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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DANIEL ARTHUR GUTENKAUF, an unmarried man Plaintiff, v. CITY OF TEMPE, a municipal corporation and body politic; et al. Defendants.	Civil Action No. 2:10-CV-02129-FJM **DEFENDANTS' GODDARDS', HALIKOWSKIS', AND VANDERPOOLS' MOTION TO DISMISS**

The Court should dismiss all claims brought by Plaintiff Daniel Gutenkauf against Defendants Terry and Monica Goddard, Roger and Valerie Vanderpool, and John and Ruth Halikowski (hereinafter collectively "State Defendants") under Fed.R.Civ.P. 12(b)(1) and (6) for lack of subject matter jurisdiction for failure to state a claim.

I. Motion to Dismiss Standards.

A complaint is subject to dismissal under Fed.R.Civ.P. 12(b)(6) if it fails to set forth a cognizable legal theory, or it fails to plead sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In deciding a motion to dismiss, a court must presume all factual allegations of the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

To survive a motion to dismiss for failure to state a claim, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 579 (2007) ("*Twombly*"). In their Complaint, a Plaintiff must make a "showing" that the plaintiff is entitled to relief, "rather than a blanket assertion" of entitlement to relief. *Id*. at 556 n. 3. Although blanket assertions may provide a defendant with the requisite "fair notice" of the nature of a plaintiff's claim, only factual allegations can clarify the "grounds" on which that claim rests. *Id*. While a trial court examining a complaint for sufficiency must accept the factual allegations as true, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("*Iqbal*"). Moreover, "[t]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* at 555, quoting 5 C. Wright & A. Miller, § 1216, pp. 235- 36 (2004). The trial court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1950.

II. Relevant Factual Allegations of Complaint.

In the Plaintiff's First Amended Complaint ("Complaint"), the Plaintiff makes the following factual allegations. "On September 4, 2008, Plaintiff Daniel Arthur Gutenkauf received an Arizona Traffic Ticket and Complaint, through the U.S. Postal service, from the Tempe Municipal Court, certified by Tempe Police Officer AARON COLOMBE on

09/02/2008 . . . ." Complaint at ¶ 38. The Arizona Traffic Ticket and Complaint "alleg[ed] a violation of ARS 28-701A on August 19, 2008 at 200 S. Rural Rd. in Tempe, Arizona." *Id.* The "Plaintiff did not respond to the citation, and was given service of process [o]f the traffic ticket on October 21, 2008, [at] 4:36 pm by CASEY ARNETT . . . ." Complaint at ¶ 39. "On February 17, 2009, Plaintiff Daniel Arthur Gutenkauf challenged a traffic citation in TEMPE MUNICIPAL COURT . . . for an alleged violation of A.R.S. § 28-701A, speed not reasonable and prudent, based on evidence gathered from a fixed speed camera operated by Defendant REDLEX TRAFFIC SYSTEMS, INC." Complaint at ¶ 40. " . . . Judge Pro-tem MARY JO BARSETTI found Daniel Gutenkauf 'Responsible' for a violation of ARS 28-701 A. and fined him $171.00 plus an additional $26 fee for service of process." Complaint at ¶ 65. The Plaintiff subsequently appealed the decision of the Tempe Municipal Court to Maricopa County Superior Court. Complaint at ¶¶ 66, 67. On October, 2009, the Maricopa County Superior Court, "overturn[ed] the decision of the Tempe Traffic Court and ordered the refund of the $197.00 fine." Complaint at ¶ 67. "On 12/03/2009 the City of Tempe issued a check refunding the $197.00 fine paid by Daniel Gutenkauf." Complaint at ¶ 68.

