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12 **UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF ARIZONA**

14 DANIEL ARTHUR GUTENKAUF, an
15 unmarried man

16 Plaintiff,

17 v.

18 CITY OF TEMPE, a municipal corporation
19 and body politic; et al.

20 Defendants.

Civil Action No. 2:10-CV-02129-FJM

**REPLY IN SUPPORT OF
DEFENDANTS' GODDARDS',
HALIKOWSKIS', AND
VANDERPOOLS' MOTION TO
DISMISS**

21
22 The Plaintiff asserts claims against John Halikowski, the Director of the Arizona
23 Department of Transportation ("ADOT"), Roger Vanderpool, the former Director of the
24 Arizona Department of Public Safety ("DPS"), and Terry Goddard, the former Arizona
25 Attorney General, and their spouses (hereinafter collectively the "State Defendants"), for
26 alleged acts or omissions in the exercise of the powers of their respective offices.

1 However, the State Defendants, in their respective roles, did not have supervisory duties
2 with regard to the City of Tempe's photo enforcement program. Additionally, the Plaintiff
3 fails to sufficiently allege a deprivation of constitutional rights to maintain a claim under
4 42 U.S.C. § 1983. Moreover, the Plaintiff fails to sufficiently allege the necessary
5 predicate acts under the Racketeer Influenced and Corrupt Organizations Act ("RICO")
6 nor sufficiently allege the participation of the State Defendants in such acts. Last of all,
7 the State Defendants are entitled to qualified immunity. Therefore, all of the claims
8 against the State Defendants should be dismissed.

9 **I. The Plaintiff's Claims Rely Upon Erroneous Assertions of Duties by the State**
10 **Defendant's In Regards to the City of Tempe's Regulation of Local Roadways**
11 **and Photo Enforcement Program.**

12 All of the Plaintiff's claims arise from the issuance of a traffic ticket and complaint
13 ("traffic ticket") against him by the City of Tempe and the City of Tempe Police
14 Department (hereinafter collectively "Tempe"). Although the State may have operated a
15 photo enforcement program of its own for a period of time, the traffic ticket issued against
16 the Plaintiff was not issued under the State's photo enforcement program nor issued by any
17 of the State Defendants or by their respective agencies. The Plaintiff even recognizes that
18 the contract between Reflex Traffic Systems, Inc. ("Redflex") and Tempe is a separate
19 contract from the contract that had existed between the State of Arizona and Reflex for the
20 State photo enforcement program. *See* Plaintiff's Response To Motion To Dismiss By
21 Defendants Goddards' Halikowskis' and Vanderpools' ("Response") at p. 18. Thus, any
22 allegations by the Plaintiff that pertain to the State photo enforcement program are
inapplicable to the Plaintiff's claims here.

23 Nevertheless, the Plaintiff attempts to impose liability upon the State Defendants in
24 connection with Tempe's issuance of the traffic ticket. In Arizona, administrative agencies
25 do not possess common law or inherent powers; instead, the scope of an agency's power is
26 limited and measured by statute. *See Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P.3d

1 765, 767 (2003). Although the Plaintiff cites to certain statutes in the First Amended
2 Complaint (“Complaint”) to support liability by the State Defendants, those statutes do not
3 actually impose the duties asserted by the Plaintiff.

4
5 **A. The Plaintiff Has Not And Cannot Sufficiently Plead a Duty By the**
6 **Director of ADOT to Impose Liability In Connection With the Traffic**
7 **Ticket Issued By Tempe.**

8 The jurisdiction and duties of ADOT are delineated by statute under A.R.S. § 28-
9 332. The duties of the Director of ADOT are further provided under A.R.S. § 28-363. The
10 Plaintiff has not cited any provision within either of those sections, or elsewhere, that
11 imposes or confers powers or duties upon the ADOT Director in regards to the regulation
12 of (1) traffic on local roadways, (2) the issuance of traffic tickets by a municipality, or (3)
13 the oversight of a municipality’s photo enforcement program. Therefore, all of the
14 Plaintiff’s claims against Defendant Halikowski in his role as Director of ADOT fail and
15 should be dismissed.

16 **B. The Plaintiff Has Not And Cannot Sufficiently Plead a Duty By the**
17 **Director of DPS to Impose Liability In Connection With the Traffic**
18 **Ticket Issued By Tempe.**

19 The jurisdiction and duties of DPS are delineated by statute under A.R.S. § 41-
20 1711. The duties of the Director of DPS are further provided under A.R.S. § 41-1713.
21 Although A.R.S. § 41-1711(A) provides that DPS “is responsible for creating and
22 coordinating services by local law enforcement agencies in protecting the public safety”,
23 A.R.S. § 41-1711(B) specifically provides that “the department shall in no way preempt
24 the authority and jurisdiction of established agencies of political subdivisions of the state.”
25 The Plaintiff has not cited any statutory provision that imposes duties upon the Director of
26 DPS in regards to the regulation of (1) traffic on local roadways, (2) the issuance of traffic
tickets by a municipality, or (3) the oversight of a municipality’s photo enforcement

1 program. Therefore, all of the Plaintiff's claims against Defendant Vanderpool in his
2 former role as Director of DPS fail and should be dismissed.

