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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

William Terence Platt and Maria B. Platt, Plaintiffs, v. Jason Moore, et al., Defendants.	Case No.: 3:16-cv-08262-PCT-BSB **NAVAJO COUNTY, TASK FORCE, AND CITY/TOWN DEFENDANTS' MOTION TO DISMISS** **(Oral Argument Requested)**

"Forfeiture of property prevents illegal uses 'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.'"

***-Chief Justice William Rehnquist, Bennis v. Michigan*, 516 U.S. 442, 452 (1996)**

The U.S. Supreme Court has noted that civil forfeiture in the United States is supported by a long history, and laudable goals benefitting society at large. *Calero–Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-86 (1974). Here, the Plaintiffs attack Arizona's civil *in rem* forfeiture process under circumstances where the Platts participated in the underlying forfeiture proceedings – with the assistance of counsel – and were returned the property that had been the subject of the underlying forfeiture proceedings.

While it appears the Platts are part of a larger attack against civil forfeiture in Arizona, this Court's focus must be on the First Amended Complaint (the "Complaint"), and its allegations. Here, the Complaint fails to raise specific, non-conclusory facts necessary to

establish jurisdiction as to certain categories of claimed relief, or to state plausible claims through 42 U.S.C. §1983 or under state law against Defendants Moore, Carlyon, K.C. Clark, and Navajo County (collectively the "County Defendants"); Defendant Navajo County Drug Task Force (the "Task Force"); and Defendants City of Winslow, Vasquez, City of Holbrook, Jackson, Town of Snowflake, Town of Taylor, Scarber, City of Show Low, Shelley, Town of Pinetop-Lakeside, and Sargent (collectively the "City/Town Defendants"). Pursuant to Fed.R.Civ.P. 12(b)(1) and (6), and the Certificate of Conferral attached as Exhibit A hereto, the County, Task Force, and City/Town Defendants request dismissal of the Complaint.

MEMORANDUM OF POINTS & AUTHORITIES

I. STANDARD OF REVIEW.

The Court may dismiss a complaint under Fed.R.Civ.P 12(b)(6) if it fails to state a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must contain sufficient factual matter, which, if accepted as true, states a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Facial plausibility exists if the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Although in deciding a motion to dismiss the Court must accept the factual allegations in the complaint as true, *Shwarz v. U.S.*, 234 F.3d 428, 435 (9th Cir. 2000), the Court must not accept as true legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also*, *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). For purposes of Rule 12(b)(6), the "plausible claim" standard applies to the pleading

of §1983 *Monell*-based official-capacity claims, as well as state law claims. *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *Boisvert v. Lohan*, 617 Fed.Appx. 810 (9th Cir. 2015); *Foster v. Gentry*, 518 Fed.Appx. 594, 595, 2013 WL 2137571, at *1 (9th Cir. 2013); *see also, Cortez v. Hawthorne*, 2010 WL 2232133, p. 1 (D. Ariz. 2010).

II. STATEMENT OF MATERIAL FACTS.[1]

Sometime in April, 2016, Plaintiffs allege they lent their 2012 VW Jetta (the "car") to their son, Shea, so he could drive it from eastern Washington to Florida. (Doc. 20, ¶ 55). On May 3, 2016, Shea was driving the car on I-40 westbound near Holbrook, Arizona. (Doc. 20, ¶¶ 31-32, 47, 59). Shea was stopped by Arizona Department of Public Safety ("DPS") Officer Plumb for a window-tint violation, and was issued a repair order. (Doc. 20, ¶¶ 60-61). While Shea signed the repair order, Plumb ran his drug-sniffing dog, Doenja, around the car. (Doc. 20, ¶¶ 62-63). Doenja alerted near the driver-side door, and Plumb, along with an arriving DPS Officer, Mortenson, searched the car. (Doc. 20, ¶ 64). The DPS Officers found $31,780.00 cash, a personal use amount of marijuana, and drug paraphernalia; and arrested Shea for possession of marijuana, possession of drug paraphernalia, and money laundering. (Doc. 20, ¶¶ 65-66).

