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UNITED STATES DISTRICT COURT
Northern District of California

KIMBERLY LUONG, et al.,

No. C11-5661 MEJ

Plaintiffs,

**TENTATIVE RULING ON
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

v.

CITY & COUNTY OF SAN FRANCISCO, et
al.,

Re: Dkt. No. 23

Defendants.

I. INTRODUCTION

In this lawsuit, Plaintiffs Kimberly (Kim) Luong, Vicky Luong, and Rocky Luong¹ (who is Kim and Vicky's father) assert that Defendants City and County of San Francisco (City), San Francisco Police Department (SFPD), SFPD Chief of Police Greg Suhr, and five SFPD police officers — Alberto Ciudad, Gary Moriyama, Thomas Haymond, Sopal Chea, and Robert Duffield (Officers) — violated Plaintiffs' rights under both federal and state law. Second Amended Complaint (SAC), Dkt. No. 21. Defendants now move for summary judgment (Motion, Dkt. No. 23), arguing that each of Plaintiffs' claims fail as a matter of law. Plaintiffs have filed an Opposition (Opp., Dkt. No. 26) to this Motion, to which Defendants have replied (Reply, Dkt. No. 27). Having carefully considered all of the papers submitted by the parties, the Court hereby GRANTS IN PART and DENIES IN PART Defendants' Motion for the reasons explained below.

¹ For the purpose of clarity, the Court occasionally refers to individuals by their first names.

1
2 **II. BACKGROUND²**

3 On November 14, 2010, a cable car operator suffered life threatening injuries when he was
4 stabbed several times near Mason Street and Jackson Street in San Francisco. The suspect — later
5 identified as George Luong (Rocky’s son and Kim and Vicky’s brother) — fled on foot to a nearby
6 alley street called Himmelman Place, where he lived in an apartment with his family. SFPD
7 Officers responded to the crime scene and were quickly alerted by witnesses to the apartment.³

8 Officers knocked on the front door, identified themselves, and demanded entrance. Neither
9 Kim, George, or their mother (who were all inside) opened the door. After obtaining permission by
10 radio from their supervisor Sergeant Haymond, Officers broke down the door and entered the
11 apartment. George then immediately announced that he would cooperate and came out to the front
12 porch, where he was arrested. Kim, who was recording the incident with a camcorder, was asked by
13 an Officer why she did not open the door. She replied that she was scared. One of the Officers
14 walked through the apartment and commented that there was a bucket inside which appeared to
15 contain a t-shirt covered in blood. Officers then ordered Kim and her mother to leave the apartment.

16 Kim and her mother joined Rocky and Vicky, who had been waiting outside of the apartment
17 while George was detained. Plaintiffs, who were still recording the ongoing events, were told by an

18 ² The Court provides this brief summary of the case for background purposes only. Because
19 the parties failed to provide a joint statement of facts with the filing of Defendants’ Motion, the
20 Court ordered the parties to submit a joint statement along with Defendants’ Reply. Dkt. No. 25.
21 The parties complied, and this background section is based on that joint statement of facts (JSF, Dkt.
22 No. 29) as well as the Court’s review of the record in this matter, including the two videos of the
23 incident: Plaintiffs’ video (Declaration of Margaret Baumgartner [Baumgartner Decl.], Dkt. No. 24,
24 Ex. A) and a video from a neighbor (Baumgartner Decl., Ex. B). In the analysis section of this
25 Order, the Court provides citations to the facts that are at issue in this dispute when they are material
26 to the disposition of Defendants’ Motion. If the parties wish to object to any of the facts that are
27 provided for background purposes only, or to those material facts discussed in the Court’s analysis,
28 they may do so at oral argument.

³ The Court only specifically identifies an Officer when it is material to the analysis of
Defendants’ Motion. This does not occur frequently, mainly because Defendants attack Plaintiffs’
claims jointly against all Officers rather than breaking them down by individual Officers (with an
exception for the claims against Duffield). The Court notes that some police officers involved in
this incident were not named as defendants in Plaintiffs’ lawsuit.

