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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COMMITTEE FOR IMMIGRANT RIGHTS OF SONOMA COUNTY, et al.,

Plaintiffs,

v.

COUNTY OF SONOMA, et al.,

Defendants.
_____/

No. CV-08-4220-PJH

COUNTY DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; APPENDICES

Date: February 17, 2010
Time: 9:00 a.m.
Place: Courtroom 3, 3rd Floor, Oakland
Judge: The Honorable Phyllis J. Hamilton

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 17, 2010, at 9:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 3, 3rd Floor, of the above-entitled Court's Oakland Division, Defendants County of Sonoma, Sheriff-Coroner William Cogbill and Deputy Sheriff Morris Eric Salkin, in their individual and official capacities (collectively, "County Defendants"), will and hereby

do move this Court for an order granting dismissal of the claims alleged against County Defendants contained in the Second Amended Complaint for Declaratory and Injunctive Relief and Damages, filed herein on September 14, 2009 (the "Second Amended Complaint").

This motion is brought pursuant to Federal Rules of Civil Procedure, Rule 12(b), subsections (1) and (6), on the grounds that dismissal as to County Defendants is appropriate because the court lacks subject matter jurisdiction over Plaintiffs' Second Amended Complaint, and the Second Amended Complaint fails to allege facts sufficient to state any claim upon which relief can be granted against County Defendants.

This motion is based on this notice, the memorandum of points and authorities in support thereof, the attached appendices, the papers and pleadings on file herein, and on such oral arguments and documentary evidence as may be adduced at the hearing of this matter.

Dated: October 29, 2009

STEVEN M. WOODSIDE, COUNTY COUNSEL

By: /s/ Anne L. Keck
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Deputy County Counsel
Attorneys for Defendants
County of Sonoma, Sheriff-Coroner William Cogbill, Deputy Sheriff Morris Eric Salkin

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In response to the Court's Order on the Defendants' previous motions to dismiss,[1] Plaintiffs filed a Second Amended Complaint on September 14, 2009 (the "SAC"). Topping 74 pages, containing 252 paragraphs and alleging 22 causes of action, the SAC is certainly more voluminous than Plaintiffs' original complaint. It also cures the primary defect in the original complaint by expressly identifying which causes of action are alleged against which defendants, based on which facts. However, volume does not equal substance: while more verbose, Plaintiffs' SAC still fails to allege sufficient facts to state a claim for relief against County Defendants, and many of the claims asserted are not legally cognizable. Accordingly, County Defendants seek dismissal of each and every claim against them in the SAC.

Prior to filing the SAC, Plaintiffs have had the benefit of a significant amount of written discovery, having received approximately 6,000 pages of documents from Defendants. Despite receipt of these substantial materials, Plaintiffs remain unable to allege any facts to support their claims of wrongdoing by County Defendants,[2] as demonstrated by the individual Plaintiffs' allegations:

1. *Plaintiff Francisco Sanchez-Lopez's Allegations*: On September 28, 2006, Sanchez-Lopez was a passenger in a car that was stopped by the Multi Agency Gang Task Force ("MAGNET") due to a "For Sale" sign in the car's rear window [SAC 74, 76]. While he alleges the stop was based on his race, his only supporting fact is that he is Latino [SAC ¶91]. During the stop, two ICE agents questioned Sanchez-Lopez, pat searched him, and then "directed Defendant Salkin to arrest Sanchez-Lopez and book him into custody at the Sonoma County jail based solely on his suspected immigration status [SAC ¶81]." ICE Agent Merendino is listed on official records as the arresting officer, and he issued the formal written immigration detainer against Sanchez-Lopez [SAC ¶85]. Sanchez-Lopez was transferred to ICE custody on October 2, 2006 [SAC ¶86]. While ICE initiated deportation proceedings against him, they were dismissed pursuant to a motion to suppress evidence gathered during the stop [SAC ¶89].

2. *Plaintiff Christyan Sonato-Vega's Allegations*: Sometime in July 2007, Sonato-Vega

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[1]See Order Granting in Part and Denying in Part Defendants' Motions to Dismiss; Granting County Defendants' Motion for a More Definite Statement, et al., filed July 31, 2009 (Docket No. 121) (hereinafter, the "Order").

[2]Plaintiff the Committee for Immigration Rights of Sonoma County ("CIRSC") does not allege any specific facts regarding alleged misconduct, though it makes a plethora of conclusory allegations and statements based "on information and belief."

was a passenger in a car with his fiancée which, after stopping, was approached by two MAGNET officers, including Deputy Salkin [SAC ¶92]. While he alleges the stop was based on his race, his only supporting fact is that he is Latino [SAC ¶¶100, 111]. Deputy Salkin ordered Sonato-Vega to stop, pat searched him, searched the car, and questioned him about his gang membership and immigration status [SAC ¶93-94.]. After 10-20 minutes, both persons were released, and no citations were issued [SAC ¶¶95-96]. Thereafter, on August 2, 2007, Deputy Salkin and ICE Agent Huelga came to Sonato-Vega's workplace, questioned him about his immigration status, and arrested him [SAC ¶97]. ICE Agent Huelga is listed on official records as the arresting officer, and he issued the immigration detainer against Sonato-Vega [SAC ¶101]. Sonato-Vega was booked into the Sonoma County jail, which classified him as a gang member and housed him with Sureno gang members [SAC ¶¶102-103]. He was transferred to ICE custody on August 6, 2007 [SAC ¶106].

3. *Plaintiff Samuel Medel Moyado's Allegations*: On August 8, 2007, a non-party law enforcement agency arrested Medel for being drunk in public [SAC ¶112]. When brought to the Sonoma County jail after arrest, jail officials classified him as a gang member and housed him with Surenos [SAC ¶113]. During his time in the jail, ICE issued an immigration detainer for him [SAC ¶115]. While Medel claims that the jail classified and housed him as a Sureno and referred him to ICE for investigation due to his race, his only supporting fact is that he is Latino [SAC ¶¶114, 115, 124]. After a judge released him on the criminal charges, the jail detained him on the immigration hold, transferring him to ICE custody on August 14, 2007 [SAC ¶116].

These limited facts simply do not support the thirteen claims for relief alleged against County Defendants, as discussed below.

II. MOTION TO DISMISS STANDARDS

A claim for relief may be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for a "failure to state a claim upon which relief can be granted." (Fed.R.Civ.P. 12(b)(1) & (6).) A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory, or the absence of sufficient facts alleged under a cognizable legal theory. (*Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008).) To withstand a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. (*Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).). Bare assertions which amount to "nothing more than a formulaic recitation of the elements" of a claim for relief are conclusory and not entitled to be assumed true. (*Id.*, at 1951, quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007).)

III. LACK OF JURISDICTION OVER INJUNCTIVE RELIEF CLAIMS

A. Plaintiffs Have Not Alleged a Case or Controversy for Injunctive Relief

The requirement that a plaintiff demonstrate a "Case" or "Controversy" exists with respect to the claims for relief is a jurisdictional mandate pursuant to Article III of the United States

Constitution. While the concept of jurisdiction embodies several different considerations, two of them are particularly relevant when injunctive relief is sought: (1) it must be likely, not speculative, that plaintiffs will be injured by the alleged misconduct in the future; and (2) it must be likely, not speculative, that plaintiff's alleged injury will be redressable by a favorable decision. *(Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Rizzo v. Goode*, 423 U.S. 362, 372 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 493-4 (1974)) If the conduct complained of is unlikely to happen again to the plaintiff, then plaintiff does not have standing to seek declaratory or injunctive relief. (See *RK Ventures v. City of Seattle*, 307 F.3d 10451056-7 (9th Cir. 2002).)

In its Order, this Court examined standing challenges to the initial complaint and determined that Plaintiffs had alleged sufficient facts to demonstrate standing to seek injunctive relief. (Order, at pp. 17-18, 31-32.) However, two intervening events warrant renewed consideration of jurisdictional issues. First, the decision in *Ashcroft v. Iqbal* [129 S.Ct. 1937 (2009)] was released after the parties had completed briefing and oral argument on the first round of motions to dismiss. Second, clarifications made in the SAC highlight Plaintiffs' inability to allege sufficient facts to demonstrate a case or controversy herein.

