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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

<b>Jack Kimm,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>2:14-cv-1966 JWS</b>
	)	
<b>vs.</b>	)	<b>ORDER AND OPINION</b>
	)	
<b>Martin Brannan, et al.,</b>	)	<b>[Re: Motions at doc. 28, 39]</b>
	)	
<b>Defendants.</b>	)	
	)	

**I. MOTIONS PRESENTED**

At docket 28, defendants Martin Brannan, Samuel Verderman, Thomas Jones, Frank Haws, and La Paz County (collectively “County Defendants”) filed a motion to dismiss pursuant to Rule 12(b)(6). Plaintiff Jack Kimm (“Kimm”) responds at docket 36, and County Defendants reply at docket 38. At docket 39, Kimm filed a motion to amend the complaint, with the proposed amendment filed at docket 39-1. County Defendants oppose the request at docket 40. Kimm filed a reply at docket 45. The parties did not request oral argument on the motions, and the court finds that argument would not be of additional assistance.

1 **II. BACKGROUND**

2 Kimm is a California resident. In this lawsuit he sued five individuals who reside  
3 in Arizona and La Paz County, Arizona. Kimm operates a hay brokerage business. His  
4 business advances funds to hay farmers in exchange for an interest in the crop to be  
5 produced. Once harvested, the hay is sold and the proceeds divided between Kimm  
6 and the hay farmers. According to the complaint, on November 4, 1997, Kimm first  
7 contracted with defendant Rayburn Evans to finance Evans's hay crop to be grown in  
8 La Paz County. Kimm alleges that his arrangement with Evans continued without  
9 incident until late summer of 2002 when Kimm learned that Evans was selling hay  
10 grown with Kimm's financial assistance to others. Kimm alleges that when he and  
11 Evans ceased to do business, Evans owed Kimm \$385,589.80. Kimm sued Evans in  
12 La Paz County Superior Court.<sup>1</sup> Evans hired lawyer Steven Suskin, a former La Paz  
13 County Attorney, to defend him in Kimm's civil suit. According to Kimm's complaint  
14 Evans is a former La Paz County Sheriff.<sup>2</sup> Both Kimm and Evans gave deposition  
15 testimony in Kimm's civil suit against Evans.<sup>3</sup>

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19 Kimm's complaint alleges that after Kimm filed the civil lawsuit former sheriff  
20 Evans contacted the La Paz County Sheriff's office on April 17, 2003, and claimed that  
21 Kimm had engaged in fraud and forgery. In particular, Kimm alleges that Evans  
22 claimed that the hay brokerage contracts for 1998, 1999, 2000, and 2001 were forged  
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<sup>1</sup>Complaint, doc. 1 at ¶¶ 14-26.

26 <sup>2</sup>*Id.* at ¶¶ 37, 46.

27 <sup>3</sup>*Id.* at ¶ 27.

1 by Kimm.<sup>4</sup> Detective Bagby of the Sheriff's office contacted Kimm who told the  
2 detective that the contracts were signed by Evans and that Evans owed Kimm money.  
3 Bagby discussed the matter with La Paz County Attorney Buckalew. Buckalew declined  
4 to prosecute Kimm.<sup>5</sup>

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6 Thereafter, Evans and his attorney Suskin continued to pursue the matter with  
7 the subsequent La Paz County Attorney, Defendant Martin Brannan. Kimm alleges that  
8 Brannan did not conduct an investigation regarding the matter, but nonetheless filed a  
9 criminal indictment against him based solely on Kimm's deposition testimony in the civil  
10 trial. Kimm alleges that Brannan "elicited false testimony regarding the opinion of a  
11 handwriting expert"<sup>6</sup> and withheld exculpatory information, such as evidence of Kimm's  
12 prepayments to Evans for five growing seasons. Kimm's attorney filed a motion to  
13 disqualify the La Paz County Attorney's Office because of Evans's professional  
14 connections to the office. Brannan conceded that disqualification was appropriate, and  
15 the case was consequently dismissed without prejudice in June of 2008.  
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18 Kimm alleges that he subsequently tried to get the La Paz County Attorney's  
19 Office to press charges against Evans for false testimony and theft, but that Brannan  
20 would not conduct an investigation and did not bring charges against Evans.

