IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROXANA ORELLANA SANTOS	*	
Plaintiff	*	
v.	*	Case No: WDQ-09-CV-2978
FREDERICK COUNTY BOARD OF COMMISSIONERS, et al.	*	
Defendants	*	

****

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THIRD AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

Frederick County Sheriff Charles Jenkins and Frederick County Board of Commissioners, two of the Defendants, by DANIEL KARP and SANDRA D. LEE, KARPINSKI, COLARESI & KARP, and MICHAEL M. HETHMON, IMMIGRATION REFORM LAW INSTITUTE, their attorneys, file this Memorandum in support of their Motion to Dismiss Third Amended Complaint or, in the Alternative, for Summary Judgment and Motion to Strike, and state as follows:

TABLE OF CONTENTS

INTRODUCTION

Plaintiff Roxana Orellana Santos' claims[1] arise from her detention on October 7, 2008, by Frederick County Sheriff's Deputies Jeffrey Openshaw and Kevin Lynch. The Deputies had approached Santos in a parking lot and asked for identification in the course of a constitutional, consensual encounter. Santos gave the Deputies a National Identification Card from El Salvador and dispatch told them Santos had a warrant for deportation. One Deputy gestured to Santos to stay sitting while he confirmed the warrant was active.

The Court of Appeals for the Fourth Circuit has affirmed the District Court's ruling that this gesture was a Fourth Amendment seizure. It occurred before the Deputies received communication from the U.S. Immigration and Customs Enforcement ("ICE") requesting Santos' arrest. The Deputies stated they seized Santos because of the warrant for deportation. They did not articulate any other justification for the seizure, although the evidence before them would have given them probable cause–and certainly reasonable articulable suspicion–to believe Santos was committing one of two federal immigration crimes, being a non-citizen in the country without registering or without carrying registration papers. The record does not demonstrate precisely when the Deputies first received a direct request from ICE to detain Santos, or whether it was before or after they transported her to the detention center. ICE provided a written Immigration Detainer, via facsimile, about forty-five (45) minutes after Santos was arrested, and an ICE agent took custody of her shortly thereafter.

The Fourth Circuit reversed the District Court's ruling that the detention was constitutional, and held

---

[1] The claims in the original Complaint and in the First Amended Complaint were claims against the Deputies for Fourth Amendment and Equal Protection violations under 42 U.S.C. § 1983 and for conspiracy under 42 U.S.C. § 1985(3); a Section 1983 personal supervisory liability claim against Sheriff Charles Jenkins; a Monell entity liability claim and claim for violation of Title VI of the Civil Rights Act of 1964 against the Frederick County Board of [County] Commissioners; and a failure to supervise claim against three individual Federal Defendants who worked in Immigration and Customs Enforcement ("ICE"). The claims for supervisory and municipal liability were bifurcated.

that Santos' detention, before a federal agent requested her arrest, violated the Fourth Amendment when it was solely on the basis of a civil immigration warrant for deportation. However, the Court affirmed judgment for the Deputies on the grounds they were entitled to qualified immunity. The Fourth Circuit remanded the bifurcated claims against Sheriff Charles Jenkins and the Frederick County Board of Commissioners.

Plaintiff has filed a Third Amended Complaint, containing the following Counts:

Count 1	Unlawful Seizure, 42 U.S.C. §1983 Claim in Violation of the Fourth and Fourteenth Amendments to the U.S. Constitution (Defendants Openshaw and Lynch in their Personal and Official Capacities);
Count 2	Unlawful Arrest, 42 U.S.C. §1983 Claim in Violation of the Fourth Amendment to the U.S. Constitution (Defendants Openshaw and Lynch in their Official and Individual Capacities);
Count 3	Personal Supervisory Liability, 42 U.S.C. §1983 (Defendant Jenkins in his Official and Individual Capacities);
Count 4	Entity Liability (Defendant Frederick County Board of Commissioners).

BACKGROUND

1. This Court has dismissed any Section 1983 claim that the Deputies or the Sheriff were participating in enforcement of federal immigration law.

The current Third Amended Complaint has been filed after six years of litigation and discovery. During this period, a number of the claims have been disposed of and are not subject to further litigation. A more complete analysis is detailed in this Memorandum of those claims and issues that again are raised in the Third Amended Complaint but that Defendants submit have been resolved.

First, the District Court, by The Honorable Judge Benson Everett Legg, dismissed the Section 1983 claims against Sheriff Charles Jenkins and the Deputies on the grounds that Defendants could not be sued under Section1983 when Plaintiff's pleading alleged they were assisting in the enforcement of federal

immigration law. The Court held that Section 1983 does not provide a cause of action for claims of constitutional violations occurring under color of federal law and that such claims are properly brought under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Santos was allowed to conduct discovery in order to determine whether Defendants acted under color of federal law or state law and was given leave to file a second amended complaint. The Second Amended Complaint then based Santos' claims on Section 1983, removed the claims against the Federal Defendants, and deleted certain allegations that the Deputies' actions were taken under federal law.

The Third Amended Complaint now has refiled the claims that Judge Legg ruled cannot be brought as Section 1983 claims. The Third Amended Complaint plucks from the First Amended Complaint allegations that Santos deleted when she filed the Second Amended Complaint, and adds them again. Defendants submit that Judge Legg's ruling is the law of the case and that claims based on these allegations of actions under color of federal law, which are asserted once again in the Third Amended Complaint, cannot be brought under Section 1983, but must be brought must be filed, if at all, as Bivens claims.

2. The Fourth Circuit held Santos' detention solely on the basis of a warrant for deportation violated the Fourth Amendment but the claims against the Deputies in their individual capacity were barred by qualified immunity.

Second, the District Court later granted summary judgment in favor of the individual Deputies on the Fourth Amendment, Equal Protection, and Conspiracy claims. It also dismissed the claims against Sheriff Jenkins and the Frederick County Board of County Commissioners, on the basis that Santos had not established a constitutional violation by the Deputies. The Court denied Santos' motion for reconsideration on the grounds, in part, that the Deputies were entitled to qualified immunity. Santos appealed the trial court's Fourth Amendment and qualified immunity rulings. She did not appeal the judgment in favor of the Deputies on the Equal Protection or Conspiracy claims.

On appeal of the Fourth Amendment ruling, the Court of Appeals for the Fourth Circuit held, for the first time in this Circuit, that Santos' initial seizure by the Deputies violated the Fourth Amendment, when the detention was not directed or authorized by ICE, because the detention was solely on the basis of the warrant for deportation. The Court of Appeals reasoned that a warrant for deportation is not a criminal warrant but a civil warrant that does not justify an arrest or even a Terry stop. It held that state or local law enforcement officers cannot arrest aliens for civil immigration violations absent, at a minimum, direction or authorization by federal officials under a federal statute, 9 U.S.C. § 1357(g). Santos v. Frederick County Board of Commissioners, 725 F.3d 451, 468 (4th Cir. 2013). It held the subsequent detainer sent by an ICE agent did not cure the constitutional defect of the previous seizure based on the warrant for deportation. Id., 725 F.3d at 466. However, the Court affirmed the dismissal of the claims against the Deputies on the grounds that they are entitled to qualified immunity. Id., 725 F.3d at 469.

3. Defendants move to strike the allegations in the Third Amended Complaint that Defendants discriminated on the basis of race and/or ethnicity, on the grounds that judgment was granted to Defendants on the Equal Protection claim and Plaintiff's immaterial and scandalous allegations of unconstitutional discrimination are unfairly prejudicial to Defendants.

The Third ruling by the District Court at issue is its holding, on the basis of the record, that the Deputies were entitled to judgment as a matter of law on her claims they discriminated against Santos and failed to accord her equal protection of the law. There had been full discovery concerning the actions of the individual Deputies on the day of the arrest at issue. Santos did not appeal the judgment against her on the claims for violation of Equal Protection and Title VI of the Civil Rights Act of 1964. Nevertheless, Santos originally sought leave to refile these claims in the originally proposed Third Amended Complaint, in Counts 3 and 4 against the Deputies for Equal Protection and Conspiracy, and in Count 6 against the County for Title VI. The Court denied Santos leave to file an amended complaint as to these three counts, holding because Santos did not appeal Judge Legg's rulings on those claims, she has abandoned them. Memorandum

Opinion, dated August 26, 2015 (Document 148), at 26. Santos was given thirty (30) days to file a "perfected" third amended complaint. Id., at 26, n. 34.

However, the Third Amended Complaint that was filed deleted only the Counts themselves that brought the formal claims for Conspiracy and violations of Equal Protection and Title VI. Unabashed by this Court's rulings, Santos continues to urge that she is entitled to relief because Defendants unlawfully discriminated against her on the basis of race or ethnicity and have a policy of such unlawful and unconstitutional discrimination. Indeed the Third Amended Complaint opens with precisely this argument:

> 1. This action arises out of Defendants' unlawful and unconstitutional interrogation and detention of individuals based solely on their race and/or ethnicity; Defendants' implementation of policies and practices that condone and perpetuate the unlawful behavior at issue in this Complaint; and Defendants' unlawful interrogation, seizure and arrest of Ms. Orellana Santos based solely on her perceived race and/or ethnicity and without any reasonable suspicion or probable cause.

Third Amended Complaint, ¶1.

Defendants move to strike the allegations of discrimination on the basis of race or ethnicity on the grounds they are immaterial to the subject matter of the litigation and will unfairly prejudice Defendants.

4. The previous holdings of the District Court and of the Fourth Circuit are no longer subject to review, and those claims which were disposed of by those holdings are no longer at issue.

Santos did not appeal the District Court's first ruling described above, dismissing those Section 1983 claims which were based on allegations that Defendants were participating in the enforcement of federal immigration law. Santos has abandoned those claims, and they no longer are at issue. The District Court's ruling is final and is the law of the case.

The second ruling, that the individual capacity claims are barred by qualified immunity, has been decided by the Court of Appeals for the Fourth Circuit, and this Court is powerless to reconsider the

decision. Those individual capacity claims are no longer at issue and Defendants submit the Deputies are entitled to dismissal of Counts I and II against them their individual capacity.

5. The only claim that truly is at issue on remand is the claim that the County has municipal liability.

The prior holdings of the District Court and of the Fourth Circuit that are final in this case have narrowed the scope of claims that remain at issue at this time. The Fourth Circuit stated it remanded the case for the District Court to "determine whether the [D]eputies' unconstitutional actions are attributable to an official policy or custom of the [C]ounty or the actions of a final [C]ounty policymaker." Santos, 725 F.3d at 470. Notably, the Fourth Circuit's opinion remanding this action declined to mention certain of the claims that would technically remain at issue if only a superficial analysis were conducted. It made no mention of a need to determine liability of Sheriff Jenkins, in his individual or official capacity, or of the Deputies in their official capacity.

It is Defendants' contention that the claim against Sheriff Jenkins in his individual capacity is a claim which is not truly at issue. The holding of the appellate court was that the individual Defendants were entitled to qualified immunity because the constitutional right at issue was not clearly established. Id., 725 F.3d at 469. Even though the supervisory claim against the Sheriff in his individual capacity had been bifurcated and technically was not before the court, that claim is barred by qualified immunity for the same reasons that the Fourth Circuit affirmed dismissal of the claims against the Deputies.

With regard to the official capacity claims, the Fourth Circuit's opinion explicitly reminded the litigants that the Section 1983 claims against the Sheriff and the Deputies in their official capacity "are 'treated as suits against the [municipality].'" Id. (alteration in the original). It is well established in both the State and Federal courts in Maryland that Sheriffs and Sheriff's Deputies in their law enforcement function are State officers, rather than local government employees. The Sheriff is a State officer under the Maryland

Constitution, and the suit against the Sheriff and his Deputies in their official capacity is a suit against the State of Maryland. The Eleventh Amendment provides complete immunity from suit to the State of Maryland and thus to the Sheriff and his Deputies in their official capacity.