1. Plaintiffs Fail to Allege Facts Demonstrating On-Going Conduct

Demonstrating a likelihood of future injury is a particularly important jurisdictional consideration in cases seeking injunctive relief against government actors, as they are normally, and properly, overseen by the executive branch. (See *Hodgers-Durgin v. De La Vina,* 199 F.3d 1037, 1044 (9th Cir. 1999).) It is axiomatic that past exposure to illegal conduct does not in itself show a present case or controversy for injunctive relief, "if unaccompanied by any continuing, present adverse effects." (*O'Shea*, 414 U.S. at 495; *Rizzo*, 423 U.S. at 372.)

With respect to "continuing, present adverse effects," Plaintiffs allege that the "joint patrols" of ICE and County Defendants of which they complain occurred only twice: on September 28, 2006 (re Sanchez-Lopez, SAC ¶74), and on August 2, 2007 (re Sonato-Vega, SAC ¶97). Despite being provided with an opportunity to bolster their complaint through time and discovery, Plaintiffs are unable to allege any other incidents of these joint patrols occurred at any time, or that actions taken by the patrols occurred to any person aside from Sanchez-Lopez and Sonato-Vega. As joint patrol incidents are alleged to have occurred only twice, and over two years ago, Plaintiffs' conclusory

allegations in the SAC that such joint patrols are "ongoing" fail to state a plausible claim for relief. (See *Iqbal*, 129 S.Ct at 1950.)

Indeed, Plaintiffs' attempt to demonstrate jurisdiction sufficient to invoke this Court's equitable powers is based on a single conclusory allegation:

> Defendants' conduct is result of ongoing policies, practices, conduct and acts that have resulted and will continue to result in irreparable injury to Plaintiffs, including but not limited to further threats to and violations of their constitutional and civil rights.

[SAC ¶125]. As this is a formulaic recitation of a required element of injunctive relief, and utterly fails to allege any specific facts relating to Plaintiffs, it is insufficient to state a cause of action and is implausible under *Iqbal*. This Court's equitable powers thus should not be invoked without allegations of fact demonstrating a likelihood of future injury. (See *O'Shea*, 414 U.S. at 495.)

2. Plaintiffs Fail to Allege Facts Demonstrating Redressability

The second case-or-controversy factor that is especially relevant to injunctive relief actions is the requirement of *redressability*. The redressability factor has been enunciated as, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' [citation omitted]" (*Lujan*, 504 U.S. at 560-561.) Plaintiffs' requests for injunctive relief will not redress any injury, as they either simply require a recitation of existing law, or are overly broad and unenforceable.

For example, Plaintiffs' First Claim for Relief seeks, *inter alia*, injunctive relief based on the Fourth Amendment's freedom from unreasonable searches and seizures, pursuant to § 1983. However, the actual order Plaintiffs request is a statement prohibiting County Defendants from, *inter alia*, "detaining persons or vehicles without reasonable suspicion of criminal activity [SAC, Prayer for Relief, ¶1(a)]." Not only is this request for relief excessively over broad, but it also does not address any underlying constitutional violation, as there are legitimate and lawful reasons that law enforcement could detain persons or vehicles without reasonable suspicion of criminal activity (e.g., questioning or searching based on parole or probation terms, or detaining/questioning a material witness). Plaintiffs' other injunctive relief requests merely ask the Court to restate existing law – such as their request for an order prohibiting County Defendants from using race as a factor to initiate a traffic stop [SAC, Prayer for Relief, §1(b)], which is current law in the Ninth Circuit. (See *United*

States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000).) Hence, a permanent injunction declaring racial profiling to be illegal would be both superfluous and unnecessary.

B. Lack of Justiciability

Plaintiffs are political activists who desire to effect a change in immigration laws through lobbying the legislative branch officials, meeting with executive branch officials, and now resorting to the judicial branch [SAC ¶¶ 69-71]. A review of the SAC reveals that the claims against County Defendants stem from one issue only: Plaintiffs do not want County Defendants to cooperate with ICE's enforcement of immigration laws, whether such cooperation is provided in the field or in the jail. While Plaintiffs may challenge ICE's legal authority with respect to immigration enforcement, the Sheriff's executive authority to assist ICE in the enforcement of such laws — whether mandatory or discretionary – is not a justiciable issue over which this Court should invoke its equity powers.

Though the justiciability doctrine is "one of uncertain and shifting contours," the doctrine at its core precludes consideration of issues that do not admit of judicial resolution – such as political questions that request the federal court to "intrude into areas committed to the other branches of government," or requests to the court to render advisory opinions. (*Flast v. Cohen*, 392 U.S. 83, 95 (1968)*;* see also *Powell v. McCormack*, 395 U.S. 486, 517 (1969).) Similarly, principles of federalism limit the availability and scope of equitable relief – including relief requested under § 1983 – and "militate heavily against the granting of an injunction under § 1983 except in the most extraordinary circumstances." (*Rizzo*, 423 U.S. at 378-9.)

The Sheriff is an Executive Branch official of the State of California; his discretionary authority to perform law enforcement and jail custodial functions is proscribed only by the requirement that he comply with applicable laws.[3] As Plaintiffs' request for judicial intervention is made as part of a political process, and seeks to require a state Executive Branch official to choose one discretionary law enforcement function over another (i.e., not to cooperate with ICE), the Court should decline to consider the matter based on federalism principles.

[3] The Sheriff's authority emanates from the California Constitution (Cal. Const. Art. V, §1, Art. V, §13) and statutes which charge and authorize him to, *inter alia*, preserve the peace (Cal. Gov't Code §26600), arrest criminal offenders (Cal. Gov't Code §26601), investigate public offenses (Cal. Gov't Code §26602), and run the County jails (Cal. Gov't Code §26605; Cal. Penal Code §4000). (See *Venegas v. County of Los Angeles*, 32 Cal.4th 820 (2004).

IV. PLAINTIFFS FAIL TO ALLEGE PLAUSIBLE CLAIMS UNDER 42 U.S.C. § 1983

A. Section 1983 Allegations Against County Defendants are Insufficient

Plaintiffs allege federal constitutional violations against all County Defendants under the right of action accorded by 42 U.S.C. §1983 ("§ 1983"), which provides:

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

(42 U.S.C. §1983.) Section 1983 is founded on the Fourteenth Amendment, as it concerns deprivations of rights that are accomplished only under the color of state law. *(Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980).) Consequently, federal actors are at least facially exempt from liability under §1983, and § 1983 does not provide redress for actions taken under color of federal law. (*District of Columbia v. Carter,* 409 U.S. 418, 424-5 (1973) (includes legislative and social history of § 1983); *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995).)

To maintain a cause of action under §1983, a plaintiff must allege: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct complained of deprived plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. (*Levine v. City of Alameda*, 525 F.3d 903, 905 (9th Cir. 2008).)

1. County Defendants Acted Under Color of Federal Law

When federal and state officials act jointly, a §1983 claim will not lie as to any of the officials' acts if they were "clothed with the authority of federal law," or otherwise acted under power possessed by virtue of federal law. (*Billings,* 57 F.3d at 801; see also *Scott v. Rosenberg,* 702 F.2d 1263, 1269 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984).) The converse is also true: federal officials can be liable under § 1983 if they acted in concert with state officials by virtue of state law. (*Id.*)

More to the point, the Ninth Circuit has declared that, when Sheriff's officers take a person into custody at the behest of a federal agency pursuant to a federal arrest, such action is accomplished pursuant to federal law – rather than state law – precluding a § 1983 claim. (*Billings*, 57 F.3d at 801.) In *Billings*, Secret Service agents arrested Ms. Billings pursuant to the procedures and protocols of

their agency. The agents then directed County Sheriff's officers to take Ms. Billings into custody. In doing so, the Court found the Sheriff officers "were clearly acting at the behest and under the direction of the federal agents." (*Id.*) The Court consequently concluded, "if the Secret Service Agents and Sheriff's officers acted jointly, it was under the color of federal law. [citation omitted] Because § 1983 provides no cause of action against federal agents acting under color of federal law," then plaintiff's § 1983 claims were properly dismissed. (*Id.*)

Plaintiffs herein allege that Sheriff's Deputies took custody of both Plaintiffs Sonato-Vega and Sanchez-Lopez at the direction and behest of the ICE agents (who were present on the scene) solely based on suspected civil immigration violations [SAC ¶¶81, 98, 100]. Plaintiffs state that ICE Agents either directed Sheriff's Deputies to arrest them, or that the ICE Agents arrested them directly [SAC ¶¶81, 85, 97, 101]. They allege that these actions were improper based on a challenge to ICE's authority to issue detainers against them, and County Defendants' authority to comply with those detainers and obtain custody of the Plaintiffs in the absence of any state criminal charges [SAC ¶44].