[1] As they must for purposes of this Motion, the County/Task Force/City Defendants recite the non-conclusory factual allegations in the Complaint, though they disagree that they are either true or accurate. Furthermore, Plaintiffs' Complaint contains many allegations (Doc. 20, ¶¶1-10, 86-170, 199-205) that are unnecessary to their claims, and appear to be included for the benefit of a different audience. This form of pleading is in violation of Fed.R.Civ.P. 8. *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996) (complaints that are argumentative, prolix, replete with redundancy, and contain largely irrelevant or immaterial background information violate Rule 8's requirements). Rather than raise a separate Rule 8 issue, the County/Task Force/City Defendants endeavor to separate the wheat from the chaff.

The next day, May 4, 2016, Officer Plumb completed a vehicle history search and identified Plaintiffs Terry and Ria Platt, residents of the State of Washington, as the car's registered owners. (Doc. 20, ¶ 75). Officer Plumb provided Plaintiffs' identity, address, and registered owner status to Deputy Navajo County Attorney Jason Moore, as the attorney for the state for purposes of asset forfeiture. (Doc. 20, ¶ 13, 76). Moore allegedly told Officer Plumb to seize and impound the vehicle, which Plumb then did. (Doc. 20, ¶ 77). Although some personal property from the car was allegedly returned to Shea upon his release from jail, Plaintiff Terry Platt alleges he had hearing aids in the car that have not been returned. (Doc. 20, ¶¶ 78-79).

On May 23, 2016, Moore filed a Notice of Pending Forfeiture (the "Notice") in Navajo County Superior Court for the car, making uncontested forfeiture available. (Doc. 20, ¶¶ 172-173). On May 25, 2016, Moore caused the Notice to be mailed to Plaintiffs as "persons known to have an interest," and on May 29, 2016, Plaintiffs received the Notice. (Doc. 20, ¶¶ 174-175). Plaintiffs allege that on June 28, 2016, they delivered a Petition For Remission which "at least substantially complied" with A.R.S. § 13-4311(E)-(F) in that it stated "NOT UNCONTESTED" in the upper right-hand corner of the first page, and addressed each of the eight enumerated issues contained in A.R.S. § 13-4311(E). (Doc. 20, ¶¶ 176-182).

On or about July 5, 2016, Moore – in his capacity as the attorney for the state – filed, and mailed to Plaintiffs, an Application For Forfeiture (the "Application") in the Navajo County Superior Court, and allegedly did not consider Plaintiffs' Petition pursuant to A.R.S. § 13-4309(3). (Doc. 20, ¶ 183, 206). The Application allegedly states "no timely claim or Petition for Remission has been filed," but allegedly also states "correspondence was received by [the NCAO] from William and Maria Platt [but] . . . that correspondence did not meet the legal requirements for a Claim or Petition for Remission, and were legally null and

void pursuant to [sic] A.R.S. §§ 13-4311(E)&(F), as well as 13-4309(2)." (Doc. 20, ¶¶ 184-185). The Application further asserts that "[t]he attached Exhibits set forth facts sufficient to demonstrate probable cause to believe that [the car is] subject to forfeiture pursuant to A.R.S. §§ 13-2314(G)(3), 13-3413(A)(3)." (Doc. 20, ¶ 191)[2].

On August 10, 2016, Plaintiffs allege they filed a timely Claim in Navajo County Superior Court that complied with A.R.S. §§ 13-4309(3)(c) and 13-4311(E), and required the claim to be adjudicated as a judicial forfeiture proceeding. (Doc. 20, ¶¶ 207-211). On September 6, 2016, Moore allegedly moved to strike Plaintiffs' August 10, 2016 Claim on the grounds that Plaintiffs' original Petition had not been signed under penalty of perjury. (Doc. 20, ¶¶ 212-215). Plaintiffs obtained counsel and, on September 26, 2016, filed an opposition to the motion to strike. (Doc. 20, ¶ 218).

On October 19, 2016, Moore filed a "Declaration of Partial Remission and Withdrawal of Motion to Strike and Application and Order of Forfeiture as to William and Maria Platt," noting receipt of new information which would support an "innocent owner exemption to asset forfeiture." (Doc. 20, ¶¶ 220-221). On November 8, 2016, the Court filed an order "dismissing any current, or future, claim in forfeiture as to the 2012 Volkswagen Jetta." (Doc. 20, ¶ 225; Exhibit B hereto). Plaintiffs have retrieved the car and taken it to Washington, but allege not to have Mr. Platt's hearing aids. (Doc. 20, ¶ 222-223).