Thus, several claims are no longer truly at issue. First, the claims that the Defendants were assisting in the enforcement of federal immigration law were dismissed because those claims cannot be brought under Section 1983 but must be brought, if at all, under Bivens. Second, claims against the Deputies in their individual capacity have been decided in favor of the Deputies because the individual Defendants are entitled to qualified immunity. Third, the claim against the Sheriff in his individual capacity must be dismissed for the same reason. Finally, the claims against the Sheriff and the Deputies in their official capacity should be summarily dismissed because the individual Defendants have the right to assert Eleventh Amendment immunity.

The sole remaining issue on remand to this Honorable Court is whether there is municipal liability on the part of Frederick County, Maryland,[2] for the Deputies' violation of the Fourth Amendment by the seizure of Santos based solely on a warrant for deportation.

6. In this Memorandum, Defendants submit the Third Amended Complaint fails to state a claim upon which relief can be granted that the County has municipal liability for the Sheriff's Deputies' violation of Santos' constitutional rights under the Fourth Amendment.

Just as it is well established that a Sheriff in the State of Maryland is a State official and not local government official, it is equally clear that, under Maryland State law, a local governmental entity, such

---

[2] At the time of the incident, on October 7, 2008, and when the Complaint was filed in 2009, Frederick County had a County Commissioner form of government with five elected County Commissioners on the Board of County Commissioners. Plaintiff properly named the Frederick County Board of [County] Commissioners as a defendant. Frederick County now has a County Charter form of government, since December 1, 2014. Under the current Frederick County Charter, there is an Executive Branch with a County Executive and a Legislative Branch with a seven-member County Council. The corporate name is now "Frederick County, Maryland." Charter of Frederick County, Maryland, Section 103.

as Frederick County, has no supervisory role over the Sheriff or Sheriff's Deputies and has no authority to change a policy or practice of the Sheriff or his Deputies. For this reason and for other reasons discussed below, Defendants submit Frederick County, Maryland, is entitled to dismissal of the Third Amended Complaint.

STATEMENT OF FACTS

1. On the basis of her detention and arrest, Plaintiff alleges unauthorized enforcement of immigration law under the guise of the Federal 287(g) program and discriminatory law enforcement on the basis of race and/or ethnicity.

The origin of Plaintiff Roxana Orellana Santos' lawsuit was her detention and arrest on October 7, 2008. Two Frederick County Sheriff's Deputies, Deputy Jeffrey Openshaw and Deputy Kevin Lynch, briefly detained Santos when they were told she had a warrant for deportation; they arrested her when the warrant was confirmed; and they then turned her over to a federal immigration agent. Santos filed suit on November 10, 2009, against Frederick County Sheriff's Deputies Jeffery Openshaw and John Doe in their individual and official capacities, Frederick County Sheriff Charles Jenkins in his individual and official capacities, the Frederick County Board of [County] Commissioners, and three federal officials. In an Amended Complaint filed on January 29, 2010, John Doe was identified as Deputy Sheriff Kevin Lynch.

The factual allegations, in the initial Complaint and the subsequent amended complaints, have been divided into two categories. In the first category (Statement of Facts Section I., "Immigration Law Enforcement in Frederick County under Sheriff Charles Jenkins," and Section II., "Implementation of the 287(g) Program"), Santos alleges a discriminatory practice by Defendants of targeting and interrogating individuals about their immigration status based solely on their perceived race, national origin, or ethnicity, for overzealous and unauthorized immigration enforcement. See, e.g., Third Amended Complaint, ¶¶ 24 and 31. Santos points to campaign promises of Sheriff Charles Jenkins which Santos calls "anti-immigrant

rhetoric" and cites a United States Government Accountability Office report which was critical of ICE and the 287(g) program. Id. ¶¶ 9-10 and 21-23. The FCSO is a participant in the Federal 287(g) program run by ICE. Id., ¶14.

The 287(g) program, authorized by Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. §1357(g), allows the Department of Homeland Security to enter into agreements with state and local law enforcement agencies such as the Frederick County Sheriff's Office ("FCSO"). See Third Amended Complaint, ¶16. Under these agreements, selected officers are trained and certified to carry out certain functions of federal immigration officers. See id. Sheriff Jenkins signed a 287(g) Memorandum of Agreement ("MOA") on February 5, 2008. Id., ¶18. It is undisputed that neither Deputy Openshaw or Deputy Lynch had any training or certification under the 287(g) program. See id., ¶20.

However, Santos alleges the discrimination and unauthorized enforcement of immigration law by Defendants occurred under the guise of the 287(g) program. Id. ¶¶ 24 and 31. The Third Amended Complaint supports this allegation by comparing percentages of illegal immigrants arrested by the FCSO for violent crimes with the national average and stating that in 2008 over 90% of the individuals detained by the FCSO under the 287(g) MOA were of Latino descent. See id., ¶¶25-27.

The second category of fact allegations (Section III., "The Arrest of Roxana Orellana Santos by FCSO Deputy Sheriffs") describes the events on the date of her arrest. Each version of Plaintiff's complaint also includes the allegation, in entirely conclusory terms, that the intent of the two Deputies involved was to interrogate Santos about her immigration status based on her perceived race, ethnicity and/or national origin. See id., ¶36.

On the day of the incident, Santos was sitting on the curb of a parking lot, near a storage container behind a food store, eating a sandwich. Id., ¶33. She was not engaged in any apparent unlawful activity. Id.,

¶34. A Frederick County Sheriff's Office patrol cruiser drove near Santos. Deputies Openshaw and Lynch, who were in the car, stopped, got out of the vehicle, and approached Santos. Id., at ¶ 35. Deputy Openshaw asked Santos if she was on break or eating lunch, and if she worked in the Common Market. Id., at ¶¶40-41. Santos responded, "Yes." Id. Deputy Openshaw asked Santos whether she spoke English, and she responded, "No." Id., at ¶42. Deputy Openshaw then asked Santos if she had identification or a passport. Id., at ¶¶43 and 44. In response to the Deputies' request for identification, Santos first told the Deputies that she had none with her, and that her passport was at home, but then she showed them a "national identification card" from El Salvador. Id., at ¶¶43, 44, and 48.

Santos asserts the Deputies stood in close proximity to her, talking to each other and periodically looking down at Santos, who remained seated, and that she did not feel free to leave. Id., at ¶¶46-47. Shortly thereafter, when Santos asked whether there was a problem, Deputy Openshaw stated, "No, no, no," while holding out his hand and gesturing that she should remain seated. Id., at ¶51. After some time, when Santos stood up to leave the scene, the Deputies prevented her from doing so and handcuffed her and transported her to the Frederick County Adult Detention Center. Id., at ¶¶54, 55, and 57. Santos was not charged by the Deputies with a violation of any law, and no incident or arrest report was filed. Id., at ¶¶59 and 60. Santos was transferred to the custody of ICE, which transferred her to an alien detention facility at the Dorchester County Jail in Cambridge, Maryland. Id., at ¶¶2 and 56-58. She was granted supervised release after a month in custody. Id., at ¶58.

The essence of each version of Santos' complaint is that the Deputies asked questions of Santos in order to interrogate her about her immigration status based on her perceived race, ethnicity and/or national origin; that by questioning her in English, standing close to her and watching her, the Deputies detained her with no reasonable or legitimate basis; that the Deputies had no reasonable, individualized and articulable

suspicion to detain Santos or probable cause to arrest her, when Deputy Openshaw gestured to her to remain seated or when the Deputies took her in custody; and that the Deputies were without authority to enforce federal civil immigration law.

2. The undisputed material facts in the record demonstrate the reason articulated by the Deputies for Santos' detention was her warrant for deportation.

In the event this Honorable Court wishes to consider additional facts in the record and to consider Defendants' motion as a motion for summary judgment, there is a record, in this case, of undisputed facts that have been disclosed in the course of discovery.

According to Santos' deposition testimony, she was sitting near a large storage container in the parking lot at the rear of the Common Market in Frederick, Maryland, eating a sandwich before her work shift began at 11:00 a.m. on October 7, 2008, when she saw a marked Frederick County Sheriff's patrol car driving slowly toward her. Deposition of Roxana Orellana Santos, attached hereto as **Exhibit A**, p. 31, lines 12-23; p. 32, line 23 - p. 33, line 22; p. 34, lines 5 - 16; and p. 36, lines 11-13. At her deposition, Santos wrote the number 1, to show where she was seated, on a photograph of the scene, attached hereto as **Exhibit B**. Deputy Openshaw identified the structure next to where Santos was sitting as a storage container. Deposition of Deputy Jeffrey Openshaw, attached hereto as **Exhibit C**, p. 49, lines 12-19. See also "Exhibit 1" to Openshaw Deposition, scene photograph marked by Deputy Openshaw, attached hereto as **Exhibit D**.

The Deputies were driving on routine patrol check through a commercial district. Id., p. 26, lines 3-14; p. 33, line 17 - p. 34, line 6; and p. 36, lines 10-22. Deputy Openshaw was working as a field training officer for Deputy Lynch, a brand new Deputy in the FCSO on approximately day seven of his ten-week long field training. Id., p. 24, line 2 - p. 25, line 6. The officers were making "a check through the businesses to make sure everything was okay." Id., p. 44, lines 2-3.

Deputy Openshaw was not trained or certified in the 287(g) program, and he knew very little about the 287(g) MOA.

> Q. Are you familiar with Frederick County so-called 287(g) agreement with ICE, do you know what that is?
> A. I have heard of it, yes.
> Q. And what's your understanding of what that is?
> A. It's a program that's, and I'm not definitely an expert on it by any means, but it's a program that once an individual is identified as illegal, in other words in the country without the proper procedures, it's a government program that allows them to get turned over to immigration, I believe. And honestly I don't know, because I haven't been trained on that.

Exhibit C, Openshaw Deposition, p. 82, line 15 - p. 83, line 6; see also id., p. 82, line 14 - p. 83, line 20. Deputy Lynch was only on his seventh day of training in the Sheriff's Office, so he also was not familiar with the 287(g) program. Id., p. 25, lines 3-6.

When Santos first saw the Deputies' car, she recognized it as a police car. **Exhibit A**, Santos Deposition, p. 36, lines 3-7. In support of her contention that she was not engaged in any unlawful or suspicious activity, Santos testified that when she saw the Deputies' marked cruiser, she remained seated and did not have a reaction. Id., p. 35, lines 6-7; and p. 36, lines 14 - 15.

However, the Deputies testified that they stopped because Santos acted in a way they thought was suspicious, ducking quickly behind the storage container out of view of the Deputies. **Exhibit C**, Openshaw Deposition, p. 45, line 9 - p. 46, line 13; p. 52, line 11; p. 82, lines 8-13.

> Q. Tell me what, if anything, occurred after you came around the corner and you saw this individual sitting on the curb.
> A. We were proceeding down the back side of the business, we observed her and --
> Q. Could you tell right away it was a woman, by the way?
> A. Observed an individual. I can't recall definitely if I knew, well, there's a woman sitting there. There was somebody sitting there. It appeared that when she observed us in a marked patrol car she gathered her stuff and stood up quickly and went around the back side of the building, of the storage container, as we indicated right there.
> Q. Okay. And when you say the back side, do you mean --

A. West.
Q. -- the west side?
A. The west side, out of our field of view.
Q. Okay.
A. Because we were continuing down this way. At that point when she stood up I would say that we were probably in this area. So we had traveling slowly progressed, I don't know, 30, 40 feet, yards, whatever, I don't know. . . . Closed the distance by half, if we look at it like that. At that point, yes, I could see it was a female, and she stood up, gathered her belongings and went back behind there to get out of our field of view.