The Plaintiff later sought $699.00 for costs incurred in his appeal from the City of Tempe in a notice of claim. Complaint at ¶ 69. The City of Tempe agreed to pay those costs and twice mailed him a check for the full amount, but the Plaintiff refused to accept. Complaint at ¶¶ 92 ("On May 24, 2010, Daniel Gutenkauf . . . returned the check for $699.00 … ."); 97 ("In a letter date[d] June 22, 2010, David McAllister again sent Daniel Gutenkauf the check from the CITY OF TEMPE for $699.00 . . . ."); 98 (" . . . Mr. Gutenkauf again returned the check for $699.00 back to the CITY OF TEMPE . . . .").

III. The Plaintiff Does Not Have Standing; Therefore, His Claims Should Be Dismissed For Lack of Subject-Matter Jurisdiction.

"A party invoking federal jurisdiction has the burden of establishing that it has satisfied the 'case-or-controversy' requirement of Article III of the Constitution." *D'Lil v.*

Best Western Encina Lodge & Suites, 538 F.3d 1031, 1036 (9th Cir. 2008).

To establish standing under Article III, the plaintiff must meet three elements:

> First, the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations omitted). Here, as discussed above, the Plaintiff successfully reversed the finding of responsibility under A.R.S. § 28-701(A) against him, was refunded his money, and voluntarily chose to forego the payment of costs offered to him. The Plaintiff has suffered no actual or imminent harm; and therefore, has no standing to assert his claims. Thus, the Plaintiff's claims should be dismissed for lack of subject-matter jurisdiction.

IV. The Plaintiff Does Not State a Cause of Action Under 42 U.S.C. § 1983 Against the State Defendants.

Against the Defendants Goddard and Vanderpool, the Plaintiff alleges deprivations of substantive and procedural due process rights under the Fourteenth Amendment and under the Fourth Amendment for malicious prosecution and the issuance of a warrant without probable cause. Complaint at ¶¶ 151, 171.

To state a claim under § 1983, a plaintiff must allege facts showing that (1) the conduct about which he complains was committed by a person acting under the color of state law and (2) the conduct deprived him of a federal constitutional right. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.2006); *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). Also, a plaintiff must allege that he suffered a specific injury as a

result of the conduct of a particular defendant; and he must allege an affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976); *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987).

A. The Plaintiff Has Not Articulated a Cognizable Procedural Due Process Claim.

The Plaintiff alleges a violation of his procedural due process rights relating to the issuance of a traffic ticket and complaint. Complaint at ¶¶ 151, 171. The Due Process Clause of the Fourteenth Amended provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

"[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 3204 (1984). Here, as discussed above, the Plaintiff received a notice in the mail, was personally served with the ticket and complaint, received a hearing in Tempe Municipal Court, was able to appeal to Maricopa County Superior Court where the Court ruled in his favor and ordered a refund of the $197.00 fine.

The Plaintiff has not sufficiently alleged any violation of his procedural due process rights.

B. The Plaintiff Has Not Articulated a Cognizable Substantive Due Process Claim.

There is no substantive due process right under the Fourteenth Amendment to be free from prosecution without probable cause. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th Cir. 2004) (citing *Albright v. Oliver*, 510 U.S. 266, 268, 271, 275, 277, 282-83, 291, 114 S.Ct. 807 (1994)). At issue here is a civil traffic fine under A.R.S. § 28-701(A), not a criminal prosecution. *State v. Poli*, 161 Ariz. 151, 776 P.2d 1077 (App. 1989) ("Appellant was issued a civil traffic complaint for speeding in violation of A.R.S. § 28-701(A)). "[T]here is no constitutional right to be free of erroneous issued traffic tickets."

Gibson v. Inacio, Slip Copy, 2010 WL 3943684, *4 (D.N.J. 2010). Thus, the Plaintiff has not and cannot allege a cognizable § 1983 substantive due process claim against the State Defendants.