III. STATEMENT OF PLAINTIFFS' CAUSES OF ACTION.

From the above facts, Plaintiffs allege five separate Causes of Action. (Doc. 20, ¶¶ 246-292). The First and Third Causes of Action allege that Arizona's *in rem* uncontested civil forfeiture statutes violate federal and state due process rights because they provide a

[2] Without describing the contents of the "Exhibits," the Complaint goes on to make conclusory allegations that the "Exhibits" do not support probable cause. (Doc. 20, ¶¶ 192-198). The Complaint does not assert a Fourth Amendment-based cause of action.

financial incentive and interest to participating prosecutorial and law enforcement agencies. (Doc. 20, ¶¶ 247-255, 269-273). The Second Cause of Action alleges that Arizona's judicial civil forfeiture statutes violate federal and state free speech/right to petition and due process rights based on the attorneys' fee provision, A.R.S. § 13-4313(F), which provides for an award of attorneys' fees to the state. (Doc. 20, ¶¶ 259-265). The Fourth Cause of Action alleges a violation of federal and state due process rights based on the allegation that Deputy County Attorney Moore did not consider the merits of their Petition, and, instead, took the position that the Petition was defective and Plaintiffs, therefore, had no standing to contest the forfeiture judicially. (Doc. 20, ¶¶ 277-278). Finally, the Fifth Cause of Action alleges a failure to return Plaintiff Terry Platt's hearing aids, although Plaintiffs' Complaint does not state whether this is a federal law, or state law claim. (Doc. 20, ¶¶ 289-292). On all these Claims, Plaintiffs seek only declaratory, prospective injunctive, and other equitable relief, including enjoining enforcement of the forfeiture statutes, (Doc. 20, Prayer for Relief, Items A-H, K), and nominal damages of $1.00 (Doc. 20, Prayer for Relief, Item I).

IV. LEGAL PRINCIPLES APPLICABLE TO BOTH FEDERAL AND STATE LAW CLAIMS.

A. Plaintiffs Have Failed To State Plausible Claims For Prospective Injunctive and Equitable Relief.

Plaintiffs are entitled to prospective injunctive and equitable relief *only* if they are likely to suffer future injury from being involved in another civil *in rem* forfeiture proceeding. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (prospective injunctive or equitable relief not available where alleged victim of improper chokehold was not subject to real and immediate threat of future chokehold); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) ("[t]o have standing to seek relief, [the plaintiff] must demonstrate a real or immediate threat that the defendants will *again* subject him to

[another illegal search].") (emphasis added); *Sears v. Hull*, 192 Ariz. 65, 69-70, 961 P.2d 1013, 1017-18 (1998)(generalized harm shared by a class of citizens insufficient to confer standing); *Klein v. Ronstadt*, 149 Ariz. 123, 124, 716 P.2d 1060, 1061 (App. 1986) (a claim for declaratory relief "must be based on a real, not theoretical controversy", and not "merely on some speculative fear.")[3]. Thus, Plaintiffs must plead they are "immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *Lyons*, 461 U.S. at 102. Allegations of past conduct directed at Plaintiffs, alone, do not show a present case or controversy "if unaccompanied by any continuing, present adverse effects." *Id.* Plaintiffs must instead show a real threat of future injury; to wit, a likelihood that they will again be involved in a future civil forfeiture proceeding. *Id.* at 102–03.

Other than the closed civil forfeiture proceedings as to them, Plaintiffs do not allege any prior, current, or reasonably expected future involvement in any other Arizona forfeiture proceeding. Indeed, the allegations show the opposite. Plaintiffs are Washington state residents, with two adult children who are also Washington residents. (Doc. 20, ¶¶ 11, 43-46). Due to mental health reasons, one adult son lives with Plaintiffs, and it is difficult for Plaintiffs to travel outside of Washington. (Doc. 20, ¶¶ 43, 46). The *res*, a car, is titled in Washington, and has been retrieved and brought back to that state by Plaintiffs. (Doc. 20, ¶¶ 42, 53, 222, 225). The underlying civil forfeiture case as to Plaintiffs, including any "future" *in rem* forfeiture claim of the car, has been dismissed by court order. (Doc. 20, ¶225; Exhibit B hereto).