Id., p. 50, line 8-p. 51, line 16.

Deputy Lynch also testified that when he saw the woman who later was identified as Santos, she looked startled, got up quickly, grabbed her belongings, and went behind the container. Deposition of Deputy Sheriff Kevin R. Lynch, attached hereto as **Exhibit E**, p. 42, line 13 - p. 46, line 14. See also "Exhibit 1" to Lynch deposition, site photograph, attached hereto as **Exhibit F**. Deputy Openshaw remarked to Deputy Lynch that the behavior was odd, so they stopped the vehicle and walked around the back side of the container. **Exhibit C**, Openshaw Deposition, p. 52, lines 1 - 19; and **Exhibit E**, Lynch Deposition, p. 46, lines 15-22 (Deputy Lynch or Deputy Openshaw stated "that was weird").

Santos knew she had an active immigration warrant. She testified she recalled an incident on May 21, 2007, when police took custody of Santos when an employee of a Boscov's store told them that Santos stole some jewelry. See **Exhibit A**, p. 27, line 4 - p. 29, line 24 (Santos admits she was stopped by a Boscov's employee and accused of stealing a ring, and states she was taken to the hospital by the police and was not charged with a crime). She admitted she was aware that she was in the country illegally:

Q. At the time he asked you for ID, you knew that you were in this country illegally, did you not?
A. Yes.

Id., p. 43, lines 1-5. A May 21, 2007, Incident/Investigation Report prepared by Frederick Police Department Officer Matthew Shane Ilko, a copy of which is attached hereto as **Exhibit G**, states that a

woman named Orellana- Santos was stopped for shoplifting and was taken to Frederick Memorial Hospital ("FMH") because she was pregnant and reported pain in her stomach. **Exhibit G**, p. 3. Officer Ilko notes, "I overheard Orellana-Santos provided the nurse with her name as Roxana Santos." Id. The Incident Report reports that an active warrant for deportation was found for Ms. Santos but was not pursued because she was pregnant:

> After leaving FMH, I requested FPD Dispatch to conduct a wanted check on Roxana Santos DOB 4-20-1980. FPD Dispatch advised that Roxana Santos revealed an Outstanding Warrant of Deportation. I requested a FMH Nurse, via telephone, to check Orellana-Santos for the listed scar on her right wrist. The scar on Orellana-Santos right wrist was confirmed.
>
> I contacted ICE Supervisor Green and after I gave him the details surrounding my contact with Orellana-Santos, ICE Green concluded that Orellana-Santo's [sic] Outstanding Warrant of Deportation would not be pursued at this time due to her pregnant status.

Id.

A copy of court records of removal proceedings against Plaintiff Roxana Elizabeth Orellana-Santos in the United States Immigration Court and Board of Immigration Appeals ("BIA"), Santos had failed to appear for a removal hearing at the Immigration Court on January 27, 2006, and was ordered removed *in absentia*. See United States Immigration Court and BIA records, attached hereto as **Exhibit H**, Memorandum and Order dated January 27, 2006, and Written Decision & Order of the Immigration Judge, dated December 12, 2008, at 2.[3]

Of note, Santos testified that the Deputies never questioned her about her immigration status. **Exhibit A**, p. 55, lines 2-4. The interaction between Santos and the Deputies proceeded like the great

---

[3] The order of the Immigration Court was appealed to the BIA, which affirmed the Immigration Judge's decision denying Santos' motion to reopen removal proceedings and dismissed the appeal of the Immigration Court's decision. **Exhibit H**, BIA records, Decision of BIA dated March 25, 2010. As 8 U.S.C. §1252(b)(1) requires that a petition for judicial review must be filed not later than 30 days after the date of the final order of removal, which in this case was January 27, 2006, the records demonstrate there was no timely appeal filed for review.

majority of routine encounters with law enforcement officers. The Deputies asked her questions about whether she worked at the nearby food store and asked if she had identification. See id., p. 37, lines 7-22; and p. 38, line 20 - p. 39, line 17; p. 40, line 2 - p. 41, line 12.

Deputy Openshaw explained it was common practice to request identification:

> Q. Tell me why you asked her for identification.
> A. Common practice to identify subjects that we come in contact with on a normal patrol shift, if we make contact with them and there is -- if we're conducting an investigation. And basically when she stood up and moved around the back side I wanted to investigate why she stood up and moved around the back side to remove herself from our field of view. At that point I decided I wanted to identify her to find out why she wanted to come around the back side, or get out of our field of view. So I asked her for identification. At that point she said she did not have any identification.

Exhibit C, Openshaw Deposition, p. 58, lines 3-17. Deputy Openshaw testified to his routine practice of calling dispatch for information about individuals who did not have identification:

> Q. And do you recall circumstances before this one, this October 7th, 2008, circumstance, in which you encountered people who did not have identification?
> A. Yes.
> Q. All right. And what -- in those circumstances what did you do?
> A. We ask them their name and date of birth, and again submit that to emergency communications or central dispatch for verification of the name they provided.

Id., p. 80, lines 7-17. He described one routine request for identification he and Deputy Lynch made for an individual who turned out to have an active warrant for trying to buy a 12-year-old girl on the Internet, and explained the Deputies' interactions all are conducted the same way. Id., p. 80, line 18 - p. 82, line 7.

When Santos said she did not have identification, Deputy Openshaw asked her for her name and date of birth. Id., p.60, lines 8-16; p. 62, lines 5-17; and p. 66, line 17 - p. 67, line 20. He then gave Santos' name and date of birth to dispatch to "run what we call a wanted check on that person," Id., p. 63, lines 5-6; see also id., p. 62, line 25- p. 63, line 9; and p. 63, line 17 - p. 64, line 1.

Q. So once you had the information, her name and her date of birth, what occurred next?
A. I provided it to central communications, and we sat there and waited for the response, basically.
Q. Did you have -- did you have to go back to the car to radio central?
A. No, I have a radio on us right there.

Id., p. 68, lines 9-17. Deputy Lynch confirmed that Santos gave him or Deputy Openshaw her name and either he or Deputy Openshaw called dispatch to run a wanted check. **Exhibit E**, Lynch deposition, p. 53, line 20 - p. 55, line 23; and, p. 56, lines 2-23.

Approximately 15 minutes later, Santos realized that she had a national identification card from El Salvador, and she gave it to the Deputies. **Exhibit A**, Santos Deposition, p. 41, lines 19-23; p. 42, lines 1 - 25; see also id., p. 69, lines 16-25; and **Exhibit C**, Openshaw Deposition, p. 89, line 3 - p. 90, line 4. Deputy Openshaw was not sure whether Santos had already given him her identification card before or after he gave dispatch her name and date of birth. Id., p. 91, line 14 - p. 92, line 3.

In response to the Deputies' inquiry, Dispatch gave the Deputies preliminary information that Santos had an active warrant. **Exhibit E**, Lynch Deposition, p. 58, lines 14-20 and p. 59, line 19 - p. 60, line 17. Dispatch informed Deputy Openshaw that Santos had an active warrant through ICE for immediate deportation:

Q. Okay. And once you did that, what were you told?
A. We were told that she had a warrant, an active warrant. And I'm sure I asked what the warrant was for, or they provided that she had an active warrant through ICE for immediate deportation.

Exhibit C, Openshaw Deposition, p. 70, line 22 - p. 71, line 5.

After Dispatch advised that there was an active warrant for Santos, the Deputies waited for Dispatch to verify the warrant was still active by contacting ICE.

Q. Okay. And once you were provided with that information, what happened next?

> A. At that point they need to verify the warrant, okay. In other words, contact whatever agency, I guess in this point, or in this situation ICE or immigration, or whoever had the warrant. Our agency would contact that agency to verify that the warrant was still active, because at times sometimes there may be a warrant that has been served or has, for whatever reason, gone inactive, for whatever reason, and they may not want it. Or there would be instances from other states where a warrant -- they may not want to extradite. For whatever reason the warrant was issued. Let's say somebody's from Oklahoma and they're up here and we pull them up here and run a check on them, they have a warrant, it may be for like a child support, they're not going to extradite the person. So we just say, "Hey, you got a warrant through Oklahoma for whatever reason, you might want to get that taken care of, we're not taking you in, they don't want you," that type of thing. So our agency had to verify the warrant. During that time she remained sitting on the ground. We knew she was, had a warrant and they were verifying it. That took a little bit of time.

Id., p. 71, line 6 - p. 72, line 9.

While Dispatch was verifying the warrant, but before ICE had advised that the federal government wanted Santos arrested on the warrant, Deputy Openshaw gestured to Santos to remain seated:

> Q. Did you ask her to stay there while they were verifying this warrant?
> A. Oh, absolutely. At that point she actually is under arrest. But we let her sit there and didn't put handcuffs on her until we verified the warrant.
> Q. Did you tell her she was under arrest?
> A. I think at one point she said, "Can I stand up?" And I said, "No, just stay there."
> Q. But did you tell her she was under arrest?
> A. I don't believe so at that time. . . .

Id., p. 72, lines 10-21; see also **Exhibit E**, Lynch deposition, p. 61, line 17 - p. 63, line 7 (stating that Santos was not free to leave before the warrant was confirmed).

Dispatch then confirmed to the Deputies that Santos did have an active ICE warrant. **Exhibit C**, Openshaw Deposition, p. 86, line 18 - p. 87, line 3; **Exhibit E**, Lynch Deposition, p. 64, line 23 - p. 65, line 2. After dispatch verified the warrant as active, Santos was taken into custody. Id., p. 73, lines 2-9. An ICE agent faxed an "Immigration Detainer - Notice of Action," attached hereto as **Exhibit I** (originally filed as "Exhibit B" (Document 87-2), pp. 34-35, attached to Plaintiff's Opposition to the Motion for Summary Judgment of Defendants Openshaw and Lynch dated October 6, 2011), at 11:17:57 A.M. The Event

Chronology, a copy of which is attached as **Exhibit J**, confirms that a "suspicious activity" was called in to dispatch at or before 10:27:37,supplemental information was provided concerning the call, at or before 10:28:05, and Santos was detained at 10:35. See also **Exhibit C**, p. 92, lines 4-21 (verifying the Event Chronology and other documents provided in discovery). Thus the detainer was faxed to the Detention Center just under 45 minutes after Santos was detained.

No testimony in the record indicates any action by the Deputies to independently seek information about Santos' immigration status or to take any independent action toward enforcing immigration law. Nothing in the record indicates there was any participation by either of the Deputies in the 287(g) program or the 287(g) MOA. The record does confirm that Sheriff Jenkins is the signatory of the 287(g) MOA on behalf of the Frederick County Sheriff's Office. See Memorandum of Agreement, attached hereto as **Exhibit K**. It also demonstrates that neither Frederick County nor any employee, official, or representative of Frederick County is a party to the 287(g) MOA. Id.

The Deputies transported Santos to Patrol Headquarters at 110 Airport Drive, where an ICE officer was present and interviewed Santos to verify that she was who the warrant was for. **Exhibit C**, p. 73, line 20 - p. 75, line 4; and p. 79, lines 3-9. The ICE agent expressly asked the Deputies to transport Santos to Central Booking, where they turned her over to the Detention Center. Id., p. 78, line 22 - p. 79, line 9.