Plaintiffs do not allege that the Sheriff's Deputies were enforcing any state law against Plaintiffs – to the contrary, they allege that Sheriff's Deputies were somehow unlawfully enforcing federal immigration law. Alternatively, Plaintiffs allege that County Defendants have denied them their immigration procedural protections under federal law while they were in jail [SAC ¶147]. In either event, Plaintiffs' allegations are based on the premise that County Defendants have acted, or were required to act, under federal law – not state law – thus precluding a claim under § 1983.

2. Sheriff Cogbill and Deputy Salkin Should Be Dismissed from the SAC

a. "Official Capacity" Allegations Require Dismissal of the Official

When a government official is sued in his "official capacity," the real party in interest is the entity for which the official works. (*Kentucky v.* Graham, 473 U.S. 159, 166 (1985); *Hafer v. Meo*, 502 U.S. 21, 25 (1991).) Accordingly, when both the governmental entity and the officials are sued under § 1983 in their "official capacity," the suit should properly proceed only against the governmental entity, as the entity must pay any damages awarded. (*Butler v. Elle*, 281 F.3d 1014, 1023, fn 8 (9th Cir. 2002); *Brown v. County of Kern*, 2008 WL 544565, 3 (E.D. Cal. 2008).) For this reason, both Sheriff William Cogbill and Deputy Eric Salkin should be dismissed from this lawsuit in their "official capacities," as Plaintiffs named the proper employing entity, the County of Sonoma, as a defendant.

b. Facts Alleged Against Sheriff Cogbill and Deputy Salkin are Insufficient

Plaintiffs simply have not alleged sufficient facts to demonstrate a plausible claim for relief against either Sheriff Cogbill or Deputy Salkin in their personal capacities pursuant to § 1983 or any other claim for relief alleged against them.[4] Indeed, to hold an individual public official liable in their personal capacity for an action under §1983, the complaint must allege they committed specific acts of wrongdoing amounting to a violation of a constitutional right. As the Ninth Circuit has held:

> A person 'subjects' another to the deprivation of a constitutional right, within the meaning of 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.

(*Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).) Thus, to state a claim for relief under § 1983, a plaintiff must link each named defendant with some affirmative act or omission that demonstrates a violation of the plaintiff's federal rights. (*Id.*)

The few allegations made against Sheriff Cogbill (see Appendix "B") state that he directs the operations of the Sheriff's Department and MAGNET [SAC ¶¶62, 65], that he received memos re immigration detainers [SAC ¶64], and that he attended a meeting with CIRSC [SAC ¶63]. While Plaintiffs allege that Sheriff Cogbill failed to adequately train and supervise his deputies regarding arrests and detention under 8 C.F.R. §287.7, and due process rights afforded civil immigration arrestees [SAC ¶¶66, 67], these conclusory statements are insufficient to allege a claim for relief against the Sheriff in his personal capacity because: (a) Plaintiffs' challenges to detainer proceedings are not supported by applicable law; and (b) the Sheriff has no duty to train his staff on application of any federal immigration laws that are administered and enforced by ICE.

The allegations made against Deputy Salkin (see Appendix "B"), while more numerous in detail, do not provide any specific facts demonstrating a violation of any of the individual Plaintiffs' constitutional rights. With respect to Medel, Deputy Salkin had no contact with him whatsoever. With respect to Sanchez-Lopez, the only specific action Deputy Salkin took was to comply with the directions of ICE to take Sanchez-Lopez into custody on suspected civil immigration violations,

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[4]The specific allegations made against these two public officials are summarized in Appendices "A" and "B", attached hereto, which Deputy County Counsel prepared pursuant to the Lexis/Nexis CaseMap program, and are provided for the convenience of the Court and the parties.

transport him and book him into jail [SAC ¶ 81-83]. With respect to Sonato-Vega, he alleges that he came into contact with Deputy Salkin at least twice. First, he alleges that, sometime in July 2007, Deputy Salkin stopped him, questioned him, and pat-searched him, allegedly without reasonable suspicion "because he appeared to be of Latino descent."[SAC ¶ 92-93]. This allegation is insufficient to establish a claim against Deputy Salkin, as racial profiling allegations must be based on specific facts – aside from the fact that a plaintiff happens to be a particular race. (*Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982); *Iqbal*, 129 S.Ct. at 1951-2.) The second alleged contact occurred when Deputy Salkin and ICE Agent Huelga appeared at Sonato-Vega's place of work to arrest him on suspected civil immigration violations [SAC ¶97]. As Deputy Salkin could take direction from the ICE Agent to assist ICE's enforcement of immigration law, such an alleged action was lawful. (See *Jose C.*, 45 Cal.4th at 551-553.)

While Plaintiffs seek to challenge the application of civil immigration laws in this case, their claims of wrongdoing against the individual County Defendants are misplaced and simply devoid of factual support. Accordingly, County Defendants request this Court dismiss Sheriff Cogbill and Deputy Salkin, in their individual and personal capacities, from the SAC.

c. Sheriff Cogbill and Deputy Salkin are Qualifiedly Immune from Liability

Government officials sued in their personal capacity in § 1983 actions may assert the personal defense of qualified immunity. *(Dittman v. California*, 191 F.3d 1020, 1027 (9th Cir. 1999).) Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." (*Saucier v. Katz*, 533 U.S. 194, 200 (2001), quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).) Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *(Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).) Qualified immunity thus protects "all but the plainly incompetent or those who knowingly violate the law." (*Malley v. Briggs*, 475 U.S. 335, 341 (1986).)

In evaluating a defendant's claim to qualified immunity, courts typically engage in a two-step inquiry, considering: (1) whether, viewing the facts in the light most favorable to plaintiff, the government actors violated plaintiff's constitutional rights; and (2) whether the rights were clearly established at the time of the violation. (*Saucier*, 533 U.S. at 201, quoting *Anderson v. Creighton*, 483

U.S. 635, 640 (1987).)[5] For a right to be clearly established, its contours, "must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." (*Id.*)

Both Sheriff Cogbill and Deputy Salkin are entitled to qualified immunity on all of Plaintiffs' § 1983 claims, as they satisfy each of *Saucier's* two prongs. First, as discussed in the preceding section, Plaintiffs have failed to allege any specific facts against either of these two county officials that could support a plausible claim for relief based on violation of constitutional rights. Second, the issues raised by Plaintiffs herein – regarding ICE's authority to issue immigration detainers, and the County Defendants' authority to comply with them – are matters of first impression, and thus the County Defendants have the right to rely on the facial validity of the immigration detainers. Not only do Plaintiffs' legal claims fail to reflect current law, they certainly do not represent the state of the law at the time of the alleged actions. Accordingly, the legal challenges alleged in this lawsuit were not established law at the time the actions took place, thus entitling Sheriff Cogbill and Deputy Salkin to qualified immunity for Plaintiffs' § 1983 claims against them in their personal capacities.