[3] Although the Arizona Constitution does not mandate a "case or controversy" requirement, state law relies on standing and ripeness to ensure the courts do not render "a premature judgment or opinion on a situation that may never occur." *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 244-45, 141 P.3d 416, 419-20 (App. 2006).

In *Alvarez v. Smith,* 558 U.S. 87, 92-94 (2009), the Court remanded for dismissal a complaint seeking declaratory and injunctive relief arising from an underlying forfeiture action in which the property subject to forfeiture – a car – was returned. As with *Alvarez,* in the absence of allegations showing a real and immediate threat that Plaintiffs will be involved in another Arizona *in rem* civil forfeiture proceeding, and not a mere speculative possibility, they lack standing to claim prospective injunctive or equitable relief.

B. Plaintiffs Have Failed To State Plausible Claims For Declaratory Relief.

"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.,* 528 U.S. 167, 185 (2000). For the same reasons that Plaintiffs have failed to state plausible claims for prospective injunctive and equitable relief, they have also failed to establish standing, or entitlement, to declaratory relief. Like injunctive/equitable relief, declaratory relief requires an ongoing matter in controversy. *See Golden v. Zwickler,* 394 U.S. 103, 109 (1969); *Blair v. Shanahan,* 38 F.3d 1514, 1519 (9th Cir. 1994); *Klein, supra.* Plaintiffs have not stated a "plausible claim" they are currently enmeshed, or suffer any real and immediate threat of being enmeshed prospectively, in any other *in rem* civil forfeiture proceeding.

In addition, federal courts are reluctant to grant declaratory relief that entail heavy federal interference in sensitive state activities, *i.e.,* the administration of the judicial system. *See Rizzo v. Goode,* 423 U.S. 362, 379 (1976); *Stone v. City and County of San Francisco,* 968 F.2d 850, 852, 860–61 (9th Cir. 1992). When the relief sought requires restructuring of state governmental institutions, federal courts will intervene only upon finding a clear constitutional violation, and even then only to the extent necessary to remedy that violation. *See Milliken v. Bradley,* 433 U.S. 267, 281–82 (1977); *Society of Separationists v. Herman,* 959 F.2d 1283, 1286 (5th Cir. 1992). Plaintiffs have failed to allege a sufficient justiciable

controversy to warrant a federal court restructuring of Arizona's civil *in rem* uncontested or judicial forfeiture processes through declaratory relief.

C. Plaintiffs' Standing To Raise Their Claims Is Limited To The Request For Nominal Damages.

Plaintiffs' Complaint is notable in that it makes no claim for monetary damages, of any kind, beyond its request for nominal damages - $1.00. Upon dismissal of any claim for prospective injunctive, equitable, or declaratory relief, Plaintiffs would retain standing to pursue their claims based on their request for nominal damages. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872-73 (9th Cir. 2002)[4].

D. Defendant Task Force Is A Non-Jural Entity And Is Not Subject To Suit.

Defendant Task Force moves for dismissal because it is not a jural entity, and, thus, is incapable of being sued in its own name. Under Arizona law, "[g]overnment entities have no inherent power and possess only those powers and duties delegated to them by their enabling statutes. Thus, a governmental entity may be sued only if the legislature has so provided." *Braillard v. Maricopa Cnty*, 224 Ariz. 481, 487, 232 P.3d 1263, 1269 (App. 2010) (citations omitted). In *Braillard*, the court held the Maricopa County Sheriff's Office ("MCSO") was not a jural entity subject to suit. The Court held, "[a]lthough A.R.S. §11–201(A)(1) provides that counties have the power to sue and be sued through their boards of supervisors, no Arizona statute confers such power on MCSO as a separate legal entity." *Id.* This Court has routinely found that sheriff's offices and police departments are non-jural entities and have dismissed them when named as parties. *See Phillips v. Salt River Police*

[4] Although the requested return of the hearing aids may also confer standing for that particular relief, as discussed below, there is no allegation the County/Task Force/City Defendants possessed, or now possess, the hearing aids such that they may be returned.

