

1 The court must dismiss a complaint or portion thereof if the court determines that the action is
2 legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks
3 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). In
4 reviewing a complaint under this standard, the court must accept as true the allegations of the
5 complaint in question (*Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740
6 (1976)), construe the pro se pleadings liberally in the light most favorable to the plaintiff
7 (*Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)), and resolve all doubts in the plaintiff’s
8 favor (*Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)).

9 Pursuant to Rule 8(a), a complaint must contain “a short and plain statement of the claim
10 showing that the pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a)(2). Although the Federal
11 Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of
12 the claim plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th
13 Cir. 1984).

14 B. Plaintiffs’ Allegations

15 Plaintiffs Robert and Michelle Morris bring this action against Fresno Police Department
16 Officers Christopher Long and Jeremy DeMoss, and Detective Rhames.

17 Plaintiffs’ allegations arise from an incident that occurred on October 28, 2007, wherein
18 Plaintiffs were awaiting law enforcement assistance for a purported assault and robbery
19 committed by unidentified third persons; however, the response ultimately resulted in Plaintiff
20 Robert Morris’s arrest for driving under the influence.

21 Plaintiff Robert Morris seeks reimbursement for medical costs incurred as a result of
22 Officer Long’s actions, and unlimited damages for compensation for pain and suffering, and for
23 the loss of his career as a floor covering installer due to permanent injury. He also seeks punitive
24 damages for the violations of his civil rights. Plaintiff Michelle Morris seeks reimbursement of
25 \$500.00 for the loss of her boxer puppy and punitive damages for the civil rights violations in an
26 unlimited amount.

1 C. The Federal & State Claims

2 The Civil Rights Act under which this action was filed provides:

3 Every person who, under color of [state law] . . . subjects, or causes
4 to be subjected, any citizen of the United States . . . to the
5 deprivation of any rights, privileges, or immunities secured by the
6 Constitution . . . shall be liable to the party injured in an action at
7 law, suit in equity, or other proper proceeding for redress.

8 42 U.S.C. § 1983. To state a section 1983 claim, a plaintiff must plead that (1) defendant acted
9 under color of state law at the time the complained of act was committed, and (2) defendant
10 deprived plaintiff of rights, privileges or immunities secured by the Constitution or laws of the
11 United States. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).

12 The statute plainly requires that there be an actual connection or link between the actions
13 of the defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v.*
14 *Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The
15 Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a constitutional
16 right, within the meaning of section 1983, if he does an affirmative act, participates in another’s
17 affirmative acts or omits to perform an act which he is legally required to do that causes the
18 deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).
19 In order to state a claim for relief under section 1983, Plaintiffs must link each named Defendant
20 with some affirmative act or omission that demonstrates a violation of Plaintiffs’ federal rights.

21 1. *Excessive Force*

22 A claim of excessive force in the course of making an arrest, an investigatory stop, or
23 other seizure, may be brought in a section 1983 claim. This claim is properly analyzed under the
24 Fourth Amendment's objective reasonableness standard. *Scott v. Harris*, 127 S. Ct. 1769 (2007);
25 *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989). This assessment involves
26 determining whether the force was objectively reasonable "in light of the facts and circumstances
27 confronting the officer without regard to the underlying intent or motivation." *Graham v.*
28 *Connor*, 109 S. Ct. at 1865. Determining whether the force used to effect a particular seizure is
"reasonable" under the Fourth Amendment requires a balancing of the nature and quality of the
intrusion on the individual's Fourth Amendment interests against the countervailing

1 governmental interests at stake. *Gregory v. County of Maui*, 523 F. 3d 1103, 1106 (9th Cir.
2 2008), citing *Graham v. Connor*, 109 S. Ct. at 1865. The factors the court uses in this analysis
3 are: (1) the severity of the crime at issue, (2) whether a suspect poses an immediate threat to the
4 safety of the officer and others, and (3) whether a suspect resists arrest. *Arpin v. Santa Clara*
5 *Valley Transp. Agency*, 261 F. 3d 912, 921 (9th Cir. 2001). The absence of probable cause of an
6 arrest does not grant an individual the right to offer resistance. *United States v. Span*, 970 F. 2d
7 573, 580 (9th Cir. 1992).

8 Plaintiff Robert Morris asserts he was the victim of excessive force by Officer Long. On
9 October 28, 2007, during a blood draw, Officer Long turned Robert Morris's wrist using such
10 force that Plaintiff's shoulder was dislocated and a ligament was torn. According to Plaintiffs,
11 Officer Long threatened to break his arm. Plaintiffs further assert that such action was
12 unnecessary for Robert Morris was compliant, quiet and calm.

13 Plaintiff Michelle Morris asserts she was the victim of excessive force due to the actions
14 of Officer DeMoss. On October 28, 2007, Officer DeMoss, having already placed Plaintiff
15 Michelle Morris in handcuffs, quickly and unexpectedly pulled her up from a sitting position on
16 the curb, causing large bruises on Plaintiff Michelle Morris's arm.