3. County Defendants are Immune from Liability Under the Eleventh Amendment

States and state officials sued in their official capacity are not considered "persons" under § 1983, and are immune from liability thereunder by virtue of the Eleventh Amendment and the doctrine of sovereign immunity. (*Venegas v. County of Los Angeles*, 32 Cal.4th 820, 829 (2004).) "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. [Citation.] As such it is no different from a suit against the State itself. [Citations.]" (*Id.*, quoting *Will v. Michigan Dept. Of State Police*, 491 U.S. 58, 71 (1989).) Likewise, "[t]he rule exempting the state and its officers applies to officers such as sheriffs if they were acting as state agents with final policymaking authority over the complained-of actions." (*Id.*, citing *McMillian v. Monroe County*, 520 U.S. 781 (1997).) It also necessarily follows that, if a sheriff is acting for the state, then their employing counties are not liable for their actions. (*Id.* , at 836.)

[5]The Supreme Court recently adopted a more flexible approach, holding that while this two-step inquiry is often appropriate, it should no longer be considered mandatory. (*Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009).) Accordingly, it is within the court's "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand." (*Id.*)

In *Venegas*, the California Supreme Court held "California sheriffs act as state officers while performing state law enforcement duties such as investigating possible criminal activity." (*Id.*, at 839.) In reaching its conclusion, the *Venegas* Court conducted an extensive analysis of state and federal law on the issue, analyzing two prior Ninth Circuit decisions that had previously concluded sheriffs were not state actors for § 1983 purposes.[6] The Supreme Court expressly disagreed with the holdings of the Ninth Circuit cases, and found that the analysis described in *McMillian* and other California cases required the conclusion that sheriffs act as state officers while performing state law enforcement duties. *(Id.*, at 839.) While the Court did not reach the issue, the analysis provided also compels the conclusion that, because deputy sheriffs are empowered with all of the authority of the office of the Sheriff (see Cal. Gov't Code §7), they are also "state actors" while engaged in enforcing state law.

In addition, California courts have also concluded that California sheriffs are state actors enforcing state law with respect to their custodial and housing assignment duties in operating the county jail. (See *Venegas*, 32 Cal.4th at 833, *et seq.*; *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166 (1998); *Bougere v. County of Los Angeles*, 141 Cal.App.4th 237, 247-8 (2006).[7]) The Supreme Court's approval of this statement of law in *Venegas* postdates an earlier Ninth Circuit decision holding to the contrary.[8]

The California Supreme Court's rejection of previous Ninth Circuit decisions on the issue of whether the sheriff is a state or local actor for § 1983 purposes has caused uncertainty and conflicting opinions in district courts. Some district courts agree that the California Supreme Court is best suited

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[6]These Ninth Circuit cases were *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir. 2002) (vacated on other grounds and remanded in *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003)), and *Brewster v. Shasta County*, 275 F.3d 805, cert. denied *sub nom. Shasta County v. Brewster*, 537 U.S. 814 (2002).

[7]After analyzing state and federal law, the *Bougere* Court dismissed a § 1983 against a county because, "in setting and implementing policies and procedures concerning the assignment of inmates in the county jail, the Sheriff acts as a state officer performing state law enforcement duties, and not as a policymaker in behalf of the County." (*Bougere*, 141 Cal.App.4th at 247-8.)

[8]See *Streit v. County of Los Angeles*, 236 F.3d 552, 565 (9th Cir. 2001).

to interpret California law, and thus apply the rule announced in *Venegas*.[9] Other courts continue to rely on the Ninth Circuit precedent on the issue.[10] While it is true that the interpretation and application of § 1983 is a federal issue, whether a particular government official is a state or local actor is solely a question of state law, and "[t]he California Supreme Court is the ultimate interpreter of California state law." (*Weiner v. San Diego County*, 210 F.3d 1025 1028-9 (9th Cir. 2000).) Accordingly, County Defendants urge this Court to apply California precedents to determine that they were state actors with respect to the actions alleged in the complaint, and dismiss them on the grounds that they are not "persons" under § 1983.

4. Sonoma County is not Liable under *Monell*

Municipalities – including counties – are considered "persons" under § 1983 and may be liable for causing constitutional deprivations. (*Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978).) However, counties cannot be held liable merely for employing a tortfeasor under a *respondeat superior* theory. (*Id.*, at 691.) Instead, a county can only be held liable under § 1983 where the county itself caused the constitutional violation through "execution of a government's policy or custom, whether made by its lawmakers or those whose edicts are acts may fairly be said to represent official policy." (*Id.*, at 694.) Accordingly, "a plaintiff must allege that the action inflicting injury flowed from either an explicitly adopted or a tacitly authorized [municipal] policy." (*Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986).)

To state a § 1983 claim for relief against a municipality, a plaintiff must therefore allege that "a deliberate policy, custom or practice ... was the 'moving force' behind the constitutional violation," or alternatively, that the violation was caused by deliberate indifference. (*Id.*, at 1186; *Galen v. County of Los Angeles*, 477 F.3d 652, 667 (9th Cir. 2007).) A "policy" for § 1983 purposes is a "deliberate choice to follow a course of action ... made from among various alternatives by the official

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[9]See *Walker v. County of Santa Clara*, 2005 WL 2437037, at p.4 (N.D.Cal. 2005). In holding that California sheriffs act as state officers while performing state law enforcement duties, the Court stated, that while it did not need to blindly accept California case law, "the California Supreme Court's decision [in *Venegas*] comports with this court's understanding of the function of California sheriffs."

[10]See, e.g., *Vega v. County of Yolo*, 2009 WL 1992532, at p. 4 (E.D. Cal. 2009); *Lopez v. Youngblood*, 609 F.Supp. 1125, 1146-8 (E.D. Cal. 2009).

or officials responsible for establishing final policy with respect to the subject matter in question [citations omitted]." (*Farley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002).) A policy can be one of action or inaction. (*Id.*) With respect to municipal custom, "[l]iability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency, and consistency that the conduct has become a traditional method of carrying out policy." (*Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 2008).) Further, a plaintiff must allege a "direct causal link" between the constitutional deprivation and a municipal policy or custom. (*Erdman v. Cochise County, Arizona*, 926 F.2d 877 (9th Cir. 1991), quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989).) This requires that a plaintiff actually allege the specific "policy" that caused the constitutional deprivation and resulting injury – mistakes or isolated events of municipal officials do not arise to the level of "policy" sufficient for § 1983 liability. (*Id.*)

Plaintiffs herein have failed to allege sufficient facts to establish a plausible *Monell* claim for § 1983 liability against the County. Plaintiffs cannot demonstrate that the Sheriff Department's cooperation with ICE officials is an unlawful policy leading to constitutional violations, as immigration law expressly and implicitly authorizes such cooperation. (See *In re Jose C.*, 45 Cal.4th 534, 551-553 (2009).) Plaintiffs cannot plausibly allege that the Sheriff Department has a policy or custom of using race as a factor to unlawfully stop and detain persons, as such a practice is unlawful and contradicts actual policy. (See *Montero-Camargo*, 208 F.3d 1122.) Plaintiffs cannot plausibly allege that the Sheriff's Department is violating civil immigration detainees' rights by failing to initiate immigration proceedings against them and invoking federal immigration procedures, as those tasks are outside their jurisdictional purview. (See 8 U.S.C. §1329.) Accordingly, Plaintiffs have alleged no facts to support their claim that County Defendants, through policy, custom or practice, violated their constitutional rights, mandating dismissal of their § 1983 claims against County Defendants.

B. No Viable Federal Constitutional Violation Alleged Against County Defendants

Plaintiffs allege multiple sub-categories of claims under each of their separate § 1983 claims for relief based on alleged federal constitutional violations. To the extent that the foregoing general provisions do not dispose of these claims, the following specific discussions warrant dismissal of the claims against County Defendants in full.