C. The Plaintiff Has Not Stated a Claim For a Violation of His Fourth Amendment Rights.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that the was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Here, the Plaintiff was not arrested nor detained for any period of time; rather he was issued a traffic ticket and complaint. The type of constitutional injury the Fourth Amendment is intended to redress is the deprivation of liberty accompanying prosecution, not prosecution itself." *Dibella v. Borough of Blackwood*, 407 F.3d 599, 603 (3rd Cir. 2005); *see also*, *Burg v. Gosselin*, 591 F.3d 95, 98 (2nd Cir. 2010) (holding that the "issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restriction, does not constitute a Fourth Amendment seizure."); *Bielanski v. County of Kane*, 550 F.3d 632, 642 (7th Cir. 2008) ("No court has held that a summons alone constitutes a seizure, and we conclude that a summons alone does not equal a seizure for Fourth Amendment purposes. To hold otherwise would transform every traffic ticket and jury summons into a potential Section 1983 claim."); *Martinez v. Carr*, 479 F.3d 1292, 1299 (10th Cir. 2007) ("[T]he issuance of a citation, even under threat of jail if not accepted, does not rise to the level of a Fourth Amendment seizure . . . ."); *DiBella v.*

Borough of Beachwood, 407 F. 3d 599, 603 (3rd Cir. 2005) ("[T]here could be no seizure significant enough to constitute a Fourth Amendment violation ... [when plaintiffs] were only issued a summons; they were never arrested; they never posted bail; they were free to travel; and they did not have to report to Pretrial Services."); *Britton v. Maloney*, 196 F.3d 24, 29-30 (1st Cir.1999) (issuance of a summons requiring plaintiff to appear in court is insufficient to establish a Fourth Amendment seizure), *cert. denied*, 530 U.S. 1204, 120 S.Ct. 2198, 147 L.Ed.2d 234 (2000).

In *DePiero v. City of Macedonia*, 180 F.3d 770 (6th Cir. 1999), the plaintiff alleged a claim under 42 U.S.C. § 1983 for a violation of his Fourth Amendment rights for the issuance of a parking citation without probable cause. *Id.* at 31. The plaintiff argued that "the issuance of a summons alone, without any face-to-face encounter may constitute a seizure of the person." *Id.* at 32. The court disagreed and held that the plaintiff could not "claim issuance of the traffic ticket effected a 'seizure' because upon appearing to answer the charges in the ticket, he would have been afforded a trial. On the date he was issued the parking ticket, he was 'free to leave.' " *Id.* Here, the Plaintiff was similarly required to appear if he wished to contest his ticket. However, such a requirement does not affect a seizure by a warrant without probable cause.

The Plaintiff also asserts a claim of malicious prosecution. However, in the Ninth Circuit, "the general rule is that a claim of malicious prosecution is not cognizable under 42 U.S.C. § 1983 if process is available within the state judicial system to provide a remedy. *Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987).

In *Vasquez v. City of Hamtramck*, 757 F.2d 771 (6th Cir. 1985), the plaintiff there brought a § 1983 claim alleging that a police officer maliciously issued the plaintiff parking tickets without probable cause. There, the court found that the plaintiff could not base a procedural due process claim on a potential loss of property in the form of a fine whereby the plaintiff's "potential loss was limited to the monetary loss and the inconvenience of contesting the tickets" and where adequate post-deprivation remedies

were available to redress any injury. *Id.* at 773; *see also, Haagensen v. Pennsylvania State Police*, Slip Copy, 2010 WL 256578, *20 (W.D.Pa. 2010) (finding that although the Plaintiff had "a property interest recognized in the law, the existence of adequate post-deprivation procedures and her utilization of them foreclose her procedural due process claims arising out of the issuance of the citations . . . ."); *Lange v. City of Grand Junction, Colo.*, Slip Copy, 2009 WL 973502, *4 (D.Colo. 2009) (plaintiff failed to cite to any binding precedent "indicating the issuance of a traffic ticket that is later dismissed amounts to a constitutional violation. Indeed, case law from other circuits indicates that-while possibly inconvenient-improperly issued traffic tickets do not raise constitutional concerns separate from those that arise from an improper traffic stop."); *Parker v. Strong*, 717 F.Supp. 767, 771 (W.D. Okl. 1989) ("The federal district court is not the proper forum in which to try traffic tickets. Plaintiff's adequate post-deprivation remedy precludes this Court from hearing his due process claim for deprivation of property.")