21 In February of 2009, the new La Paz County Attorney, Defendant Samuel  
22 Verderman, and the La Paz County Chief Deputy Attorney, Defendant Thomas Jones,  
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25 <sup>4</sup>*Id.* at ¶¶ 28-30.

26 <sup>5</sup>*Id.* at ¶¶ 32-36.

27 <sup>6</sup>Doc. 1 at p. 7, ¶ 43.

1 resumed criminal proceedings against Kimm in regard to the matter with Evans. Kimm  
2 alleges they “presented false information” and “failed to present exculpatory evidence”  
3 to the grand jury.<sup>7</sup> He alleges that the only witness presented to the grand jury was  
4 investigator Frank Haws. The grand jury issued an indictment. Kimm again moved for  
5 disqualification of the La Paz County Attorney’s Office, and his request was granted.  
6 Prosecution of the case was transferred to the Colorado River Indian Tribe. The case  
7 was eventually dismissed with prejudice on September 20, 2013, based in part on the  
8 prosecution’s failure to present the case to the grand jury in a fair and impartial manner.  
9

10 Kimm then filed this federal lawsuit. The basis of his complaint is that the  
11 various county employees wrongfully prosecuted him. Count One of the complaint  
12 asserts violations of Kimm’s constitutional rights pursuant to 42 U.S.C. §§ 1981 and  
13 1983 against all defendants. Specifically, Kimm alleges he was “deprived of privileges  
14 and immunities guaranteed to all citizens when he was subjected to law enforcement  
15 retaliatory conduct, malicious and selective prosecution and was criminally charged  
16 without probable cause.”<sup>8</sup> He then asserts that he “was deprived of equal protection  
17 and due process in an attempt to chill his free speech . . . and exact revenge for filing  
18 the civil lawsuit against Rayburn Evans.”<sup>9</sup> He also asserts that he “was investigated,  
19 prosecuted, harassed and subjected to improper abuse of power, without probable  
20 cause, and with malice.”<sup>10</sup>  
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24 <sup>7</sup>Doc. 1 at p. 9, ¶ 59.

25 <sup>8</sup>Doc. 1 at p. 14, ¶ 89.

26 <sup>9</sup>Doc. 1 at p. 14, ¶ 90.

27 <sup>10</sup>Doc. 1 at p. 14, ¶ 91.

1 Count Two is directed at La Paz County, Martin Brannan, and Samuel  
2 Verderman. In the text of Count Two, Kimm makes specific allegations directed solely  
3 at those three defendants based on their “unconstitutional policies, customs, and failure  
4 to train.” Specifically, it alleges that they “foster[ed] and encourag[ed] the practice of  
5 presenting false evidence to the grand jury, ignor[ed] exculpatory evidence and  
6 condon[ed] investigatory practices that violate the rights of those subjected to these  
7 investigations.”<sup>11</sup>

9 Count Three is a 42 U.S.C. § 1983 claim based on due process under “the  
10 United States and Arizona State Constitutions” for the defendants’ “malicious  
11 prosecution without probable cause.”<sup>12</sup> Count Four is labeled as a § 1983 claim based  
12 on equal protection, but the text indicates generally that it is also based on the First,  
13 Fourth, Fifth, and Fourteenth Amendment.<sup>13</sup> Again, the allegation is that the  
14 defendants subjected him to unconstitutional malicious prosecution. Count Five is  
15 another § 1983 claim based on conspiracy.

17 Count Six alleges that all defendants engaged in a pattern of unlawful activity  
18 constituting a violation of both federal and state law. Specifically, Kimm alleges that  
19 defendants violated 18 U.S.C. § 1961 *et seq.* and A.R.S. § 13-2301 *et seq.*

21 Count Seven pleads a state claim for abuse of process against all defendants.  
22 Count Eight pleads a state law claim for false arrest and imprisonment against all  
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25 <sup>11</sup>Doc. 1 at p. 15, ¶ 99.