1. Fourth Amendment Search and Seizure Claims, § 1983

Plaintiffs' First Claim for Relief against County Defendants alleges 20 sub-theories based on the Fourth Amendment's search and seizure clause [SAC ¶¶135-138]. A review of the SAC demonstrates that there are insufficient facts to support these claims, or the claims are based on incognizable legal theories. As virtually all of the damages allegations are included within the claims for injunctive relief [SAC ¶135], those claims are discussed below.

a. *Stopping persons/vehicles without reasonable suspicion of criminal activity or traffic infraction*

Sanchez-Lopez alleges that MAGNET stopped the car in which he was riding due to a "For Sale" sign in the window – which may be a traffic infraction if the sign obstructed the driver's view, or if the circumstances met the requirements of California Vehicle Code § 22651.9. Sonato-Vega alleges that he had emerged from a vehicle as a passenger and was immediately stopped by Sheriff's Deputies, but he does not allege what happened immediately prior to the stop. An omission of these critical facts makes it impossible for the Court to determine on the face of the SAC whether or not Sheriff's Deputies had reasonable suspicion to contact him. In other words, Sonato-Vega's intentional omission of the facts leading up to the stop, and reliance on conclusory allegations that the stop was unreasonable, constitutes a failure to state a plausible claim for a Fourth Amendment violation. (*Iqbal*, 129 S.Ct. at 1949.) Medel does not allege he was stopped by Sheriff's Deputies.

b. *Unreasonably prolonging the stop to ask about immigration status*

Sanchez-Lopez does not allege that Sheriff's Deputies questioned him – he alleges only ICE Agents questioned him [SAC, ¶77, 80]. Sonato-Vega alleges that during the July 2007 incident, he had just emerged from a car as a passenger when Deputies stopped him, and Deputy Salkin questioned him on several topics, including his immigration status [SAC ¶94]. Yet, Sheriff's Deputies have the ability to question on immigration status, as they are authorized to arrest persons for criminal immigration violations [see *Jose C.*, 45 Cal.4th at 551-553] and can assist ICE in the performance of its duties. (*Id.;* 8 U.S.C. §§ 1373, 1644.) Further, officers may ask pedestrians and vehicle passengers questions, even without reasonable suspicion or probable cause to believe criminal conduct has occurred, if they are free to decline to answer or leave. (See *United States v. Gushwa*, 326 Fed.Appx.

447, 448 (9th Cir. 2009); *Meuhler v. Mena*, 544 U.S. 93, 101 (2005); *United States v. Turvin*, 517 F.3d 1097 (9th Cir. 2008).) Like the prior claim, Medel alleges no field contact with Sheriff's Deputies.

c. *Conducting searches without probable cause or for officer safety*

Sanchez-Lopez alleges that ICE agents, and not Sheriff's Deputies, searched him [SAC, ¶78]. Like the prior theory, Sonato-Vega omits to allege facts that led to his encounter with Sheriff Deputies, which omission renders his allegations conclusory and his claims implausible. Once again, Medel alleges no field contact with Sheriff's Deputies.

d. *Unreasonably arresting individuals based solely on civil immigration violations*

The SAC alleges that Sheriff's Deputies acted under the direction and at the behest of ICE Agents who were present on the scenes of the arrests of both Sanchez-Lopez and Sonato-Vega, that ICE Agents directed Sheriff's Deputies to take them into custody based on their suspected civil immigration violations, and later issued immigration detainers for them [SAC, ¶¶ 81, 101]. Medel does not allege that he was arrested by Sheriff's Deputies for civil immigration violations.

e. *Holding persons in the County jail based solely on suspected civil immigration violations*

Through this claim, Plaintiffs challenge the provisions of 8 C.F.R. §287.7 ("§ 287.7") on the theory that it does not permit ICE to issue immigration detainers for persons who are not already in local custody for an underlying criminal arrest [SAC ¶44].[11] Consequently, they allege that County Defendants cannot lawfully hold persons in jail pursuant to such immigration detainers. Yet, their claim ignores the express provisions of § 287.7, subdivision (d), which provides as follows:

> (d) Temporary detention at Department [ICE] request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit the assumption of custody by the Department.

(8 C.F.R. §287.7(d).) The language of this regulation, in allowing a detainer to issue "for an alien not otherwise detained by a criminal justice agency" expressly allows ICE to issue immigration detainers for persons not already in County Defendants' custody on criminal charges. As subsection (d) states

[11]The provisions of 8 U.S.C. §1103, among others, provide Congressional authority for ICE to issue immigration detainers to require County Defendants to hold persons in local custody pursuant to the requirements of § 287.7.

that the criminal justice agency "shall" maintain custody of the person for the identified time period, immigration detainers obligate a county jail to maintain custody under the terms of § 287.7. In other words, County Defendants are required to comply with facially valid detainers issued under § 287.7, and thus cannot be liable to Plaintiffs for complying with an order of the federal government.

f. & g. *Arresting, holding and prolonging the custody of persons in the County jail on immigration detainers for more than 48 hours without an independent probable cause determination by a non-arresting ICE officer or neutral magistrate*

This claim contains two elements: (1) whether the County could hold a person subject to an immigration detainer for longer than 48 hours; and (2) whether the County jail is required to initiate immigration procedures with respect to such detainees under 8 U.S.C. § 1357 and 8 C.F.R. § 287.3.

First, § 287.7(d) expressly requires that, upon ICE issuing a detainer, the jail "shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays..." (8 C.F.R. § 287.7.) Each of the individual Plaintiffs were held for a period longer than 48 hours due to intervening weekends: (a) Sanchez-Lopez was booked into jail on Thursday, September 28, 2006, and released to ICE custody on Monday, October 2, 2006; (b) Sonato-Vega was booked into jail on Thursday, August 2, 2007, and released to ICE custody on Monday August 6, 2007; (c) Medel's immigration detainer became effective on Friday August 10, 2007, and he was released to ICE custody on Tuesday August 14, 2007. Plaintiffs' detentions through the weekends thus comply with the express terms of § 287.7(d) – nor do they allege otherwise.

Second, Plaintiffs allege that because their detentions under the § 287.7 detainers actually lasted longer than 48 hours, the detentions must be "supported by a separate probable cause determination by a non-arresting ICE officer or a neutral magistrate," per 8 U.S.C. § 1357 and 8 C.F.R. § 287.3 [SAC ¶52]. However, neither of these federal statutes apply to the time during which the Sheriff's Department temporarily detains a suspected alien for ICE. Not only are such procedural requirements outside the scope, function and jurisdiction of County Defendants, but county officials are preempted by federal law from initiating immigration proceedings. (See 8 U.S.C. §1329; see also *Sturgeon v. Bratton*, 174 Cal.App.4th 1407, 1412 (2009).) Plaintiffs' request for the Sheriff's Department to provide immigration detainees with federal procedural protections would constitute a usurp of the functions of ICE.

2. Fourteenth Amendment Equal Protection Claims, § 1983

Plaintiffs allege 13 separate claims or theories in support of their 2nd Claim for Relief based on the Equal Protection Clause of the Fourteenth Amendment. In addition, the same theories and facts are incorporated into Plaintiffs' 7th Claim for Relief based on Title VI, 42 U.S.C. §2000d, *et seq*., and their 14th Claim for Relief based on California Government Code § 11135. These three claims for relief should be dismissed, based on the lack of sufficient facts and incognizable legal theories.

a. *Using race as a motivating factor to stop, detain, interrogate, and/or search persons who appear to be Latino*

A complaint alleging a violation of equal protection based on race must allege specific factual allegations showing that defendants engaged in racial discrimination – not merely vague or conclusory allegations of discriminatory civil rights violations. *(Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).) To state a claim, plaintiff must plead sufficient facts to show that defendants took actions "not for a neutral investigative reason but for the purpose of discriminating on account of race, religion, or national origin" (*Iqbal*, 129 S.Ct. at 1948-9.) The fact that a person is a particular race or national origin is not enough to draw an inference of discrimination under *Iqbal*: additional facts, such as derogatory statements, must be alleged for such a claim to survive a motion to dismiss. (*Ibrahim v. Department of Homeland Security*, 2009 WL 2246194 (N.D. Cal., 2009); *Smith v. Commonwealth of Virginia*, 2009 WL 2175759 (E.D. Vir., 2009).)

Further, purposeful discrimination requires a decisionmaker undertaking a course of action "'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." (*Iqbal*, 129 S.Ct. at 1951, quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).) The fact that a particular action has a disparate impact on one group does not imply discrimination. As the *Iqbal* Court noted, it "should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the [9/11] attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." (*Id.*, at 1951.)