Dep't, 2013 WL 1797340 (D. Ariz. 2013); *Tarantino v. Dupnik*, 2012 WL 1718893 (D. Ariz. 2012); *Gotbaum v. City of Phoenix*, 617 F.Supp.2d 878, 886 (D. Ariz. 2008); *Wilson v. Maricopa Cnty.*, 2005 WL 3054051, at *2 (D. Ariz. 2005).

Plaintiffs' Complaint alleges only that the Task Force is a group of participating agencies, consisting of Navajo County Sheriff's Office, and the Police Departments of the various Defendant Cities and Towns. (Doc. 20, ¶ 15). Where a task force is nothing more than an intergovernmental association of participating municipalities, it is not a legal entity subject to suit under §1983. *Hervey v. Estes*, 65 F.3d 784, 791-92 (9th Cir. 1995); *see also*, *Eversole v. Steele*, 59 F.3d 710, 716, nt. 6 (7th Cir. 1995); *Giacolone v. Northeastern Pennsylvania Ins. Fraud Task Force*, 2012 WL 3027841 (M.D. Penn. 2012) (conclusions allegations insufficient to state *Monell* liability against task force).

V. PLAINTIFFS' COMPLAINT FAILS TO ALLEGE COGNIZABLE FEDERAL CLAIMS AGAINST THE COUNTY/CITY/TOWN DEFENDANTS.[5]

A municipal entity may be held constitutionally liable only if the alleged wrongdoing was committed pursuant to a municipal policy, custom or practice that was the moving force behind the constitutional violation. *See Bd. of County Comm'rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 402–04 (1997); *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 691 (1978). The municipal defendant is liable only "where the entity's policies evince a 'deliberate indifference' to the constitutional right" of the plaintiff. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989); *Rivera v. County of Los Angeles*, 745 F.3d 384, 389 (9th Cir. 2014). The "moving force" requirement means "a direct causal link between the municipal policy or custom and the alleged constitutional deprivation." *Villegas v. Gilroy*

[5] In the event this Court finds Defendant Task Force is a jural entity, the Task Force remains entitled to dismissal from this action for the all same reasons applicable to the County/City/Town Defendants.

Garlic Fest. Assoc., 531 F.3d 950, 957-58 (9th Cir. 2008). Additionally, municipal liability requires an underlying constitutional violation committed by a municipal employee. *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (if municipal officer acted constitutionally, city cannot be held liable); *Long v. City and County of Honolulu*, 511 F.3d 901, 907 (9th Cir. 2007). The requirements of *Monell* do not depend on the relief sought, and apply irrespective of whether the plaintiff seeks monetary or prospective injunctive relief. *Los Angeles County v. Humphries*, 562 U.S. 29, 39 (2010). A municipal entity cannot be held liable in a §1983 action on a theory of *respondeat superior*. *Monell*, 436 U.S. at 691[6].

A. Plaintiffs' Complaint Fails To Allege A Municipal Policy, Custom, or Practice That Was The Moving Force Behind Any Alleged Constitutional Violation.

Plaintiffs' Complaint does not identify or mention, anywhere in its forty-five pages, a municipal policy, custom, or practice of Navajo County, or the City of Winslow, City of Holbrook, Town of Snowflake, Town of Taylor, City of Show Low, or Town of Pinetop-Lakeside, that was the moving force behind the commission of an alleged constitutional wrong. Instead, the only statement of policy or practice alleged in Plaintiffs' Complaint, as to each municipality, is a "conscious decision" to "seiz[e] property for forfeiture and obtain[]

[6] Plaintiffs' decision to sue all public officials only in their "official capacities" fails to create liability based on a *respondeat superior* theory, and does nothing to independently advance Plaintiffs' claims. Indeed, a civil suit against a governmental official in their official capacity is, in reality, only a suit against the governmental entity itself. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). Accordingly, Plaintiffs' official capacity-only suit against Defendants Moore and Carlyon can only be construed as a claim against the State, or Navajo County. Likewise, the official capacity-only suits against Defendants Clark, Vasquez, Jackson, Scarber, Shelley, and Sargent can only be suits against the municipalities for which they provide services. Indeed, Plaintiffs have conspicuously chosen to sue all natural persons in their official capacities, and none in their individual capacities. (Doc. 20, Caption, ¶¶ 13-14, 18, 20, 22, 25, 27, and 29).

