future plans, her
11 financial security, her career plans and ability to work, her
12 home and eventually her mental and physical health." (TAC at 15,
13 17, 19, 22, 24-25).

14 IV.

15 STANDARD OF REVIEW

16 As plaintiff is proceeding *in forma pauperis*, the Court must
17 screen the TAC prior to ordering service on any defendant, and is
18 required to dismiss the case at any time if it concludes the
19 action is frivolous or malicious, fails to state a claim on which
20 relief may be granted, or seeks monetary relief against a
21 defendant who is immune from such relief. See 28 U.S.C. §
22 1915(e)(2)(B); see also Barren v. Harrington, 152 F.3d 1193, 1194
(9th Cir. 1998).

23 In determining whether a complaint fails to state a claim
24 for purposes of screening under 28 U.S.C. § 1915(e)(2)(B)(ii),
25 the Court applies the same pleading standard from Rule 8 of the
26 Federal Rules of Civil Procedure as it would when evaluating a
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1 motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).
2 See Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012).

3 Under Rule 8(a), a complaint must contain a "short and plain
4 statement of the claim showing that the pleader is entitled to
5 relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule
6 8 announces does not require 'detailed factual allegations,' but
7 it demands more than an unadorned, the-defendant-unlawfully-
8 harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129
9 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic
10 Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed.
11 2d 929 (2007)). "[A] complaint must contain sufficient factual
12 matter, accepted as true, to 'state a claim to relief that is
13 plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570).
14 "[A] complaint [that] pleads facts that are 'merely consistent
15 with' a defendant's liability . . . 'stops short of the line
16 between possibility and plausibility of entitlement to relief.'" Id.
17 (quoting Twombly, 550 U.S. at 557). In addition, although a
18 court must accept as true all factual allegations contained in a
19 complaint, a court need not accept a plaintiff's legal
20 conclusions as true. Id. "Threadbare recitals of the elements
21 of a cause of action, supported by mere conclusory statements, do
22 not suffice." Id. (quoting Twombly, 550 U.S. at 555).

23 Especially in civil rights cases, a *pro se* plaintiff's
24 pleadings are liberally construed to afford the plaintiff "the
25 benefit of any doubt." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th
26 Cir. 2012) (quoting Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th
27 Cir. 1985) (*en banc*)) (internal quotation marks omitted). If,

1 however, a court finds that a *pro se* complaint has failed to
2 state a claim, dismissal may be with or without leave to amend.
3 Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). *Pro se*
4 plaintiffs should be permitted leave to amend unless it is
5 absolutely clear that the complaint's deficiencies cannot be
6 cured. Cafasso v. General Dynamics C4 Sys., Inc., 637 F.3d 1047,
7 1058 (9th Cir. 2011) ("Normally, when a viable case may be pled,
8 a district court should freely grant leave to amend."). A court
9 may consider factual allegations outside of the complaint in
10 determining whether to grant leave to amend. See Broam v. Bogan,
11 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

12 v.

13 **DISCUSSION**

14 **A. Failure to State Municipal Liability and Official Capacity**
15 **Claims**

16 In order to state a claim for a civil rights violation under
17 42 U.S.C. section 1983, a plaintiff must allege that a particular
18 defendant, acting under color of state law, deprived plaintiff of
19 a right guaranteed under the U.S. Constitution or a federal
20 statute. 42 U.S.C. § 1983; see West v. Atkins, 487 U.S. 42, 48,
21 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). However, a local
22 government cannot be held liable under Section 1983 on a
23 *respondeat superior* theory, that is, solely because it employs a
24 tortfeasor. Monell v. Dep't of Soc. Serv. of City of New York,
25 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).
26 Local government entities, such as defendant WPD, may be held
27 liable only if the alleged wrongdoing was committed pursuant to a

1 government policy, custom or usage. See Board of Cnty. Comm'rs
2 of Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 402-04, 117 S. Ct.
3 1382, 137 L. Ed. 2d 626 (1997); Monell, 436 U.S. at 691; Gibson
4 v. Cnty. of Washoe, 290 F.3d 1175, 1185 (9th Cir. 2002)
5 (describing "two routes" to municipal liability: (1) where
6 municipality's official policy, regulation, or decision violated
7 plaintiff's rights, or (2) alternatively where municipality
8 failed to act under circumstances showing its deliberate
9 indifference to plaintiff's rights). Under certain
10 circumstances, a single act, when carried out by a municipal
11 "policymaker," may also give rise to Monell liability, even in
12 the absence of a municipal policy or custom. See Pembaur v. City
13 of Cincinnati, 475 U.S. 469, 483-84, 106 S. Ct. 1292, 89 L. Ed.
14 2d 452 (1986) ("[Section 1983] municipal liability may be imposed
15 for a single decision by municipal policymakers under appropriate
16 circumstances.").