In support of each of their equal protection theories, Plaintiffs repeatedly state that the actions taken against them were on account of their race or national origin. Their allegations are conclusory in

nature – not a single one of them is supported by any facts demonstrating that any defendant acted against them on the basis of race. Plaintiffs simply allege that, because they are Latino, the actions taken against them were based on the fact that they are Latino. Further, whether the MAGNET unit's law enforcement efforts to control gang crime has a disparate impact on Latino males in Sonoma County does not create a plausible claim for relief for violation of equal protection rights. Plaintiffs' race is thus simply an insufficient basis on which to allege a plausible claim for racial discrimination pursuant to the equal protection clause of the Fourteenth Amendment. (*Id.*)

b. *Using race as a motivating factor to unreasonably prolong detentions to question persons about their immigration status*

As stated in the preceding section, Plaintiffs have failed to allege any facts to demonstrate that race was a motivating factor for any action County Defendants took. As discussed in Section IV.B.1.b, above, County Defendants may lawfully question persons regarding their immigration status.

c. *Using race as a motivating factor in deciding to contact ICE agents to seek immigration detainers for persons County Defendants encounter in the field and for whom they lack probable cause to arrest for criminal activity*

Aside from failing to allege specific facts to support a claim for discrimination, Plaintiffs also fail to allege facts showing that any County Defendant contacted ICE to seek an immigration detainer for any person they encounter in the field: Sanchez-Lopez and Sonato-Vega both allege that ICE Agents were present on the scene at the time of their arrest, and Sheriff's Deputies never contacted Medel in the field.[12] Further, federal law prohibits any kind of order, law, or other rule that would limit the ability of local law enforcement agencies to contact ICE regarding persons suspected of violating immigration laws. (8 U.S.C. §1373.) Accordingly, the Court cannot grant Plaintiffs their requested relief, as it would have the affect of delimiting the Sheriff's Department's ability to contact ICE.

d. *Using race, etc., to classify arrestees as gang members to make jail housing decisions*

Plaintiffs allege no facts to suggest that jail officials used Plaintiffs' race to classify them as gang members for housing purposes – aside from the fact that they were housed with one of the two

[12]Plaintiffs can only litigate events that happened to them. (*Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 221 (1984).)

Latino gangs prevalent in Sonoma County (Surenos and Nortenos) [SAC 113]. Plaintiffs appear to claim that they have a right to avoid being classified as gang members, and to be placed in general population housing in the jail [SAC ¶103]. These claims are simply without merit.

Prior to 2005, San Quentin prison officials used race as the primary factor in making housing decisions for newly admitted or transferred prison inmates. Prison officials' justification for this race-based policy was "to prevent violence caused by racial gangs." (See *Johnson v. California*, 543 U.S. 499, 502 (2005).) In rejecting this procedure, the Supreme Court held that prison official could not use "race as a proxy for gang membership and violence" without complying with the strict scrutiny test. (*Id.*, at 511.)

In the instant case, Plaintiffs are challenging the Sonoma County Jail's use of gang status as a factor for inmate housing classification – a practice condoned by the Supreme Court. (*Id.*; *Wilkinson v. Austin*, 545 U.S. 209 (2005).)[13] Classifying jail inmates based on gang status for housing purposes does not implicate any of the protected classes under the Equal Protection Clause, and gang membership – or lack thereof – has never been determined to be a protected class. Nor can Plaintiffs allege any facts demonstrating a plausible claim that the jail used their race in classifying them as Sureno gang members – which renders their equal protection claim implausible.

e. *Using race, etc., as a motivating factor to interrogate inmates regarding their immigration status and recommend that ICE issue immigration detainers*

This allegation is similar to subsection (c), above, though it relates to contact in the jail, rather than in the field. Like subsection (c), Plaintiffs do not allege any facts to that could suggest that County Defendants have acted in this fashion, or how any injunctive relief could be consistent with 8 U.S.C. § 1373. In addition, County jail staff are required to question inmates on alien status, for the purpose of providing them with the state-mandated Foreign Consulate Notice.[14]

3. Fourteenth Amendment Due Process Claims, § 1983

Plaintiffs allege 9 separate claims or theories in support of their Third Claim for Relief based

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[13]The past 20 years has seen a rise in prison gangs and prison violence, making gang membership a priority in prison administrative housing decisions. (*Wilkinson*, 545 U.S. at 213.)

[14] See Penal Code §834c; Health and Safety Code §11369; U.S. Department of State Guidelines Regarding Foreign Nationals Arrested or Detained in the United States.

on the Due Process Clause of the Fourteenth Amendment. As in the prior analyses, County Defendants respond to the allegations made in connection with Plaintiffs' injunctive relief claims [SAC ¶147], which are incorporated in the individual damages claims as well.

a. *Arresting and detaining individuals solely for civil immigration violations, in violation of their substantive rights to due process*

County Defendants agree that, while Sheriff Deputies have the authority to arrest persons for criminal immigration violations, they do not have the authority to arrest persons for civil immigration violations. Nor do Plaintiffs allege that they do so: Plaintiffs allege that ICE Agents directed the arrest and taking into custody of Sanchez-Lopez and Sonato-Vega, and thus Sheriff's Deputies did not act on their own or without direction from ICE.

b. *Aiding and abetting ICE in denying procedural protections due civil immigration arrestees who are arrested without a warrant*

County Defendants cannot discern the basis of this allegation - though they presume it is a more general claim relating to the two successive theories, below.

c. *Denying procedural protections under 8 U.S.C. § 1357 and 8 C.F.R. § 287.3 to persons arrested on state law charges and whose County custody is prolonged due to an immigration detainer*

Similar to the issues addressed in sections IV.B.1.f and g, above, this claim appears to request County Defendants to begin invoking federal immigration procedures while a suspected alien remains in jail on an immigration detainer, awaiting pickup from ICE. Such procedures are outside the scope and jurisdiction of County Defendants, and doing so would usurp the function of federal authorities.

d. *Detaining or prolonging the detention of persons in County Jail pursuant to immigration detainers without providing notice of the charges against them and an opportunity to respond within a reasonable time*

By this claim, Plaintiffs initiate a facial challenge to that portion of § 287.7(d) providing ICE the authority to issue a detainer compelling a jail to "maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit the assumption of custody by the Department." (8 C.F.R. §287.7.) The Sheriff's Department is compelled to comply with the terms of the detainers ICE issues. While it appears from a review of applicable federal law that § 287.7(d) is facially valid, this is not an issue within the discretion of the Sheriff's Department, as it is required to comply with the facially valid detainers.

V. Plaintiffs Have No Claim for Relief Under the California Constitution

A. California Constitutional Claim Analysis is the Same as Federal Law

Plaintiffs' California Constitutional claims are identical in substance to their federal counterparts. Conveniently, the search and seizure, equal protection, and due process clauses of the United States and California Constitutions are also the same, and employ the same legal analysis. (See *Sanchez v. County of San Diego*, 464 F.3d 916, 930 (9th Cir. 2006); *Los Angeles County Bar Assoc. v. Eu*, 979 F.2d 697, 705 (9th Cir. 1992), relying on *Payne v. Superior Court*, 17 Cal.3d 908 (1972).) Accordingly, County Defendants incorporate the discussions in Section IV.B, above, in response to Plaintiffs' claims based on the California Constitution: 10th Claim for Relief (Search and Seizure); 11th Claim for Relief (Equal Protection); and 12th Claim for Relief (Due Process).

B. Plaintiffs' California Constitutional Claims do Not Allow for Damages

Plaintiffs' claims for monetary damages under the California Constitution for violations of its search and seizure, equal protection and due process clauses should be dismissed, as the California Constitution precludes such claims. (See *Katzberg v. Regents of Univ. Of Cal.*, 29 Cal.4th 300 (2002.) In *Katzberg*, the California Supreme Court held generally that state constitutional provisions do not necessarily support a claim for monetary damages. Specifically, the Katzberg Court used the analysis provided in *Bivens v. Six Unknown Fed. Narcotics Agents* [403 U.S. 388 (1971)] to conclude that the California Constitution's due process clause (article I, section 7(a)) does not confer a right to monetary damages. (*Id.*, at 307-329.) California courts have also expressly rejected state constitutional damage claims for violation of the state equal protection clause. (See *Javor v. Taggart*, 98 Cal.App.4th 795, 807 (2002).)

The issue of whether the California Constitution creates a private claim for monetary damages with respect to search and seizure clause has not yet been definitively decided by California courts. However, it appears that every *post-Katzman* District Court to have considered the issue has determined that the California Constitution's search and seizure provisions likewise do not provide for a private right of action for monetary damages.[15] The analysis in the *Wigfall* case convincingly

[15] *See e.g., Weimer v. County of Kern*, 2006 WL 3834237 (E.D. Cal. 2006); *Wigfall v. City and County of S.F.*, 2007 WL 174434 (N.D. Cal. 2007); *Buzayan v. City of Davis Police Department*, 2007 WL 2288334 (E.D. Cal. 2007).

demonstrates that there is no evidence of any kind that California intended for its search and seizure clause to provide for a monetary damages claim, and that the *Katzberg* analysis "militates against fashioning a new tort remedy under article I, §13." (*Wigfall*, 2007 WL 174434, at p. 6.)

Plaintiffs Sonata-Vega and Medel each seek compensatory and punitive damages against County Defendants based on the California Constitution's search and seizure clause, article I, §13 (10th Claim for Relief), equal protection clause, article I, §7 (11th Claim for Relief), and due process clause, article I, §7 (12th Claim for Relief). As the California Constitution does not allow a private right of action for monetary damages for claims, they should be dismissed without leave to amend.

VI. PLAINTIFFS' STATUTORY CLAIMS ARE WITHOUT MERIT

A. Conspiracy Claims, 42 U.S.C. §§ 1983, 1985(3)

Plaintiffs' Ninth Claim for Relief for conspiracy is based on a theory that it is unlawful for federal and local law enforcement agencies to participate together in "targeting" criminal gang members who may also be illegal aliens. Plaintiffs have utterly failed to allege any facts demonstrating that their Constitutional rights have been violated, or a cognizable legal theory that could support a claim that Federal and County Defendants unlawfully conspired together.

In its previous Order, this Court identified the requirements a plaintiff must allege to state a conspiracy claim under § 1985(3): (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *(Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992).) The second element of a § 1985(3) claim requires that a plaintiff must allege that the deprivation of the right was "motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" (*Id.*) A conspiracy claim based on a violation of constitutional rights cannot be supported by merely conclusory allegations: "the plaintiff must state specific facts to support the existence of the claimed conspiracy." (*Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 929 (9th Cir. 2004).)

A conspiracy claim brought under § 1983 requires proof of "an agreement or meeting of the minds to violate constitutional rights," and an actual deprivation of constitutional rights. (*Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2001); *Hart v. Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006).)

Plaintiffs have failed to allege specific facts demonstrating an agreement between Federal and County Defendants to violate Plaintiffs' constitutional rights, and if so, the substance of the agreement. While Plaintiffs admit that Federal and County Defendants are engaged in routing out criminal gangs, they allege that this effort is intended to invidiously discriminate against them – though they have no specific facts to even suggest such a theory. Plaintiffs' allegation of a conspiracy to discriminate is therefore implausible: "[a]s between that 'obvious alternative explanation' for the arrests [citation omitted] and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." (See *Iqbal*, at 1951-2.)[16]

B. California Statutory Claims

Plaintiffs allege four state law claims for relief against County Defendants based on: (1) California Civil Code § 52.1 (13th Claim for Relief); (2) discrimination related to state funding of programs, Cal. Gov't Code § 11135 (14th Claim for Relief)[17]; (3) false imprisonment, Cal. Gov't Code § 815.2 (15th Claim for Relief); (4) intentional infliction of emotional distress, Cal. Gov't Code § 815.2 (16th Claim for Relief); and (5) negligence, Cal. Gov't Code § 815.2 (17th Claim for Relief). Plaintiffs' allegations and theories of liability under each of these causes of action are repetitions of those alleged in connection with Plaintiffs' § 1983 claims, and County Defendants incorporate their responses to those claims herein.

Further, these claims should be dismissed based on the immunities provided County Defendants under California Government Code Sections 820.2, 820.4, 820.6, 821.6, and/or 815.2, as follows:

[16]Individual County Defendants are also immune from liability for conspiracy based on their right to qualified immunity (see discussion in Section IV.A.2.c, above).

[17]Plaintiffs' claims under Cal. Gov't Code § 11135 are limited to equitable relief only. (Gov't Code § 11139; *Donovan v. Poway Unified Sch. Dist.* (2008) 167 Cal.App.4th 567, 593-95.)

a. Government Code § 820.2 provides,

> Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion was abused.

(Cal. Gov't Code §820.2.) Such immunity applies to "basic policy decisions" of government employees, but not their "operational decisions." (*Ohlsen v. County of San Joaquin*, 2008 WL 2331996, at p. 5 (E.D. Cal. 2008), citing *Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 1051 (2007).) The individual County Defendants are thus immune from liability for any claims resulting from the Sheriff's policy decisions to cooperate with ICE, or his decisions to take any other alleged law enforcement actions, as they are discretionary functions of the Sheriff.

b. Government Code § 820.4 provides,

> A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or imprisonment.

(Cal. Gov't Code §820.4.) The individual County Defendants are consequently immune from liability for any of Plaintiffs' claims based on their compliance with ICE directions, orders, or immigration detainers issued under § 287.7. However, this immunity does not apply to Plaintiffs' false imprisonment claim.

c. Government Code § 820.6 provides,

> If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid, or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable.

(Cal. Gov't Code §820.6.) The individual County Defendants are thus immune from liability for any alleged violation of rights Plaintiffs could possibly have suffered based on County Defendants' enforcement of § 287.7, or any other applicable state law or federal immigration law that could form a basis of Plaintiffs' claims.

d. Government Code § 821.6 provides,

> A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

(Cal. Gov't Code §821.6.) The immunity provided by § 821.6 has been interpreted broadly, so as to provide immunity from actions for intentional infliction of emotional distress, negligence, conspiracy,

and the Bane Act provision of California Civil Code Section 52.1. (*Walker,* 2005 WL 2437037 at p. 13.) In addition, "[s]ince investigation is an essential step to the institution of formal proceedings, it, too, is cloaked with immunity." (*Id.*, citing *Kemmerer v. County of Fresno,* 2– Cal.App.3d 1426, 1436-7 (1988).) Accordingly, as all of the individual County Defendants' actions with respect to Plaintiffs were either investigatory or taken pursuant to ICE requests in connection with civil immigration proceedings, they are immune from liability for the above-referenced claims for relief.

While Government Code § 821.6 may not provide immunity for claims relating to false imprisonment (see *Garcia v. City of Merced,* 637 F.Supp.2d 731, 755 (E.D. Cal. 2008)), California law provides a defense to false imprisonment claims if the public officials were acting under a facially valid process. (*Id.*, citing *Downey v. Allen,* 36 Cal.App.2d 269, 273 (1939).) As County Defendants were acting under facially valid immigration detainers issued under § 287.7, they have a complete defense to the claims for false imprisonment.

e. Government Code § 815.2 provides,

> Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act of omission of an employee of the public entity where the employee is immune from liability.

(Cal. Gov't Code §815.2.) In other words, if the individual County Defendants are not liable under Plaintiffs' claims for relief, then neither is the County of Sonoma.

As County Defendants are immune from liability (or have defenses) as to all of Plaintiffs' state law statutory claims, such claims should be dismissed with prejudice.

VIII. CONCLUSION

Based on the foregoing, County Defendants respectfully request that this Court dismiss the claims alleged against County Defendants in the Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b), subsections (1) and (6), and grant such other and further relief as the Court deems just and proper.

