UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERTO MUNIZ, et al.,	)	CASE NO.: 3:09-CV-02865
	)	
Plaintiffs,	)	JUDGE JACK ZOUHARY
	)	
vs.	)	**DEFENDANTS VILLAGE OF ATTICA AND JEFFREY BRIGGS' RENEWED MOTION TO DISMISS**
	)	
RANDY L. GALLEGOS, et al.,	)	
	)	
Defendants.	)	

Defendants Village of Attica and former Police Chief Jeffrey Briggs ("Chief Briggs") (collectively referred to as the "Attica Defendants") respectfully request that this Court dismiss Plaintiffs' First Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as Plaintiffs have failed to state a claim upon which relief can be granted. A Memorandum in Support of this Motion Follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND STATEMENT OF FACTS

In the First Amended Complaint, Plaintiffs have filed suit against the Village of Attica, former Attica Police Chief Jeffrey Briggs in his individual capacity and unidentified police officers employed by the Attica Police Department. Plaintiffs now allege five claims against the Attica Defendants: 1) a violation of the Fourth Amendment prohibition against unreasonable searches and seizures, 2) a violation of the Fourteenth Amendment right to equal protection, 3) a violation of the Fourteenth Amendment right due process, 4) a violation of 42 U.S.C. §1985(3) and 5) a violation of 42 U.S.C. §1986. Plaintiffs have failed to allege facts sufficient to maintain any of these claims, and, as a result, this Complaint must be dismissed.

The following facts are alleged in Plaintiffs' Complaint and, for the purposes of this motion only, are presumed to be true:

On September 27, 2009 an unidentified officer of the Attica Police Department conducted a routine traffic stop after observing a pick-up truck being driven without proper illumination of the rear license plate. ECF 1, ¶87. Upon conducting the traffic stop, the officer learned that the pick-up truck was occupied by the driver, Plaintiff Roberto Muniz, and five other individuals. *Id.* During the traffic stop, the Attica police officer asked the occupants of the pickup truck about their immigration status and asked them to produce identification, namely their immigration papers. *Id.*, ¶88. During the course of this traffic stop, the Attica Police Officer placed two of the individuals, Emeterio Nieto-Medina and Luis Enrique Muniz-Muniz in an Attica Police Department vehicle. *Id.* at ¶90 and ¶99. The complaint is absolutely silent as to the

reason that these individuals were placed in the police vehicle, or what happened after these individuals were placed in the vehicle.

The Complaint alleges that the Attica Defendants have adopted a policy, practice, and custom of stopping, detaining, questioning, and /or searching Hispanics and questioning them about their immigration status outside the presence of Border Patrol Agents. *Id.* at ¶55 and ¶57. The Complaint further alleges that police officers from the Attica Police Department participated in seminars, trainings or otherwise communicated with the Sandusky Border Patrol Station and its agents. *Id.* at ¶61. The Complaint does not allege that anyone was taken into custody as a result of this traffic stop.

II. LAW AND ARGUMENT

A. Standard of Review

A claim survives a motion to dismiss under Fed. R. Civ. P. 12(b)(6) only if it "contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). The plausibility standard is "not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* A complaint's factual allegations must "be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007).

While the court must construe the complaint in the light most favorable to plaintiff, *Inge v. Rock Fin. Corp.*, 281 F. 3d 613, 619 (6th Cir., 2002), a complaint is insufficient if it "tenders naked assertions devoid of further factual enhancement. *Iqbal*, 129 S. Ct. at 1949, *citing Twombly*, 550 U.S. at 557). "Threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949. Indeed, Plaintiffs must provide more

than labels and conclusions, because a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

B. Plaintiffs' have failed to allege a Fourth Amendment violation.

1. The Plaintiffs' Fourth Amendment rights were not violated by the initial traffic stop.

The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." *Smoak v. Hall*, 460 F. 3d 768, 778 (6th Cir., 2006). Police officers are permitted to conduct a limited type of seizure- the "investigatory stop"- in the absence of probable cause. *Id.*, *citing Terry v. Ohio*, 392 U.S. 1 (1968). Reasonable suspicion requires more than just a "mere hunch", but is satisfied by a likelihood of criminal activity less than probable cause, and falls considerably short of the satisfying the preponderance of the evidence standard. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). An officer may conduct a *Terry* stop if he possesses "a particularized and objective basis for suspecting the particular person based on specific and articulable facts." *Smoak*, 460 F. 3d at 778.