PROCEDURAL HISTORY

On November 10, 2009, Santos filed a Complaint alleging eight claims against Defendants and officials from the Department of Homeland Security ("DHS"). On January 29, 2010, she filed a First Amended Complaint that only identified one "John Doe" Defendant. Counts One through Four were brought against Sheriff's Deputies Openshaw and Lynch. Count One alleged a Fourth Amendment violation for unlawful arrest. Count Two alleged a Fourteenth Amendment violation of Equal Protection. Count Three

alleged a Fourth and Fourteenth Amendment violation for unlawful seizure. Count Four alleged a Section 1985 claim for conspiracy to violate Santos' Fourteenth Amendment rights. Count Five was brought against Sheriff Jenkins alleged a Section 1983 claim for supervisory liability. Count Six alleged a Section 2000d claim against the Frederick County Board of County Commissioners ("BOCC") for violating Title VI of the Civil Rights Act of 1964. Count Seven alleged a Monell claim against the BOCC. Count Eight alleged a failure to supervise against the DHS officials.

On August 25, 2010, Judge Legg granted Defendants' Motion to Dismiss the Section 1983 claims, with leave to file an amended complaint, on the grounds that the claims that the Deputies and the Sheriff were participating in the enforcement of federal immigration law could not be brought under Section 1983 and should be brought as Bivens claims. In a conference call on September 14, 2010, the Court ruled the parties could conduct discovery concerning Santos' claims against the individual Deputies and concerning the question whether the Deputies acted pursuant to federal law. Telephone Conference (Document 58), at 13 and 31. After this period of discovery, Plaintiff was to determine if the claims against the individual Defendants would be brought as Section 1983 claims or Bivens claims. Id., at 22, 23, 27, and 31. The claims against the Sheriff and the County were bifurcated. Telephone Conference on February 4, 2011 (Document 66).

On February 18, 2011, Plaintiff filed the Second Amended Complaint, which did not include claims against the DHS officials and no longer claimed the Deputies lacked authority to enforce the civil provisions of federal immigration law. On February 7, 2012, the District Court granted Defendants' Motion for Summary Judgment on the Fourth Amendment claims and Equal Protection claims against the Deputies. On July 11, 2012, the District Court denied Santos' Rule 59(e) Motion to Amend or Alter Judgment.

Plaintiff appealed the ruling (1) that the encounter between the Deputies and Santos was consensual until a seizure under the Fourth Amendment occurred when one of the Deputies gestured to Santos with his hand for her to remain seated; (2) that the detention of Santos did not violate the Fourth Amendment after dispatch had informed the Deputies that Santos had a warrant for deportation but before a federal ICE agent directed them to detain her; and (3) that Deputies were entitled to qualified immunity even if the Rule 59(e) motion were otherwise justified by developments in the law.

On August 7, 2013, the Fourth Circuit affirmed in part, vacated in part, and remanded the decision of the District Court. Santos, 725 F.3d at 470. The Fourth Circuit agreed with the District Court that the Deputies did not violate the Fourth Amendment by approaching Santos and asking her if she had identification. Second, it held, for the first time in this Circuit, that absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on a warrant for deportation. Third, it affirmed the dismissal of the claims against the Deputies, holding they are entitled to qualified immunity. The appellate court remanded the case for the District Court to "determine whether the deputies' unconstitutional actions are attributable to an official policy or custom of the county or the actions of a final county policymaker." Id.

STANDARD OF LAW

Federal Rule of Civil Procedure 12 (b)(6) provides that a Complaint should be dismissed if it fails to state a claim upon which relief can be granted. In considering a motion to dismiss, claims must be construed in the light most favorable to the non-moving party, and all well pleaded allegations should be accepted as true. See Martin Marietta Corp. v. International Telecommunications Satellite Organization, 991 F.2d 94 (4th Cir. 1992). Dismissal also is appropriate when the face of the complaint clearly reveals the

existence of a meritorious affirmative defense. See Brooks v. City of Winston–Salem, 85 F.3d 178, 181 (4th Cir.1996)

While construing those facts in a light most favorable to plaintiff, the Court need not accept as true legal conclusions, unwarranted inferences, unreasonable conclusions, or arguments. E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007) (internal quotation omitted). A court need not accept conclusory allegations concerning the legal effect of events plaintiff has alleged if those conclusions do not reasonably follow from his description of what happened. Ficker v. Chesapeake & Potomac Telephone Co., 596 F. Supp. 900 (D.Md. 1984).

Rule 56(b) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered in favor of a moving party when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Where, in a case "decided on summary judgment, there have not yet been factual findings by a judge or jury, and [one party's] version of events . . . differs substantially from [the other party's,] . . . courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the [summary judgment] motion." Scott v. Harris, 550 U.S. 372, 378, 127 S.Ct. 1769, 1774 (2007). However, "[a]t the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." Id. 550 U.S. at 380, 127 S.Ct. at 1776 (quoting Fed.R.Civ.P. 56(c)).

Federal Rule of Civil Procedure 12(f) authorizes the Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Fed.R.Civ.P. 12(f). " 'Immaterial' matter is that which has no essential or important relationship to the claim for relief, and 'impertinent' material consists of statements that do not pertain to, and are not necessary to resolve, the disputed issues. 'Scandalous' matter includes allegations that cast a cruelly derogatory light on a party to other persons. Glass v. Anne Arundel Cnty., No. CIV. WDQ-12-1901, 2013 WL 1120549, at *9 (D. Md. Mar. 14, 2013) (citing CTH 1 Caregiver v. Owen, No. 8:11–2215–TMC, 2012 WL 2572044, at *5 (D.S.C. July 2, 2012)). Rule 12(f) is designed to "reinforce the requirement in Rule 8(e) that pleadings be simple, concise, and direct." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1380 (3d. ed. 2014).

ARGUMENT

I. The claims that Defendants participated in the enforcement of immigration law under the guise of the 287(g) program must be dismissed.

A. When participating in the enforcement of immigration law, the Deputies are acting under color of federal law, pursuant to 8 U.S.C. § 1357(g)(8), and therefore Defendants may not be sued under 42 U.S.C. § 1983 for participating in the enforcement of immigration law.

Santos fails to state a 42 U.S.C. § 1983 claim upon which relief can be granted for any claim that Defendants participated in the enforcement of federal immigration law. When state and local law enforcement agencies assist in the enforcement of immigration laws, they are acting under color of federal law, not under color of state law. United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043 (1941); 8 U.S.C. §1357(g)(8). A "Bivens action" would be the appropriate cause of action for Plaintiff to file against Defendants for claims that Defendants took actions enforcing the immigration laws. Arias v. U.S. Immigration & Customs Enforcement Div. of Dep't of Homeland Sec., 2008 WL 1827604, at *14 (D. Minn. Apr. 23, 2008) (citing 8 U.S.C. § 1357(g)(8)) (copy attached hereto as **Exhibit L**).

> Although the [municipal] Defendants do not address the full implication of 8 U.S.C. § 1357(g), the Court finds that the statute bars Plaintiffs' Monell claims against the [municipal] Defendants in their official capacities. Plaintiffs seek to hold the [municipal] Defendants liable in their official capacities for assisting ICE in implementing Operation Cross Check, which is a federal immigration initiative executed pursuant to federal policy. The [municipal] Defendants' assistance falls squarely within the ambit of § 1357(g). Accordingly, the [municipal] Defendants are considered to be acting under color of federal authority and under the supervision of the Attorney General and the DHS Secretary. Therefore, Plaintiffs cannot assert a 42 U.S.C. § 1983 Monell claim because the [municipal] Defendants were not acting under color of state law, and they were not the final policymakers regarding Operation Cross Check.

Arias, 2008 WL 1827604, at *15. Furthermore, 8 U.S.C. § 1357(g)(10) clarifies that an agreement with ICE is not a prerequisite for local law enforcement agency to cooperate in the enforcement of immigration laws. United States v. Vasquez-Alvarez, 176 F.3d 1294, 1300 (10th Cir. 1999); Arias, 2008 WL 1827604, at *13.

When local and state enforcement agencies are assisting the federal government in the enforcement of immigration laws, a Federal statute expressly protects them from claims they acted under State law:

> An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

8 U.S.C. § 1357(g)(8). By using the conjunctive "or" in § 1357(g)(8), Congress specifically conferred federal authority to both officers who were "acting under color of authority under [§ 1357(g)]" (i.e., assisting in the enforcement of immigration laws) and to those working under a 287(g) agreement. Id.

Santos may not proceed under 42 U.S.C. § 1983. Buonocore v. Harris, 65 F.3d 347, 359 (4th Cir. 1995) ("Because [sheriff's deputy] Cundiff was acting pursuant to federal authority, he took on the rights and obligations of a federal officer."). When a state or local law enforcement officer, such as the Deputies in this case, detains a person for a federal immigration violation, the officer is "assisting the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the

United States." 8 U.S.C. § 1357(g)(10). As such, "for purposes of determining the liability, and immunity from suit," the Deputies were "acting under color of federal authority." Arias, 2008 WL 1827604, at *15. On August 25, 2010, Judge Legg granted Defendants' motion to dismiss the Section 1983 claims on the grounds that Section 1983 provides a cause of action only for constitutional deprivation by officers acting under color of state law, but Santos claimed Defendants acted under color of federal immigration law when she claimed they were assisting in the enforcement of federal immigration law.

> Section 1983 "provides a cause of action for constitutional deprivations arising out of actions taken under color of state law." Askew v. Bloemker, 548 F.2d 673, 676-77 (7th Cir. 1976); see also Rosas v. Brock, 826 F.2d 1004, 1007 (11th Cir. 1987) (holding that "[o]ne prerequisite to suit under [§ 1983] is that the challenged action be taken under color of state law"). It does not provide a cause of action for constitutional violations occurring under color of federal law. Askew, 548 F.2d at 677. Those claims are properly brought as Bivens actions. See Bivens, [403 U.S. at 389] (holding that a cause of actions exists for individuals whose constitutional rights have been violated by federal agents).

Memorandum, dated August 25, 2010 (Document 50), at 5-6. The Court granted Santos leave to file a Second Amended Complaint. Judge Legg stated, "in this case, the critical inquiry is whether Jenkins, Openshaw, and Lynch were acting under color of state or federal law when interrogating and detaining Santos." Id., at 6.

On February 18, 2011, Santos filed the Second Amended Complaint (Document No. 75). She removed allegations previously found in the Amended Complaint that Sheriff's deputies who were not trained or certified under the 287(g) MOA enforced civil immigration law. See Comparison Copy of Second Amended Complaint (Document 75-1). Specifically, the Second Amended Complaint deleted allegations in the Amended Complaint that each of the Deputies, Deputy Openshaw and Deputy Lynch, "had not received the training, was not a certified officer within the meaning of the 287(g) MOA and, therefore, was not authorized to conduct immigration officer functions." Id., Amended Complaint, ¶26 and ¶27 (deleted in Second Amended Complaint); and Amended Complaint, ¶¶60 and 61 (stating the Deputies were not

certified to perform the functions of federal immigration officers under the 287(g) MOA, and that they therefore were not authorized to arrest Santos on the deportation warrant) (deleted in Second Amended Complaint). The Second Amended Complaint removed allegations previously found in the Amended Complaint that Sheriff's deputies who were not trained or certified under the 287(g) MOA nonetheless enforced civil immigration law under 287(g). Id., Amended Complaint, ¶63 (revised as Second Amended Complaint, ¶57); and Amended Complaint, ¶65 (alleging Sheriff Jenkins knew the enforcement of immigration law by non-287(g) officers is preempted by federal law) (deleted in Second Amended Complaint). It deleted the contention that federal law preempts state police from enforcing federal civil immigration laws except for officers certified under the 287(g) MOA, and that Deputies Openshaw and Lynch were not certified under the 287(g) MOA. Id., Amended Complaint, ¶¶74-76 (deleted in Second Amended Complaint). The Second Amended Complaint also deleted from the former Amended Complaint the entire Section II of the Statement of Facts, which had detailed the limited authority conferred by the MOA on certified law enforcement agency officials. Id., Amended Complaint, ¶¶22-32 (deleted in Second Amended Complaint).