As discussed above, the Plaintiff was provided process that resulted in a ruling in his favor and the refunding of his of the monies previously paid. For the foregoing reasons, the Plaintiff has not stated a § 1983 Fourth Amendment claim.

D. The Plaintiff Has Not Plead His 42 U.S.C. § 1983 Claims With the Required Specificity.

To state a claim under § 1983, a plaintiff must allege specific facts upon which a plaintiff relies in claiming the liability of each defendant. *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir.1982). Even a liberal interpretation of a Section 1983 complaint may not supply the essential elements of a claim that a plaintiff has failed to plead. *Id.*

Under his § 1983 claims against Defendants Goddard and Vanderpool, the Plaintiff does not allege direct participation in the deprivation of these rights, rather, the Plaintiff merely asserts conclusory allegations of a policy or custom of "deliberate indifference" for failure to properly advise or supervise as to the proper procedures for issuing traffic citations. Complaint at ¶¶ 151, 171.

As discussed above, *Twombly* requires a party to state factual allegations sufficient to raise a claim for relief above the speculative level. *Twombly*, 550 U.S. at 555. In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court emphasized that while a trial court examining a complaint for sufficiency must accept the factual allegations as true, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." 129 S.Ct. at 1949. The trial court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1950. Determining whether a complaint states a plausible claim for relief is "a context-specific task" requiring the court "to draw on its judicial experience and common sense." *Id.* Where well-pleaded facts only "permit the court to infer more than the mere possibility of misconduct," the complaint has not shown that the plaintiff is entitled to relief. *Id.*

Here, the Plaintiff has only alleged that the State Defendants knew or should have known of the actions taken by others that purportedly created the deprivation of the Plaintiff's constitutional rights. *See* Complaint at ¶¶ 149-152, 164-174. Such allegations are insufficient to state a claim under § 1983.

The Plaintiff's § 1983 claims should be dismissed for failure to plead with the required particularity. For all of the foregoing reasons, all of the Plaintiff's § 1983 claims against the State Defendants should be dismissed for failure to state a claim.

V. The Plaintiff Fails To State a Claim of a Conspiracy To Deprive The Plaintiff's Rights Under Color of State Law.

To state a viable claim under 42 U.S.C. § 1985(c) the Plaintiff must plead and prove, among other things, specific facts showing that all the Defendants reached a meeting of the minds and entered into an agreement to violate his civil rights. *See, e.g.*, *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993); *Taliaferro v. Voth*, 774 F.Supp. 1326, 1332-33 (D.Kan. 1991); *see also Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989). Sweeping allegations of a conspiracy that do not specify facts showing an agreement between the defendants to violate the Plaintiff's civil rights are insufficient to

state a viable Section 1985(3) claim. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988); *Gillibeau v. City of Richmond*, 417 F.2d 426, 430-31 (9th Cir. 1969). "'With near unanimity, the courts have rejected complaints containing only conclusory allegations of conspiracy under [sections 1985(2) and (3)].'" *LaBoy v. Zuley*, 747 F.Supp. 1284, 1289 (N.D.Ill.,1990).

Also, "[i]t is not enough for the plaintiff to ''allege that the [private and state] defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves towards an unconstitutional action by virtue of a mutual understanding.'" *Todd v. City of Natchitoches, Louisiana* , 238 F.Supp.2d 793, 803 (W.D.La. 2002). The allegations must contain "specific facts" showing that the mutual understanding was reached among the conspirators before they acted. *LaBoy*, 747 F.Supp. at 1289 (dismissing complaint for plaintiff's failing to offer "any facts of a *previous agreement or plan* to deprive him of his constitutional rights." (emphasis added)).