Pursuant to Section 4513.05 of the Ohio Revised Code, "Either a tail light or a separate light shall be so constructed and placed as to illuminate with a white light the rear registration plate, when such registration plate is required, and render it legible from a distance of fifty feet to the rear." Ohio law is well settled that a possible violation of R.C. §4513.05 warrants an investigatory stop of the vehicle. *State v. Numbers*, 3rd App. No. 1-07-46, 2008-Ohio-513 (Ohio App. 3. Dist., Feb. 11, 2008). *See also State v. Pirpich*, 12 App. No. CA2006-07-083, 2007-Ohio-6745 (Ohio App. 12 Dist., 2006); *State v. Weinheimer*, 12 App. No. CA2003-04-044, 2004-Ohio-801 (Ohio App. 12 Dist., Feb. 23, 2004). The validity of such a stop is not implicated

if, after the stop is conducted, the officer does not verify the faulty license plate light. *State v. Strawder*, 7th App. No. 04 CA 800, 2004-Ohio-6813 (Ohio App. 7 Dist., Dec. 9, 2004).

Plaintiffs have alleged that the Attica Police Officer conducted the traffic stop because the light on the rear license plate was "too dim." ECF 1, ¶65. This allegation is consistent with a determination that the traffic stop was conducted based upon the officer's reasonable suspicion that the vehicle was being driven in violation of R.C. §4513.05. Notably, although baldly asserting that this reason was "pretext," Plaintiffs did not allege any facts that would dispute the officer's account that this light was too dim and could not be seen from a distance of 50 feet away. Presumably, if the Plaintiffs' license plate light was in compliance with the law, they would have included such an important fact in their Complaint. Plaintiffs do not allege that the officer did not have reasonable suspicion to conduct the initial traffic stop. As a result, the only plausible conclusion that can be arrived at is that the initial traffic stop was consistent with the Fourth Amendment.

2. Plaintiffs' Fourth Amendment rights were not violated by the officer's subsequent questioning related to the Plaintiffs' immigration status.

The United States Supreme Court has repeatedly held that "mere police questioning does not constitute a seizure." *Muehler v. Mena*, 544 U.S. 93, 101 (2005), *citing Florida v. Bostick*, 501 U.S. 429, 434 (1991), *INS v. Delgado*, 466 U.S. 210, 212 (1984). Indeed, "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification, and request consent to search his or her luggage." *Id.* In *Muehler*, the Supreme Court held that there were no Fourth Amendment violations when police began questioning the plaintiff about her immigration status after she was lawfully seized in relation to a separate criminal manner. *Id.*

Other Circuits have routinely held that the Fourth Amendment is not implicated when officers question lawfully seized individuals about their immigration status, even when that questioning extends the length of the detention for a brief time. *See Estrada v. State of Rhode Island*, 594 F. 3d 56 (1st Cir., 2010); *United States v. Aispuro-Medina*, 256 Fed. Appx. 215 (10th Cir., 2007); *U.S. v. Soriano-Jarquin*, 492 F. 3d 495 (4th Cir., 2007).

The crux of the factual allegations against the Attica Police Department is that the police officer asked the individuals for identification and about their immigration status after the traffic stop was initiated. As *Muehler* and its progeny have demonstrated, this questioning simply does not constitute a seizure, and does not constitute a violation of the Fourth Amendment.

As Plaintiffs have not alleged any facts to support a finding that this conduct violated the constitution, their complaint must fail.

3. Plaintiffs have not alleged any facts that would make it plausible for the Court to find that the placement of the two individuals in the police cruiser violated the Fourth Amendment.

Plaintiffs allege that two individuals were placed in the back of the police cruiser at some point during this traffic stop. ECF 1, ¶90, 99. This vague reference can only be intended to raise an inference that there was something wrongful about this detention. However, without concrete factual allegations, this allusion to wrongful conduct cannot meet the plausibility standards required by *Iqbal* and *Twombley*.

These vague allusions to the Plaintiffs being placed in the back of the police cruiser are actually similar to the allegations made in *Iqbal*. In that case, the plaintiff alleged that two high ranking officials knew of, condoned and willfully and maliciously agreed to subject the plaintiff to harsh conditions of confinement, solely on account of his religion, race or national origin following the 9/11 attacks on the World Trade Center and the Pentagon. The *Iqbal* court held

that these allegations were simply not plausible in light of more likely explanations for the policies, namely that the policies were lawful and justified by a non-discriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.

Here, although it is potentially possible that the placement of these two individuals in the back of the police cruiser violated the Fourth Amendment, absent any other factual allegations, the more likely explanation is that this conduct was lawful. This is particularly true, given the fact that the Complaint fails to finish the story and fails to state what happened after the individuals were placed in the back of the cruiser. Without any additional facts, the only plausible conclusion this court can arrive at is that the placement of the two Plaintiffs in the back of the car was in compliance with the Fourth Amendment.