All of these allegations about the Deputies enforcing immigration law when they were not certified under the 287(g) MOA were deleted from the Second Amended Complaint. Thus, the Second Amended Complaint brought no claims against the Deputies under Bivens, but removed the allegations that the Deputies acted under color of federal law.

Despite the dismissal of Santos' Section 1983 claims, Santos has essentially refiled the same §1983 claims of unauthorized enforcement of immigration law that Judge Legg dismissed on August 25, 2010. The Third Amended Complaint has added back in the very same allegations that were removed from Amended Complaint when Santos filed the Second Amended Complaint. Third Amended Complaint ¶20 adds the

previously removed allegation that the Deputies were not trained or certified pursuant to the 287(g) MOA (from Amended Complaint deleted ¶¶26-27, 60-61, and 76 (see Document 75-1)). Newly added ¶¶28 , 30, 32, and 98-101 in the Third Amended Complaint revive the allegation that non-287(g) deputized Frederick County Sheriff's Deputies enforced federal immigration law without authority to do so and that Sheriff Jenkins was knew of this (compare with Amended Complaint deleted ¶¶65 and 74-75).

Santos did not appeal the August 25, 2010, holding that the claims the individual Defendants violated Santos' constitutional rights by participation in the enforcement of immigration law could not be brought under Section 1983. She cannot now bring the same Section 1983 claims that have been dismissed and not appealed. The claims that have been remanded are limited to the bifurcated Section 1983 claims of supervisory and municipal liability for the unconstitutional conduct of the individual Deputies in seizing Santos, under color of State law, solely on the basis of a civil warrant for deportation, without probable cause or reasonable articulable suspicion of a criminal offense.

The allegation of unconstitutional conduct on the part of the Deputies cannot now be expanded to encompass a claim that previously was dismissed, the claim that their unconstitutional conduct was their participation in the enforcement of immigration law without the requisite certification under the 287(g) MOA. Accordingly, the remanded claims based on the Deputies' violation of Santos' constitutional rights also cannot now be expanded to claim the municipality is liable for undetermined claims that the Deputies conducted unauthorized enforcement of immigration law.

B. Even if the claims that Defendants engaged in unauthorized enforcement of Federal immigration law pursuant to the 287(g) program were properly brought as Bivens claims, Plaintiff does not have standing to challenge implementation of the 287(g) program.

In addition, Santos does not have standing to challenge the 287(g) program or the allegation there is "discrimination" due to the 287(g) program. The Third Amended Complaint discusses in detail

allegations about Sheriff Jenkins' implementation of the 287(g) MOA with DHS. However, the Third Amended Complaint has renewed the assertion that the Deputies were not 287(g) trained and were not participating in the program. See, e.g., Third Amended Complaint, ¶¶20, 28 , 32, 56, 66, and 98-101.

Therefore, any claim that Santos has suffered injury attributed to the 287(g) program must be dismissed. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 1867 (2006) ("The standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted" and "a plaintiff must demonstrate standing separately for each form of relief sought.") (emphasis in original).

The apparent basis for the claim that Santos' detention is somehow attributable to the 287(g) program despite the undisputed fact that neither of the Deputies had any training in the 287(g) program (see **Exhibit C**, Openshaw Deposition, p. 25, lines 3-6; p. 82, line 15 - p. 83, line 6; and p. 82, line 14 - p. 83, line 20), is the recitation in the Third Amended Complaint of reports that in some jurisdictions, non-287(g) certified officers have arrested individuals under the guise of a 287(g) program, and statistics comparing percentages of individuals with violent felony charges arrested under the 287(g) MOA in Frederick County with a national average, or reporting that 90% of 287(g) detainees in Frederick County are of Latino descent.

Santos apparently asks this Court to infer that because a 90% of 287(g) arrestees in Frederick County allegedly are Latinos, the arrest of one particular arrestee of Latino descent, Santos, was part of the 287(g) program. See Third Amended Complaint, ¶27. In addition, she continues to claim the existence of "a discriminatory practice and policy of targeting and interrogating individuals about their immigration status based solely on their perceived race, national origin or ethnicity." Id., ¶24. Twombly does not give credit as fact to such bald assertions as the ones Plaintiff alleges which amount to no more than "labels and

conclusions, and a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 544, 127 S. Ct. at 1965.

To the extent Santos is attempting to assert claims based on her belief that Defendants will act in an unlawful manner against Latinos at some point in the future, such claims would neither be ripe nor particularized, and would therefore be nonjusticiable. See, e.g., Texas v. United States, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotations omitted); Abbot Labs v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515 (1967) (the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements").

The percentages cited in Santos' pleading allow for the theoretical possibility that discrimination was at work in the implementation of the 287(g) program, but Santos has failed to show how those disparities support an inference that the 287(g) program had any causal relation to the injury she suffered in particular. Without more, a jury would have to rely on impermissible speculation to find in her favor.

Accordingly, Santos does not have standing to challenge Defendants' implementation of the 287(g) program and her claims based on alleged implementation of the 287(g) program or the 287(g) MOA must be dismissed.

C. Even if the claim under Section 1983 were interpreted to substitute for a Bivens claim, no Bivens action is recognized for municipal liability.

The Third Amended Complaint brings claims against the County based on allegations that the County has municipal liability for unconstitutional enforcement of civil immigration law, under the 287(g) program, which is federal law. Under Judge Legg's analysis and ruling, such claims must be brought as Bivens claims.

However, the Supreme Court has held a Bivens claim cannot be brought against an entity for constitutional violations by individuals who act under color of federal law. Correctional Services Corp. v. Malesko, 534 U.S. 61, 122 S. Ct. 515 (2001). The plaintiff in Malesko brought a claim for a constitutional violation against a halfway house operating under a contract with the federal bureau of prisons to house federal prisoners. The Court in Malesko refused to recognize an action against the corporate employer:

> The purpose of Bivens is to deter individual federal officers from committing constitutional violations. [FDIC v.] Meyer [510 U.S. 471, 114 S.Ct. 996 (1994)] made clear that the threat of litigation and liability will adequately deter federal officers for Bivens purposes no matter that they may enjoy qualified immunity, 510 U.S., at 474, 485, 114 S.Ct. 996, are indemnified by the employing agency or entity, id., at 486, 114 S.Ct. 996, or are acting pursuant to an entity's policy, id., at 473-474, 114 S.Ct. 996. Meyer also made clear that the threat of suit against an individual's employer was not the kind of deterrence contemplated by Bivens. . . . This case is, in every meaningful sense, the same. For if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury. On the logic of Meyer, inferring a constitutional tort remedy against a private entity like CSC is therefore foreclosed.

Malesko, 534 U.S. at 70 - 71, 122 S. Ct. at 521; see also Meyer, 510 U.S. at 485, 114 S.Ct. at 1005 (holding no damages action lies under Bivens against a federal agency–and bypassing qualified immunity–because the purpose of Bivens is to deter the individual officer).

For this reason also, because no action can be brought against a corporate entity such as the County, no claim can be brought in this case against the County for alleged participation in enforcement of immigration law by the Deputies.

II. Counts I and II against the Deputies in their individual capacity, claiming violation of the Fourth Amendment, must be dismissed because they already have been finally adjudicated in this action.

The District Court has granted summary judgment in favor of the individual Deputies on the Section 1983 claims. Santos appealed the trial court's Fourth Amendment and qualified immunity rulings. On appeal of the Fourth Amendment ruling, the Court of Appeals for the Fourth Circuit affirmed the dismissal of the claims against the Deputies on the grounds that they are entitled to qualified immunity.

Deputies Openshaw and Lynch therefore are entitled to dismissal of the claims in Counts I and II of the Third Amended Complaint against them in their individual capacities, because they have been finally adjudicated, and this District Court is without authority to reconsider the holding by the Court of Appeals for the Fourth Circuit in their favor.

III. Defendants are entitled to have this Court strike the allegations that they engaged in unconstitutional discriminatory actions, practices, and policies.

Defendants move this Court pursuant to Rule 12(f) to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Fed.R.Civ.P. 12(f). A Rule 12(f) motion falls within the discretion of the district court. Xerox Corp. v. ImaTek, Inc., 220 F.R.D. 241, 243 (D.Md.2003) (J. Titus). Consideration of a motion to strike is particularly appropriate in a case such as the instant one where prior discovery and hearings on the merits already have determined the legal issues. "[Q]uestions of law 'quite properly are viewed as determinable only after discovery and a hearing on the merits.' 5A C. Wright and A. Miller § 1381 at 674–6. Thus, 'even when technically appropriate and well-founded, [a motion to strike is] often not granted in the absence of a showing of prejudice to the moving party.' 5A C. Wright and A. Miller § 1381 at 672." United States v. Fairchild Indus., Inc., 766 F. Supp. 405, 408 (D. Md. 1991).

Defendants recognize that ". . . before a motion to strike will be granted the allegations must be both immaterial and prejudicial." Hare v. Family Publications Service, Inc., 342 F.Supp. 678, 685 (D.Md.1972). "'Immaterial' matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." 5A Charles Alan Wright and Arthur R. Miller, § 1382 (1986). Similarly, "'impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." Id. "However, the courts are granted considerable discretion to determine motions to strike,

especially if the allegations in the complaint will cause prejudice at a later date in the litigation." Xerox Corp. v. ImaTek, Inc., 220 F.R.D. at 243 (citing 5A Wright and Miller, supra, § 1382).

Defendants respectfully submit that they are unfairly prejudiced by the relentless assertions in the Third Amended Complaint that Defendants have engaged in unconstitutional discrimination on the basis of the race or ethnicity of individuals in Frederick County. No claim of discrimination is before the court. The allegations fall squarely within the proscription in Rule 12(f) of "immaterial, impertinent or scandalous matter."

The following are more than a dozen objectionable statements included in the Third Amended Complaint in a litany of immaterial and frankly defamatory statements:

> 1. This action arises out of Defendants' unlawful and unconstitutional interrogation and detention of individuals based solely on their race and/or ethnicity . . . and Defendants' unlawful interrogation, seizure and arrest of Ms. Orellana Santos based solely on her perceived race and/or ethnicity . . .
>
> 10. . . . Defendant Jenkins engaged in anti-immigrant rhetoric. . . . He stated that ". . . We cannot continue to absorb this population or we will end up in collapse like a Third World Country."
>
> 24. . . . FCSO's implementation of the 287(g) MOA . . . has resulted in a discriminatory practice and policy of targeting and interrogating individuals about their immigration status based solely on their perceived race, national origin or ethnicity and selective enforcement of state and local law . . . .
>
> 27. In 2008, over 90% of the individuals arrested by the FCSO and detained under the 287(g) MOA were of Latino descent.
>
> 31. . . . the Defendants in this action engage in a policy and practice of racially profiling individuals for immigration enforcement purposes and engaged in unauthorized immigration enforcement . . .
>
> 36. . . . Defendants Openshaw and Lynch stopped the car solely because they intended to interrogate Ms. Orellana Santos about her immigration status based on her perceived race, ethnicity and/or national origin.

> 65. . . . Defendant Jenkins has directed, encouraged, aided, abetted, and/or permitted deputies of the FCSO to selectively target for investigation and law enforcement individuals whom deputies perceive to be immigrants . . .
>
> 69. Defendant Jenkins knew or should have known that the policies and practices that he implemented and condoned were likely to result in unlawful discrimination, seizures and arrests by FCSO officers.
>
> 70. . . . Defendant Jenkins directed, encouraged, aided, abetted, and/or permitted this unlawful behavior as part of his ongoing anti-immigrant campaign.
>
> 76. Ms. Orellana Santos continues to fear that she, her family, and/or her acquaintances will be arbitrarily and unlawfully arrested by officers of FCSO.
>
> 77. . . . the discriminatory and otherwise unlawful actions committed and/or permitted by Sheriff Jenkins and the members of the FCSO have created a climate of fear among immigrants, Latinos, and those perceived to be of either or both groups, who reside, work, and/or travel through Frederick County.
>
> 85. As a result of the Defendants' actions, Plaintiff Orellana Santos fears that she will be stopped, interrogated and treated unfairly and in a discriminatory manner in the future by law enforcement officers in the FCSO.
>
> 97. Defendant Jenkins' anti-immigrant rhetoric . . .