26 <sup>12</sup>Doc. 1 at p. 16, ¶ 101.

27 <sup>13</sup>Doc. 1 at pp. 16-17.

1 defendants. Count Nine is a state law defamation claim against all defendants. Count  
2 Ten is a state law claim against all defendants for intentional infliction of emotional  
3 distress. Count Eleven is a negligence claim directed at defendants La Paz County,  
4 Brannan, Verderman, Jones, and Haws. Count Twelve is a *Monell* claim directed  
5 solely at La Paz County based on its failure to “adequately train, supervise, and  
6 discipline its employees.”<sup>14</sup>

### 8 III. STANDARD OF REVIEW

9 Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s claims. In reviewing such  
10 a motion, “[a]ll allegations of material fact in the complaint are taken as true and  
11 construed in the light most favorable to the nonmoving party.”<sup>15</sup> To be assumed true,  
12 the allegations “may not simply recite the elements of a cause of action, but must  
13 contain sufficient allegations of underlying facts to give fair notice and to enable the  
14 opposing party to defend itself effectively.”<sup>16</sup> Dismissal for failure to state a claim can  
15 be based on either “the lack of a cognizable legal theory or the absence of sufficient  
16 facts alleged under a cognizable legal theory.”<sup>17</sup> “Conclusory allegations of law . . . are  
17 insufficient to defeat a motion to dismiss.”<sup>18</sup>

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23 <sup>14</sup>Doc. 1 at p. 22, ¶ 135.

24 <sup>15</sup>*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

25 <sup>16</sup>*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

26 <sup>17</sup>*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

27 <sup>18</sup>*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

1 To avoid dismissal, a plaintiff must plead facts sufficient to “state a claim to relief  
2 that is plausible on its face.”<sup>19</sup> “A claim has facial plausibility when the plaintiff pleads  
3 factual content that allows the court to draw the reasonable inference that the  
4 defendant is liable for the misconduct alleged.”<sup>20</sup> “The plausibility standard is not akin  
5 to a ‘probability requirement,’ but it asks for more than a sheer possibility that a  
6 defendant has acted unlawfully.”<sup>21</sup> “Where a complaint pleads facts that are ‘merely  
7 consistent’ with a defendant’s liability, it ‘stops short of the line between possibility and  
8 plausibility of entitlement to relief.’”<sup>22</sup> “In sum, for a complaint to survive a motion to  
9 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that  
10 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”<sup>23</sup>

#### 13 **IV. DISCUSSION**

##### 14 **A. County Defendants’ Motion to Dismiss**

##### 15 **1. Defendant prosecutors Brannan, Verderman, and Jones**

16 County Defendant’s argue that all claims against defendant Brannan should be  
17 dismissed based upon the running of the statute of limitations because his involvement  
18 ended with the first dismissal in 2008 and this lawsuit was not filed until 2014. A § 1983  
19 claim is subject to a two-year statute of limitation. “Under federal law, a claim accrues  
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22 <sup>19</sup>*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*,  
550 U.S. 544, 570 (2007)).

23 <sup>20</sup>*Id.*

24 <sup>21</sup>*Id.* (citing *Twombly*, 550 U.S. at 556).

25 <sup>22</sup>*Id.* (quoting *Twombly*, 550 U.S. at 557).

26 <sup>23</sup>*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); see also *Starr v. Baca*,  
27 652 F.3d 1202, 1216 (9th Cir. 2011).