3
4 **C. The Plaintiff Has Not And Cannot Sufficiently Plead a Duty By the**
5 **Arizona Attorney General to Impose Liability In Connection With the**
6 **Traffic Ticket Issued By Tempe.**

7 The Arizona Attorney General does not have any statutorily conferred supervisory
8 control over ADOT, DPS, or Tempe. Under A.R.S. § 28-333, the Attorney General is
9 expressly made the legal advisor to ADOT; however, even though the Attorney General is
10 the legal advisor to ADOT, "the Governor alone, and not the Attorney General, is
11 responsible for the supervision of the executive department" *Arizona State Land*
12 *Dept. v. McFate*, 87 Ariz. 139, 148, 348 P.2d 912, 918 (1960). To the extent may be
13 attempting to assert a claim against Defendant Goddard for a purported failure to
14 prosecute, Defendant Goddard is entitled to absolute prosecutorial immunity from such a
15 claim. *See Roe v. City and County of San Francisco*, 109 F.3d 578, 583-84 (9th Cir. 1997)
16 (holding prosecutors absolutely immune from damage suits for decisions not to initiate
17 prosecutions). Additionally, the Plaintiff has not cited any statutory provision that imposes
18 duties upon the Arizona Attorney General in regards to the regulation of (1) traffic on local
19 roadways, (2) the issuance of traffic tickets by a municipality, or (3) the oversight of a
20 municipality's photo enforcement program. For the aforementioned reasons, the Plaintiff's
21 claims against Defendant Goddard in his former role as Arizona Attorney General fail and
22 should be dismissed.

23 **D. Receipt By the State of Some of the Monies Collected Under the Tempe**
24 **Photo Enforcement Program Does Not Impose Liability Upon the State**
25 **Defendants.**

26 The Plaintiff argues that he has "alleged facts showing liability for acts and
omissions" by the State Defendants in paragraph 222 and Exhibit K of the Plaintiff's First

1 Amended Complaint. *See* Plaintiff’s Response at p. 4. In paragraph 222 of the Complaint,
2 the Plaintiff alleges, in relevant part:

3 Each of the ... STATE OF ARIZONA Defendants
4 (VANDERPOOL, HALIKOWSKI, GODDARD) ... directly or
5 indirectly received a distribution of proceeds from the traffic
6 fine, as shown in the pie illustration, provided by Tempe City
7 Court and published on page 3 of Tempe News in the Arizona
8 Republic, dated Friday, February 27, 2009. *See* EXHIBIT A,
9 Notice of Claim Against City of Tempe, with attachment
10 showing headline “City gets \$1.56 million from photo
11 enforcement”)

12 Complaint at ¶ 222. However, the pie chart referenced by the Plaintiff indicates that the
13 *State* receives a percentage of the photo enforcement funds. However, the distribution of
14 monies at issue here are delineated by law. *See, e.g.*, A.R.S. § 22-404. The State
15 Defendants did not receive any of these monies in an individual capacity. Moreover, it
16 does not appear that the State Defendants received these monies in an official capacity
17 either. Thus, the Plaintiff cannot maintain a suit against the State Defendants on these
18 grounds.

19 The allegations against the State Defendants are based upon theories of general
20 statutory duties of oversight. In *McClanahan v. United States*, 2008 WL 345350 (W.D.
21 Okla. 2008), the Court granted the United State’s Attorney General’s motion to dismiss for
22 failure to state a claim. There, the court found that the complaint failed to sufficiently
23 allege a requisite affirmative link between the alleged constitutional violation and the
24 United States Attorney General’s personal participation, exercise of discretion or control,
25 or a failure to supervise. The court explained:

26 The only basis for defendant Attorney General Ashcroft’s
liability set forth in the Complaint is defendant Attorney
General Ashcroft’s general statutory duty to oversee the
Federal Bureau of Prisons and its employees, agents, and
servants. Plaintiff sets forth absolutely no allegations of
personal participation by defendant Attorney General Ashcroft

1 in the conduct at issue in this case and no allegations that
2 defendant Attorney General Ashcroft exercised any direct
3 control or supervision over the individuals who engaged in the
conduct at issue in this case.

4 *Id.* Here, the situation is very much the same; the Plaintiff has failed to sufficiently plead
5 allegations demonstrating any direct control or supervision over the issuance of the traffic
6 ticket by Tempe or control or participation in the subsequent proceedings.