Third Amended Complaint (underlining added).

These allegations, underlined above, are not only of technically illegal conduct but of morally reprehensible acts and motives. The contention that the Sheriff's political campaign included an intent to create a racially or ethnically discriminatory County underscores the invidious nature of the allegations.

For this reason these allegations clearly are unfairly prejudicial in this case which Plaintiff has demanded be tried before a jury. In addition, litigating such immaterial matters will unfairly prejudice Defendants at trial. They do not assert any cognizable claim and do not relate to any claim or remedy, now that Defendants have been granted summary judgment on the Equal Protection claim and have been denied leave to refile that claim in the Third Amended Complaint. Defendants respectfully move to strike these allegations pursuant to Rule 12(f).

IV. The Sheriff in his individual capacity is entitled to qualified immunity.

The Fourth Circuit held that "qualified immunity bars [Santos'] individual capacity claims because the right at issue was not clearly established at the time of the encounter." 725 F.3d at 469. It is true that the supervisory claim against the Sheriff in his individual capacity had been bifurcated and technically was not before the court. However, the Sheriff in his individual capacity is entitled to qualified immunity for the same reasons that the Fourth Circuit held the Deputies in their individual capacity were entitled to qualified immunity. The "right at issue was not clearly established at the time of the encounter." Nor was it clearly established in this Federal Circuit until the Fourth Circuit issued its opinion in this case on August 7, 2013.

Accordingly, Defendant Sheriff Charles Jenkins respectfully moves for dismissal of Count III claiming personal supervisory liability, under Section 1983, against him in his individual capacity.[4]

V. The Sheriff and the Deputies in their official capacities are State officials and have Eleventh Amendment Immunity.

In McMillian v. Monroe County, 520 U.S. 781, 786, 117 S.Ct. 1734 (1997), the Supreme Court held that whether a sheriff is considered a county or a state official, when acting in his law enforcement capacity,

---

[4] Should the Court disagree and hold that the Sheriff in his individual capacity is subject to suit in his supervisory capacity, despite the Fourth Circuit's ruling that the individual Defendants are entitled to qualified immunity, then Defendants respectfully submit the Third Amended Complaint fails to provide the necessary allegation of specific facts indicating any personal conduct by Sheriff Jenkins related in any way to the Fourth Amendment violation at issue, a seizure based solely on a warrant for deportation. In order to find a supervisor, such as Sheriff Jenkins, liable under 42 U.S.C. § 1983, the "plaintiff must plead that…[the] defendant, through the official's own individual actions, has violated the Constitution" or a federal statutory right. Iqbal, 129 S. Ct. 1937, 1948. The only personal actions alleged, in the Third Amended Complaint, that are even tangentially related to the Fourth Amendment seizure are allegations that Sheriff Jenkins was aware that FCSO deputies have enforced federal immigration law. See id., ¶ 95 (alleging the Sheriff was aware of officers using traffic offenses as pretense to check the immigration status of individuals and arrest individuals for federal immigration violations); ¶96 (alleging he was aware that FCSO officers stopped, interrogated, or detained individuals based solely on violations of federal immigration law or notice of civil immigration warrants); and ¶99 (alleging his anti-immigrant rhetoric has fostered an atmosphere that has encouraged unauthorized enforcement of federal immigration law).

for purposes of §1983, depends on an analysis of state law. Under the Maryland Constitution, a county sheriff is a designated state constitutional official . MD. CONST. ART. IV, § 44. County sheriffs and deputy sheriffs are defined as State personnel by State statute. See MD. CODE ANN., STATE GOV'T ART., § 12–101(a)(6). The Sheriff's salary is set by the state rather than by the County. MD. CODE ANN., CTS. & JUD. PROC. ART., §2–309. The Maryland Court of Appeals has held that under Maryland law, sheriffs and their deputies are "officials and/or employees of the State of Maryland," rather than of their county. Rucker v. Harford County, 316 Md. 275, 281, 558 A.2d 399, 402 (1989).

For purposes of civil liability, the general rule is well settled that Maryland courts treat county sheriffs and their deputies are state officials when considering claims based on their law enforcement functions. See, e.g., Barbre v. Pope, 402 Md. 157, 173, 935 A.2d 699, 709 (2007) (a civil action against a Deputy Sheriff of Queen Anne's County law enforcement officer who shot Plaintiff is classified as an action against a "state personnel," citing Section 12–101(a)(6) of the State Government Article); Lee v. Cline, 384 Md. 245, 265–66, 863 A.2d 297, 309 (2004) (a Frederick County Deputy Sheriff who detained the plaintiff in a traffic stop is a State employee and whether he was entitled to qualified immunity was governed by the Maryland Tort Claims Act); Prince George's County v. Aluisi, 354 Md. 422, 434, 731 A.2d 888, 895 (1999) ("Sheriffs and deputy sheriffs are state officials, not local government officials"); Ritchie v. Donnelly, 324 Md. 344, 357, 597 A.2d 432, 438 (1991) (under Maryland law, a sheriff is a state official, and citing Dotson v. Chester, 937 F.2d 920, 927 (4th Cir.1991) as suggesting that a Maryland sheriff is a state official under § 1983 while engaged in a law enforcement activity); Rucker v. Harford County, 316 Md. at 281, 558 A.2d at 402 (deciding issue certified by District of Maryland court "whether the Sheriff or Deputy Sheriffs of Harford County are employees of the State of Maryland or of Harford County," the Court of Appeals held,

"as a matter of Maryland law, the Sheriff and Deputy Sheriffs of Harford County are officials and/or employees of the State of Maryland rather than of Harford County").

The District Court for the District of Maryland has followed the reasoning of the Court of Appeals in Rucker. The Court in Rucker conducted a detailed analysis of the Maryland Constitution and the Maryland Code and concludes that sheriffs and sheriff's deputies are state officials. This Court in Rossignol v. Voorhaar, 321 F. Supp. 2d 642 (D. Md. 2004), concluded that a sheriff in his law enforcement capacity, such as Sheriff Jenkins in the case at bar, is a state official who has immunity from suit under the Eleventh Amendment:

> [D]irect control over the sheriff in . . . Maryland counties remains solidly with the State General Assembly and the judiciary. Accordingly, this Court concludes that the . . . County Sheriff and his Deputies are state officials when acting in their law enforcement capacities.

Rossignol, 321 F. Supp. 2d at 651 (D. Md. 2004). "It follows that the official capacity claims raised against [the Sheriff and Sheriff's Deputy] under § 1983 are barred by the Eleventh Amendment." Id., 321 F. Supp. 2d at 651. This Court has consistently taken the view that Maryland sheriffs are State, not county, actors. See, e.g., Willey v. Ward, 197 F.Supp.2d 384, 387–88 (D.Md.2002); Lindsey v. Jenkins, Civ. No. RDB–10–1030, 2011 WL 453475, at *3 (D.Md. Feb. 3, 2011); Jiggets v. Forever 21, Civ. No. AW–08–1473, 2010 WL 5148429, at *2 (D.Md. Dec. 13, 2010); D'Alessandro v. Montgomery County, Civ. No. PJM–08–2841, 2009 WL 2596479, at *2 (D.Md. Aug. 14, 2009); and Hayat v. Fairely, Civ., No. WMN–08–3029, 2009 WL 2426011, at *10 (D.Md. Aug. 5, 2009).

The State's limited waiver of sovereign immunity under the Maryland Tort Claims Act ("MTCA") does not apply to Federal suits such as this action. Under the MTCA, "the immunity of the State and of its units is waived as to a tort action, in a court of the State [.]" MD.CODE ANN., STATE GOV'T ARTICLE, § 12–104(a)(1). Section 12–103(2) further states that the State has not "waive[d] any right or defense of the

State ... in a court of the United States ... including any defense that is available under the [Eleventh] Amendment to the United States Constitution[.]" Id., § 12–103(2). The MTCA "clearly limits the State's waiver of immunity to actions brought in the Maryland courts," Weller v. Dep't of Soc. Servs., 901 F.2d 387, 397 (4th Cir.1990).

"A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action[.]" Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 576, 124 S.Ct. 1920, 1927 (2004) (internal quote omitted). Because the Sheriff and the Deputies are State officers under the Maryland Constitution and Maryland statutes and Maryland case law, the suit against the Sheriff and the Deputies in their official capacity is a suit against the State of Maryland. The Eleventh Amendment provides complete immunity from suit to the State of Maryland and thus to the Sheriff and the Deputies in their official capacity. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989) (holding that, in suits for damages, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" because suits against officials acting in their official capacity are indistinguishable from suits "against the State itself"). The Court lacks subject matter jurisdiction over claims that are barred by sovereign immunity. See McLean v. United States, 566 F.3d 391, 401 (4th Cir.2009) (holding the courts lack jurisdiction to entertain a suit against an immune sovereign save as it consents to be sued).

Therefore, Sheriff Charles Jenkins and Deputies Jeffrey Openshaw and Kevin Lynch, in their official capacities, are entitled to dismissal of the claims against them on the basis of this Federal Court's lack of subject matter jurisdiction under the Eleventh Amendment.

VI. There is no viable Monell claim in this case.

A. The County is not liable for a practice or policy of the Sheriff because the Sheriff and his Deputies are State law enforcement officers and by State law the County has no power or authority to change the duties or functions of the Sheriff or his Deputies.

For the same reasons that the Sheriff and the Sheriff's Deputies are officers of the State and not of the County, the County can have no liability for a policy or practice of the Sheriff or Deputies. The Maryland Court of Appeals has held that in Maryland, "county officials may not directly abridge the functions and duties of a sheriff under the common law and enactments of the General Assembly. As our cases make clear, only the General Assembly can change the duties and functions of the sheriffs." Rucker v. Harford County, 316 Md. at 288, 558 A.2d at 405 (1989). Following this analysis, this Court, in Rossignol v. Voorhaar, has held that because of the "County's basic impotence to 'directly abridge the functions and duties of a sheriff under the common law and enactments of the General Assembly, ... direct control over the sheriff in St. Mary's and other Maryland counties remains solidly with the State General Assembly and the judiciary . . . Furthermore, as the only claims plead against the Defendant [County] were asserted for Federal Constitutional violations through § 1983, and those claims are no longer viable pursuant to the analysis above, the [County] will be dismissed from this action." Rossignol v. Voorhaar, 321 F.Supp.2d at 651 (quoting Rucker v. Harford County, 316 Md. at 288, 558 A.2d 399).

Since the decision in Rucker, other cases decided by the Maryland State courts have held that a county can have no liability for actions by a sheriff or sheriff's deputy. See, e.g., Penhollow v. Bd. of Comm'rs for Cecil County, 116 Md.App. 265, 296, 695 A.2d 1268, 1284–85 (1997) (Cecil County Sheriff was State employee, and the County thus could not be held liable for Sheriff's alleged negligent hiring or retention of persons who were not hired by the County but were appointed by the Cecil County Sheriff; citing Rucker v. Harford County); Boyer v. State, 323 Md. 558, 572–73, 594 A.2d 121, 128 (1991) (county

commissioners could not be held liable for death caused by Charles County deputy sheriffs' car chase because it is clear that under Maryland law the Sheriff and deputy sheriffs are State employees).