4. Plaintiffs' claim that the Fourth Amendment was violated because the Attica Defendants were enforcing civil provisions of the federal immigration law is unfounded.

a. Plaintiffs have not alleged any facts that would support their conclusion that the Attica Defendants were enforcing civil provisions of the federal immigration law.

The Attica Defendants dispute the Plaintiffs' contention that local law enforcement officials lack the authority to enforce the civil provisions of the federal immigration laws. However, even assuming *arguendo*, that this assertion is correct, Plaintiffs have not alleged any facts that would support their assertion that the Attica Defendants were attempting to enforce civil provisions of the immigration laws.

Plaintiffs have not alleged that any of the six individuals in Plaintiff Muniz's vehicle were arrested or detained for violations of any civil provisions of federal immigration laws.

Plaintiffs clearly hope that the Court will infer that the two individuals placed in the back of the police cruiser were placed there for violations of civil immigration laws. However, if this truly were the case, those specific facts would have been alleged by Plaintiffs, instead of left unanswered.

Instead, the facts that are alleged indicate that the Attica Police officer simply asked the occupants of the vehicle for their identification. As previously discussed, mere questioning about immigrations status during an otherwise lawful seizure is constitutional. *Muehler*, 544 U.S. at 101 (2005). This is true even if the questioning extends the duration of the stop for a brief time. *See Estrada v. State of Rhode Island*, 594 F. 3d 56 (1st Cir., 2010); *United States v. Aispuro-Medina*, 256 Fed. Appx. 215 (10th Cir., 2007); *U.S. v. Soriano-Jarquin*, 492 F. 3d 495 (4th Cir., 2007).

As a result, Plaintiffs have failed to allege facts that would support a finding that the Attica police officer was attempting to enforce civil provisions of the immigration code.

b. The factual allegations do support a finding that the Attica Defendants violated the Plaintiffs' Fourth Amendment rights by enforcing a criminal provision of the federal immigration law.

There is no question that local law enforcement officers have the ability to enforce criminal immigration laws. Indeed, the cases cited by the Plaintiffs in their Complaint expressly recognize this authority. *See Gonzales v. City of Peoria*, 722 F. 2d 468, 472-475 (9th Cir., 1983).

The facts alleged in the Complaint state that the Attica Police Officer asked each of the occupants of the Plaintiffs' truck for their "papers" or "documents," referring to immigration documents. *See* Complaint ¶88, 91, 93, 95, 97, 100. Under federal law, all aliens eighteen years of age and over are required to carry and have in his possession any certificate of alien

registration or alien registration receipt card issued to him. 8 U.S.C. §1304 (e). It is a misdemeanor criminal offense to fail to comply with the provisions of 8 U.S.C. §1304(e).

While the Attica Defendants maintain the officer was simply questioning these individuals as permitted under *Muehler,* it is readily apparent that if the Attica police officer were enforcing any immigration laws, the law that was being enforced was a criminal law. Thus, despite Plaintiffs' assertions that the Attica police officer was only enforcing civil provisions of the immigration code, this is clearly not the case. These individuals, who in all probability are aliens as the Complaint does not allege that they are United States citizens, could have been committing a criminal violation simply by virtue of not possessing their immigration documentation. There can be no question that the Attica police officer had the authority to enforce the criminal provisions of the immigration code, such as 8 U.S.C. §1304(e). As such, Plaintiffs' claim that the Attica Police Officer violated the Plaintiffs' Fourth Amendment rights by enforcing the civil provisions of the immigration code is meritless.

c. Plaintiffs' argument that the Attica Defendants lack the authority to enforce the civil provisions of the immigration code is incorrect.

The Tenth Circuit has held that state and local law enforcement officers have the authority to enforce federal immigration laws, without making a distinction between criminal provisions and civil provisions. *See U.S. v. Santana-Garcia,* 264 F. 3d 1188 (10th Cir., 2001); *U.S. v. Vasquez-Alvarez,* 176 F. 3d 1294 (10th Cir., 1999); *U.S. v. Salinas-Calderon,* 728 F. 2d 1298 (10th Cir., 1984).

In *Santana-Garcia,* the defendant was arrested by a local law enforcement officer for violations of civil provisions of the federal immigration code. Following the arrest, the officer conducted a routine search of the defendant's vehicle and discovered narcotics. The defendant

was then charged with federal drug offenses. At the criminal trial, the defendant attempted to suppress the evidence of the drugs, claiming that the officer did not have authority to detain him for suspected violations of the federal immigration law. The Tenth Circuit rejected that argument, stating "state and local police officers had implicit authority within their respective jurisdictions to investigate and make arrests for violations of federal law, including immigration law." *Id.* at 1194.

