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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

William Terrance Platt, et. al., Plaintiffs, v. Jason Moore, et al., Defendants.	NO. CV-16-8262-PCT-BSB **NAVAJO COUNTY, TASK FORCE, AND CITY/TOWN DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS** **(Oral Argument Requested)**

Plaintiffs sue municipalities only, either by directly naming those municipalities or suing municipal personnel in their "official capacities." As the basis for their municipal liability claims, Plaintiffs assert a municipal policy amounting to a "conscious choice" to enforce Arizona's state forfeiture statutes. (Doc. 50, p. 12, ll. 24 – p. 13, ll. 23). Having put their eggs in that basket, Plaintiffs' first through third causes of action fail if this Court determines that Arizona's civil *in rem* forfeiture statutes are constitutional. *Legal Aid Services of Oregon v. Legal Services Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010) (no facial or as-applied challenges can survive in the absence of a constitutional violation). The County, Task Force, and City/Town Defendants join in the State's Reply in support of dismissal based on Plaintiffs' failure to state constitutional claims on these causes of action. In addition to this most basic, and insurmountable, hurdle to the maintenance of Plaintiffs' constitutional claims, the County, Task Force, and City/Town Defendants provide the following arguments for dismissal of the case - in its entirety.

I. PLAINTIFFS' ASSERTION OF A MERE POSSIBILITY OF PARTICIPATION IN A FUTURE ARIZONA FORFEITURE PROCEEDING DOES NOT SUPPORT RECOVERY OF PROSPECTIVE INJUNCTIVE, EQUITABLE, OR DECLARATORY RELIEF.

"Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975) and *Golden v. Zwickler*, 394 U.S. 103, 108 (1969)). "If an action or a claim loses its character as a live controversy, then the action or claim becomes 'moot,' and we lack jurisdiction to resolve the underlying dispute." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797–98 (9th Cir. 1999). Here, the Navajo County, Task Force, and City/Town Defendants do not assert Plaintiffs' *entire case* lacks standing, or is "moot," due to the absence of a live controversy. Indeed, Plaintiffs' Complaint alleges they were deprived of the use of their vehicle during the pendency of the underlying forfeiture proceedings, and seek a nominal damage award of $1 for that alleged deprivation. (First Amended Complaint, Doc. 20, Prayer for Relief, Item I). Rather, these Defendants maintain that Plaintiffs have no valid claim for prospective injunctive, equitable, or declaratory relief (on both a personal and global basis) because the State no longer seeks forfeiture of the subject vehicle, the vehicle has been returned, and the court in the underlying forfeiture case has dismissed the State's claim to the subject vehicle, both now and in the future. (Doc. 20, ¶¶ 220-225). In Opposition, Plaintiffs assert only the mere possibility of a future, active forfeiture proceeding. That is not enough.

The parties appear in agreement that the centerpiece of this Court's analysis is *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983). (Doc. 50, pgs. 3-4). In *Lyons*, the Supreme Court held that a plaintiff claiming to have suffered a past injury, who is seeking to enjoin the government from engaging in further unconstitutional conduct, lacks standing unless he can show he is *likely* to suffer injury in the future from the same conduct. A

claimant's "lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued." *Id.* at 109. Conduct merely "capable of repetition" does not confer standing for prospective relief *unless* "the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *Id.*

Plaintiff mischaracterizes *Lyons* in arguing that standing in that case was lacking because the underlying governmental policy did not authorize the chokehold. The Court's focus in *Lyons*, was not on the substance of the underlying policy, but on Lyons' inability to demonstrate future harm to himself. Indeed, the Court concluded that absent:

> a sufficient likelihood that [Lyons] will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.

Lyons, 461 U.S. at 111; *see also, Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). Stated another way, to have standing, the plaintiff must allege "real and immediate danger that the alleged harm will occur." *Lyons*, 461 U.S. at 102; *see also Sierakowski v. Ryan*, 223 F.3d 440, 444 (7th Cir. 2000).