In the absence of any authority to control the duties or functions of the Sheriff or the Sheriff's Deputies, there is no basis upon which the County can be liable for a constitutional violation by the Deputies or by the Sheriff. The County does not exercise any authority over Sheriff Jenkins' law enforcement policies, procedures, or functions. See Rucker, 316 Md. at 288, 558 A.2d at 405. Compare Dotson v. Chester, 937 F.2d 920, (4th Cir. 1991) (Dorchester County Board of Commissioners may be liable for unconstitutional condition of confinement in Dorchester County Jail because the Board created unconstitutional conditions by refusing adequately to fund the operation of the jail).

B. No factual allegations or facts in the record support a finding that unconstitutional conduct by the Deputies was attributable to an official policy or custom of the County or the actions of a final County policymaker, especially when the Deputies could have articulated a reasonable suspicion Santos was engaged in criminal activity, before ICE directed her arrest.

The County cannot be held vicariously liable to Plaintiff. Monell v. New York City Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037 (1978). A local government may be sued under Section 1983 only where some custom, practice, or policy of the local government itself is the proximate cause of the plaintiff's injury. Id., 436 U.S. at 694, 98 S.Ct. at 2037-38; City of Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 1114 (1987). The Supreme Court in City of Oklahoma v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427 (1985), noted the "policy or custom" requirement of Monell "was intended to prevent imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decision makers." Id., 471 U.S. at 821, 105 S.Ct. at 2435.

While there are no enhanced pleading requirements with respect to claims against municipalities, see Leatherman v. Tarrant County, 507 U.S. 163, 113 S.Ct. 1160 (1993), the Third Amended Complaint

is barren of any factual allegations whatsoever–as opposed to conclusory allegations–from which it could be concluded that the events of October 7, 2008, were the result of any unconstitutional act, omission, policy, custom, or practice of the County or of a final County policymaker. No County employee has been identified who might possibly be found to be a final County policymaker.[5] Instead, the Third Amended Complaint alleges: "Defendant BOCC is liable pursuant to Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), for the promulgation of county policy and/or custom, pattern, or practice by Defendants Jenkins, Openshaw and Lynch prior to and during the arrest of Plaintiff Orellana Santos on October 7, 2008." Third Amended Complaint, ¶111. For the reasons discussed above, the Sheriff and the Deputies are not and were not final policymakers for the County. Moreover, no factual allegations indicate any relation of the one incident at issue to any policy, practice, or custom of the County.

The only other reference in the Third Amended Complaint to the claim that the County has any policy, custom or practice that was responsible for the unconstitutional conduct at issue is the conclusory allegation that the BOCC "fully funds the FCSO, which operates under a set of law enforcement policies, practices, and customs directed and affected by Frederick County." Third Amended Complaint, ¶¶6 and 107. Factors such as funding of the Sheriff's Office by the County may demonstrate certain ties to the County, but such factors have been given minimal importance by the Supreme Court. See McMillian, 520 U.S. at 791, 117 S. Ct. at 1740. Santos has not alleged sufficient factual support for a finding of any County policy related in any way to the Deputies' unconstitutional conduct on the day of Santos' arrest. The only basis for a jury to find a County policy caused the constitutional violation would be speculation.

---

5 Should the Court hold it appropriate to consider the substantive claims against the Sheriff, there also are no factual allegations which could support a finding that the Deputies' violation of the Fourth Amendment was the result of any unconstitutional act of the Sheriff.

Moreover, the specific showing required for municipal liability, deliberate indifference, is conspicuously absent. In City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197 (1989), the plaintiff was arrested by City police officers and was incoherent while being transported to the police station as well as inside the police station, but the police officers never called for medical help. The plaintiff subsequently brought a § 1983 action against the City, claiming that it failed adequately to train its officers. The Supreme Court has held that local government liability for policy or custom attaches only upon a showing of the local government's "deliberate indifference" -- not mere gross negligence:

> Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a City "policy or custom" that is actionable under § 1983.

Id., 489 U.S. at 389, 109 S.Ct. at 1205. In the instant case, even if the County or the Sheriff in his official capacity were subject to suit for a failure to train the Deputies about the 287(g) program that the Deputies were not trained or certified in and were not implementing, there is no factual allegation in the Third Amended Complaint or evidence in the record that would support a reasonable jury's finding of deliberate indifference.

In Board of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 117 S.Ct. 1382 (1997), the Supreme Court addressed a claim involving a sheriff's decision to hire a deputy based upon an inadequate screening of the deputy's background. The Court again ruled that the plaintiff must show deliberate indifference on the part of the municipality and must show that:

> alleged deprivation was caused by the municipality's deliberate indifference. As we recognized in Monell and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless deliberate action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose. Cf. Canton v. Harris, 489 U.S. at 392, 109 S. Ct. at 1206. Bryan County is not liable for Sheriff Moore's isolated decision to hire Burns without adequate screening, because respondent has not demonstrated

> that his decision reflected a conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally protected right.

Id., 520 U.S. at 415 - 16, 117 S. Ct. at 1394 (emphasis in original).

The facts in the record demonstrate there was in fact no deliberate indifference to Santos' Fourth Amendment rights in this case because in addition to the reason stated by the Deputies for her detention, notice of her warrant for deportation, the facts known to the Deputies gave them reasonable suspicion that criminal activity was afoot. At the time they detained her while they awaited communication from ICE as to whether ICE wanted them to arrest her, the Deputies knew facts which would have justified her brief detention, had the Deputies articulated those facts rather than depending solely on the warrant for deportation. Santos appears to concede that if the deputies had probable cause to arrest her for a "criminal" violation, the arrest was lawful. See Third Amended Complaint, ¶¶ 60, 87, and 88. The Deputies did have at least reasonable suspicion that Santos was engaged in a violation of federal criminal law when they detained her.

Santos claims that she was "not arrested for or charged with the violation of any state, local or federal criminal law." Id., ¶60. However, there were two federal crimes for which her detention and arrest would have been lawful under the Fourth Amendment. Both crimes related to alien registration documents. Santos alleges that when the officers asked for her identification, she told them that "she did not have any identification with her" and that "her passport was at home." Third Amended Complaint, ¶¶ 43-44. Then, "[a]fter a few minutes passed, Ms Orellana Santos remembered that she had a national identification card in her purse, which she then retrieved and showed to Defendants." Id. at ¶ 48. These pled facts establish at the least a "reasonable suspicion that criminal activity 'may be afoot.'" United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 750 (2002) (quoting United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581 (1989) (quoting, in turn, Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968)).

First, it is a misdemeanor for an alien aged 18 years or older to fail to carry with her in her personal possession her certificate of alien registration or registration receipt card. 8 U.S.C. § 1304(e). Second, it is also a misdemeanor for an alien to willfully fail to apply for alien registration. 8 U.S.C. § 1306(a). The Deputies were already put on notice that Ms. Santos claimed to have no form of identification on her. Third Amended Complaint, ¶¶ 43-44. She then showed the deputies that she had a "national identification card." The "national identification card" is also known as a "Matricula" card or "Consular" card.[6]

The fact that Santos showed the Deputies a national identification card but had no other identification was evidence that she was an alien whose nationality is recognized by the foreign state which issued the card (in this case El Salvador). Santos did not claim to the Deputies (nor has she claimed to this Court) that she possesses United States citizenship or any lawful immigration status. See generally Third Amended Complaint. As such, the Deputies had a reasonable suspicion that Santos either was committing the crime of being an alien who was not carrying her registration documents, or was committing the crime of being an alien who entered the United States without inspection and who never applied for alien registration.

Under the circumstances, there is no reason why a claim against the County should be recognized. See Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 405, 117 S. Ct. 1382, 1389 (1997) ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure

---

6 "[There are] no references to matricula or consular identification cards in either federal statues or the statutes of selected states. [These]…cards are a form of identification for foreign nationals who are present in the United States. These cards certify the nationality of the card holder but not his or her legal residency status in the United States." Border Security/Consular Identification Cards Accepted within the United States, but Consistent Federal Guidance Needed, GAO Report -4-881, at 30 (August 2004).

that the municipality is not held liable solely for the actions of its employee"); Cain v. Rock, 67 F.Supp. 2d 544, 549 (D.Md. 1999) (same).

C. Plaintiff fails to plead factual allegations from which an unconstitutional governmental policy or custom could be inferred and otherwise fails to satisfy the minimum pleading standard for a Monell claim.

Santos argues that the fact of the single encounter between herself and the Deputies, coupled with statistics and commentators' opinions about ICE's 287(g) programs (Third Amended Complaint, ¶¶21-28) and statements and actions by Sheriff Jenkins supporting the 287(g) MOA (Id., ¶¶9-19), are a sufficient basis to conclude that the Deputies were engaged in a policy and practice of unlawful law enforcement activity.

"Municipalities are not liable under respondeat superior principles for all constitutional violations of their employees simply because of the employment relationship." Spell v. McDaniel, 824 F.2d 1380, 1385 (4th Cir. 1987)(citing Monell, 436 U.S. at 692-94, 98 S.Ct. at 2036-37). "Instead, municipal liability results only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. (quoting Monell, 436 U.S. at 694, 98 S.Ct. at 2037-38).

Alternatively, policy or custom may be inferred from "continued inaction in the face of a known history of widespread constitutional deprivations on the part of [municipal] employees." Milligan v. City of Newport News, 743 F.2d 227, 229–30 (4th Cir.1984). But "a municipal policy or custom giving rise to § 1983 liability will not be inferred merely from municipal inaction in the face of isolated constitutional deprivations by municipal employees." Id., at 230.

Plaintiff fails to set forth any facts in the Complaint which support the contention that a policy or practice actually existed. Nor does she provide factual allegations that might support a finding of "a known

history of widespread constitutional deprivations" on the part of County employees. There are no factual allegations which identify any other alleged occurrence of the specific policy at issue, seizure of an individual solely on the basis of an immigration warrant for deportation or any other seizure of an individual on any civil immigration warrant. There are not factual allegations which identify any other occurrences of a similar nature. Plaintiff alludes to some elements of a Monell-style cause of action but only in the form of conclusory statements, without reference to any specific factual allegations. Under Iqbal and Twombly, Santos' conclusory pleading is insufficient to sustain a Monell claim.

The Fourth Circuit's opinion in Walker v. Prince George's County, Maryland, 575 F.3d 426 (4th Cir. 2009) is instructive. In Walker, the pertinent issue was whether Prince George's County violated the Walkers' constitutional rights when a county animal control officer seized their pet wolf without notice. Associate Justice (retired) of the Supreme Court of the United States, Sandra Day O'Connor, sitting by special designation, and writing for Court of Appeals, explained the standard for sufficient pleading of a Monell claim:

> Under Monell, a municipality's liability "arises only where the constitutionally offensive actions of employees are taken in furtherance of some municipal 'policy or custom.' " Milligan v. City of Newport News, 743 F.2d 227, 229 (4th Cir.1984). Thus, appellants were obliged to "identify a municipal 'policy,' or 'custom' that caused [their] injury." Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (quoting Monell v. City of New York Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). We agree with the district court that appellants "failed to make any allegations in their complaint in regards to the existence of the County's policy, custom, or practice, therefore failing to plead" a viable Monell claim. Walker, Civ. Action No. AW–07–123, at 9 (citing Semple v. City of Moundsville, 195 F.3d 708, 712 (4th Cir.1999)).