Under Count XI of the Complaint, the Plaintiff only offers bare conclusory statements as to any conspiracy or meeting of the minds by any of the State Defendants at paragraphs 184 and 222. Moreover, because the Plaintiff has not sufficiently alleged a deprivation of constitutional rights by any of the State Defendants, as explained above, there can be no conspiracy to violate civil rights alleged based upon the same actions or omissions.

VI. The Plaintiff Fails To State a Claim Under The Racketeer Influenced and Corrupt Organizations Act.

The Racketeer Influenced and Corrupt Organizations Act (commonly referred to as RICO Act or RICO) is a federal law that provides for extended penalties for criminal acts performed as part of an ongoing criminal organization. *See* 18 U.S.C. § 1962. The Plaintiff alleges a conspiracy to violate 18 U.S.C. 1962(c) and 1964 under 18 U.S.C. § 1962(d). Complaint at p. 64. In relevant part, § 1962(d) makes it "unlawful for any person

to conspire to violate . . . subsection (c)" of § 1962. Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." A "'pattern of racketeering activity' requires at least two acts of racketeering activity . . . ." 18 U.S.C. § 1961(5).

To state a civil claim for damages under RICO, a plaintiff has two pleading burdens. First, he must allege that the defendant has violated the substantive RICO statute, 18 U.S.C. § 1962, commonly known as "criminal RICO." In so doing, he must allege the existence of seven constituent elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. 18 U.S.C. § 1962(a)-(c). The Plaintiff must adequately allege the State Defendants' violation of section 1962 before turning to the second burden, *i.e.*, invoking RICO's civil remedies of treble damages, attorney's fees and costs. See *Bays v. Hunter Savings Association*, 539 F.Supp. 1020, 1023 (S.D.Ohio 1982).

A. The Plaintiff Has Not and Cannot Allege That The State Defendants "Participated" In a RICO Enterprise Committing Any Predicate RICO Acts.

To "participate, directly or indirectly, in the conduct of such enterprise's affairs" under 18 U.S.C. § 1962(c), one must have some part in directing the affairs of the RICO enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 1170, 122 L.Ed.2d 525 (1993). The Plaintiff alleges the existence of two separate RICO enterprises: (1) the City of Tempe and (2) the State of Arizona. Complaint at ¶¶ 293-294, 297-298. None of the seven predicate acts alleged by the Plaintiff against the State Defendants under their RICO claims involved any participation directly or indirectly by the State Defendants or by the State of Arizona as a RICO enterprise. *See* Complaint at ¶¶ 310-316. Aside from conclusory assertions as to the State Defendants' supervisory authority, the Plaintiff does

not officially allege supervisory authority by the State Defendants, in their respective roles, over the City of Tempe's photo enforcement program or the procedures Tempe utilizes for issuing traffic tickets and complaints. Additionally, state agencies only have the power that the Legislature grants to them. *Cox v. Pima County Law Enforcement Merit Improvement Council*, 27 Ariz. App. 494, 556 P.2d 342 (1976); *Alexander v. Fund Manager, Public Safety Personnel Retirement System*, 166 Ariz. 589, 592, 804 P.2d 122, 125 (App. 1990). The Plaintiff has not specifically alleged what powers or duties the State Defendants possessed, but failed to exercise, to direct or control the affairs of the City of Tempe or the City of Tempe Police Department.

Throughout the Complaint, the Plaintiff confuses the State's photo enforcement program and contract with Redflex with the Tempe's photo enforcement program and Tempe's separate contract with Redflex. Nevertheless, the Plaintiff does acknowledge that the City of Tempe had its own contract with Redflex. *See, e.g.*, Complaint at ¶ 37 ("Upon information and belief, on July 19, 2007, the TEMPE CITY COUNCIL approved the contract for Redflex Traffic Systems, Inc. to run their photo enforcement program in the CITY OF TEMPE, Arizona.").