forfeiture proceeds." (Doc. 20, ¶¶ 16, 19, 21, 23, 24, 26, and 28). This allegation, however, is not a statement of the municipal policy of Navajo County, the Task Force, or any named City/Town Defendant, but, rather, an allegation that the entities engage in forfeiture enforcement under existing state statutes. Liability attaches only where the "entity's policies" evince a "deliberate indifference" to constitutional rights. *Edgerly v. City and County of San Francisco,* 599 F.3d 946, 960 (9th Cir. 2010). "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Brown,* 520 U.S. at 403-04. An allegation that a municipality has a policy of enforcing state statute is insufficient to state a cognizable claim against the County and City/Town Defendants. *See Kidd v. Los Angeles Police Dept.,* 2010 WL 2104669, at * 3 (C.D. Cal. 2010) (citing *Monell,* 436 U.S. at 690-691 - "[i]nsofar as Plaintiff is suing a municipal entity, she must identify a municipal, and not *state,* policy that violated her constitutional rights").

Plaintiffs' allegations demonstrate only individual decision-making among the involved law enforcement officers, and deputy county attorney. (Doc. 20, ¶¶ 59-66, 75-78, 172-175, 183-190, 204-222). The allegations do not include any fact showing that a decision, or action, was caused by an offending municipal practice, custom, or policy. Plaintiffs' *Monell*-based claims against all County and City/Town Defendants must be dismissed for failure to allege an offending County, City or Town policy that was the moving force behind any alleged constitutional violation. *See*, *Brown*, *supra.*

B. Plaintiffs' Complaint Fails To Allege Any Constitutional Violation.

The County and City/Town Defendants hereby join in the Intervenor State's Motion to Dismiss, and adopt the State's arguments that Plaintiffs' First, Second, and Third Causes of Action fail to state legally cognizable, plausible constitutional claims. Without cognizable

underlying constitutional claims, there can be no *Monell*-based liability for the County/City/Town Defendants. *See Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994). As to the Fourth and Fifth Causes of Action, the following additional arguments apply.

In their Fourth Cause of Action, Plaintiffs claim they were deprived of a meaningful opportunity to be heard , in violation of their Fourteenth Amendment procedural due process rights, because Deputy County Attorney Moore *took the position* they lacked standing to assert a property claim due to a defective Petition For Remission. (Doc. 20, ¶¶ 277-284). First, a Fourteenth Amendment procedural due process claim requires a denial of adequate procedural protections. *Krainski v. Nevada ex.rel. Bd. of Regents of Nevada System of Higher Educ.*, 616 F.3d 963, 970-71 (9th Cir. 2010). Plaintiffs' Complaint, however, alleges they obtained counsel, filed an opposition to the state's counsel position, and that, based on the state's withdrawal of their claim to the car, obtained the relief they sought before any hearing was even necessary. (Doc. 20, ¶¶ 212-222). Moore's taking of *a position* during the underlying proceedings does not mean that Plaintiffs did not receive notice, or an opportunity to be heard. *See, Dusenbery v. U.S.*, 534 U.S. 161, 167 (2002). Second, Moore was justified in his position. Under A.R.S. §§ 13-4309(2) and 13-4311(E) a property claimant may file a claim with the court, or a petition for remission which "shall be signed by the claimant under penalty of perjury . . ." Arizona courts have strictly enforced the requirements of § 13-4311(E). *In the Matter of $70,269.91 in U.S. Currency*, 172 Ariz. 15, 20, 833 P.2d 32, 37 (App. 1991); *State ex. rel. McDougall v. Superior Court*, 173 Ariz. 385, 387, 843 P.2d 1277, 1279 (App. 1992). Moore's decision to hold Plaintiffs to the procedural processes contained in A.R.S. §§ 13-4309(2) and 13-4311(E) does not deprive them of due process. *U.S. v. Real Property*, 135 F.3d 1312, 1317 (9th Cir. 1998)("[s]o long as the Government takes the steps mandated by due process to notify the record owner of an

impending forfeiture, it is the owner's responsibility to comply with the procedural requirements for opposing the forfeiture.").