Walker, 575 F.3d at 431. In finding the factual allegations pleaded in Walker deficient, Justice O'Connor explained that a sufficient allegation of a policy or custom requires factual support for the proposition that

alleged facts permit the court to infer more than the mere possibility that those facts implemented an official government policy or custom:

> [The Walkers] assert without elaboration that a County policy to seize animals without inquiring whether their owners have valid permits for those animals "can be inferred from Officer Jacobs' testimony" and that it should be "presumed that the County never checks to see if owners lawfully possess wild or exotic animals before seizing them." . . . But they fail to explain the basis of their inference or the justification for their presumption. At best, plaintiffs have alleged that it was Officer Jacobs' " common practice based on her years of experience and training ... to tell her supervisor what she is observing and then he will tell her whether she should take the animal." Id. at 21. Critically lacking is any support for the proposition that Officer Jacobs' common practice "implemented an official government policy or custom." Walker, Civ. Action No. AW–07–123, at 9 (quotation marks omitted).
>
> As the Supreme Court has recently explained, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim. Ashcroft v. Iqbal, 556 U.S. 662, [678], 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). And "[w]e are not bound to accept as true a legal conclusion couched as a factual allegation." Id.[, 556 U.S. at 678, 129 S. Ct.] at 1949–1950 (quotation marks omitted). Appellants' allegations "do not permit [us] to infer more than the mere possibility of misconduct." Id.[, 556 U.S. at 678, 129 S. Ct.] at 1950.

Walker, 575 F.3d at 431 (additional citations omitted).

Here, the Third Amended Complaint mechanically alleges a "county policy and/or custom, pattern, or practice" without explanation or justification. Third Amended Complaint, ¶111. It fails to allege facts that could plausibly infer the existence of an unconstitutional policy and fails to allege any factual support for finding a causal relationship between an alleged policy and an injury to Santos.

D. In the Fourth Circuit there can be no municipal liability absent a finding of an underlying constitutional violation by an individual.

The posture of this case is important. There has been no finding of fact, only a judgment that the Deputies were not entitled to summary judgment, on the basis of facts viewed in the light most favorable to Plaintiff, because those facts showed the Deputies violated Santos' right to be free from a Fourth Amendment seizure when the articulated justification for the seizure was solely an immigration warrant for Santos' deportation. Because a lawful Fourth Amendment seizure requires probable cause to believe

criminal conduct was afoot or, for a Terry stop, reasonable articulable suspicion that criminal conduct may be afoot, the civil immigration warrant did not provide justification for a seizure, however brief.

The ruling by the Court of Appeals for the Fourth Circuit was that the warrant for deportation did not justify a seizure, under the review of the record in the light most favorable to the Plaintiff, as the non-moving party, when the appellate court reviewed the trial court's ruling on Defendants' motion for summary judgment. However, neither the District Court nor the Fourth Circuit considered any other justification for the detention. In particular, although the Deputies did not articulate any other reason to detain Santos apart from the warrant for deportation, they did in fact have probable cause, or at least reasonable articulable suspicion, to detain Santos for other, criminal conduct, and the seizure while awaiting direction from ICE was constitutional under Terry v. Ohio. Thus, the Deputies' seizure of Santos, while unconstitutional if based solely on a warrant for deportation, should not be held unconstitutional if the Deputies articulated a reasonable suspicion that Santos was committing one of the two federal crimes related to registration, based on the facts known to the Deputies.

In addition, supervisory or municipal liability in the Fourth Circuit requires a finding of an underlying constitutional violation by the acting individual.

> The law is quite clear in this circuit that a section 1983 failure-to-train claim cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by the employee. See Grayson, 195 F.3d at 697 ("As there are no underlying constitutional violations by any individual, there can be no municipal liability."); Temkin v. Frederick County Comm'rs, 945 F.2d 716, 724 (4th Cir.1991) ("A claim of inadequate training under section 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation on the part of the person being supervised.").

Young v. City of Mount Ranier, 238 F.3d 567, 579 (4th Cir. 2001). See also Rossignol, 321 F. Supp. 2d at 651 ("as the only claims plead against the [County] were asserted for Federal Constitutional violations through §1983, and those claims are no longer viable ..., the [County] will be dismissed from this action.").

While the failure to establish an underlying constitutional violation on the part of individuals in the municipality in the case at bar was because of qualified immunity, that fact does not alter the rule in this Circuit, as articulated in Temkin and Young, that municipal liability cannot be found in the absence of a finding of an underlying constitutional violation. The Honorable Judge Smalkin followed this rule when qualified immunity barred a claim against a municipal employee:

> [A]n Order will be entered separately, that grants summary judgment to defendant Reddy on the ground of her qualified immunity from suit under 42 U.S.C. § 1983. Furthermore, the Order will dismiss the complaint as against defendant, Baltimore County, Maryland. The allegations of the complaint are plainly insufficient to warrant the imposition of liability upon the County under well-settled Supreme Court and Fourth Circuit precedent. See e.g., City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) (no liability for single act of misconduct by non-policy-making official); Temkin v. Frederick County Comm'r, 945 F.2d 716 (4th Cir.1991), cert. denied, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992) (no liability for inadequate training in the absence of underlying Constitutional infraction); Morrash v. Strobel, 842 F.2d 64 (4th Cir.1987) (no liability for negligent supervision or oversight for occurrence of a single instance under condonation theory).

Smith v. Reddy, 882 F. Supp. 497, 503 (D. Md. 1995), aff'd, 101 F.3d 351 (4th Cir. 1996).

For these reasons, the County is entitled to dismissal of the Monell claim in Count IV.

VII. Even if there were an actionable constitutional violation, recoverable damages are limited to $1 nominal damages.

The Supreme Court has held that compensatory damages may be recovered in Section1983 actions for proven violations of a constitutional right, but only for any actual harms caused by the violation and not for the violation standing alone. Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054 (1978)(absent proof of actual injury, plaintiffs in §1983 action for violation of procedural due process are entitled to recover only nominal damages); Memphis Community School District v. Stachura, 477 U.S. 299, 308-310, 106 S.Ct. 2537, 2543-44 (1986)(holding, in §1983 action, that nominal damages and not damages based on some value of infringed rights, are the appropriate means of "vindicating" rights whose deprivation has not

caused actual, provable injury); see also Farrar v. Hobby, 506 U.S. 103, 112, 113 S.Ct. 566, 573-74 (1992) (holding that "Carey obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right] but cannot prove actual injury"). In Carey, the Court made clear that only nominal damages are available in the absence of any showing of actual injury where there is a finding that a constitutional right has been violated. Id., 435 U.S., at 266, 98 S.Ct. at 1054.

Actual harms that result from conduct which violated a constitutional right may include economic loss, physical injury, or emotional distress. However, compensatory damages may not be awarded in a §1983 suit where alleged injury consists only of a plaintiff's own conclusory statements, Price v. City of Charlotte, 93 F.3d 1241, 1245 (4th Cir. 1996)(reversing compensatory damages award in §1983 suit and awarding nominal damages where evidence of plaintiffs' emotional distress consisted exclusively of their own conclusory statements), or in the absence of actual harm, Heck v. Humphrey, 512 U.S. 477, 487 n.7, 114 S.Ct. 2364, 2373 n.7 (1994) ("In order to recover compensatory damages . . . the §1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury . . ., " citing Memphis Community School District v. Stachura, supra); Norwood v. Bain, 143 F.3d 843, 855 (4th Cir. 1998), vacated but aff'd in pertinent part en banc, 166 F.3d 243 (4th Cir. 1999), cert. denied, 527 U.S. 1005, 119 S.Ct. 2342 (1999) (unlawful search without evidence of actual harm insufficient for award of compensatory damages).

In the instant case, even if this Honorable Court determined that there was a cognizable claim of a constitutional violation by the Sheriff or the County for the Deputies' unconstitutional seizure of Santos solely on the basis of the warrant for deportation, she still could not recover compensatory damages for her subsequently being taken into custody and being transferred to the ICE, because such injury was not the result of the constitutional violation but was the result of Santos' superceding arrest by the Federal ICE

agent. There is no proximate, legal causation between the unconstitutional detention of Santos on the basis solely of the warrant for deportation and her subsequent lawful detention–at the latest when an ICE agent met the Deputies at Patrol Headquarters and asked the Deputies to transport Santos to Central Booking (See **Exhibit C**, Openshaw Deposition, p. 78, line 25 - p. 79, line 9) or when the Immigration detainer (**Exhibit I**) was faxed to the Detention Center, or at the earliest when an ICE agent responded to the request from Dispatch for confirmation of the warrant, before the Deputies took custody of Santos and formally arrested her. In the instant case, the intervening, superceding cause of Santos' alleged injury, her being detained by ICE for more than a month, was the direction by an ICE agent to the Deputies to arrest her on the immigration warrant. See, e.g., Bodine v. Warwick, 72 F.3d 393, 400 (3rd Cir. 1995) (holding that defendant officers "would not be liable for harm produced by a 'superseding' cause." (citing Restatement (Second) of Torts §§440-453 (1965)).

In Trask v. Franco, 446 F.3d 1036 (10th Cir. 2006), the Court of Appeals for the Tenth Circuit explained that an intervening superceding cause relieves a defendant of liability for a constitutional violation:

> the officers only 'would be liable for the harm 'proximately' or 'legally' caused by their tortious conduct.' Bodine v. Warwick, 72 F.3d 393, 400 (3d Cir.1995). 'They would not, however, necessarily be liable for all of the harm caused in the 'philosophic' or but-for sense by the illegal entry.' Id. In civil rights cases, a superseding cause, as we traditionally understand it in tort law, relieves a defendant of liability.

Id., 446 F.3d, at 1046 (other citations omitted).

Here, even though Santos was seized, for purposes of the Fourth Amendment, on the articulated basis of her civil immigration warrant for deportation rather than at the direction of a Federal agent or on the articulated basis of reasonable suspicion or probable cause to believe she was committing a criminal immigration offense, Defendants could be liable only for the harm proximately or "legally" caused by the improper seizure, under basic principles of tort law. Bodine, 72 F.3d, at 400; Trask, 446 F.3d, at 1046.

Defendants are not liable for any injury that was caused to Santos by the ICE agency's choice to detain her or for the Deputies' statutorily authorized conduct in arresting her at the direction of an ICE agent. See id.

Thus, as a matter of law, even if the Terry stop or the arrest were not constitutional, Santos can recover only nominal damages for that violation absent proof of some other damage proximately caused by the brief period of the illegal seizure.

CONCLUSION

For all of the above reasons, Defendants Sheriff's Deputies Jeffrey Openshaw, Kevin Lynch, Sheriff Charles Jenkins, and Frederick County, Maryland, submit that they are entitled to dismissal of the claims in the Third Amended Complaint or to summary judgment or, in the alternative, that any damages recoverable by Santos are limited to nominal $1 damages, and that the Court should grant Defendants' motion to strike the quoted immaterial and unfairly prejudicial allegations in the Third Amended Complaint.

Respectfully submitted,

KARPINSKI, COLARESI & KARP

BY: /s/
DANIEL KARP, #00877

/s/
SANDRA D. LEE, #27902
Suite 1850
120 E. Baltimore Street
Baltimore, Maryland 21202
(410) 727-5000

IMMIGRATION REFORM LAW INSTITUTE

BY: /s/

MICHAEL M. HETHMON, # 15719
Immigration Reform Law Institute
25 Massachusetts Ave. N.W.
Suite 335
Washington, DC 20001
(202) 232-5590
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October 2015, a copy of the foregoing Memorandum in Support of Motion to Dismiss Third Amended Complaint or, in the Alternative, for Summary Judgment and Motion to Strike was electronically filed, with notice to:

John C. Hayes, Esquire
Brian Whittaker, Esquire
Nixon Peabody, LLP
401 Ninth Street, N.W.
Suite 909
Washington, D.C. 20004
jhayes@nixonpeabody.com
bwhittaker@nixonpeabody.com

Jose Luis Perez, Esquire
Joanna Elise Cuevas Ingram, Esquire
LatinoJustice PRLDEF
99 Hudson St 14th Floor
New York, NY 10013
jperez@latinojustice.org

/s/Sandra D. Lee
Of Counsel for Defendants