1 when the plaintiff knows or has reason to know of the injury which is the basis of the  
2 action.”<sup>24</sup> The underlying basis for Kimm’s claims against Brannan is malicious  
3 prosecution. An “essential element of a malicious prosecution claim is that the prior  
4 proceedings must have terminated in favor of the person against whom they were  
5 brought.”<sup>25</sup> Kimm’s claim for malicious prosecution therefore did not arise until the  
6 proceedings were terminated in his favor.<sup>26</sup> The 2008 dismissal was not terminated on  
7 the merits; that is, it was not necessarily based on the legitimacy of the prosecution, but  
8 rather, on the fact that the La Paz County Attorney’s Office agreed to drop the  
9 prosecution without prejudice out of concerns of bias.<sup>27</sup> Thus, the earliest Kimm’s  
10 claims for malicious prosecution could have arisen would have been in September of  
11 2013, when the case was dismissed with prejudice. Kimm filed the lawsuit just under a  
12 year later. The court declines to dismiss the charges against Brannan based on the  
13 statute of limitations.  
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19 <sup>24</sup>*TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999).

20 <sup>25</sup>*Moran v. Klatzke*, 682 P.2d 1156, 1157 (Ariz. Ct. App. 1984).

21 <sup>26</sup>*See, e.g., Peinado v. City & Cty. of San Francisco*, No. C-11-1799 EMC, 2013 WL  
22 163473, at \*3 (N.D. Cal. Jan. 15, 2013) (discussing when the statute of limitations begins in a  
23 § 1983 malicious prosecution claim and noting that “the Ninth Circuit has recognized that  
malicious prosecution claims brought under § 1983 accrue upon favorable termination of the  
underlying criminal proceeding”).

24 <sup>27</sup>*See* Restatement (Second) of Torts § 674 cmt. j (1977) (stating that favorable  
25 adjudication may be by judgment in favor of defendant after trial or upon demurrer or its  
26 equivalent and noting that withdrawal only constitutes a final favorable termination depending  
27 on why it is withdrawn); *See Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 417-18 (2d Cir.  
1999) (noting that favorable termination is when there has been a disposition of the case that  
would indicate the innocence of the accused).

1 County Defendants also argue that all charges against the prosecutors—  
2 Brannan, Verderman, and Jones—should be dismissed based on prosecutorial  
3 immunity. “A state prosecutor is entitled to absolute immunity from liability under  
4 § 1983 for violating a person’s federal constitutional rights when he or she engages in  
5 activities ‘intimately associated with the judicial phase of the criminal process.’”<sup>28</sup>  
6  
7 However, when a prosecutor is performing investigatory or administrative functions—  
8 that is, when he is essentially functioning as a police officer or detective—he is only  
9 granted qualified immunity. Thus, the type of immunity applied depends on “the nature  
10 of the function performed, not the identity of the actor who performed it.”<sup>29</sup>  
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12 While there is no bright line for determining whether an activity is quasi-judicial in  
13 nature, absolute immunity clearly applies to a prosecutor’s decision to initiate a  
14 prosecution. It also extends to any “acts undertaken by a prosecutor in preparing for  
15 the initiation of judicial proceedings or for trial, and which occur in the course of his role  
16 as an advocate for the State.”<sup>30</sup> Preparation for judicial proceedings includes the  
17 prosecutor’s evaluation of evidence or of a witness, “even if that judgment is harsh,  
18 unfair or clouded by personal animus.”<sup>31</sup> That is, even allegations of a prosecutor’s  
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23 <sup>28</sup>*Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) (quoting *Imbler v. Pachtman*,  
24 424 U.S. 409, 430 (1976)).

25 <sup>29</sup>*Forrester v. White*, 484 U.S. 219, 229 (1988).

26 <sup>30</sup>*Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

27 <sup>31</sup>*Roe v. City & Cty. of San Francisco*, 109 F.3d 578, 584 (9th Cir. 1997).