Similarly, in *Vasquez-Alvarez*, the Tenth Circuit held that a local law enforcement officer had the authority to arrest an individual for "illegal presence" and that his arrest did not violate the Fourth Amendment. 176 F. 3d 1294. In this case, the officer was investigating a potential drug deal. He approached the defendant, who admitted that he was an illegal alien. Upon learning that the defendant was in the country illegally, i.e. illegally present in violation of the civil provisions of 8 U.S.C. §1325, the officer placed the defendant under arrest. After booking, it was learned that the defendant had previously been deported or left the United States for prior felony violations, and he was charged and convicted of illegally re-entering the United States, a felony violation of the federal immigration law. The defendant challenged his conviction, arguing that the officer did not have the authority to arrest him for "illegal presence." The Tenth Circuit rejected this argument, noting that the local law enforcement agents have the authority to make these arrests. Furthermore, the Tenth Circuit noted that recent statutory provisions "evince a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." *Id.* at 1299.

While Plaintiffs are correct that the Ninth Circuit held in 1983 that local law enforcement agencies have the authority to enforce the criminal provisions of the immigration code, but not the civil provisions, *Gonzales v. City of Peoria*, 722 F. 2d 468, 472 (9th Cir., 1983), the more

recent case law from the Tenth Circuit demonstrates the general movement in the United States towards expanding the role of state and local law enforcement in enforcing federal immigration laws. It is important to note that *Gonzales* is not binding within the Sixth Circuit.

Plaintiffs have failed to allege any facts to support their claim that the Attica Defendants were engaged in enforcing only the civil provisions of the federal immigration code. However, even if the Attica Defendants were engaged in enforcing these civil provisions, the Plaintiffs' Fourth Amendment rights would not have been violated by this action. As a result, Plaintiffs' claim must fail and the Attica Defendants are entitled to judgment as a matter of law.

C. Plaintiffs have failed to allege facts sufficient to support their claim that their right to equal protection were violated.

To prevail on a claim of a violation of the Fourteenth Amendment right to equal protection, the Plaintiffs must establish that the challenged police action "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Bennett v. City of Eastpoint*, 410 F. 3d 810 (6th Cir., 2005), *citing Wayte v. United States,* 470 U.S. 598, 608 (1985). To show discriminatory effect, the Plaintiffs must demonstrate that they were treated differently from similarly situated individuals. *Singfield v. Akron Metropolitan Housing Authority*, 389 F. 3d 555, 566 (6th Cir., 2004). To show discriminatory purpose, the plaintiffs must establish that an official chose to engage in the action because of, not merely in spite of, its adverse effects upon an identifiable group. *Bennett*, 410 F. 3d at 818 (6th Cir., 2005). There is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary; the standard is a demanding one. *Harajli v. Huron Tp.*, 365 F. 3d 501, 508 (6th Cir., 2004), *citing Gardenshire v. Schubert*, 205 F. 3d 303 (6th Cir., 2000).

Plaintiffs have not made this showing. Plaintiffs have not alleged discriminatory effect, as they have not alleged that individuals outside of the Plaintiffs protected class are not stopped for violations of R.C. §4513.05. Furthermore, the Supreme Court has held that there is nothing unconstitutional about questioning an individual regarding their immigration status during the course of a routine traffic stop. *See Muehler*, 544 U.S at 101. As Plaintiffs have failed to demonstrate that they were treated differently than similarly situated individuals, they have failed to establish a violation of their equal protection rights and cannot recover under §1983.

Similarly, Plaintiffs have failed to establish discriminatory purpose. As the Sixth Circuit has recognized, there is a strong presumption that officials acted properly, and, in this case, there is no clear evidence to the contrary. The police officer involved in this incident has an obligation to enforce the laws. This obligation extends to the enforcement of federal immigration laws.

Based upon *Muehler*, it is clear that the police officer involved in this incident was not required to have reasonable suspicion to ask the Plaintiffs about their immigration status during a lawful traffic stop. However, he did have reasonable suspicion to do so, and this reasonable suspicion makes it impossible for the Plaintiffs to demonstrate that he acted with a discriminatory purpose. This reasonable suspicion was based, not only upon the appearance of the Plaintiffs, but on the number of individuals in the car, the location of the traffic stop, and the type of vehicle that was involved in this incident. ECF 21, ¶15-20, 87.