17 Municipal liability may also arise when an unwritten custom
18 becomes "so 'persistent and widespread' that it constitutes a
19 'permanent and well settled [municipal] policy.'" Trevino v.
20 Gates, 99 F.3d 911, 918 (9th Cir. 1996) (quoting Monell, 436 U.S.
21 at 691); see Thomas v. Baca, 514 F. Supp. 2d 1201, 1212 (C.D.
22 Cal. 2007) ("A custom is a 'longstanding practice . . . which
23 constitutes the standard operating procedure of the local
24 government entity.'" (quoting Menotti v. City of Seattle, 409
25 F.3d 1113, 1151 (9th Cir. 2005)). "Isolated or sporadic
26 incidents" are insufficient to establish an improper municipal
27 custom. Trevino, 99 F.3d at 918 ("Liability for improper custom

1 may not be predicated on isolated or sporadic incidents; it must
2 be founded upon practices of sufficient duration, frequency and
3 consistency that the conduct has become a traditional method of
4 carrying out policy.”) (internal citations omitted).

5 Suits against governmental officers in their official
6 capacities are subject to the same requirements as Monell claims
7 against local governments. See Kentucky v. Graham, 473 U.S. 159,
8 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (“[A]n official-
9 capacity suit is, in all respects other than name, to be treated
10 as a suit against the entity of which an officer is an agent.”)
11 (internal citation omitted). Indeed, despite naming individual
12 governmental officials, “[o]fficial-capacity suits . . .
13 generally represent only another way of pleading an action
14 against an entity of which an officer is an agent.” Id.
15 (quoting Monell, 436 U.S. at 691). Hence, as with claims against
16 local governments under Monell, to impose liability against
17 officials acting in their official capacity, “the entity’s
18 ‘policy or custom’ must have played a part in the violation of
19 federal law.” Id. at 166 (internal citations omitted).

20 Here, the TAC fails to allege WPD maintained a policy or
21 custom that caused any constitutional violation by a particular
22 governmental actor. More specifically, plaintiff does not allege
23 that any of the WPD officers was a municipal “policymaker” such
24 that a single act by such officials would give rise to Monell
25 liability. Nor does plaintiff claim that the alleged misconduct
26 was committed pursuant to any official government policy or
27 custom. Rather, the alleged misconduct plaintiff complains of

1 (including an illegal search of her home, false reports to the
2 Whittier City Planning Department and SSD, and the failure to
3 investigate her complaints) was committed by individual officers
4 not acting pursuant to any identifiable governmental policy or
5 custom. While plaintiff speculates that defendants Nyberg,
6 Plank, Bolanos, Karson, Jensen, Cheng, Esquivel, Harrison and
7 Becker "in all probability" maintained a "dossier" about
8 plaintiff "on file at police headquarters" that "aimed to set the
9 entire Whittier Police Department against plaintiff," and that
10 such information "caus[ed] the [WPD] and its officers . . . to
11 treat plaintiff cruelly and exhibit only hostility to [plaintiff]
12 for no valid reason" (TAC at 23-24), such speculation is
13 insufficient to state a municipal liability claim based on an
14 unwritten municipal custom. See Trevino, 99 F.3d at 920 ("When
15 one must resort to inference, conjecture and speculation to
16 explain events, the challenged practice is not of sufficient
17 duration, frequency and consistency to constitute an actionable
18 policy or custom."). Accordingly, plaintiff's claims against
19 defendant WPD and the defendant WPD officers sued in their
20 official capacities must be dismissed. **Plaintiff should only
21 include claims against defendant WPD and the defendant WPD
22 officers in their official capacities in any amended complaint if
23 she can allege facts sufficient to establish that the alleged
24 wrongdoing was committed pursuant to a government policy, custom
or usage.**