The reasoning expressed in *Lyons* is applicable here. This Court can assume Plaintiffs will conduct their future activities within the law and, based on their alleged residency and lifestyle, will easily avoid future entanglement in another Arizona civil *in rem* forfeiture action. Similarly, Plaintiffs' concern that the prosecutor will reverse his position that discovered facts reasonably support Plaintiffs' "innocent owner" assertion[1], or that the superior court will go against its order dismissing the underlying civil forfeiture

[1] Plaintiffs argue that Defendants continue to assert the legality of the seizure and forfeiture and, for that reason, future injury is reasonably likely. (Doc. 50, p. 6, lls. 21-23). Plaintiffs' characterization is contrary to their own allegations. While the Defendants maintain the Arizona statutes are constitutional, and were correctly applied, resumption of the underlying forfeiture is neither real nor immediate because the forfeiture proceedings were terminated as to the Platts' vehicle because sufficient evidence had been developed in support of Plaintiffs' "innocent owner" defense. (Doc. 20, ¶¶ 212-215). There are no allegations of any expected change in that regard.

case as to Plaintiffs, including any "future" *in rem* forfeiture claim of the car, are nothing more than pure speculation that does not support prospective relief[2]. *See, e.g., Wolf v. Beauclair*, 2005 WL 2847418, at *3 (D.Idaho 2005) (no prospective relief without facts showing reasonable expectation that claimant would both violate parole, and be sent back to the same institution).

The Plaintiffs also rely on *Friends of the Earth, Inc. v Laidlaw Environ. Servs.*, 528 U.S. 167 (2000) and *Haro v. Sebelius*, 747 F.3d 1099 (9th Cir. 2014) for the proposition that standing issues are assessed at the time the complaint is filed and, therefore, the issue is not one of standing, but is one of mootness. Defendants contend the above principle is applied under circumstances where lack of standing results in dismissal of the entire case. In any event, Plaintiffs' argument does not change the outcome of the issue. "[M]ere cessation of illegal activity in response to pending litigation does not moot a case, unless the party alleging mootness can show that the 'allegedly wrongful behavior could not reasonably be expected to recur.' " *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000)). Even if Plaintiffs had standing at the time their lawsuit commenced, her claim may have become moot. *See Laidlaw*, 528 U.S. at 191–92. An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir. 2001). If mootness is not raised by the parties, the court must still raise issues concerning subject matter jurisdiction *sua sponte*. *Wakefield v. Thompson*, 177 F.3d 1160, 1162 (9th Cir. 1999). This includes mootness. *Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). Where the activities sought to be enjoined already have occurred, and the appellate courts cannot

[2] Plaintiff suggests the superior court's order dismissing any future *in rem* forfeiture proceeding is insufficient to eliminate standing for prospective relief because it is not a final judgment with preclusive effect. (Doc. 50, pg. 3, lls. 12-14; pgs. 4-5, ll. 24 – ll. 10). Whether future harm is precluded with absolute certainty is not the standard. Rather, there must be facts showing a sufficient likelihood of future harm, as opposed to a mere speculative possibility. *See, Lyons, supra.*

undo what has already been done, the action is moot, and must be dismissed. *Seven Words*, 260 F.3d at 1095.

As with the issue of standing, dismissal and lack of pendency of an underlying action is sufficient to render a claim for injunctive or declaratory relief moot. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) ("[w]e find no indication in Bernhardt's complaint that she will be subjected to the same situation again."). Whether this Court relies on standing, or mootness, there is no prospective injunctive or declaratory relief to be given in this case based on any real or immediate threat of recurring harm[3].

II. A FINDING THAT PLAINTIFFS LACK STANDING TO CLAIM PROSPECTIVE RELIEF IN FEDERAL COURT DOES NOT REQUIRE REMAND TO STATE COURT.

A claim for compensatory or nominal damages, even where injunctive or declaratory relief has been dismissed, represents a "live controversy" that avoids mooting the entire case. *Bernhardt*, 279 F.3d at 872-73. *Polo v. Innoventions International, LLC*, 833 F.3d 1193 (9th Cir. 2016) is inapposite. In that case, the claimant did not dispute that her entire case lacked Article III standing. *Id.* 1195. Here, for purposes of Article III standing, or mootness, neither side claims Plaintiffs' Complaint is entirely lacking. Plaintiffs claim a prior, tangible injury – the deprivation of their automobile - and seek $1 in nominal damages for that alleged injury. That claimed injury provides sufficient standing for this Court to maintain jurisdiction over the matter, even if claims for prospective injunctive, declaratory, or equitable relief are properly dismissed. *See, Bernhardt, supra.*

III. PLAINTIFFS HAVE FAILED TO SHOW THE TASK FORCE IS A SEPARATE, JURAL ENTITY SUBJECT TO SUIT.

Under Arizona law, a governmental entity, or body, may sue or be sued only where

[3] In their Opposition, Plaintiffs make no argument, whatsoever, that their broad requests for injunctive relief (Doc. 20, Prayer for Relief, Items B, E, and G) are appropriate under any circumstance.