In this manner, this case is very much analogous to *Hartman v. Moore*, 547 U.S. 250, 266 (2006). In *Hartman*, the plaintiff filed suit alleging that he was being prosecuted in retaliation for exercising his First Amendment rights. The Defendants filed a motion for summary judgment, arguing that they were entitled to qualified immunity because the underlying criminal charges were supported by probable cause. The district court denied the motion, and the appellate court

affirmed. However, the Supreme Court reversed and held that the plaintiff was required to plead and prove an absence of probable cause in order to state his claim. Lack of probable cause is necessary to establish causation, as there can be no injury if the person would have been prosecuted even absent the retaliatory animus. *Id.* at 266.

The same rule should apply in this case; that is to say that if the officer acted with reasonable suspicion, this suspicion should conclusively determine that he was not acting with a discriminatory purpose. Indeed, upon achieving reasonable suspicion, the police officer was required to act and investigate to determine if any criminal conduct was occurring.

The only fact that the Plaintiffs allege to support their contention that the officer acted inappropriately is that he asked the Plaintiffs about their immigration status based upon their Hispanic appearance. However, the Supreme Court has already stated that appearance is an appropriate consideration in determining whether an officer had reasonable suspicion to conduct a stop to enforce immigration law violation. In *United States v. Brignoni-Ponce*, 422 U.S. 873,884 (1975), the Court held "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor in establishing reasonable suspicion, but is not enough standing alone to justify stopping all Mexican-Americans to ask if they are aliens." As this stop occurred at night for a reason unrelated to immigration status there is no basis to infer that the stop was predicated on Hispanic appearance.

Other relevant factors include: 1) characteristics of the area where the vehicle is found, 2) its proximity to the border, 3) usual traffic patterns on the road, 4) previous experience with alien traffic on the road, 5) recent information about specific illegal border crossings there, 6) the driver's behavior, such as attempting to evade officers, 7) characteristics of the vehicle itself, and 8) the appearance of persons in the vehicle. *U.S. v. Singh*, 415 F. 3d 288, 294-295 (2nd Cir.,2005),

citing Brignoni-Ponce, 422 U.S. at 884-885. Additionally, the fact that group members speak to each other almost exclusively in Spanish and do not understand English, *U.S. v. Manzo-Jurado*, 457 F. 3d 928, 937-938 (9th Cir., 2006), and the number of passengers in the vehicle. *U.S. v. Zapata-Ibarra*, 212 F. 3d 877, 886 (5th Cir., 2000), are relevant to the reasonable suspicion inquiry.

In this case, Plaintiffs have alleged facts that support the conclusion that the officer was acting with reasonable suspicion that the Plaintiffs were illegal aliens, negating their claim for an equal protection violation. Plaintiffs have alleged that they appear to be Hispanic and that there were six individuals riding in a pick-up truck and camper. The stop occurred in Seneca County, Ohio, a region in Ohio where migrant farm workers, including illegal aliens, are employed with a higher frequency than other parts of the state. Indeed, the Plaintiffs involved in the traffic stop in Attica were all migrant farm workers temporarily residing in nearby Willard, Ohio. Notably, the Complaint never refers to any of these plaintiffs as U.S. citizens. Had these plaintiffs been legal, United States citizens, that information would have been included in the complaint. As such, the police officer's reasonable suspicions were confirmed.

Plaintiffs simply cannot make a claim for equal protection in this situation. Although not required to under the Fourth Amendment, the police officer alleged to be involved in this incident had reasonable suspicion that a crime was being committed, and asked questions related to investigating that crime. It would be impractical for this Court to find a violation of the equal protection clause when an officer reasonably includes the fact that the individuals appear to have Hispanic ancestry in his determination that he has reasonable suspicion to believe that the individuals are in the country illegally. Under this circumstance, the officer's clear purpose is to enforce the law, not to discriminate.

As Plaintiffs have not alleged facts necessary to support their claims, the Plaintiffs' Complaint should be dismissed.

D. Plaintiffs have failed to allege sufficient facts to support their claim that their right to procedural due process was violated.

Plaintiffs' claims that the Attica Defendants have violated their rights to procedural due process, as protected by the Fourteenth Amendment also fail. Plaintiffs' assert two actions by the Attica Defendants that they believe violate their right to procedural due process: 1) restraining and interrogating individuals without probable cause and 2) aiding and abetting Defendant Border Patrol Agents in denying procedural protections due to civil immigration arrestees who are arrested with a warrant. Both of these claims fail.

1. The Fourth Amendment, and not the due process clause, protects the right to be free from restraint and interrogation absent probable cause.

The Due Process Clause of the Fourteenth Amendment states that no state shall "deprive any person of life, liberty or property without due process of law." *Radvansky v. City of Olmsted Falls*, 395 F. 3d 391, 313 (6th Cir., 2005). However, it is the Fourth Amendment that was "tailored explicitly for the criminal justice system, and its balance between individual and public interest always has been thought to define the 'process that is due' for seizures of persons or property in criminal cases." *Id. citing Gerstein v. Pugh*, 420 U.S. 103, 125, n. 27 (1975). The *Radvansky* court concluded that "the Due Process Clause of the Fourteenth Amendment does not require any additional procedures beyond those mandated by the Fourth Amendment."