17 Plaintiffs state cognizable claims for excessive force in violation of their federal
18 constitutional rights.

19 2. *Equal Protection Violations*

20 Plaintiffs assert their constitutional rights to equal protection were violated. More
21 particularly, Mr. Morris asserts his equal protection rights were violated because Officer Long
22 failed to permit Mr. Morris to be treated by EMS personnel, thereby denying him necessary
23 medical care. Mr. Morris was bleeding from the ears with blood running down both sides of his
24 face, and he suffered from numerous bruises and abrasions.

25 As previously indicated in the Order dated February 23, 2009, the Equal Protection
26 Clause requires that persons who are similarly situated be treated alike. *City of Cleburne v.*
27 *Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). An equal protection claim may be
28 established in two ways. First, a plaintiff establishes an equal protection claim by showing that

1 the defendant has intentionally discriminated on the basis of the plaintiff's membership in a
2 protected class. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir.2001). Under
3 this theory of equal protection, the plaintiff must show that the defendants' actions were a result
4 of the plaintiff's membership in a suspect class, such as race. *Thornton v. City of St. Helens*, 425
5 F.3d 1158, 1167 (9th Cir. 2005).

6 If the action in question does not involve a suspect classification, a plaintiff may establish
7 an equal protection claim by showing that similarly situated individuals were intentionally treated
8 differently without a rational relationship to a legitimate state purpose. *Village of Willowbrook v.*
9 *Olech*, 528 U.S. 562, 564 (2000); *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1972);
10 *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir.2004); *SeaRiver Mar.*
11 *Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002). To state an equal protection
12 claim under this theory, a plaintiff must allege that: (1) the plaintiff is a member of an
13 identifiable class; (2) the plaintiff was intentionally treated differently from others similarly
14 situated; and (3) there is no rational basis for the difference in treatment. *Village of Willowbrook*,
15 528 U.S. at 564. If an equal protection claim is based upon the defendant's selective
16 enforcement of a valid law or rule, a plaintiff must show that the selective enforcement is based
17 upon an "impermissible motive." *Squaw Valley*, 375 F.3d at 944; *Freeman v. City of Santa Ana*,
18 68 F.3d 1180, 1187 (9th Cir.1995).

19 Plaintiffs fail to state a claim for a violation of equal protection. Plaintiffs do not show
20 Robert Morris was intentionally discriminated against on the basis of his membership in a
21 protected class. Neither does Plaintiff Robert Morris allege that he is a member of an identifiable
22 class.

23 Plaintiffs do state that they believe they were treated differently because the residents of
24 the home at which the disturbance arose operated towing companies and/or were tow truck
25 operators that performed services at the request of the Fresno Police Department. But again,
26 whereas that information may be relevant to motive or a lack of rational basis, Plaintiffs have
27 failed to identify that Robert Morris was a member of an identifiable class.

28 Plaintiffs have failed to state a claim for a violation of equal protection rights.

1 3. *False Arrest and Imprisonment*

2 Plaintiffs allege Robert Morris was falsely arrested and imprisoned on October 28, 2007.
3 Officer Long followed Plaintiffs from the area of the initial disturbance at 2904 Austin Way in
4 Fresno. During his contact with Plaintiffs, Officer Long apparently took note of their injuries
5 and called for emergency medical services to respond. Rather than permitting Plaintiff Robert
6 Morris to be treated by EMS personnel, Officer Long arrested Mr. Morris for driving under the
7 influence and transported him to the jail. Mr. Morris claims he was not permitted to perform
8 field sobriety tests, nor the breath test. He also complains that he was not permitted to call his
9 private attorney so that his attorney could be present.¹

10 Under California law, false imprisonment is the “unlawful violation of the personal
11 liberty of another.” *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1379 (9th Cir. 1998)
12 (quoting *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 757 (1997)). “The elements of a tortious
13 claim of false imprisonment are: (1) the nonconsensual, intentional confinement of a person, (2)

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15
16 ¹The Sixth Amendment to the United States Constitution provides, in pertinent part, that
17 “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of
18 Counsel for his defence.” U.S. Const. amend. VI. The right to counsel attaches only upon “the
19 initiation of adversary judicial criminal proceedings” against the defendant. *United States v.*
20 *Gouveia*, 467 U.S. 180, 189 (1984). This right applies to all “critical stages” of the prosecution
21 both before, during, and after trial. *Gouveia*, 467 U.S. at 189 (citing *United States v. Wade*, 388
22 U.S. 218, 225-27 (1967)). However, there is no Sixth Amendment right to counsel when the
23 plaintiff is asked to submit to a chemical test because the plaintiff is “not entitled to assert the
24 privilege [against self-incrimination]” by refusing to submit to a chemical test. *Schmerber v.*
25 *California*, 384 U.S. 757, 760-66 (1966).