the appropriate legislative authority has granted the power to sue or be sued. *Braillard v. Maricopa County*, 224 Ariz. 481, 487, 232 P.3d 1263, 1269 (App. 2010). In *Braillard*, the court concluded that, although a Sheriff's Office is authorized by statute to engage in a number of governmental activities, suing or being sued is not one of them. Accordingly, the Sheriff's Office was held to be a non-jural entity. *Id.* The Ninth Circuit Court of Appeals, likewise, holds that a task force made up of local governmental entities is "*only* subject to suit if the parties that created [the task force] intended to create a separate legal entity." *Hervey v. Estes*, 65 F.3d 784, 791-92 (9th Cir. 1995) (emphasis added). In arriving at this conclusion, the *Hervey* court cites favorably to *Maltby v. Winston*, 36 F.3d 548, 560 n. 14 (7th Cir. 1994) which holds that state law must be examined to determine whether a task force was created with a desire that it be subject to suit. *See*, 65 F.3d at 792.

Plaintiffs' description of the Task Force as a "multi-jurisdictional, multi-agency task force" (Doc. 20, ¶ 15) is insufficient to support jural entity status. Plaintiffs' conclusory allegation that the Task Force was the "seizing agency" (Doc. 20, ¶ 150) is irrelevant to the jural entity issue, and is belied by Plaintiffs' allegations that the vehicle was actually seized for forfeiture after it was stopped by DPS Officers, and Deputy Navajo County Attorney Jason Moore allegedly instructed DPS to "seize and impound" the vehicle. (Doc. 20, ¶¶ 54-77).

Plaintiffs suggest that if the Task Force is dismissed, they should still be allowed to sue the municipal Task Force members. (Doc. 50, p. 11). They already have - and then some. In addition to suing DPS and Navajo County, Plaintiffs have taken the additional step of suing a multitude of agencies and agency heads who were not involved in the traffic stop, the seizure or impoundment of the vehicle, or the decision to seek forfeiture. While these various cities and towns may possess jural status, they are not alleged to have acted in any manner supporting a federal claim. *See, Connick v. Thompson*, 563 U.S. 51, 60-62 (1978) (local governments are responsible under § 1983 only for their own illegal acts; and

are not vicariously liable for the acts of others, including their own employees). In any event, the Task Force is not a jural entity, and it must be dismissed; regardless of the disposition of this case as to the other named Defendants.

IV. PLAINTIFFS HAVE FAILED TO ALLEGE OR DEMONSTRATE VALID BASES FOR MUNICIPAL LIABILITY.

Plaintiffs sue only municipal entities, either by suing those entities directly or naming persons in their "official capacities" only. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (suit against government official in their "official capacity" is only a suit against the government itself). All Plaintiff's official-capacity claims require proof the alleged constitutional violation was committed pursuant to a policy, custom, or practice, and the policy or custom was the moving force behind the violation. *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 694 (1978). Plaintiffs argue a municipality's "conscious choice" to seek civil forfeiture, as provided by Arizona statute, constitutes a sufficient municipal policy. (Doc. 50, p. 12, lls. 25-27). This is not so.

Notwithstanding Plaintiffs' arguments, a municipality's decision to initiate state forfeiture proceedings—in accordance with state law—is not a municipal practice for purposes of *Monell*. In *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 791-92 (7th Cir. 1991), the court addressed whether a municipality's enforcement of challenged state statutes represented a sufficient municipal policy. The court held it did not. First, the court noted a pleading's failure to allege a municipal policy is, itself, grounds for dismissal. 928 F.2d at 790. This principle would also apply to the Platts' Complaint. Substantively, however, the court stated:

> It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality. *Cf. Tuttle*, 471 U.S. at 823, 105 S.Ct. at 2436:

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official.... But *Monell* must be taken to require proof of a city policy different in kind from [the "policy" of establishing a police force] before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

Surplus Store, 928 F.2d at 791–92, citing, *Thompson v. Duke*, 1987 WL 33188 (N.D. Ill. 1988); *see also, Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993) (holding that county board did not act in a policy-making capacity when it fired plaintiff because termination procedures and criteria were prescribed by the state although the state procedures allowed the county board some discretion); *see also, Whitesel v. Sengenberger*, 222 F.3d 861, 872 (10th Cir. 2000) (stating that it was not clear whether policies of state entity authorized certain actions but "emphasiz[ing] that the [municipal entity] cannot be liable for merely implementing a policy created by the state [entity]").