Elsewhere in the Complaint, the Plaintiff acknowledges that, without a direct contract between the State and Redflex that the DPS is not responsible for the implementation and oversight of the City of Tempe and Redflex program:

> 376. On July 15, 2010, the Arizona Department of Public Safety contract for Photo Enforcement with REDFLEX TRAFFIC SYSTEMS INC. was officially terminated.
>
> 377. Since the termination of the DPS contract with REDFLEX TRAFFIC SYSTEMS., on July 15, 2010, DPS no longer has power of regulation and oversight of the operations of Redflex … .

Complaint at ¶ 376-77 (emphasis added).[1] The Plaintiff has failed to sufficiently plead how the State Defendants participated in a RICO enterprise relating to his alleged injuries.

B. The Plaintiff Has Failed to Adequately Plead the Predicate Acts of Racketeering.

"Racketeering activity" is defined as including any act which is indictable listed under 18 U.S.C. § 1961(1)(B). 18 U.S.C. § 1961. In alleging a "pattern of racketeering, the Plaintiff alleges mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, and extortion under 18 U.S.C. § 1951(b)(2).

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[1] Moreover, the Plaintiff does not have a right of action based upon any allegations of aiding and abetting by any of the State Defendants. *See, e.g.*, Complaint at ¶ 291. There is no private right of action for aiding and abetting a violation of Racketeer Influenced and Corrupt Organizations Act ("RICO"). In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), the United States Supreme Court held that because there was no language creating liability for aiding and abetting within the Securities Exchange Act of 1934, Section 10(b), there was no aiding and abetting liability under Section 10(b). *See Central Bank*, 511 U.S. at 177-78, 114 S.Ct. at 1448; *Westways World Travel v. AMR Corp*., 182 F.Supp.2d 952, 961 (C.D.Cal. 2001). Although the Ninth Circuit has not yet addressed this issue, the majority of courts that have done so since *Central Bank* have concluded that there is no basis to distinguish Section 1962(c). *Westways World Travel* at 961; *See, e.g.*, *In re Countrywide Financial Corp. Mortg. Marketing and Sales Practices Litigation*, 601 F.Supp.2d 1201, 1219 (S.D.Cal. 2009); *Pennsylvania Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 843-44 (3rd Cir. 2000); *In re* MasterCard Int'l, Inc., 132 F. Supp. 2d 468, 494-95 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002); *Jubelirer v. MasterCard Int'l*, 68 F. Supp. 2d 1049, 1054 (W.D. Wis. 1999); *Touhy v. Northern Trust Bank*, No. 98 C 6302, 1999 WL 342700, at *3-4 (N.D. Ill. May 17,1999) ("Thus, even though this court must construe RICO liberally ... this court cannot ignore the clear indication by Congress in failing to reference 18 U.S.C. § 2 in the language of § 1962(c) as well."); *In re Lake States Commodities, Inc.*, 936 F. Supp. 1461, 1475 (N.D. Ill. 1996); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 256 (S.D.N.Y. 1997) ("Following the reasoning in *Central Bank*, this Court declines to create a private right of action for aiding and abetting a RICO violation. Nowhere in the text of Section 1962 is there any indication that Congress intended to impose aiding and abetting liability for a violation of the RICO statute."); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 475-77 (S.D.N.Y. 1996); *Wuliger v. Liberty Bank, N.A.*, No. 3:02 CV 1378, 2004 WL 3377416 (N.D.Ohio Mar. 4, 2004).

1. The Plaintiff Has Failed To State a Claim For The Predicate Acts of Mail Fraud and Wire Fraud.

Mail fraud under § 1341 has three elements: (1) a scheme or artifice to defraud; (2) use of the United States mails or causing a use of the United States mails in furtherance of the scheme; and (3) the specific intent to deceive or defraud. *Miller v. Yokhama Tire Corp.*, 358 F.3d 616, 620 (9th Cir. 2004). Wire fraud under § 1343 has three elements: (1) a scheme to defraud, (2) use of the wires in furtherance of the scheme, and (3) the specific intent to defraud. *U.S. v. McNeil*, 320 F.3d 1034, 1040 (9th Cir. 2003).