Dated: October 29, 2009

Stephen M. Woodside, County Counsel

By___s/s Anne L. Keck_____
Anne L. Keck, Deputy County Counsel
Attorneys for County Defendants

Facts by Person Report for Sheriff Cogbill
Second Amended Complaint
APPENDIX A

Case: CIRSC v. COS
Created: 9/24/09 3:02:39 PM ALK

Person: Sheriff Cogbill

Facts related to Sheriff Cogbill:

Fact Text	Source(s)
Sheriff Cogbill directs the operations, staffing and investigations conducted by MAGNET.	Complaint, ¶62
10/5/07 meeting between Sheriff Cogbill and CIRSC: Sheriff Cogbill confirmed that County Defendants arrest for civil immigration violations outside presence of ICE, hold persons in jail based on civil immigration violations alone w/o criminal basis, at request of ICE.	Complaint, ¶63
Sheriff Cogbill received memos re practice of detaining persons w/o criminal basis for arrest.	Complaint, ¶64
Sheriff Cogbill directs the practices of deputy sheriffs in the Detention Division, which manages the processing, care and management of arrestees held in the jail.	Complaint, ¶65
County of Sonoma and Sheriff Cogbill failed to train deputy sheriffs on the requirements imposed on ICE agents for warrantless arrests of persons suspected of civil immigration violations and the terms and limitations of 8 CFR §287.7.	Complaint, ¶66
County of Sonoma and Sheriff Cogbill failed to adequately train deputy sheriffs on the due process and equal protection rights of inmates held in the jail.	Complaint, ¶67
Sheriff Cogbill is liable in his personal capacity for actions of his subordinates and ICE agents acting in concert with sheriff deputies because he was intimately familiar with, approved of, and ratified the policies, practices and customs, and failed to take any remedial action to stop ongoing constitutional violations.	Complaint, ¶68
Unknown Roe and Doe defendants characterized Medel as a gang member based on his Latino appearance and descent, though he denied gang affiliation and had no indicia of gang membership. To the contrary, he was wearing a red t-shirt, associated with Nortenos. Yet, County of Sonoma, Sheriff Cogbill and Does place Medel in detention with Surenos (color blue).	Complaint, ¶113

Facts by Person Report for Deputy Salkin
Second Amended Complaint
Appendix B

Case: CIRSC v. COS
Created: 9/24/09 2:56:07 ALK

Person: Deputy Salkin

Facts related to Deputy Salkin:

Fact Text	Source(s)
Sanchez-Lopez was riding as a passenger in a car. A group of MAGNET officers stopped the car - the group included ICE Agent Huelga, ICE Agent Merendino, Deputy Salkin, and at least one CHP officer.	Complaint, ¶74
MAGNET, including Deputy Salkin, ICE Agent Merendino, and ICE Agent Huelga, stopped a car in which Sanchez-Lopez was riding as a passenger in Santa Rosa, near West 9th; they stopped the car in part due to the race and/or ethnicity of the occupants.	Complaint, ¶75
During car stop, and after interrogation and search of Sanchez-Lopez wallet, ICE Agent Merendino and ICE Agent Huelga directed Deputy Salkin to arrest Sanchez-Lopez and book him into custody at the jail based solely on his suspected immigration status. Neither ICE Agent Merendino nor ICE Agent Huelga made a determination that Sanchez-Lopez posed a flight risk within in the meaning of 8 USC §1357. At the time of Sanchez-Lopez arrest, ICE had not issued a Notice to Appear or an arrest warrant for Sanchez-Lopez.	Complaint, ¶81
After Sanchez-Lopez was arrested, Deputy Salkin placed him in handcuffs and walked him over to a Sheriff's patrol car. No one told Sanchez-Lopez that he was under arrest or way, and no one gave him Miranda rights. Sanchez-Lopez girlfriend asked why he was being taken, and several officers including Deputy Salkin responded "he knows why" in a laughing manner.	Complaint, ¶82
After Sanchez-Lopez was arrested, Deputy Salkin took physical custody of him and drove him to jail. ICE Agent Merendino accompanied Deputy Salkin and Sanchez-Lopez in Deputy Salkin 's patrol car. Sanchez-Lopez arrived at the Sonoma County jail at about 6:00pm (via Deputy Salkin 's patrol car).	Complaint, ¶83
Deputy Salkin and ICE Agent Merendino characterized Sanchez-Lopez as a gang member based on his Latino appearance and descent (though he repeatedly denied any gang affiliations); he was housed with Sureno inmates in the jail.	Complaint, ¶84
In Sanchez-Lopez removal proceedings, immigration judge suppresses evidence gained during his search, seizure and interrogations in the field by ICE and Deputy Salkin, and the judge terminates the proceedings. Board of Immigration Appeals denies ICE's appeal of immigration judge's decision terminating Sanchez-Lopez's removal proceedings based on the motion to suppress. No further appeal.	Complaint, ¶89
Sonato-Vega was a passenger in a car driven by his fiancee. She parked the car and they got out at a bakery in Santa Rosa, intending to purchase a cake. They were ordered to stop by two MAGNET officers, Deputy Salkin and a Doe Defendant, who stopped Sonato-Vega because he appeared to be of Latino descent.	Complaint, ¶92
Deputy Salkin ordered Sonato-Vega to stop w/o reasonable suspicion to believe that he was engaged in criminal activity or posed a threat of danger. Sonato-Vega continued walking, and Deputy Salkin repeated "Stop and put your hands on your head." Sonato-Vega complied. Deputy Salkin walked him over to the car, asked if he had any weapons, Sonato-Vega replied no, but Deputy Salkin ordered Sonato-Vega to empty his pockets. Deputy Salkin searched through the contents and did a pat-down search of his body. Deputy Salkin asked Sonato-Vega to spread his legs for the pat-down search, and Sonato-Vega complied; but Deputy Salkin kicked Sonato-Vega's legs apart further, pulled his hands back, and caused him pain.	Complaint, ¶93
Deputy Salkin questioned Sonato-Vega about his immigration status, tattoos, and whether he was a gang member. Sonato-Vega said he was not a gang member, and would not answer questions re his immigration status. Deputy Salkin threatened that if Sonato-Vega did not cooperation, they would arrest his fiancee.	Complaint, ¶94

After Deputy Salkin interrogated and searched Sonato-Vega, he searched the car w/o consent. Deputy Salkin also questioned Sonato-Vega about the contents of the car. The entire detention lasted between 10-20 minutes, and then Deputy Salkin told Sonato-Vega that he and his fiancee were free to go.	Complaint, ¶95
Neither Deputy Salkin nor the Doe Defendant issued any citation to Sonato-Vega or his fiancee during the stop.	Complaint, ¶96
Deputy Salkin and ICE Agent Huelga approached Sonato-Vega at his place of employment, a gas station in Rohnert Park. W/o reasonable suspicion that Sonato-Vega was engaged in criminal activity or was an illegal alien, Deputy Salkin and ICE Agent Huelga detained Sonato-Vega and interrogated him about his immigration status and family.	Complaint, ¶97
When Deputy Salkin and ICE Agent Huelga arrived at the gas station, they ordered Sonato-Vega to "stop" and told him he was under arrest. They made him empty his pockets and handcuffed him. Deputy Salkin subjected Sonato-Vega to a pat-down search, searched his wallet, and asked him about his immigration status and the status of his parents. Sonato-Vega refused to answer questions re his immigration status.	Complaint, ¶98
Deputy Salkin and ICE Agent Huelga arrested Sonato-Vega and booked him into the jail based on suspected civil immigration violations alone. The arrest was made w/o probable cause to believe that Sonato-Vega was an illegal alien and w/o determining that he was likely to escape before an arrest warrant could be obtained. ICE Agent Huelga and Deputy Salkin subjected Sonato-Vega to the stop, interrogation, search and arrest because of his Latino appearance and Spanish surname.	Complaint, ¶100
Deputy Salkin, ICE Agent Huelga, and Doe defendants characterized Sonato-Vega as a gang member based on his Latino appearance and descent, despite lack of reliable indicia of gang membership.	Complaint, ¶102