This brief has already demonstrated that the Attica Defendants did not violate the Plaintiffs' Fourth Amendment rights. As the Fourth Amendment establishes the procedural protections that were due to the Plaintiffs, and the Attica Defendants complied with the Fourth Amendment's requirements, the Attica Defendants are entitled to judgment as a matter of law.

2. Plaintiffs have not alleged any facts that would support their contention that the Attica Defendants have aided and abetted the Defendant Border Control Agents in denying procedural protections due to civil immigration arrestees.

Plaintiffs' second claim related to the Due Process Clause must also fail. Plaintiffs have failed to allege any facts that would support this assertion. Indeed, Plaintiffs' complaint has not alleged that any of the Plaintiffs in Mr. Muniz's truck were arrested for civil violations of the federal immigration code. As none of these individuals were arrestees, there can be no doubt that they were not entitled, nor were they denied, the procedural protections due to civil immigrations arrestees. Furthermore, the only allegation linking the Attica Defendants to the Defendant Border Control Agents is the allegation that the Sandusky Border Patrol Station and its officers have held seminars, trainings, or otherwise communicated with numerous local law enforcement agencies, including the Attica Police Department. This allegation is a far cry from alleging facts demonstrating that the Attica Defendants "aided and abetted" the Defendant Border Patrol Agents.

As Plaintiffs have failed to allege specific facts to support their conclusory allegations, the Attica Defendants are entitled to judgment as a matter of law.

E. Chief Briggs is entitled to qualified immunity.

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982). Qualified immunity is an immunity from suit rather than a mere defense to liability. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009), *citing Mitchell v. Forsythe*, 472 U.S. 511 (1985). Whether an official protected by qualified immunity may be held

personally liable for an allegedly unlawful action generally turns on the "objective legal reasonableness of the action." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

The Supreme Court mandated a two-step sequence for resolving government officials' qualified immunity claims in *Saucier v. Katz*, 533 U.S. 194 (2001). Under this test, courts were instructed to first decide whether the facts that the plaintiff has shown constitute a violation of a constitutional right. Second, the courts were instructed to decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Id.* Recently, the Supreme Court announced that judges for the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. *Pearson,* 129 S. Ct. at 818. For the purposes of this memorandum, the two prongs will be addressed in their traditional order.

1. Defendant Chief Briggs did not commit any constitutional violations.

This brief has already established that the Plaintiffs have failed to allege facts that would make it plausible for the Court to find that the Plaintiffs' rights have been violated. However, even if the Plaintiffs had been able to demonstrate that the individual Attica police officer did commit constitutional violations (which the Attica Defendants firmly assert he did not), the Plaintiffs have failed to allege any facts that would support a finding that former Chief Briggs should be held personally liable in this case.

The Sixth Circuit has recognized that "Because §1983 liability cannot be imposed under a theory of *respondeat superior*, proof of personal involvement is required for a supervisor to incur personal liability." *Grinter v. Knight*, 532 F. 3d 567, 575 (6th Cir., 2008), *citing Miller v. Calhoun County*, 408 F. 3d 803, 817 n. 3 (6th Cir., 2005). At a minimum, a §1983 plaintiff must

show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate. *Id., citing Bellamy v. Bradley,* 729 F. 2d 416, 421 (6th Cir., 1984).

Plaintiffs have failed to alleged facts to make this showing in their Complaint. Indeed, there are no allegations of any personal wrongdoing on the part of Chief Briggs. There are no allegations that Chief Briggs had any idea that the Plaintiffs were Hispanic, had been detained for having a their rear license plate improperly illuminated or that he authorized, ratified or acquiesced to the officer's action. As a result, Chief Briggs was not personally involved in any constitutional violations, and is entitled to qualified immunity and judgment as a matter of law.

2. Any constitutional violations committed by Chief Briggs were not clearly established at the time of the traffic stop in September, 2009.

As there are no allegations of any personal wrongdoing by Chief Briggs, it is readily apparent that he did not commit any constitutional violations of rights that were clearly established in September, 2009.

However, even assuming that he was aware that a police officer stopped the Plaintiffs because their rear license plate was not properly illuminated and then questioned them about their immigration status, it was not clearly established in September, 2009 that this type of conduct violated the Plaintiffs' constitutional rights.