Plaintiffs' citation to *Evers v. County of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984) is not helpful as the case is factually distinguishable in critical aspects. In *Evers*, the court merely held that a County Board's issuance of a declaration that plaintiff's road was public sufficed to impose liability. In that case, although a statute existed which allowed a government to declare a road "public" under certain circumstances, the underlying complaint was the entity's act of making that declaration without prior notice or opportunity to be heard. *Id.* The Board's allegedly illegal actions went beyond the procedures dictated by statute. The result in *Vives v. City of New York*, 524 F.3d 346, 352-53 (2nd Cir. 2008) merely reflects a conclusion opposite of *Surplus Store*. Defendants argue, however, that the reasoning in *Surplus Store* represents the correct rule of law because it fosters the goals of *Monell*, and its progeny, that municipalities are held accountable only for their own unconstitutional policies, customs, or practices.

Whatever this Court's approach on whether a municipality's enforcement of state statute is a sufficient municipal policy, custom, or practice, Plaintiffs have additional *Monell* issues which they have not overcome. First, and foremost, if the portions of the statute under attack here are determined to be constitutional, the first, second, and third claims must be dismissed. The Intervenor State has demonstrated the statutory provisions under attack are constitutional[4]. Second, Plaintiffs have failed to allege the Navajo County Sheriff's Office or the City/Town Defendants acted, at all, *vis-à-vis* Plaintiffs, much less that any of them committed an unconstitutional act pursuant to city or town policy, custom, or practice[5]. Third, any attack on Navajo County can only be based on the alleged decisions made by Deputy County Attorney Moore. However, Plaintiffs allege Mr. Moore to be acting as the "attorney for the state." (Doc. 20, ¶¶ 75-78, 71-75, 183-190, 204-222). In their Opposition, Plaintiffs offer no dispute that a county attorney who prosecutes a matter on behalf of the state, does not act on behalf of the local government entity when sued in his or her official capacity. *See, e.g., Ceballos v. Garcetti,* 361 F.3d 1168, 1182-83, n. 11 (9th Cir. 2004), *overruled on other grounds, Garcetti v. Ceballos,* 547 U.S. 410 (2006). Whether a state official is a final policy maker for purposes of municipal liability depends on state law. *Streit v. County of Los Angeles*, 236 F.3d 552, 560 (9th Cir. 2001), In their Opposition, Plaintiffs cite to *Puente Arizona v. Arpaio,* 2016 WL 6873294 (D. Ariz. 2016),

[4] At various times in the Opposition, Plaintiffs attempt to sway this Court by characterizing Arizona's civil *in rem* forfeiture statutes as a means to "police for profit." Plaintiffs' approach is political, not judicial. The U.S. Supreme Court has analyzed, and endorsed, civil assert forfeiture as a system that protects our communities by serving the dual purpose of preventing property used in crime to be used, again, for criminal purposes, and to render illegal behavior unprofitable. *Bennis v. Michigan,* 516 U.S. 442, 452 (1996). This Court's focus must be on whether the particular provisions of Arizona's statutes under attack violate existing constitutional law. For all the reasons posited by Defendants, the statutes meet all constitutional requirements.

[5] Plaintiffs acknowledge neither the Navajo County Sheriff, nor any of the City/Town Defendants, applied the forfeiture statutes to the Platts. (Doc. 50, p. 12, lls. 12-13). While Plaintiffs assert that some tangential interest in forfeiture proceeds generally, based on Task Force participation, is enough to support constitutional liability, Plaintiffs offer no authority for this proposition. Indeed, such a proposition would be inconsistent with *Monell* and its progeny.

where the court, unequivocally, held "that the Maricopa County Attorney acts for the state when conducting criminal prosecutions." *Id.* at p. 24. While Plaintiffs suggest this issue is a "fact intensive" inquiry, it is not here. Not only do Plaintiffs allege that Mr. Moore was acting as the "attorney for the state," but Arizona state law makes clear that a prosecuting authority acting pursuant to Arizona's forfeiture statutes is bringing the claim for the state, and acting as the "attorney for the state," both for uncontested and judicial forfeiture proceedings. A.R.S. §§ 13-4308-4310. Without a County actor alleged to have committed a constitutional tort in relation to Plaintiffs, Navajo County bears no liability.