In his Complaint, the Plaintiff fails to allege the requisite intent to deceive or defraud required under the elements for both mail and wire fraud by the State Defendants.

C. The Plaintiff Has Not Sufficiently Plead The Predicate Act of Extortion In Relation to Any of the State Defendants Under Federal or Arizona Law.

Under Count III, the Plaintiff claims extortion by the State Defendants as defined by 18 U.S.C. § 1951(b)(2) and A.R.S. § 13-1804(A)(7). Under § 1961, "[R]acketeering activity" includes any act which is indictable under 18 U.S.C. § 1951, otherwise known as the Hobbs Act, as well as "any act or threat involving ... extortion ... which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A). The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Under A.R.S. § 13-1804(A)(7), "[a] person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat to do in the future any of the following: … [t]ake or withhold action as a public servant or cause a public servant to take or withhold action."

In *Wilkie v. Robbins*, 551 U.S. 537, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007), an owner of a commercial guest ranch brought RICO claims, including extortion, against Bureau of Land Management (BLM) employees who allegedly used extortion to force the

owner to grant an easement to the BLM. There, the Court found that the conduct alleged did not fit the traditional definition of extortion; and therefore, the Plaintiff's RICO claim did not survive under an extortion theory under state law either. *Id.*, 551 U.S. at 567, 127 S.Ct. at 2608. Analyzing extortion within the context of governmental employees' efforts to acquire property for the government, rather than themselves, the United States Supreme Court noted that the plaintiff "cited no decision by any court, much less [the Supreme Court], from the entire 60-year period of the Hobbs Act that found extortion in efforts of Government employees to get property for the exclusive benefit of the Government. *Id.*, 551 U.S. at 565, 127 S.Ct. at 2606. The Supreme Court also noted that "[i]t is not just final judgments, but the fear of criminal charges or civil claims for treble damages that could well take the starch out of regulators who are supposed to bargain and press demands vigorously on behalf of the Government and the public." *Id.*, 551 U.S. at 567, 127 S.Ct. at 2607.

Here, like the BLM employees in *Wilkie*, any monies collected by the State of Arizona from traffic fines are collected for the benefit of the government and not the State Defendants individually. *See, e.g.*, Complaint at ¶¶ 335, 337. Therefore, the Plaintiff's claims of extortion as a predicate "racketeering activity" against the State Defendants fails. The Plaintiff's RICO claims should be dismissed for failure to sufficiently plead two or more predicate acts to establish a pattern of racketeering by the State Defendants.

For the reasons stated above, the Plaintiff's RICO claims should be dismissed for failure to state a claim.

VII. The Plaintiff's Claims Are Barred By Qualified Immunity.

"The doctrine of qualified immunity protects government officials '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.' " *Pearson v. Callahan*, 555 U.S. 223, 230, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). As explained above, the

Plaintiff has failed to sufficiently allege a violation of a federal right by the State Defendants; and therefore, they are immune from the Plaintiff's § 1983 claims.

The qualified immunity doctrine bars Plaintiffs' claims here against the State Defendants; and those claims should not be subject to any discovery to help bolster the inadequate allegations. *Ashcroft*, 129 S.Ct. at 1953.

VIII. Conclusion.

The Plaintiff has failed to state any claims upon which relief may be granted against the State Defendants. Moreover, the Plaintiff's lack of standing similarly bars Plaintiff's claims. For all the foregoing reasons, the State Defendants' claims should be dismissed.

RESPECTFULLY SUBMITTED this 25th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2011, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing.

I further certify that on the 25th day of February, 2011, a COPY of the foregoing was mailed to:

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