In the Fifth Cause of Action, Plaintiff Terry Platt seeks the return of hearing aids which are alleged to have been in the subject car - at some point. This claim stands independently of the earlier causes of action, as the hearing aids are not alleged to be the *res* in any forfeiture proceeding. The claim, itself, does not allege a constitutional violation. Because the hearing aids are alleged to have been seized as part of legitimate law enforcement activity, the Takings Clause of the Fifth Amendment does not provide relief, *see Bennis v. Michigan*, 516 U.S. 442, 452 (1996), and state tort law provides adequate post-deprivation remedies for purposes of Fourteenth Amendment due process. *Young v. County of Hawaii*, 578 Fed.Appx. 728, 729–30 (9th Cir. 2014); *Wise v. Nordell*, 2012 WL 3959263 (S.D. Cal. 2012). In other words, no constitutional claim is stated as to the allegedly lost hearing aids.

C. Plaintiffs' Complaint Fails To Allege A Constitutional Violation Committed By Any Municipal Employee.

Plaintiffs' Complaint discusses actions taken by three different individuals only, DPS Officers Plumb and Mortenson, and Deputy Navajo County Attorney Jason Moore. (Doc. 20, ¶¶ 59-66, 75-78, 172-175, 183-190, 204-222). The County and City/Town Defendants cannot be held liable for any alleged constitutional violation committed by the DPS Officers. *See, Heller, supra.* For the following additional reasons, Plaintiffs' Complaint is defective in its failure to allege unconstitutional behavior that can support *Monell* liability under *Heller, supra.*

Navajo County Deputy County Attorney Moore is sued in his official capacity and as the "attorney for the state" in the subject civil *in rem* forfeiture proceedings, and the offered uncontested forfeiture process. (Doc. 20, ¶¶ 75-78, 172-175, 183-190, 204-222)*; see also*,

A.R.S. §§13-4301, 13-4309, 13-4311. When a county attorney prosecutes a matter on behalf of the state, he is acting as a state official when sued in his official capacity. *See Ceballos v. Garcetti*, 361 F.3d 1168, 1182-83 & n.11 (9th Cir. 2004), *rev'd on other grounds, Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Del Campo v. Kennedy*, 517 F.3d 1070, 1073 (9th Cir. 2008); *Weiner v. San Diego County*, 210 F.3d 1025, 1031 (9th Cir. 2000). Thus, the municipal entity, Defendant Navajo County, cannot be held liable under *Monell* for the alleged actions of Mr. Moore in his capacity as a state, and not county, actor. *See, Heller, supra.*

As for the City of Winslow, City of Holbrook, Town of Snowflake, Town of Taylor, City of Show Low, or Town of Pinetop-Lakeside, there are no allegations that any employee of these municipal entities committed a constitutional violation, such that *Monell* liability may apply. *See, Heller, supra.*

VI. PLAINTIFFS' COMPLAINT FAILS TO ALLEGE COGNIZABLE STATE LAW CLAIMS AGAINST THE COUNTY/CITY/TOWN DEFENDANTS.

A. Plaintiffs Have Failed To Allege State Constitutional Violations.

The County and City/Town Defendants hereby join in the Intervenor State's Motion to Dismiss, and adopt the State's arguments that Plaintiffs have failed to allege cognizable underlying state constitutional violations, whether they be due process, right to petition, or equal protection-based. In addition to the arguments and authorities advanced by the State, the alleged state law claims fail for the following reasons.

B. Plaintiffs Have Failed To Allege Facts Supporting *Respondeat Superior* Liability For The County And City/Town Defendants.

For the state law claims, it is fundamental that vicarious or *respondeat superior* liability exists only for the actions of employee for the defendant-employer. In *Robarge v. Bechtel Power Corp.*, 131 Ariz. 280, 283, 640 P.2d 211, 214 (App. 1980), the court held that in order to hold an employer vicariously liable for the negligent acts of its employee, "the

employee must be subject to the *employer's control or right of control."* (emphasis added). Here, no County, City, or Town Defendant employs the DPS Officers, and cannot be held liable for their actions. Additionally, there are no allegations that any employee of the City of Winslow, City of Holbrook, Town of Snowflake, Town of Taylor, City of Show Low, or Town of Pinetop-Lakeside was involved in the traffic stop, property seizure, or forfeiture proceedings relative to the car, or have ever been in possession of the subject hearing aids.