1 improper motive do not nullify a prosecutor's absolute immunity. Absolute immunity  
2 also extends to any claim that the prosecutor withheld exculpatory material.<sup>32</sup>

3 Here, while Kimm's complaint is difficult to follow and the various constitutional  
4 claims are conflated, it is clear that Kimm's federal claims (Counts One through Six)  
5 rest upon the County Defendants' decision to pursue criminal charges against him  
6 without adequate probable cause and their actions during their presentation to the  
7 grand jury. As noted above, such decisions and actions, even if improperly motivated,  
8 are granted absolute immunity and cannot support a lawsuit. Indeed, absolute  
9 immunity shields prosecutors from a malicious prosecution lawsuit under federal law.<sup>33</sup>  
10 While there is an allegation that the prosecutors failed to conduct an investigation  
11 before bringing charges, "that does not render the complained-of conduct 'investigatory'  
12 in nature."<sup>34</sup> Moreover, absolute immunity extends to claims involving a prosecutor's  
13 failure to investigate.<sup>35</sup> Kimm simply has not alleged enough factual details to support  
14 an argument that the prosecutors took actions that could be considered investigatory or  
15 administrative in nature. It also extends to Count Two of Kimm's complaint to the  
16 extent that the count alleges that the prosecutors failed to adequately train and  
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24 <sup>32</sup>*Imbler*, 424 U.S. at 431-32 n.34.

25 <sup>33</sup>*Imbler*, 424 U.S. at 428.

26 <sup>34</sup>*Fiorito v. DiFiore*, No. 13-cv-2691, 2014 WL 4928979, at \* 5 (S.D.N.Y. Oct. 2, 2014).

27 <sup>35</sup>*Broam*, 320 F.3d at 1029.



1 arrested him without lawful authority. The prosecutors are not alleged to have actually  
2 arrested Kimm or performed some police-like functions here; rather, presumably, based  
3 on the facts provided in the complaint, their role in such an arrest was limited to the  
4 decision to file criminal charges and, thus, as discussed above, they cannot be held  
5 liable for such actions. The same is true of Count Ten, which is Kimm’s claim for  
6 intentional infliction of emotional distress as a result of his unlawful detention and  
7 malicious prosecution. Count Eleven is a claim for negligence against La Paz County  
8 and the individual prosecutors for negligent training and supervising of employees who  
9 handle criminal investigations and prosecutions. Again, the individual prosecutors are  
10 absolutely immune from such a claim.<sup>40</sup>

13 Count Nine of the complaint raises a state claim for defamation against the  
14 prosecutors. In that count, Kimm generally alleges that all the defendants “made or  
15 released statements to the public regarding [Kimm]” that were knowingly false and  
16 defamatory.<sup>41</sup> A prosecutor who makes allegedly false statements to the media is  
17 entitled to qualified immunity and not absolute immunity under federal law.<sup>42</sup> There is  
18 no reason to believe that Arizona courts would conclude differently. County Defendants  
19 do not raise any other arguments as to why Count Nine otherwise fails to state a claim.  
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25 <sup>40</sup>*Van de Kamp*, 555 U.S. at 344-48.

26 <sup>41</sup>Doc. 1 at p. 19, ¶ 122.

27 <sup>42</sup>*Buckley*, 509 U.S. at 277-78.





1 *Monell*, a local government entity is only liable under § 1983 for its own actions and not  
2 those of its employees.<sup>46</sup> Thus, a local government entity can only be liable under  
3 § 1983 if the alleged constitutional violation was caused by a policy, practice, or custom  
4 of the entity.<sup>47</sup> Under a *Monell* claim, a plaintiff must show “(1) that [the plaintiff]  
5 possessed a constitutional right of which he was deprived; (2) that the municipality had  
6 a policy; (3) that this policy amounts to deliberate indifference to the plaintiff’s  
7 constitutional right; and, (4) that the policy is the moving force behind the constitutional  
8 violation.”<sup>48</sup> The policy can be an expressly adopted formal policy or an action taken by  
9 the final policy maker for the local government entity, or it can be an informal policy  
10 shown through longstanding customs or practices.<sup>49</sup>

13 In Count Twelve, Kimm specifically pleads a *Monell* claim. He alleges that “[a]s  
14 a proximate result of La Paz County unconstitutional policies, practices, acts and  
15 omissions, [Kimm] was detained and then spent ten years fighting a prosecution that  
16 lacked probable cause.”<sup>50</sup> In the next paragraph he alleges that the actions of the  
17 defendants “occurred as a direct result of a failure on the part of La Paz County to  
18 adequately train, supervise, and discipline its employees” and that this failure to train  
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22 <sup>46</sup>*Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978).