7 For the aforementioned reasons, all the claims against the State Defendants should
8 be dismissed.

9 **II. The Plaintiff Fails to State a Claim Under 42 U.S.C. § 1983 Upon Which Relief**
10 **Can Be Granted; And, Therefore, Also Fails to State a Conspiracy to Violate**
11 **the Plaintiff's Civil Rights.**

12 The Plaintiff asserts claims against the State Defendants under § 1983 alleging
13 deprivations of his Fourth Amendment rights, including malicious prosecution, and
14 violations of substantive and procedural due process. However, where there is no
15 underlying constitutional violation, there can be no § 1983 liability. *City of Los Angeles v.*
Heller, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573 (1986).

16 To state a claim under § 1983, a plaintiff must allege facts showing that (1) the
17 conduct about which he complains was committed by a person acting under the color of
18 state law and (2) the conduct deprived him of a federal constitutional right. *Long v. County*
19 *of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). A § 1983 claim against a
20 government official in his or her individual capacity requires pleading that “each
21 Government-official defendant, through the official’s own individual actions, has violated
22 the Constitution.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948 (2009).

23 The requirement to appear in court in order to contest the traffic ticket did not
24 constitute a “seizure” under the Fourth Amendment nor malicious prosecution. In support
25 of his assertion of his Fourth Amendment claims, the Plaintiff argues that the “Plaintiff
26 was served with process, so he was required to appear, and he was unlawfully haled into

1 court on the basis of Officer Colombe’s perjured traffic ticket, issued without any probable
2 cause or ‘reasonable grounds’. Failure to appear would mean default, fine, points against
3 license, suspension of license, and raised insurance rates (property interest).” Response at
4 p. 12. However, such a requirement does not constitute a “seizure” under the Fourth
5 Amendment. *See Karam v. City of Burbank*, 352 F.3d 1188, 1194 (9th Cir. 2003) (finding
6 restrictions placed on plaintiff were “no more burdensome than the promise to appear a
7 motorist makes when issued a traffic citation” and did not constitute a Fourth Amendment
8 seizure where misdemeanor charges against the plaintiff were later dismissed and where
9 the plaintiff, as a condition of her pre-trial release, had been required to appear in court and
10 was restricted from leaving the State); *Crock v. City/Town, or Boro of Mt. Lebanon Pa.*,
11 No. 09-426, 2010 WL 2606627, at *4 (W.D. Pa. May 25, 2010) (finding plaintiff who
12 received a citation that was later dismissed failed to allege a malicious prosecution claim
13 where plaintiff failed to identify any pretrial restraints on his liberty and did “not even
14 plead that he was arrested, detained, or handcuffed; that he was restricted from traveling;
15 or that he had to post any kind of bail” and where he was only required to make a court
16 appearance). The requirement for the Plaintiff to appear in court to contest the traffic
17 ticket and complaint did not violate the Fourth Amendment. The Plaintiff was never
18 stopped, arrested, or restricted as to where he could travel. Moreover, the Plaintiff’s
19 allegations fail to show that the *State Defendants* did anything to require the Plaintiff to
20 appear in court. Furthermore, had Defendant Goddard actually participated in the
21 “prosecution” of the traffic ticket, he would be entitled to absolute prosecutorial immunity.
22 *Roe v. City and County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997) (“[I]t is well
23 established that a prosecutor has absolute immunity for the decision to prosecute”)
24 For the aforementioned reasons, the Plaintiffs claims under the Fourth Amendment fail.

24 The Plaintiff has also failed to state a substantive due process claim. There is no
25 substantive due process right under the Fourteenth Amendment to be free from prosecution
26 without probable cause. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th Cir. 2004).

1 Additionally, “there is no constitutional right to be free of erroneous issued traffic tickets.”
2 *Gibson v. Inacio*, No. 09-6356, 2010 WL 3943684, slip op. at *4 (D.N.J. Oct. 5, 2010).

3 Although the Plaintiff argues that the traffic ticket was actually a criminal
4 prosecution, violations of A.R.S. § 28-701 are clearly delineated as civil violations under
5 Arizona law. Here, the Plaintiff’s traffic ticket and complaint was issued under A.R.S. §
6 28-701(A). The Legislature explicitly provides that a violation of A.R.S. § 28-701
7 constitutes a civil traffic violation. A.R.S. §§ 28-121(B) (“A violation of or failure or
8 refusal to do or perform an act or thing required by chapter 3 . . . of [Title 28] is a civil
9 traffic violation unless the statute defining the violation provides for a different
10 classification” and A.R.S. § 28-701 is found under Title 28, Chapter 3); 28-1521 (“A
11 person who violates a provision of chapter 3 of [Title 28] . . . is subject to a civil penalty
12 unless the statute defining the offense provides for a criminal classification.”). Thus, the
13 traffic ticket and complaint were civil in nature and did not impact a fundamental liberty
14 interest