Although Mr. Moore is a Navajo County Deputy Attorney, he is sued as the "attorney for the state," and, in any event, does not perform duties for which the County, or City/Town Defendants may be held liable. Indeed, under A.R.S. §11–251, the powers of Navajo County, and its Board of Supervisors, do not extend to control over County Attorney personnel in the exercise of statutorily mandated duties, and therefore, the doctrine of *respondeat superior* does not apply to impose liability on the County. *See Vacaneri v. Ryles*, 2014 WL 1152883, p. 2 (D.Ariz. 2014); *see also, Nevel v. Maricopa County*, 2012 WL 1623217, p. 4 (D.Ariz. 2012); *see also*, G*uillory v. Greenlee County*, 2006 WL 2816600, at *12 (D.Ariz.,2006); *see also, Fridena v. Maricopa County*, 18 Ariz.App. 527, 530, 504 P.2d 58, 61 (1972) (no control over sheriff in service of writs of restitution, therefore, no liability under doctrine of *respondeat superior* liability); *see, e.g.*, A.R.S. § 11–531, *et. seq.* (providing the various duties of the County Attorney.

C. Plaintiffs Have Failed To Allege Facts Supporting Individual Liability Under State Law.

Plaintiffs' Complaint is unclear whether it seeks to impose personal liability on the individually-named Defendants - Moore, Carlyon, Clark, Vasquez, Scarber, Shelley, and Sargent - for the state law claims. If so, the Complaint insufficiently alleges any personal action, of any kind, undertaken by Carlyon, Clark, Vasquez, Scarber, Shelley, or Sargent. For all the reasons stated in this Motion, as well as the State's Motion, the Complaint fails to

state claims against Deputy County Attorney Moore as well. Even then, Moore is entitled to absolute immunity on any individual claim based on his actions as the "attorney for the state." *State v. Superior Court*, 186 Ariz. 294, 297-98, 921 P.2d 697, 700-01 (1996).

D. Plaintiffs' Damage Claim Under State Law Must Be Dismissed For Failure to Service A Pre-Litigation Notice Of Claim.

A.R.S. §12-821.01(A) requires persons asserting claims against a public entity or public employee to first submit a notice of claim within 180 days of the claim's accrual. A fundamental precept of A.R.S. §12-821.01 is that it "requires presentation of a claim *and disallowance* before suit may be brought . . . ." *Mammo v. State*, 138 Ariz. 528, 530, 675 P.2d 1347 (App. 1983) (emphasis added); *see also, City of Tucson v. Fleischman*, 152 Ariz. 269, 731 P.2d 634 (App. 1986). Where a claimant wishes to bring suit against a public employee, the notice of claim must be directed and served on the public employee, or else the notice is not effective as to the individual public employee. *Crum v. Superior Court in and for the County of Maricopa*, 186 Ariz. 351, 353, 922 P.2d 316, 318 (App. 1996). Here, there are no allegations that a notice of claim was served on any named Defendant, and any claim for damages, including the $1 nominal damage claim, must be dismissed in the absence of a pre-litigation notice of claim.

E. Plaintiffs Have Failed To Show The County/City/Town Defendants Possess, Or Have Possessed, The Hearing Aids.

Plaintiffs' Complaint does not allege, for federal or state law purposes, that the County/City/Town Defendants have possessed, or currently possess, Terry Platt's hearing aids for purposes of equitable relief – i.e., return of the hearing aids. Without allegations showing possession, the claim is moot as to the County/City/Town Defendants, and must be dismissed. *See, Triple "S" Wildlife Ranch, LLC v. Oklahoma*, 2016 WL 3512269, at *3 (W.D.Okla., 2016)

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VII. CONCLUSION.

For these reasons, as well as those contained in the Intervenor State's Motion To Dismiss, the Complaint against the County, Task Force, and City/Town Defendants must be dismissed.

DATED this 21st day of February, 2017.

JELLISON LAW OFFICES, PLLC

By: s/James M. Jellison
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Attorney for County, Task Force, and City/Town Defendants

I hereby certify that on February 21, 2017
I electronically transmitted the attached document
to the Clerk's Office using the
CM/ECF System for filing.

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