As to Plaintiffs' fourth cause of action, Plaintiffs have yet to identify a municipal policy, custom, or practice supporting a municipal claim under §1983. Plaintiffs' fourth cause of action is not based on a municipal decision to enforce state statute, but rather, on decisions of an individual government actor (Mr. Moore) on statutory interpretation and litigation positions on behalf of the state. (Doc. 20, ¶¶ 183, 191, 206, 207-223, 277-284). Plaintiffs do not allege or argue Mr. Moore's decisions were the product of a municipal policy, custom, or practice. Moreover, their assertion they were denied due process when they were actively involved in judicial review is nonsensical[6]. The fourth claim attempts to impose *respondeat superior* liability where no such liability is recognized under § 1983. *Monell*, 436 U.S. at 691[7]. Finally, to the extent Plaintiff's fifth cause of action is meant to be a federal claim, Plaintiffs do not allege that Mr. Platt's hearing aids are missing because of some municipal policy, custom, or practice of the County, City, or Town Defendants.

[6] Plaintiffs' citation to *State v. Benson*, 172 Ariz. 15, 20-21, 833 P.2d 32, 37-38 (App. 1991) only serves to validate Mr. Moore's individual decisions. The *Benson* court allowed for a grant of additional time to amend for "technical" defects, but concluded that the claimant must first have made a filing satisfying the basic substantive requirements, including that "the claim must be verified on oath or solemn affirmation."

[7] To the extent the fourth or fifth claims are deemed state law claims, Plaintiffs disavow *respondeat superior*, or individual, liability. (Doc. 50, p. 16, lls. 20-25). Since these are the only avenues available for state law-based liability for the County or City/Town Defendants, any state law claim intended under the fourth or fifth claims must be dismissed.

V. PLAINTIFFS' CLAIM FOR MONETARY DAMAGE, NO MATTER HOW SMALL, REQUIRES A PROPERLY AND TIMELY FILED NOTICE OF CLAIM PRIOR TO SUIT.

Plaintiffs contend they can obtain a damage award without serving a conforming notice of claim, provided the monetary claim is "merely incidental" to a claim for injunctive relief. (Doc. 50, p. 8, lls. 21-22). For this, Plaintiffs cite to *State v. Mabery Ranch, Co., L.L.C.*, 216 Ariz. 233, 165 P.3d 211 (App. 2007); and *Martineau v. Maricopa County*, 207 Ariz. 332, 86 P.3d 912 (App. 2004). These cases do not support Plaintiffs' contention. In *Martineau*, the court held the Arizona notice of claim statute has no application to a claim for declaratory judgment. 207 Ariz. at 337, 86 P.3d at 917. In that case, plaintiffs sought *no damages*, and the declaratory relief for which they prayed "would not result in any monetary award against the County even if successful." 207 Ariz. at 336, 86 P.3d at 916. Likewise, in *Mabery*, 216 Ariz. at 244-45, 165 P.3d at 222-23, the court found a notice of claim was not required where *only* injunctive relief was sought. If a monetary award is sought, the claimant must have delivered a notice demanding "a specific amount for which the claim can be settled." A.R.S. §12-821.01(A). The statute, and its interpreting cases, do not distinguish between a $1, $100, or $1,000 claim, and neither should this Court. For any state law cause of action, the $1 claim should be dismissed.

VI. PLAINTIFFS CANNOT ASSERT A CLAIM FOR INJUNCTIVE RELIEF SEEKING RETURN OF TERRY PLATT'S HEARING AIDS.

It would seem inescapable that injunctive relief, in the form of returning hearing aids, can only be had against the party possessing the hearing aids – whether the claim is made under state or federal law. Plaintiffs cannot seek this relief against all named Defendants. Without an allegation of possession, the County and City/Town Defendants are entitled to dismissal from this claim. As stated above, as a federal claim, the fifth cause of action must be dismissed because there is no allegation of an offending municipal policy, custom, or practice. As a state law claim, it must be dismissed as Plaintiffs have abandoned both *respondeat superior* and individual liability as theories of recovery in this matter.

VII. CONCLUSION.

For all of these reasons, and those asserted in the underlying Motion, Plaintiffs' Amended Complaint must be dismissed.

DATED this 14th day of April, 2017

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I hereby certify that on April 14, 2016,
I electronically transmitted the attached document
to the Clerk's Office using the
CM/ECF System for filing.

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