15 The Plaintiff has also failed to state a procedural due process claim. The Plaintiff
16 was provided an adequate post-deprivation remedy reversing the finding of responsibility
17 and resulting in a refund of amount paid for the traffic ticket; therefore, the Plaintiff did
18 not suffer a deprivation of his procedural due process rights. *Vasquez v. City of*
19 *Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985)

20 For the aforementioned reasons, the Plaintiff fails to assert cognizable claims under
21 § 1983. Additionally, for the same reasons, the Plaintiff also fails to state a conspiracy to
22 violate the Plaintiff’s civil rights against the State Defendants.

23 **III. The Plaintiff Does Not Sufficiently Allege the State Defendants’ Participation**
24 **in the Predicate Acts of Racketeering; Therefore, the Plaintiff’s RICO Claims**
25 **Should Be Dismissed.**

26 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

1 seven predicate acts alleged by the Plaintiff against the State Defendants under their RICO
2 claims involved any participation directly or indirectly by the State Defendants or by the
3 State of Arizona as a RICO enterprise. *See* Complaint at ¶¶ 310-316.¹

4 Additionally, the predicate acts asserted by the Plaintiff under his RICO claims fail
5 to state a claim. Simply mailing or sending the traffic tickets did not constitute mail or
6 wire fraud. In *Tassio v. Mullarkey*, No. 07-cv-02167, 2008 WL 3166149, (D. Colo. Aug.
7 5, 2008), the plaintiff claimed that the State of Colorado engaged in racketeering via mail
8 fraud and extortion when it mailed him notice of his tax delinquency. *Id.* at 7. The court
9 held that the plaintiff's belief that the notices were fraudulent did not mean mailing the
10 notice constituted mail fraud. "Mail fraud is not committed by sending notices through the
11 mail, even if the recipient plaintiff perceives them as fraudulent based upon his feelings
12 about federal and state taxing authorities." *Id.* Here, the Plaintiff has never denied that he
13 was the person operating the vehicle under the circumstances for which the traffic ticket
14 was issued. Thus, the Plaintiff has not sufficiently alleged that the traffic ticket he
15 received was actually fraudulent; and, therefore, his mail and wire fraud claims fail.

16 The Plaintiff cites to *Wood v. Incorporated Village of Patchogue of New York*, 311
17 F.Supp.2d 344 (E.D.N.Y. 2004) in support of his allegation of mail fraud by the State
18 Defendants; however, in that case the plaintiff only sued local authorities for tickets issued
19 by a local governmental entity but did not sue state officials for the actions of a local
20 governmental entity as is the case here.

21 Also, any monies that were collected by the State of Arizona from traffic fines are
22 collected for the benefit of the government and not the State Defendants individually. *See*,
23 *e.g.*, Complaint at ¶¶ 335, 337. Therefore, the Plaintiff's claims of extortion as a predicate

24
25 ¹ To the extent that the Plaintiff attempts to assert any claims upon the basis of the State's
26 photo enforcement program, the Plaintiff lacks standing to do so since his traffic ticket was
not issued under that program.

1 “racketeering activity” against the State Defendants fails. *See Wilkie v. Robbins*, 551 U.S.
2 537, 127 S.Ct. 2588 (2007).

3 For the aforementioned reasons the Plaintiff fails to state any RICO claim against
4 the State Defendants.

5 **IV. The State Defendants Are Entitled to Qualified Immunity.**

6 As explained in the Motion to Dismiss and above, the State Defendants did not
7 violate the Plaintiff’s constitutional rights, let alone clearly established constitutional
8 rights; therefore, qualified immunity is appropriate. *Lange v. City of Grand Junction*,
9 *Colo.*, No. 08-cv-02049, 2009 WL 973502 (D. Colo. Apr. 10, 2009) (finding “case law
10 from other circuits indicates that-while possibly inconvenient-improperly issued traffic
11 tickets do not raise constitutional concerns separate from those that arise from an improper
12 traffic stop” and that “to the extent [p]laintiff claims [the] [d]efendant [] violated the
13 [p]laintiff’s constitutional rights by issuing a later-dismissed traffic ticket-qualified
14 immunity is appropriate.”).

15 **V. Conclusion.**

16 For the aforementioned reasons, the Plaintiff has failed to state any claims upon
17 which relief can be granted against the State Defendants; therefore, the claims against them
18 should be dismissed.

19 RESPECTFULLY SUBMITTED this 21st day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March, 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 21st day of March, 2011, a COPY of the foregoing was mailed to:

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