Indeed, less than five years earlier, the United States Supreme Court had announced that "mere police questioning does not constitute a seizure." *Muehler v. Mena*, 544 U.S. 93, 101 (2005), *citing Florida v. Bostick*, 501 U.S. 429, 434 (1991), *INS v. Delgado*, 466 U.S. 210, 212 (1984), and that it was constitutional for an officer to make inquiries related to immigration status during the course of an otherwise lawful seizure. As a result, assuming 1) that the police

officer committed a constitutional violation by inquiring about the Plaintiffs' immigration status and 2) that Chief Briggs authorized, approved or knowingly acquiesced in the officer's conduct, Chief Briggs would still be entitled to qualified immunity because it was not clearly established that that type of conduct was unconstitutional. As a result, Chief Briggs is entitled to judgment as a matter of law.

F. Plaintiffs have failed to allege facts sufficient to support their *Monell* claim.

Plaintiffs' claims against the Village of Attica must fail, as Plaintiffs have failed to allege facts sufficient to support their claims against the Village.

1. Absent factual allegations of a constitutional violation by an employee of a municipality, the municipality cannot be held liable.

Claims against entities, such as the Village of Attica, challenging the entity's policies, procedures and training practices cannot stand if the plaintiff's constitutional rights were not violated. *Wilson v. Morgan*, 477 F. 3d 326, 340 (6th Cir., 2007). Indeed, the United States Supreme Court has held that "if a person suffered no constitutional injury … the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

This brief has clearly demonstrated that Plaintiff's constitutional rights were not violated. As a result, the Village of Attica cannot be held liable for its allegedly unconstitutional policies and patterns.

2. Plaintiffs have failed to allege facts sufficient to warrant a finding that Attica has engaged in a pattern or practice of unconstitutional behavior.

A municipality cannot be held liable *solely* because it employs a tortfeasor. *Monell v.Dept. of Social Services of City of New York*, 436 U.S. 658, 691 (1978). Since *Monell*, the Sixth Circuit has recognized that an entity may not be held liable under § 1983 based upon a

respondeat superior theory simply for having an employee or employees who may commit a wrong. *Biver v. Saginaw Tp. Community Schools*, 878 F. 2d 1436, 1989 WL 74654 (6th Cir., 1989). Instead, a plaintiff may only hold a government entity liable under § 1983 where its official policy or custom actually serves to deprive an individual of his or her constitutional rights. *Gregory v. City of Louisville*, 444 F. 3d 725, 752 (6th Cir., 2006).

The plaintiff has the burden of proof for establishing the existence of an unconstitutional policy and demonstrating a causal link between the policy and the alleged injuries at issue. *Bennett v. City of Eastpointe*, 410 F. 3d 810, 819 (6th Cir., 2005). To meet this burden, Plaintiffs must show that the official policy or custom was the moving force of the constitutional violation. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). Where the policy relied upon is not itself unconstitutional, considerably more proof than a single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the policy and the constitutional deprivation. *Mann v. Helmig*, 289 Fed Appx. 845, 852 (6th Cir., 2008), c*iting Oklahoma City v. Tuttle*, 471 U.S 808, (1985).

Plaintiffs have failed to meet this burden. Indeed, they have alleged only one incident where an Attica police officer questioned individual about their immigration status during a routine traffic stop. Although this conduct does not violate the constitution, even if it did, this single incident is not sufficient to state a viable claim against the municipality. As a result, Plaintiffs' Complaint must be dismissed.

G. Plaintiffs have failed to allege facts to support their claims for violations for 42 U.S.C. §1985(3).

To prevail on a §1985(3) cause of action for conspiracy, the Plaintiffs must prove four elements: 1) the existence of a conspiracy, 2) the purpose of the conspiracy was to deprive any

person or class of persons the equal protection or equal privilege and immunities of the law, 3) an act in furtherance of the conspiracy, and 4) injury or deprivation of a federally protected right. *Royal Oak Entertainment, LLC v. City of Royal Oak, MI,* 205 Fed. Appx 389, 399 (6th Cir.,2006). Courts rightfully view conspiracy claims against public officials with suspicion and disfavor. *Fisher v. City of Detroit,* 1993 WL 344261 (6th Cir., 1993). The Sixth Circuit has established a "strict" pleading requirement for civil conspiracy claims. *Center for Bio-Ethical Reform, Inc. v. City of Springboro,* 477 F. 3d 807 (6th Cir., 2007). As a result, it is "well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim." *Gutierrez v. Lynch,* 826 F. 2d 1534, 1538 (6th Cir., 1987). Plaintiffs quite simply have failed to allege sufficient facts to support these claims.