23 <sup>47</sup>*Id.* at 694; *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011).

24 <sup>48</sup>*Plumeau v. Sch. Dist. No. 40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997)  
25 (internal quotation marks omitted).

26 <sup>49</sup>*Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013).

27 <sup>50</sup>Doc. 1 at p. 22, ¶ 134.

1 and supervise “constituted an official policy of La Paz County Attorney’s Office.”<sup>51</sup> That  
2 is all that is alleged regarding the county’s policies and customs. There is no factual  
3 allegation about a formally adopted policy, or an allegation of a pattern of similar  
4 behavior on the part of prosecutors. Rather, the factual basis of the *Monell* claim rests  
5 on Kimm’s prosecution alone and the assumption that because it happened to him, it  
6 must be a custom or policy. Such conclusory allegations are insufficient to adequately  
7 plead a claim under Rule 8 of the Federal Rules of Civil Procedure; the claim “lack[s]  
8 any factual allegations that would separate [it] from the ‘formulaic recitation of a cause  
9 of action’s element’ deemed insufficient by *Twombly*.”<sup>52</sup> Indeed, “it is not enough to  
10 state that there is a policy and the policy amounted to deliberate indifference to various  
11 constitutional rights of the [p]laintiffs; there must be facts showing the plausibility of  
12 those statements.”<sup>53</sup> Kimm, therefore, has failed to plead a *Monell* claim that is  
13 plausible on its face.

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16 La Paz County is a named defendant in all of the other counts as well. The  
17 County Defendants fail to address these other counts. As noted above, however, La  
18 Paz County cannot otherwise be liable under § 1983 for the actions of its employees  
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24 <sup>51</sup>Doc. 1 at p. 22, ¶ 135.

25 <sup>52</sup>*Dougherty*, 654 F.3d 982 (quoting *Twombly*, 550 U.S. at 555).

26 <sup>53</sup>*Herrera v. City of Sacramento*, No. 2:13-cv-00456, 2013 WL 3992497, at \* 8 (E.D. Cal.  
27 Aug. 2, 2013).

1 and a government entity is not the proper defendant in a racketeering cause of action.<sup>54</sup>  
2 Thus, all of the federal claims against La Paz County must be dismissed.

3         The County Defendants have not provided an argument as to why the state  
4 claims against La Paz County must be dismissed. The court, however, found that the  
5 individual prosecutors and Haws are immune from suit in relation to Count Seven, as  
6 well as the state racketeering claim and state due process claim. Such a finding  
7 forecloses any potential *respondeat superior* theories against La Paz County as to such  
8 claims.  
9

10 **B. Kimm’s Motion to Amend**

11         After County Defendants filed their motion to dismiss, Kimm filed a motion to  
12 amend the complaint. Under Rule 15(a), “[t]he court should freely give leave when  
13 justice so requires.”<sup>55</sup> In deciding whether to grant leave to amend under Rule 15(a),  
14 courts generally consider the following factors: undue delay, bad faith by the moving  
15 party, prejudice to the opposing party, futility of amendment, and whether the party has  
16 previously amended his pleadings.<sup>56</sup> “Generally, this determination should be  
17 performed with all inferences in favor of granting the motion.”<sup>57</sup> The party opposing  
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21 <sup>54</sup>See *Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996) (summarily rejecting the  
22 plaintiffs’ RICO claims against the city defendant based on the fact that such government  
23 entities cannot have the necessary malicious intent needed to support a RICO claim (citing  
*Lancaster Cmty. Hosp. v. Antelope Valley Hosp.*, 940 F.2d 397, 404 (9th Cir. 1991))).

24 <sup>55</sup>*Id.*

25 <sup>56</sup>See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Bonin v. Calderon*, 59 F.3d 815, 845  
26 (9th Cir.1995).

27 <sup>57</sup>*Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir.1999) (citing *DCD*  
*Programs*, 833 F.2d at 186).

1 amendment bears the burden of demonstrating a permissible reason for denying the  
2 motion to amend.<sup>58</sup> Here, County Defendants do not assert that the proposed  
3 amendment creates undue delay, is offered in bad faith, or creates prejudice. Kimm  
4 has not previously amended his complaint. The primary argument provided in  
5 opposition to Kimm’s proposed amendment is futility.  
6

7 The proposed amended complaint does not add much in the way of substance  
8 or factual allegations to the original complaint. Instead, it simply includes a few  
9 additional phrases here and there and separates out some state claims that were  
10 originally combined with the corresponding federal claim. It remains, unfortunately, a  
11 poorly articulated and confusing complaint, with a jumble of headings and various  
12 attempts to formulate different ways to bring what is essentially a malicious prosecution  
13 claim. Defendants Brannan, Verderman, and Jones and defendant Haws are still  
14 immune from the federal claims and the state claims as discussed above. Kimm’s  
15 proposed amendment continues to allege that the prosecutors “conducted no  
16 independent investigation,” but thereafter adds a new allegation that they “acted as  
17 both the prosecutor and investigator of the matter.”<sup>59</sup> This addition does not change the  
18 analysis. Absolute immunity applies to a prosecutor’s failure to investigate. There are  
19 no additional factual allegations about Brannan, or any of the other prosecutors,  
20 performing any investigatory functions here. The claims against La Paz County have  
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25 <sup>58</sup>*DCD Programs*, 833 F.2d at 187; see *Richardson v. United States*, 841 F.2d 993, 999  
26 (9th Cir.1988) (stating that leave to amend should be freely given unless the opposing party  
makes “an affirmative showing of either prejudice or bad faith”).

27 <sup>59</sup>Doc. 39-1 at p. 6, ¶ 40.

1 also not been fixed. While the amendment adds allegations in the general fact section  
2 of the complaint about La Paz County's failure to provide proper training and  
3 supervision, the new language is still simply conclusory in nature and fails to provide  
4 factual content to support a plausible *Monell* claim. Thus, the proposed amendment  
5 fails to cure the deficiencies noted above.  
6

7 County Defendants argue that the proposed amended complaint's substantive  
8 due process claims and state racketeering claim are inadequately pled and thus  
9 amendment would be futile. However, the court notes that the substantive due process  
10 claims, both federal and state, and the state racketeering claims are not actually newly  
11 added claims. The state and federal substantive due process claims were included  
12 together in Count Three and the state and federal racketeering claim were included  
13 together in Count Six. Kimm opted to separate them out in the proposed amended  
14 complaint. County Defendants did not argue in their motion to dismiss that the due  
15 process or racketeering claims were substantively inadequate, and the court declines to  
16 decide that here with the limited briefing provided by the parties.  
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19 While the proposed amendment does not cure the deficiencies noted above, it  
20 contains additions that could possibly be relevant with respect to defendant Evans or  
21 the remaining state claims. The proposed amendment's failure to preclude dismissal of  
22 claims against some of the defendants is no reason to deny it altogether.  
23

#### 24 **V. CONCLUSION**

25 For the reasons set out above, County Defendants' motion to dismiss at  
26 docket 28 is GRANTED IN PART AND DENIED IN PART. The federal claims against  
27 Brannan, Verderman, Jones, Haws, and La Paz County are dismissed. The state  
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1 claims for abuse of process, substantive due process, and racketeering against  
2 Brannan, Verderman, Jones, Haws, and La Paz County are dismissed. The state  
3 claims for false arrest, intentional infliction of emotional distress, and negligence are  
4 dismissed as to Brannan, Verderman, and Jones, but survive at this time as to Haws  
5 and La Paz County. The state claim for defamation survives.  
6

7 Kimm's motion to amend at docket 39 is GRANTED. However, the court notes  
8 that the amendment does not change the court's ruling as to the motion to dismiss.

9 DATED this 8<sup>th</sup> day of October 2015.

10  
11 /s/ JOHN W. SEDWICK  
12 SENIOR UNITED STATES DISTRICT JUDGE  
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