1 Officer that they could not use the camcorder because it was a crime scene. The Officer also
2 motioned for them to move down the alley to the main street, and Plaintiffs started to walk in that
3 direction. Two different Officers then informed Plaintiffs that they would have to seize the
4 camcorder as evidence. Plaintiffs refused to give up the camcorder, expressing in an indirect way
5 that they had rights since George was a family member, and that the camcorder could be obtained at
6 a later time from their lawyer.

7 A handcuffed George was then escorted by Officers down the alley and past Plaintiffs, who
8 were still recording, to a patrol car. An Officer refocused his attention to Plaintiffs and asked them
9 whether they saw what had transpired earlier. Moments later, an individual off-camera is heard
10 saying “you know what, excuse me,” which is followed by an Officer physically attempting to take
11 the camcorder away from Plaintiffs. In the ensuing scuffle — the exact details of which both parties
12 dispute — Officers used force to take possession of Plaintiffs’ camcorder and detain each of them.
13 During the struggle, each Plaintiff was in possession of the camcorder for a brief moment before the
14 Officers were able to seize it. All three Plaintiffs were eventually handcuffed and arrested. Rocky
15 and Vicky were cited under California Penal Code § 148 (Section 148) for resisting and delaying
16 police officers in the execution of their duties. Kim was cited under California Penal Code § 243
17 (Section 243) for battery on a police officer.⁴

18 Based on the above events, Plaintiffs filed a Complaint against Defendants in San Francisco
19 County Superior Court on September 15, 2011. Dkt. No. 1, Ex. A. Defendants then removed the
20 lawsuit to this Court on November 22, 2011. Dkt. No. 1. The 12 claims asserted by Plaintiffs
21 mostly stem from their allegation that Defendants used excessive force to unlawfully arrest them.
22 The specific claims, delineated in Plaintiffs’ SAC that was filed on July 17, 2012, are as follows: (1)
23 a 42 U.S.C. § 1983 (Section 1983) claim against the Officers for violating Plaintiffs’ constitutional
24 rights under the First, Fourth, and Fourteenth Amendments; (2) a Section 1983 municipal claim
25 against the City based on the same allegations as the first claim and pursuant to *Monell v.*

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27 ⁴ In a supplemental declaration filed after the close of briefing, Kim testifies that she never
28 struck an Officer during the incident. *See* Dkt. No. 30.

1 *Department of Social Services of City of New York*, 436 U.S. 658 (1978); (3) a 42 U.S.C. § 1981
2 (Section 1981) claim against the Officers for violating Plaintiffs’ constitutional rights on account of
3 their race; (4) a California Civil Code § 51.7 (Section 51.7) claim against the Officers based on the
4 same allegations as the third claim; (5) an assault claim against the City and the Officers; (6) a
5 battery claim against the City and the Officers; (7) an intentional infliction of emotional distress
6 (IIED) claim against the City and the Officers; (8) a negligence claim against the City and the
7 Officers; (9) a Section 1983 municipal claim against the City and Suhr for negligent selection,
8 training, retention, supervision, investigation, and discipline of the Officers; (10) a California Civil
9 Code § 52.1 (Section 52.1) claim against the City and the Officers; (11) a claim for injunctive and
10 declaratory relief; and (12) a false imprisonment/false arrest claim against the City and the Officers.
11 In their Motion, Defendants move to dismiss each of these claims.

12 **III. LEGAL STANDARD FOR SUMMARY JUDGMENT**

13 Summary judgment is appropriate only when there is no genuine dispute of material fact, and
14 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party
15 bears both the initial burden of production as well as the ultimate burden of persuasion to
16 demonstrate that no genuine dispute of material fact remains. *Nissan Fire & Marine Ins. Co., Ltd. v.*
17 *Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party meets its initial
18 burden, the nonmoving party is required “to go beyond the pleadings and by [its] own affidavits, or
19 by the depositions, answers to interrogatories, and admissions on file, designate specific facts
20 showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)
21 (internal quotations and citations omitted). On summary judgment, courts are required to view the
22 evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v.*
23 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If a reasonable jury could return a verdict in favor of
24 the nonmoving party, summary judgment is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477
25 U.S. 242, 248 (1986).

26 **IV. ANALYSIS**

27 In their Opposition, Plaintiffs first note that they are withdrawing their Section 1983 *Monell*
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1 claims against the municipal Defendants. Opp. at 1, fn. 2. Plaintiffs also do not oppose Defendants’
2 Motion on the following: (1) the Section 1981 claim; (2) the Section 51.7 claim; (3) the injunctive
3 and declaratory relief claim; and (4) that there is no evidence to support that Duffield was present
4 during the incident or used any force. Accordingly, Defendants’ Motion with respect to Duffield
5 and each of the above claims is GRANTED. The Court discusses the merits of Plaintiffs’ seven
6 remaining claims against Defendants in turn below, focusing first on the crux of Defendants’
7 Motion: that Plaintiffs’ Section 1983 claims against the Officers for excessive force and unlawful
8 arrest fail as a matter of law.

9 A. Section 1983 Claim for Excessive Force

10 Pursuant to the Fourth Amendment, police officers may only use such force as is
11 “objectively reasonable” under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989).
12 To determine whether the Officers’ use of force was reasonable in this matter, this Court must
13 balance the “nature and quality of the intrusion on a person’s liberty with the countervailing
14 governmental interests at stake.” *Davis v. City of Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007)
15 (internal quotations and citations omitted). This balancing requires the Court to “assess the quantum
16 of force used” and then “measure the governmental interests at stake” by considering “(1) the
17 severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the
18 officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by
19 flight.” *Id.* (internal quotations and citations omitted). Since cases involving police misconduct
20 almost always involve disputed facts and turn on credibility determinations, the Ninth Circuit has
21 “held on many occasions that summary judgment or judgment as a matter of law in excessive force
22 cases should be granted sparingly.” *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir.
23 2003).

24 The Ninth Circuit’s warning in *Drummond* that summary judgment in excessive force cases
25 should be granted sparingly aptly applies to Kim and Vicky’s claims in this matter. In their Motion,
26 Defendants argue that the “Officers did not use pepper spray or their batons, or cause any serious
27 injury to Plaintiffs,” but, rather, only “pushed Kimberly and Vicky away when they attempted to
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1 interfere, and then held them while they continued to resist, resulting in a few scrapes and bruises.”
2 Motion at 9-10. According to Defendants, this constituted a reasonable use of force, and, even if it
3 did not, they are “entitled to qualified immunity because none of their alleged actions violated
4 clearly established law.” *Id.* at 10.⁵

5 Defendants’ argument on this issue could be persuasive, but the record contains allegations
6 of more serious conduct on the part of the Officers (and not just pushing and holding Kim and Vicky
7 while they allegedly resisted, like Defendants argue above). Kim has testified that while she was
8 prone, handcuffed, and trying to look around, one Officer put a knee on her head for 30 seconds and
9 another Officer purposefully stepped on her ankle for five to ten seconds.⁶ JSF ¶ 39. During his
10 deposition, Rocky testified that one of the Officers slapped Kim in the back of her head, causing her
11 to fall down. Declaration of Panos Lagos (Lagos Decl.), Dkt. No. 26-2, Ex. 2 at 61 (“No, [the
12 Officer] also — he also gave a very big slap in the back of the head of my daughter and made her
13 fall down.”). Vicky testified that she saw an Officer use his fist while detaining Kim. *Id.*, Ex. 3 at
14 70. Plaintiffs have also provided photographs, which were taken on the day after the incident, that
15 show Kim suffered severe bruising to her arms, and her ankle was visibly swollen and bruised. *Id.*,
16 Ex. 14.

17 With respect to Vicky, evidence has been submitted that some Officers pushed her head,
18 shook her real hard, and then threw her across the street. JSF ¶¶ 48, 49. Specifically, Vicky testified
19 as follows: “I was — I was thrown. And then next thing I felt was the wall on my right arm, which
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21 ⁵ “Qualified immunity shields government officials from liability provided that ‘their
22 conduct does not violate clearly established statutory or constitutional rights of which a reasonable
23 person would have known.’” *Reza v. Pearce*, 2011 WL 5024265, at *1 (D. Ariz. Oct. 21, 2011)
24 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). In determining whether qualified
25 immunity applies, the Court must consider (1) whether the alleged facts “make out a
26 violation of a constitutional right,” and (2) if so, whether the right “was ‘clearly established’ at the
27 time of defendant’s alleged misconduct.” *Pearson*, 555 U.S. at 232. The Court may consider these
28 two steps in any order. *Id.* at 236.

⁶ Although not material to Kim’s excessive force claim, the Court notes that the Officer who
intentionally stepped on her ankle had a “satisfied look” on his face when doing so, and another
Officer screamed “she’s stupid!” while Kim was on the ground getting handcuffed. JSF ¶¶ 40, 41.

1 — and then I felt the rest of my body just go into the wall and then bounce back.” Lagos Decl., Ex.
2 3 at 74. Kim described the use of force against her sister like this: “And then they flung her, and
3 then that’s when I look up and I actually see her body just get thrown. . . . I mean, it’s like —
4 because it’s like, she just tumbled all the way to the wall.” *Id.*, Ex. 1 at 79-80. When asked whether
5 Vicky’s body actually rotated, Kim responded in the affirmative, explaining “It’s like, it made at
6 least one whole rotation, and then it’s like, if she didn’t hit the wall, she might not have stopped.”
7 *Id.* at 80. The photographs of Vicky’s injuries confirm that she also suffered severe bruising to her
8 arms and abrasions to her knees. *Id.*, Ex. 14.

9 Based on the above testimony and evidence — which must be assumed as true and
10 interpreted in a light most favorable to Plaintiffs — the Court finds that it is possible for a rational
11 juror to conclude that the Officers’ use of force was unreasonable. If a juror believes that an Officer
12 purposefully stepped on Kim’s ankle for ten seconds while she was laying face-down on the ground
13 and in handcuffs (i.e., she was not resisting so she was not a threat to others nor a flight risk), then
14 that juror may reasonably conclude that this constitutes excessive force, especially considering she
15 was not a suspect in a violent crime. Such conduct, if true, also cannot be considered a mistake in
16 judgment since reasonable police officers would know that purposefully stepping on a detainee’s
17 ankle violates established law, which means the Officers are not entitled to qualified immunity under
18 these circumstances.⁷

19 A similar rationale applies to Vicky’s excessive force claim. While there is more room to
20 argue here that the Officers’ use of force was an appropriate response to Vicky’s alleged resistance,
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22 ⁷ Moreover, qualified immunity is usually inappropriate when the Court finds there is a
23 triable issue regarding whether police officers acted reasonably or used excessive force. *See Santos*
24 *v. Gates*, 287 F.3d 846, 855 n. 12 (9th Cir. 2002); *Fleming v. Clark*, 2010 WL 3516112, at *5 (N.D.
25 Cal. Sept. 8, 2010) (denying summary judgment with respect to a qualified immunity defense on an
26 excessive force claim because “there are several disputed issues of fact regarding the length of the
27 search, the use of handcuffs and the use of guns, [so] the Court finds this issue inappropriate for
28 disposition on summary judgment”); *Siwec v. Thompson*, 2004 WL 2480516, at *11 (D. Or. Nov. 4,
2004) (“Because the record reveals this disputed issue of fact regarding a Fourth Amendment
violation, and the right in question was clearly established at the time of Siwec’s arrest, Thompson
enjoys no qualified immunity defense to the Second Claim.”).