1. Plaintiffs have failed to allege facts to demonstrate injury or deprivation of a federal constitutional right.

This brief has already clearly established that the Plaintiffs have failed to allege facts to support a finding that the Attica Defendants violated the Plaintiffs' right to be free from unreasonable search and seizure as protected by the Fourth Amendment, the Plaintiffs' right to equal protection under the Fourteenth Amendment and the Plaintiffs' right to due process under the Fourteenth Amendment. As Plaintiffs have failed to demonstrate any constitutional violations, their claims under §1985 necessarily fail. *See White v. Rockafellow,* 181 F. 3d 106 (6th Cir., 1999), *Haverstick Enters, Inc. v. Financial Fed. Credit, Inc.*, 32 F. 3d 989, 994 (6th Cir., 1994), *Newell v. Brown*, 981 F.2d 880, 886 (1992).

2. Plaintiffs have failed to allege facts that make it plausible that they are entitled to relief.

Plaintiffs have also failed to demonstrate the existence of a conspiracy. The factual allegations in this Complaint that are intended to support the conspiracy are nothing more than a threadbare recitation of the elements of the cause of action, which the Supreme Court has held to be insufficient to state a cause of action. *Iqbal*, 129 S. Ct. at 1949. In an attempt to satisfy the first element of a cause of action under §1985, Plaintiffs allege that Chief Briggs and officers from the Attica Police Department have participated in seminars, trainings, or otherwise communicated with Defendant Gallegos and agents of the Sandusky Border Patrol about restraining and interrogating individuals regarding their immigration status.

Although the Plaintiffs attempt to characterize these training sessions as a conspiracy, the allegation that local law enforcement officials, like Chief Briggs would attend such a training seminar, if true, is not surprising, and is not evidence of a conspiracy to discriminate. Congress has expressly delegated to local officers the authority to arrest aliens for violating the criminal provisions of federal alien smuggling laws. 8 U.S.C. §1324(c). Additionally, state law enforcement officers have inherent authority to inquire into immigration status pursuant to a lawful investigation. *United States v. Janik*, 723 F. 2d 537 (7th Cir., 1983). Indeed, such communication between federal immigration agencies and local law enforcement agencies are expressly encouraged by Congress, and Congress has prohibited the states from restricting communication between local or state officers and federal immigration officials regarding the citizenship or immigration status, lawful or unlawful, of any person. 8 U.S.C. §§1373, 1644; 8 U.S.C. §1357(g)(10)(a). As Congress has encouraged these interactions, the fact that Chief

Briggs and his officers allegedly attended such trainings and seminars does not plausibly suggest discrimination.

Plaintiffs have failed to allege facts to support the second element of their claim and that the purpose of the conspiracy was to deprive the Plaintiffs' of their constitutional rights. Plaintiffs attempt to make this assertion in Paragraph 59, which claims that the Attica Defendants have been encouraged to target Hispanics for restraint and interrogation about their immigration status, is not substantiated by any of the factual allegations of the Complaint. Standing alone, this statement is a mere recitation of the elements of the cause of action, and not sufficient to maintain a claim. Indeed, the Plaintiffs involved in this incident were not stopped because they were Hispanic, but because their rear license plate was not properly illuminated.

Furthermore, Plaintiffs have not alleged any acts in furtherance of this conspiracy. Indeed, the only incident that they discuss related to the Attica Defendants was conducted properly and without any constitutional violations. Notably, Plaintiffs have only alleged one incident in Attica to support their contention that such a conspiracy exists.

As Plaintiffs have failed to plead facts sufficient to pass the *Iqbal* standard, Plaintiffs 42 U.S.C. §1985(3) claim must fail as well.

H. Plaintiffs have failed to allege facts to support their claims for violations for 42 U.S.C. §1986.

Section 1986 liability is derivative of §1985 liability. *Royal Oak Entertainment, LLC v. City of Royal Oak, MI,* 205 Fed. Appx. 389, 399 (6th Cir., 2006), *citing Haverstick Enterprises,Inc. v. Financial Federal Credit, Inc.,* 32 F. 3d 989, 994 (6th Cir., 1994). Established federal law clearly holds that absent a violation of §1985, plaintiff's §1986 claim cannot be sustained. *Id. citing Grimes v. Smith,* 779 F. 2d 1359, 1363 (7th Cir., 1985). Thus, as Plaintiffs

have failed to state a claim under §1985, Plaintiffs' claim pursuant to 42 U.S.C. §1986 must also fail. *Castle v.Central Benefits Mut. Ins. Co.*, 940 F. 3d 659 (6th Cir., 1991.

III. CONCLUSION

For these reasons, Plaintiffs' Complaint must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2010, a copy of the foregoing Defendants Village of Attica and Jeffrey Briggs' Renewed Motion to Dismiss was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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