26 Also, Plaintiffs complain that Officer Long permitted six to eight unidentified subjects,
27 who purportedly robbed and assaulted Plaintiffs, to get away. As previously discussed in this
28 Court’s order of February 23, 2009, however, Plaintiffs does not have a constitutional right that
 permits them to force law enforcement officials to conduct investigations. *See DeShaney v.*
 Winnebago County Dept. Of Social Services, 489 U.S. 189, 196-197 (1989) (“Although the
 liberty protected by the Due Process Clause affords protection against unwarranted government
 interference . . . , it does not confer an entitlement to such [government aid] as may be necessary
 to realize all the advantages of that freedom . . .”); *cf. Linda R.S. v. Richard D.*, 410 U.S. 614,
 619 (1973) (observing that “a private citizen lacks a judicially cognizable interest in the
 prosecution or nonprosecution of another”). Thus, Plaintiffs cannot assert a cause of action
 related to Officer’s Long purported failure to investigate.

1 without lawful privilege, and (3) for an appreciable period of time, however brief.” *Lyons v. Fire*
2 *Ins. Exchange*, 161 Cal.App.4th 880, 888 (2008) (internal citations omitted).

3 Although it is not entirely clear from the second amended complaint, this Court will
4 presume that Plaintiff Robert Morris was not convicted of a violation of the California Vehicle
5 Code for driving under the influence. Assuming the lack of conviction, Plaintiffs state a
6 cognizable claim for false arrest and imprisonment based upon Robert Morris’s arrest in the
7 absence of lawful privilege.

8 4. *Defamation*

9 Plaintiffs assert defamation of character as against Officer Long. More particularly, on
10 April 29, 2008, Plaintiffs claim Officer Long made statements at a DMV administrative hearing
11 that Plaintiff Michelle Morris had been placed under arrest for “being drunk in public, and that
12 Officer DeMoss had taken Plaintiff Mrs. Morris to jail . . .” On a second occasion, on June 12,
13 2008, Officer Long stated that Mrs. Morris had been “taken into custody for violat[ing Penal
14 Code section] 647f.” Mrs. Morris was never arrested.

15 Plaintiffs’ complaint expressly states the purported defamation by Officer Long is “[a]
16 violation of California [l]aw. Federal Court has jurisdiction over state claims, when there [sic]
17 [c]ivil in nature.” Federal courts may exercise supplemental jurisdiction.²

18
19 ²Reputation alone does not implicate any "liberty" or "property" interests sufficient to
20 invoke the procedural protection of the due process clause, and something more than simple
21 defamation by a state official must be involved to establish a claim under section 1983. *Paul v.*
22 *Davis*, 424 U.S. 693, 701 (1976). A plaintiff’s allegation that is based solely on the charge of
23 defamation is not sufficient to state a claim under section 1983, unless the act by the public
24 official significantly altered a protected status previously recognized by state law. *Id.*, at 710-11;
25 *see also Grennier v. Frank*, 453 F.3d 442, 445 (7th Cir. 2006) (citing *Paul v. Davis*, and noting
26 that “the shame and humiliation of being called a criminal is not enough by itself to require a
27 hearing under the Due Process Clause”); *Kaylor v. Fields*, 661 F.2d 1177, 1181 (8th Cir. 1981)
28 (allegation that prosecutor made baseless accusation of criminal activity to the media without
filing charges was not actionable under § 1983). In *Gabbert v. Conn*, 131 F.3d 793, 800-01 (9th
Cir. 1997), *rev’d on other ground sub nom. Conn v. Gabbert*, 526 U.S. 286 (1991), the court held
that injury to professional reputation is not a liberty interest protected by the Fourteenth
Amendment. Additionally, to support a section 1983 claim based on injury to reputation, a
plaintiff must allege "that the stigma was accompanied by some additional deprivation of liberty
or property . . . protected by the state that directly affects the plaintiff's rights." *Miller v.*

1 Based on the above, Plaintiffs' complaint appears to assert a claim for defamation under
2 California law.

3 "Defamation is an invasion of the interest in reputation. The tort involves the intentional
4 publication of a statement of fact which is false, unprivileged, and has a natural tendency to
5 injure or which causes special damage." *Ringler Associates Inc. v. Maryland Cas. Co.*, 80
6 Cal.App.4th 1165, 1179, 96 Cal.Rptr.2d 136 (2000). "Publication, which may be written or oral,
7 is defined as a communication to some third person who understands both the defamatory
8 meaning of the statement and its application to the person to whom reference is made." *Id.*
9 Publication to a single individual is sufficient to satisfy the publication element of a defamation
10 claim. *Id.*; see *Smith v. Maldonado*, 72 Cal.App.4th 637, 645, 85 Cal.Rptr.2d 397 (1999); see
11 also Cal. Civ.Code § 46.