1 the Court cannot find that actually throwing a detainee against a wall is reasonable as a matter of
2 law. The Court would be more sympathetic to Defendants' position if the Officers' interactions with
3 Vicky occurred inside her apartment, where the Officers were required to be particularly defensive
4 since they were looking for a possibly armed murder suspect in an unfamiliar surrounding that may
5 house dangerous accomplices. But that is not the case. When the Officers decided to forcefully
6 seize the camcorder and detain Vicky, George had already been arrested and was sitting inside a
7 patrol car. The Officers outnumbered the Plaintiffs, were in an open and public space, and knew that
8 Vicky was only a family member that was likely not involved in the earlier stabbing, making their
9 decision to throw her against the wall just to retrieve the camcorder an issue that should be evaluated
10 by a jury at trial. *See Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991) ("Whether the amount
11 of force used was reasonable is usually a question of fact to be determined by the jury."). Due to
12 these reasons, the Court finds that a genuine dispute of material fact remains on Kim and Vicky's
13 Section 1983 excessive force claims, and Defendants' Motion on these claims is therefore DENIED.

14 Defendants' Motion, however, with respect to Rocky's excessive force claim is GRANTED.
15 Rocky concedes that the Officers did not use any force to detain him. JSF ¶ 59. His only complaint
16 is that his handcuffs were too tight, which left a slight abrasion on his wrists. JSF ¶¶ 59, 60.
17 Plaintiffs argue that the Ninth Circuit has held that overly-tight handcuffing claims sometimes raise
18 a triable issue of fact. But the cases cited by Plaintiffs are distinguishable. In *Palmer v. Sanderson*,
19 the plaintiff claimed that the handcuffs were so tight that they left bruises for several weeks, which
20 is not the case here. 9 F.3d 1433, 1436 (9th Cir. 1993). The plaintiff in *Alexander v. County of Los*
21 *Angeles*, besides alleging that he was slammed against a car, claimed that the handcuffs caused his
22 hands to become blue and swollen, and the latter condition remained nine months later at his
23 deposition when he could not even make a fist. 64 F.3d 1315, 1323 (9th Cir. 1995). This too is not
24 analogous with Rocky's claim. In *Wall v. County of Orange*, the plaintiff, unlike Rocky, claimed
25 that he was picked up by his handcuffed arms and thrown "upside down" and head first into the
26 patrol car. 364 F.3d 1107, 1109 (9th Cir. 2004). Lastly, in *LaLonde v. County of Riverside*, the
27 plaintiff was grabbed by his ponytail, knocked backwards, pepper sprayed, and then left to sit on a
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1 couch with handcuffs that were too tight and pepper spray burning his eyes. 204 F.3d 947, 952 (9th
2 Cir. 2000). The Ninth Circuit only reversed the district court’s decision to grant the defendants’
3 motion for judgment as a matter of law because the court completely ignored and never analyzed the
4 overly-tight handcuffing claim, pointing out in dicta that such a claim may constitute excessive force
5 under certain circumstances. *Id.* at 960.

6 The Court finds the reasoning in *Ha v. City of Liberty Lake* instructive on this issue. 2010
7 WL 4065491 (E.D. Wa. Oct. 15, 2010). *Ha* analyzed the Ninth Circuit’s rulings on overly-tight
8 handcuffing claims and explained that “*unreasonable* injury to a person’s wrists using handcuffs
9 constitutes excessive force,” but “handcuffing is not excessively forceful unless supported by factual
10 allegations detailing specific actions that caused specific injuries in the application of the
11 handcuffs.” *Id.* at *6. Here, Rocky’s only evidence to support his excessive force claim is his
12 testimony that the handcuffs were too tight and caused him a slight abrasion. Plaintiffs do not
13 include any photographs to corroborate the severity of this slight abrasion or any other evidence
14 indicating Rocky’s injuries were unreasonable. The Court finds that Rocky’s vague testimony is not
15 enough to withstand summary judgment on this claim. *See Orsak v. Metro Airports Comm’n*
16 *Airport Police Dept.*, 675 F.Supp.2d 944, 957 (D. Minn. 2009) (“The use of handcuffs, unlike the
17 use of a taser, is a standard practice in nearly every arrest. To allow excessive force claims to
18 survive summary judgment every time a plaintiff alleged that handcuffs were painful would
19 disregard the inherent necessity of the use of handcuffs in the context of an arrest.”). Accordingly,
20 summary judgment is entered against Rocky’s Section 1983 excessive force claim.

21 B. Section 1983 Claim for Unlawful Arrest

22 A claim for unlawful arrest is cognizable under Section 1983 as a violation of the Fourth
23 Amendment, provided that the arrest was without probable cause or other justification. *Dubner v.*
24 *City and Cnty. of San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001). “An arrest is supported by
25 probable cause if, under the totality of circumstances known to the arresting officers, a prudent
26 person would have concluded that there was a fair probability that [the defendant] had committed a
27 crime.” *Beier v. City of Lewiston*, 354 F.3d 1058, 1065 (9th Cir. 2004) (internal quotations and
28

1 citations omitted). Moreover, “[r]egardless of the reasons initially given for making an arrest, an
2 arrest is valid as long as there is probable cause to arrest for any offense.” *Davis v. Cnty. of San*
3 *Bernardino*, 2009 WL 3838287, at *5 (C.D. Cal. Nov. 13, 2009) (citations omitted).

4 Defendants contend that they had probable cause to arrest Plaintiffs for violating Section 148
5 — which makes it a criminal offense to willfully resist, delay, or obstruct any police officer in the
6 discharge of his duties — due to their refusal to comply with the Officers’ instructions to give up the
7 camcorder.⁸ The Officers believed they were entitled to seize the camcorder since it could contain
8 evidence pertinent to their investigation of the stabbing incident. In their Opposition, Plaintiffs
9 argue that they had a First Amendment right to record George’s arrest. *See, e.g., Glik v. Cunniffe*,
10 655 F.3d 78, 82 (1st Cir. 2011) (“The filming of government officials engaged in their duties in a
11 public place, including police officers performing their responsibilities, fits comfortably within [the
12 First Amendment].”). But Defendants have never maintained that Plaintiffs were not entitled to
13 record the incident. Rather, Defendants argue that the Officers had a right to take the camcorder
14 because they had probable cause — based on the Officers’ collective knowledge⁹ — that it may
15 contain evidence of George’s crime, and they could do so without a warrant since any recording
16 could have been destroyed by Plaintiffs if it was unfavorable to George. Plaintiffs do not directly
17 oppose this argument, and the Court finds that Defendants’ position is correct. *See, e.g., Berglund v.*
18 *City of Maplewood*, 173 F.Supp.2d 935, 943-44 (D. Minn. 2001) (finding that police officers had the
19 right to seize a videotape because there was probable cause to believe that the tape contained
20 evidence about a crime and there were exigent circumstances since the tape could easily be
21 destroyed).

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24 ⁸ Even though Kim was cited under Section 243 for battery against a police officer (and not
25 under Section 148), Defendants are correct that the Officers can now lawfully base Kim’s arrest on
Section 148. *See, e.g., Davis*, 2009 WL 3838287, at *5.

26 ⁹ To the extent that Plaintiffs argue that the Officers did not have probable cause to believe
27 that the recording would have evidence of George’s crime, this argument is denied. Based on their
28 collective knowledge, the Officers knew that Kim was recording inside of the apartment, where one
Officer observed a bucket that contained a t-shirt covered in blood. JSF §§ 7, 9, 10.

1 Because the Officers were entitled to seize the camcorder, their commands to Plaintiffs to
2 give up the camcorder should have been obeyed. When Plaintiffs failed to comply with the
3 Officers' unequivocal instructions, the Officers developed probable cause to arrest them for
4 violating Section 148 since they were willfully delaying and obstructing the Officers' duties. *See,*
5 *e.g.*, JSF §§ 20, 22, 25, 26. Moreover, the Court finds that other conduct on the part of Plaintiffs
6 provided the Officers with probable cause to arrest them under Section 148. For instance, Kim did
7 not open the front door when instructed to do so by the Officers. JSF § 3. She also told the Officers
8 that nobody was inside the apartment even though her mother was still there. JSF § 12;
9 Baumgartner Decl., Ex. A. Lastly, each Plaintiff put forth some resistance after the Officers'
10 decided to physically seize the camcorder. JSF §§ 31, 32. Based on the above, the Court finds that
11 no rational juror could conclude that the Officers' did not have probable cause to arrest each
12 Plaintiff for violating Section 148. Defendants' Motion is therefore GRANTED, and summary
13 judgment is entered on Plaintiffs' Section 1983 unlawful arrest claim.

14 C. Section 52.1 Claim

15 Section 52.1 provides individuals with a private right of action if improper means (e.g.,
16 threats, intimidation, or coercion) are used to interfere with their civil rights. Defendants move for
17 summary judgment on the Section 52.1 claim on the grounds that Plaintiffs fail to show that there
18 were any threats, intimidation, or coercion not inherent in the alleged underlying constitutional
19 violation, as required by a recent California Court of Appeal decision that specifically analyzed
20 Section 52.1. Motion at 17 (citing *Shoyoye v. Cnty. of Los Angeles*, 203 Cal.App.4th 947, 959
21 (2012)). In their Opposition, Plaintiffs do not contend that such independent threats, intimidation, or
22 coercion exist, and instead argue that the Court should not follow *Shoyoye* because it was not
23 correctly decided, pointing to many cases before the *Shoyoye* decision as examples of supporting
24 case law. Opp. at 20-25. The Court disagrees, and finds a recent decision from this District
25 analyzing these parties' exact arguments instructive:

26 Courts within California were split on whether the intimidation, threats or coercion
27 required by the Act must be separate from the alleged underlying constitutional
28 violation. *See, e.g., Haynes*, 2010 WL 2991732, at *6 (discussing the varying
approaches courts have taken to this issue); *compare Knapps v. City of Oakland*, 647

1 F.Supp.2d 1129, 1168 (N.D. Cal. 2009) (finding the elements of a section 52.1
2 excessive force claim identical to a section 1983 excessive force claim) *with Gant v.*
3 *County of Los Angeles*, 765 F.Supp.2d 1238, 1252–53 (C.D. Cal. 2011) (holding that
4 a wrongful arrest and detention, without more, could not constitute “force,
5 intimidation, or coercion” for purposes of Section 52.1).

6 The California Court of Appeal, however, recently addressed this issue and held that
7 “where coercion is inherent in the constitutional violation alleged ... the statutory
8 requirement of ‘threats, intimidation, or coercion’ is not met. The statute requires a
9 showing of coercion independent from the coercion inherent in the wrongful
10 detention itself.” *Shoyoye v. County of Los Angeles*, 203 Cal.App.4th 947, 959 []
11 (2012). This Court is bound by *Shoyoye* “unless there is convincing evidence that the
12 California Supreme Court would hold otherwise.” *Carvalho v. Equifax Info. Services,*
13 *LLC*, 629 F.3d 876, 889 (9th Cir. 2010); *see also Alvarez v. Chevron Corp.*, 656 F.3d
14 925, 932 n. 7 (9th Cir. 2011) (holding that the federal court was bound by decision of
15 the California Court of Appeal on issue of state law “because there is no California
16 Supreme Court decision on point, and no indication that the California Supreme
17 Court would disagree” with the Court of Appeal); *see also Archer v. City of Taft*,
18 2012 WL 3638064, at *10 (E.D. Cal. Aug. 22, 2012) (following *Shoyoye*).

19 *Hunter v. City and Cnty. of San Francisco*, 2012 WL 4831634, at *5 (N.D. Cal. Oct. 10, 2012); *see*
20 *also Ervin v. City of Los Angeles*, 2012 WL 4758224 (C.D. Cal. Oct. 5, 2012) (following *Shoyoye*
21 and holding that to “the extent that an alleged violation of a right is inherently coercive, that
22 coercion is insufficient to meet the statutory requirements of Section 52.1, which requires a showing
23 of an independent threat or coercive act.”)).

24 Here, Plaintiffs have not persuaded the Court that the California Supreme Court would
25 disagree with the recent decision of the California Court of Appeal. Accordingly, because Plaintiffs
26 have not made a showing of independent coercion outside of their underlying constitutional claims,
27 the Court follows *Shoyoye*, *Hunter*, *Archer*, and *Ervin* to hold that Plaintiffs’ Section 52.1 claim is
28 not actionable as a matter of law. Defendants’ Motion on the Section 52.1 claim is therefore
GRANTED.

D. Remaining State Law Claims (Assault, Battery, Negligence, IIED, and False Arrest)

Defendants argue that Plaintiffs’ remaining state law claims fail as a matter of law “on the
same basis as Plaintiffs’ constitutional claims” since the Officers used reasonable force to lawfully
arrest Plaintiffs. Motion at 18. But, as explained above, this Court finds that there is a genuine
dispute of material fact with respect to Kim and Vicky’s excessive force claim. Summary judgment
would therefore be inappropriate for their corresponding state law claims (assault, battery,

1 negligence, and IIED), and Defendants’ Motion on these claims is therefore DENIED. However,
2 because summary judgment was granted on Rocky’s excessive force claim and Plaintiffs’ unlawful
3 arrest claim, the corresponding state law claims also fail as a matter of law. Defendants’ Motion on
4 these state law claims (false arrest and each of Rocky’s state law claims) is consequently
5 GRANTED.

6 In their Motion, Defendants also attack the IIED claim from Kim and Vicky because “they
7 lack evidence of ‘extreme and outrageous conduct’ or that they suffer ‘severe or extreme emotional
8 distress.’” Motion at 18. This argument is DENIED. If a jury believes Plaintiffs’ claims about the
9 Officers’ conduct (i.e., purposefully stepping on Kim’s ankle or throwing Vicky against the wall),
10 the jury could reasonably find this to be extreme and outrageous conduct. And Kim and Vicky’s
11 deposition testimony shows that there is a triable issue with respect to the severity of their emotional
12 distress. *See* JSF §§ 44, 58.

13 In the last sentence of the body of their Motion, Defendants point out that they “would be
14 immune under California Government Code § 821.6 [Section 821.6] of the investigation or initiation
15 of any criminal proceeding.” Motion at 18. To the extent that Defendants intend to move for
16 summary judgment on each of Plaintiffs’ state law claims based on this one sentence immunity
17 argument, the Court declines to consider such an undeveloped and curt position. Moreover, even if
18 it were considered, this Court has previously held that Section 821.6 only immunizes public
19 employees from malicious prosecution claims and not other tort claims. *See, e.g., Dinius v. Perdock*,
20 2012 WL 1925666, at *9 (N.D. Cal. May 24, 2012) (“The Court agrees with the California Supreme
21 Court’s decision in *Sullivan* and finds that Section 821.6 only applies to claims for malicious
22 prosecution.”); *Tucker v. City of Richmond*, 2012 WL 2571314, at *4-5 (N.D. Cal. July 2, 2012)
23 (rejecting the defendants’ arguments that Section 821.6 provides officers with immunity against the
24 plaintiff’s claims for false imprisonment, NIED, and IIED).

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V. CONCLUSION

For the foregoing reasons, Defendants’ Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. This case will proceed to trial on Kim and Vicky’s Section 1983 excessive force claim and their state law claims for assault, battery, negligence, and IIED. Summary judgment is entered against each of Plaintiffs’ other claims.

IT IS SO ORDERED.

Dated: November 14, 2012



Maria-Elena James
Chief United States Magistrate Judge