25 **B. Failure to State Individual Capacity Claims**

26 In contrast to suits against governmental officers in their
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1 official capacities and Monell claims against local governments,
2 individual capacity suits “seek to impose personal liability upon
3 a government official for actions he takes under color of state
4 law.” Graham, 473 U.S. at 165. “A person deprives another of a
5 constitutional right, within the meaning of section 1983, if he
6 does an affirmative act, participates in another’s affirmative
7 acts, or omits to perform an act which he is legally required to
8 do that causes the deprivation of which [the plaintiff
9 complains].” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.
10 1978). In short, “there must be a showing of personal
11 participation in the alleged rights deprivation” Jones
12 v. Williams, 297 F.3d 930, 934 (9th Cir. 2002) (internal citation
13 omitted). See also Taylor, 880 F.2d at 1045 (“Liability under
14 section 1983 arises only upon a showing of personal participation
15 by the defendant.”). While individual governmental agents may
16 still be held liable for group participation in unlawful conduct,
17 there must be some showing of “individual participation in the
18 unlawful conduct” for imposition of liability under Section 1983.
19 Absent such individual participation, an officer cannot be held
20 liable based solely on membership in a group or team that engages
21 in unconstitutional conduct unless each officer was an “integral
22 participant” in the constitutional violation alleged. Chuman v.
23 Wright, 76 F.3d 292, 294 (9th Cir. 1996). See also Jones, 297
24 F.3d at 934.

24 Even if the Court were to very liberally construe the TAC as
25 attempting to assert individual capacity claims² against the WPD

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27 ² On February 18, 2014, plaintiff filed a request to proceed *in*
28 *forma pauperis* (“IFP Application”) and lodged a complaint in

1 officers, plaintiff largely fails to state a Section 1983 claim
2 against any identifiable individual defendant.

3 1. Personal Involvement of Defendants

4 For the most part, the TAC does not sufficiently allege the
5 personal involvement of the WPD officers in the constitutional
6 violations complained of and, thus, does not assert viable
7 Section 1983 individual capacity claims. All of plaintiff's
8 claims rely on general and conclusory allegations against the WPD
9 officers collectively, without specifying the individual
10 participation of each officer in the events giving rise to each
11 claim. As part of her Fourth Amendment claim, plaintiff alleges
12 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng,
13 Esquivel, Harrison, and Becker violated her constitutional rights
14 on February 4, 2009, when they searched her home without a
15 warrant and arrested her without a warrant or probable cause.

16 (TAC at 13-16). As part of her Ninth Amendment claim, plaintiff
17 alleges defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng,
18 Esquivel, Harrison, and Becker violated her constitutional rights
19 by making false reports against plaintiff to the Whittier City
20 Planning Department and the SSD. (TAC at 16-19). As part of her
21 Eighth Amendment claim, plaintiff alleges defendants Hedgpeth and
22 Dineen violated her constitutional rights by refusing to

23 Central District of California, Case No. CV 14-1222, which
24 asserted essentially the same claims against the WPD officers
25 based on the same underlying transactions as the TAC, but sued
26 the defendants in their individual capacities only. (Case No. CV
27 14-1222, Docket No. 1-1). The District Judge denied plaintiff's
28 IFP Application, noting that any relief to which plaintiff might
be entitled against the WPD officers in their individual
capacities could be obtained in the instant pending action.
(Docket No. 2).

1 investigate her complaint and by defaming her on September 20,
2 2010. (TAC at 23-25). Plaintiff's Fourteenth Amendment claims
3 are predicated on all of these incidents. (TAC at 19-22). Aside
4 from naming the group of officers involved in each of these
5 incidents, plaintiff does not specify that any individual
6 defendant took any particular act that resulted in a
7 constitutional violation. Rather, in each of these claims,
8 plaintiff always refers to the defendants as an undifferentiated
9 group involved in the constitutional violations alleged. See
10 Jones, 297 F.3d at 934 (holding that police officers could not be
11 held liable under Section 1983 for damages caused in an
12 unreasonable search under the Fourth Amendment based on mere
13 membership in a searching party and absent evidence of personal
14 involvement in causing the damages).

15 The Court finds plaintiff's allegations in regard to her
16 claim that defendants Nyberg, Plank, Bolanos, Karson, Jensen,
17 Cheng, Esquivel, Harrison, and Becker illegally entered
18 plaintiff's apartment and arrested her in violation of her Fourth
19 Amendment rights to be sufficient. The TAC's allegations make
20 clear that each of the defendants personally participated in the
21 unconstitutional conduct complained of (*i.e.* the warrantless
22 entry into the apartment and plaintiff's arrest). However, all
23 of plaintiff's other allegations of misconduct (including
24 allegations of defamation and false reporting to the Planning
25 Department and SSD) require precise identification of each
26 officer's participation in bringing about the constitutional
27 violation alleged. See Pena v. Gardner, 976 F.2d 469, 471 (9th
28 Cir. 1992) (holding that vague and conclusory allegations of

1 official participation in civil rights violations are not
2 sufficient to state a claim under Section 1983) (citing Ivey v.
3 Board of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir.
4 1982)). To the extent plaintiff fails to identify any specific
5 act or omission on the part of each particular defendant in
6 bringing about the constitutional violations alleged, the TAC
7 fails to state individual capacity claims against the defendant
8 WPD officers, with the noted exception of plaintiff's Fourth
9 Amendment claim.

10 2. Claim One - Fourth Amendment

11 The Fourth Amendment requires that an officer have probable
12 cause before arresting a suspect, such that "an arrest without
13 probable cause violates the Fourth Amendment and gives rise to a
14 claim for damages under [Section] 1983." Lee v. City of Los
15 Angeles, 250 F.3d 668, 685 (9th Cir. 2001) (internal citations
16 and quotation marks omitted). Similarly, a warrantless entry
17 into a person's home to effect an arrest is presumed to be
18 unreasonable under the Fourth Amendment absent probable cause.
19 See Payton v. New York, 445 U.S. 573, 586, 590, 100 S. Ct. 1371,
20 63 L. Ed. 2d 639 (1980) (warrantless arrest in suspect's dwelling
21 presumptively unreasonable); LaLonde v. Cnty. of Riverside, 204
22 F.3d 947, 954 (9th Cir. 2000) ("It is a basic principle of Fourth
23 Amendment law that searches and seizures inside a home without a
24 warrant are presumptively unreasonable.") (internal citation and
25 quotation marks omitted). Probable cause exists when, "under the
26 totality of circumstances known to the arresting officers, a
27 prudent person would have concluded that there was a fair
28 probability that [the defendant] had committed a crime." Grant,

1 315 F.3d at 1085 (internal citation omitted). "A police officer
2 has probable cause to effect an arrest if 'at the moment the
3 arrest was made . . . the facts and circumstances within [his]
4 knowledge and of which [he] had reasonably trustworthy
5 information were sufficient to warrant a prudent man in
6 believing' that the suspect had violated a criminal law." Orin
7 v. Barclay, 272 F.3d 1207, 1218 (9th Cir. 2001) (quoting Beck v.
8 State of Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142
9 (1964)).

10 Here, liberally construed, the TAC alleges facts which
11 plausibly support an inference that the warrantless entry into
12 plaintiff's home and the warrantless arrest of plaintiff by
13 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng,
14 Esquivel, Harrison, and Becker in February 2009 violated her
15 Fourth Amendment rights. Hence, the TAC states a claim under the
16 Fourth Amendment.

17 3. Claims Two and Three – Ninth Amendment

18 The TAC fails to state a Section 1983 claim predicated on a
19 Ninth Amendment violation. In short, the Ninth Amendment "has
20 never been recognized as independently securing any
21 constitutional right, for purposes of pursuing a civil rights
22 claim." Strandberg v. City of Helena, 791 F.2d 744, 748 (9th
23 Cir. 1986). Accordingly, plaintiff's Second and Third Claims
24 predicated on alleged Ninth Amendment violations must be
25 dismissed with leave to amend.

26 4. Claim Four – Fourteenth Amendment (Due Process and
27 Equal Protection)

28 The TAC fails to state a Section 1983 claim predicated on a

1 violation of the Fourteenth Amendment's due process and equal
2 protection clauses.

3 (a) Procedural Due Process Claim

4 The procedural due process guarantee in the Due Process
5 Clause of the Fourteenth Amendment requires "some kind of a
6 hearing *before* the State deprives a person of [a] liberty or
7 property [interest]." Zinermon v. Burch, 494 U.S. 113, 127, 110
8 S. Ct. 975, 108 L. Ed. 2d 100 (1990) (emphasis in original).

9 Plaintiff alleges defendants violated her procedural due
10 process rights by "set[ting] up their own separate system of
11 'justice' . . . apart from her own arrest and subsequent trial."
12 (TAC at 21). Plaintiff's allegation does not demonstrate the
13 deprivation of any liberty or property interest that would give
14 rise to a procedural due process claim.

15 Plaintiff also makes allegations throughout the claims in
16 the TAC that defendants "defamed" her before her fiancé, the
17 Whittier City Planning Department, and the SSD. (TAC at 16-20;
18 23-25). These references may be liberally construed as
19 attempting to assert a Section 1983 claim for defamation, based
20 on the procedural protections of the Due Process Clause. To
21 amount to a procedural due process violation giving rise to a
22 viable Section 1983 defamation claim, a plaintiff must allege
23 injury to reputation "plus" loss of a recognizable property or
24 liberty interest. See Herb-Hallman Chevrolet, Inc. v.
25 Nash-Holmes, 169 F.3d 636, 645 (9th Cir. 1999) ("There are two
26 ways to state a cognizable § 1983 claim for defamation-plus: (1)
27 allege that the injury to reputation was inflicted in connection
28 with a federally protected right; or (2) allege that the injury

1 to reputation caused the denial of a federally protected right.")
2 (internal citation omitted). Plaintiff alleges no facts
3 indicating the loss of a recognizable property or liberty
4 interest as a result of the alleged reports to the Whittier City
5 Planning Department and the SSD and, thus, fails to state a
6 defamation claim. Because plaintiff may still be able to allege
7 facts showing the loss of a recognizable property or liberty
8 interest as a result of the alleged reports, dismissal of
9 plaintiff's procedural due process claim should be with leave to
10 amend.

11 (b) Substantive Due Process Claim

12 Plaintiff fails to state a Section 1983 claim predicated on
13 the violation of her substantive due process rights under the
14 Fourteenth Amendment's Due Process Clause. Plaintiff alleges her
15 substantive due process rights were violated in February 2009
16 when defendants interrogated her in her home, arrested her, and
17 attempted to force her to confess to drunk driving. (TAC at 20).
18 In short, plaintiff's substantive due process claim is based on
19 essentially the same conduct that is the predicate for Claim One,
20 which arises under the Fourth Amendment. Accordingly,
21 plaintiff's claim is subject to analysis under Fourth Amendment
22 principles, rather than under the Fourteenth Amendment. See
23 Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843, 118 S. Ct. 1708,
24 140 L. Ed. 2d 1043 (1998) (noting that if a specific
25 constitutional provision covers a plaintiff's constitutional
26 claim (e.g., the Fourth Amendment), "the claim must be analyzed
27 under the standard appropriate to that specific provision," and
28 not under general due process) (internal citations omitted). See

1 also Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L.
2 Ed. 2d 443 (1989) ("Because the Fourth Amendment provides an
3 explicit textual source of constitutional protection against this
4 sort of physically intrusive governmental conduct, that
5 Amendment, not the more generalized notion of 'substantive due
6 process,' must be the guide for analyzing [excessive force claims
7 relating to arrest or seizure by law enforcement]."). Hence, in
8 light of the separate Fourth Amendment claim, plaintiff's
9 substantive due process claim is superfluous and must be analyzed
10 under Fourth Amendment principles.³

11 (c) Equal Protection Clause Claim

12 Plaintiff also fails to state a Section 1983 claim
13 predicated on an equal protection violation. The Equal
14 Protection Clause of the Fourteenth Amendment requires that
15 persons who are similarly situated be treated alike. City of
16 Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S.
17 Ct. 3249, 87 L. Ed. 2d 313 (1985).

18 An equal protection claim may be established in two ways.
19 First, a plaintiff may establish an equal protection claim by
20 showing that the defendants acted with an intent or purpose to
21 discriminate against the plaintiff based upon the plaintiff's
22 membership in a protected class. See, e.g., Thornton v. City of
23 St. Helens, 425 F.3d 1158, 1167 (9th Cir. 2005); Lee, 250 F.3d at

24 ³ Any allegations of defamation by the WPD officers as part of
25 plaintiff's substantive due process claim are more properly
26 addressed as part of plaintiff's procedural due process claim.
27 See Paul v. Davis, 424 U.S. 693, 710-11, 96 S. Ct. 1155, 47 L.
28 Ed. 2d 405 (1976) (discussing requirements for Section 1983
defamation claims as part of *procedural* due process guarantees).

1 686. Second, a plaintiff may establish an equal protection claim
2 by showing that similarly situated individuals were intentionally
3 treated differently without a rational relationship to a
4 legitimate state purpose (or a compelling need in a case
5 involving a suspect class or a fundamental right). Vill. of
6 Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L.
7 Ed. 2d 1060 (2000); SeaRiver Maritime Fin. Holdings, Inc. v.
8 Mineta, 309 F.3d 662, 679 (9th Cir. 2002).

9 Plaintiff does not allege facts showing an equal protection
10 violation. Here, plaintiff does not allege membership in any
11 protected class that could form the basis of an equal protection
12 claim. See, e.g., Lee, 250 F.3d at 687 (“[T]he disabled do not
13 constitute a suspect class for equal protection purposes . . .
14 .”) (internal citations and quotation marks omitted). Plaintiff
15 also fails to allege that a particular defendant intentionally
16 treated plaintiff differently from others similarly situated.
17 Plaintiff’s only allegation in support of her equal protection
18 claim is her statement that “her intended police report
19 [complaining of a screaming woman in her neighborhood] was
20 excluded.” (TAC at 21). This allegation, without further
21 allegations of membership in a protected class, is insufficient
22 to state a viable equal protection claim.

23 Accordingly, plaintiff’s Fourth Claim predicated on alleged
24 Fourteenth Amendment violations is dismissed with leave to amend
25 the procedural due process defamation claim.

26 5. Claim Five – Eighth Amendment (Cruel and Unusual
27 Punishment)

28 Liberally construed, the TAC appears to allege, in pertinent

1 part, that defendants Hedgpeth and Dineen subjected plaintiff to
2 cruel and unusual punishment because when they responded to
3 plaintiff's call on September 20, 2010, the two officers (1)
4 refused to talk to plaintiff, (2) refused to document plaintiff's
5 complaint, and (3) defamed plaintiff by telling plaintiff's
6 fiancé plaintiff was hysterical and that she should lie down and
7 take her pills. (TAC at 23).

8 Plaintiff has failed to state a claim for an Eighth
9 Amendment violation. First, as noted previously, Plaintiff has
10 not sufficiently alleged the individual participation of
11 defendants Hedgpeth and Dineen in the constitutional violation.
12 Furthermore, the defendants' conduct, even if improper, would not
13 implicate the Eighth Amendment's prohibition against cruel and
14 unusual punishment, which applies only *after* a defendant is
15 convicted and sentenced for a particular crime.⁴ See Wilson v.
16 Seiter, 501 U.S. 294, 296-97, 111 S. Ct. 2321, 115 L. Ed. 2d 271
17 (1991); Graham v. Connor, 490 U.S. 386, 393 & n.6, 109 S. Ct.
18 1865, 104 L. Ed. 2d 443 (1989).

19 Moreover, even if the foregoing allegations were evaluated
20 under the rubric of the Eighth Amendment, plaintiff fails to
21 state a viable Section 1983 claim against either defendant.
22 First, plaintiff does not cite any authority which establishes a
23 constitutional right to have the police investigate a crime in
24 any particular fashion. Indeed, Ninth Circuit precedent suggests

25 ⁴ To the extent plaintiff suggests that the actions of
26 defendants Hedgpeth and Dineen sought to "punish" plaintiff for
27 her conviction for "leaving the scene of an accident," (TAC at
28 23), such speculation does not support an Eighth Amendment claim.
See Pena, 976 F.2d at 471 (internal citation omitted).

1 otherwise. See Gini v. Las Vegas Metro. Police Dep't., 40 F.3d
2 1041, 1045 (9th Cir. 1994) ("The police have no affirmative
3 obligation to investigate a crime in a particular way")
4 (citing DeShaney v. Winnebago Cnty., 489 U.S. 189, 195-96, 109 S.
5 Ct. 998, 103 L. Ed. 2d 249 (1989)). See also Andersen v. Helzer,
6 551 Fed. Appx. 363, 363 (9th Cir. 2014) (district court properly
7 dismissed due process claim against deputy sheriff defendants
8 where plaintiff failed to allege facts in amended complaint
9 showing defendants violated any federally protected right by
10 allegedly failing to investigate theft of plaintiff's property).
11 In addition, even if plaintiff's allegations that defendants
12 Hedgpeth and Dineen would only speak with plaintiff's fiancé and
13 stated that plaintiff was "hysterical" and "needed to take a
14 pill" were true, they do not, without more, state a Section 1983
15 claim. See Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir.
16 1987) (claims of verbal harassment or abuse do not state a
17 constitutional deprivation under Section 1983) (internal citation
18 omitted). Accordingly, Claim Five must be dismissed with leave
19 to amend.

20 VI.

21 LEAVE TO FILE A FOURTH AMENDED COMPLAINT

22 For the foregoing reasons, the TAC is subject to dismissal,
23 except for plaintiff's Fourth Amendment claim as against
24 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng,
25 Esquivel, Harrison, and Becker in their individual capacities.

26 Accordingly, **IT IS ORDERED THAT:**

27 1) **Within 28 days of the service date of this Order,**
28 **plaintiff may file a Fourth Amended Complaint ("FAC") to attempt**

1 **to cure the deficiencies discussed above.** The Clerk is directed
2 to provide plaintiff with a Central District of California Civil
3 Rights Complaint Form, CV-66, to facilitate plaintiff's filing of
4 an FAC if she elects to proceed with this action. Plaintiff is
5 strongly encouraged to use that form.

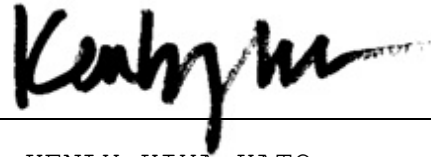
6 **2) Alternatively, plaintiff may voluntarily dismiss all**
7 **claims and defendants unrelated to her Fourth Amendment claim**
8 **(Claim One) and proceed on her Fourth Amendment claim alone.** In
9 other words, plaintiff must: (a) file a voluntary dismissal of
10 (i) defendant WPD (ii) defendants Nyberg, Plank, Bolanos, Karson,
11 Jensen, Cheng, Esquivel, Harrison, and Becker in their official
12 capacities *only*, (iii) defendants Hedgpeth and Dineen in their
13 individual *and* official capacities, and (iv) Claims Two, Three,
14 Four, and Five; and (b) proceed *only* on Claim One against
15 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng,
16 Esquivel, Harrison, and Becker in their individual capacities
17 *only*. **If plaintiff elects to dismiss these defendants and**
18 **this Order, a document captioned "Voluntary Dismissal" in which**
19 **she identifies the claims and the defendants she is dismissing**
20 **from the action.**

21 3) If plaintiff chooses to file an FAC, the FAC should bear
22 the docket number assigned to this case, be labeled "Fourth
23 Amended Complaint," and be complete in and of itself without
24 reference to the TAC or any other pleading, attachment, or
25 document. **Plaintiff is advised that the allegations regarding**
26 **the Fourth Amendment claim, as presented in the TAC, are**
27 **sufficient to state a claim. Although she must include them in**
28

1 any FAC, she need not supplement them with any additional facts.
2 However, with respect to plaintiff's procedural due process claim
3 based upon alleged defamation, plaintiff must allege additional
4 facts sufficient to establish the deprivation of a recognizable
5 liberty or property interest to state a claim.

6 Plaintiff is admonished that if she fails to timely file a
7 sufficient FAC or, alternatively, a voluntary dismissal as
8 described above, the Court will recommend that this action be
9 dismissed with prejudice on the grounds set forth above and/or
10 for failure to diligently prosecute.

11 DATED: August 15, 2014



12
13 HON. KENLY KIYA KATO
UNITED STATES MAGISTRATE JUDGE