12 Plaintiffs assert that Officer Long damaged Mrs. Morris's reputation by falsely testifying
13 at the administrative per se hearing that Mrs. Morris was arrested for a violation of California
14 Penal Code section 647f, when in fact Mrs. Morris was not arrested for any violation. Rather,
15 after initial detention by Officer DeMoss, Mrs. Morris was released. Thus, Plaintiffs have stated
16 a cognizable claim for defamation under California law.

17 5. *Due Process Violation*

18 Plaintiffs claim Detective Brendan Rhames violated their rights to due process of law.
19 Plaintiff assert, as they did in their first amended complaint, that Detective Rhames failed to
20 return stolen property to them, now identified as a purebred boxer puppy worth \$500. Plaintiffs
21 assert that Detective Rhames's failure to return the puppy was unreasonable and "without
22 morals."

23 The Due Process Clause of the Fourteenth Amendment protects individuals from being
24 deprived of life, liberty, or property without due process of law. *Wolff v. McDonnell*, 418 U.S.

25 _____
26 *California*, 355 F.3d 1172, 1178 (9th Cir. 2004) (citation omitted). Plaintiffs' claim does not
27 assert an act by a public official that significantly altered a protected status previously recognized
28 by state law, nor does Plaintiffs' complaint contain a stigma plus allegation regarding any
additional deprivation of liberty or property.

1 539, 556 (1974). However, procedural due process claims require (1) a deprivation of a
2 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural
3 protections. *Kildare v. Saenz*, 325 F.3d 1078, 1085 (9th Cir. 2003). “To establish a violation of
4 substantive due process . . . , a plaintiff is ordinarily required to prove that a challenged
5 government action was clearly arbitrary and unreasonable, having no substantial relation to the
6 public health, safety, morals, or general welfare. Where a particular amendment provides an
7 explicit textual source of constitutional protection against a particular sort of government
8 behavior, that Amendment, not the more generalized notion of substantive due process, must be
9 the guide for analyzing a plaintiff’s claims.” *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996)
10 (citations, internal quotations, and brackets omitted), *cert. denied*, 117 S. Ct. 1845 (1997);
11 *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

12 Here, Plaintiffs’ claim fails because the puppy was never seized or in the possession of
13 Detective Rhames or the Fresno Police Department. Rather, Plaintiffs’ complaint indicates that
14 the puppy was found in possession of a third party, who claimed ownership of the animal, when
15 Detective Rhames located it. The puppy was left in the care of the third party. Thus, Detective
16 Rhames cannot be said to have denied Plaintiffs their due process rights because the government
17 never possessed the puppy and as such did not deprive Plaintiffs of a constitutionally protected
18 liberty or property interest, nor did it deny Plaintiffs adequate procedural protections.

19 CONCLUSION AND RECOMMENDATION

20 Plaintiffs state cognizable claims against Defendants Long and DeMoss for excessive
21 force. Relatedly, Plaintiff Robert Morris asserts cognizable state law claims for false arrest and
22 imprisonment, and defamation against Defendant Long. However, Plaintiffs fail to state
23 cognizable claims for violations of their equal protection and due process rights. Plaintiffs have
24 been granted leave to amend on two prior occasions, and have been provided with the legal
25 standards applicable to their claims, yet Plaintiffs have failed to cure these deficiencies
26 previously addressed. Because the deficiencies pertaining to Plaintiffs’ equal protection and due
27 process claims cannot be cured by amendment, this Court recommends that further leave to
28 amend not be granted.

1
2 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 3 1. This action proceed against Defendants Long and DeMoss for excessive force in
4 violation of Plaintiffs' federal constitutional rights for the injuries suffered by
5 Robert and Michelle Morris, and against Defendant Long for state law claims of
6 false arrest and imprisonment, and defamation by Plaintiff Robert Morris;
- 7 2. Plaintiffs' equal protection and due process claims arising under the Fifth and
8 Fourteenth Amendments be dismissed, with prejudice, for failure to state a claim
9 upon which relief may be granted; and
- 10 3. Defendant Detective Brendan Rhames shall be dismissed from this action as a
11 result of Plaintiffs' failure to state a claim for a violation of due process against
12 him.

13 These Findings and Recommendations will be submitted to the Honorable United States
14 District Judge Oliver W. Wanger, pursuant to the provisions of Title 28 U.S.C. Section
15 636(b)(1). Within **twenty (20) days** after being served with these Findings and
16 Recommendations, the parties may file written objections to the court. The document should be
17 captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are
18 advised that failure to file objections within the specified time may waive the right to appeal the
19 District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

20
21 IT IS SO ORDERED.

22 Dated: April 17, 2009

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE