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3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

5 **EDWARD WARKENTINE, an individual; and**
6 **DANIEL TANKERSLEY, an individual,**

7 **Plaintiffs,**

8 **v.**

9 **HECTOR J. SORIA; et. al.**

10 **Defendants.**

1:13-cv-01550-LJO-MJS

**MEMORANDUM DECISION AND
ORDER RE DEFENDANTS' MOTION
TO DISMISS FIRST AMENDED
COMPLAINT (DOC. 44)**

11
12 **I. PRELIMINARY STATEMENT TO PARTIES AND COUNSEL**

13 Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this
14 Court is unable to devote inordinate time and resources to individual cases and matters. Given the
15 shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters
16 necessary to reach the decision in this order. The parties and counsel are encouraged to contact the
17 offices of United States Senators Feinstein and Boxer to address this Court's inability to accommodate
18 the parties and this action. The parties are required to reconsider consent to conduct all further
19 proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to
20 parties than that of U.S. District Judge Lawrence J. O'Neill, who must prioritize criminal and older civil
21 cases.

22 Civil trials set before Judge O'Neill trail until he becomes available and are subject to suspension
23 mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if Judge O'Neill
24 is unavailable on the original date set for trial. Moreover, this Court's Fresno Division randomly and
25 without advance notice reassigns civil actions to U.S. District Judges throughout the nation to serve as
26 visiting judges. In the absence of Magistrate Judge consent, this action is subject to reassignment to a

1 U.S. District Judge from outside the Eastern District of California.

2 **II. INTRODUCTION**

3 Plaintiffs Edwards Warkentine and Daniel Tankersly owned and operated junkyards in Fresno
4 County. They allege that they were targeted for prosecution for the benefit of neighboring junkyard
5 owners and their associates in Mendota City government. Plaintiffs seek to recover under Section 1983
6 based on alleged violations of their constitutional rights. The City of Mendota, along with defendants
7 who are municipal officials or employees, moves to dismiss Plaintiffs claims on the basis that a)
8 Plaintiffs inadequately plead that the City maintained a policy or custom that disfavored Plaintiffs; b)
9 claims against municipal employees and officials failed to allege sufficient detail; c) takings claims were
10 unripe and d) equal protections claims failed to establish grounds for liability.

11 **III. THRESHOLD ISSUES**

12 Municipal defendants were identified by title or position in Plaintiffs' original complaint, but not
13 in their First Amended Complaint (FAC). Doc 40. Defendants adopt this information by reference in
14 their Memorandum (Doc. 44 at 7) and Plaintiffs do not object to this incorporation in their Opposition.
15 The Court will analyze Defendant's Motion to Dismiss assuming that this information is undisputed.
16 However, because this information is critical to the sufficiency of Plaintiffs' claims, the complaint must
17 be amended so that it stands alone. This Court ORDERS Plaintiffs to amend its complaint to harmonize
18 all assertions of fact. Plaintiff is cautioned that this is the second opportunity this Court has offered it to
19 correct its pleadings (*see* Doc. 31) and that it is within a district court's discretion to deny a plaintiff
20 leave to amend if it determines that "allegation of other facts consistent with the challenged pleading
21 could not possibly cure [deficiencies]." *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir.
22 2010).

23 **IV. FACTUAL BACKGROUND**

24 Plaintiffs Edward Warkentine and Daniel Tankersly own various real properties and operate junk
25 yards in Fresno County. FAC at ¶¶ 3-4, 64. They believe that they have been targeted unfairly for
26 prosecution by associates of their competitors in positions of authority. Plaintiffs point to the fact that

1 their competitors were issued conditional use permits to operate their nearby businesses in “M-1” zones,
2 while Plaintiffs were denied similar permits. FAC at ¶ 65. Plaintiffs point to a public statement,
3 allegedly made by Defendant Joseph Amador (a Mendota City Council Member) singling out Plaintiffs
4 for prosecution. FAC at ¶ 71.

5 In August of 2010, Defendant City of Mendota (The City) served a notice to abate public
6 nuisance (2010 Notice) seeking the removal of allegedly inoperative vehicles. FAC at ¶ 30; Mem. of
7 Points and Authorities in Supp. Of Defs.’Mot. to Dismiss FAC, Doc. 44 (Def.’ Mem.), at 2. Plaintiffs
8 allege that Defendant Hector Soria (Mendota City Code Enforcer) and other defendants trespassed on
9 Plaintiffs’ properties prior to effecting service to obtain information needed for the 2010 Notice. FAC at
10 ¶ 30.

11 Plaintiffs allege that Defendants Soria, Gerry Galvin (Mendota City Police Officer) and Bryce
12 Atkins (Mendota City Director of Support Operations) served the 2010 Notice on Mr. Warkentine, but
13 that the property described in it was owned by Mr. Tankersly. FAC at ¶ 30. Plaintiffs requested, and
14 were granted, a hearing. Plaintiffs claim that notice of this hearing was sent to Mr. Warkentine, but not
15 to Mr. Tankersly, and that the hearing notice specified a different property would be at issue than the
16 one subject to the 2010 Notice. FAC at ¶ 33.

17 Plaintiffs allege that at the hearing, Defendants introduced evidence of nuisance problems at
18 several properties owned by Plaintiffs. FAC at ¶ 35. Plaintiffs objected to the lack of notice regarding
19 these parcels, but the hearing proceeded over their objections. FAC at ¶ 35. Written findings were
20 issued March 30, 2011, accompanied by a “Notice of Nuisance and to Abate Vehicles” (Notice to
21 Abate). FAC at ¶ 38. The Notice to Abate stated that a nuisance existed at various properties discussed
22 at the hearing and that certain materials, including junk, trash and inoperative vehicles had to be
23 removed within 30 days. *Id.* Plaintiffs allege that these findings were issued by Defendant Kristal
24 Chojnacki (Mendota City Hearing Officer and City Manager). FAC at ¶ 38.

25 Plaintiffs allege at some point “later in 2011”, Defendants “invaded” one of Mr. Tankersly’s
26 properties, without a warrant, and removed materials from the property beyond the scope of the Notice

1 to Abate, including personal property worth several hundred thousand dollars. FAC at ¶¶ 40, 42.
2 Plaintiffs further allege that they were never provided an inventory of confiscated materials notice or an
3 explanation as to how they could recover their property, and that ultimately some of their property was
4 given to their business competitors. FAC at ¶¶ 43-46. Defendants claim that The City “conducted
5 abatement activities” only after Plaintiffs failed to comply with the Notice to Abate. Defs.’ Mem. at 2-3.

6 In April of 2012, The City obtained an “Inspection and Abatement Warrant” (Warrant) for four
7 properties. FAC at ¶ 47. Plaintiffs allege that this warrant was based on an “improperly noticed
8 declaration” prepared by Defendant Daniel Grasserand¹ (Mendota City Code Enforcement Officer) at
9 the direction of Mr. Soria, Ms. Chojnacki and Mr. Atkins. *Id.* Plaintiffs claim that the declaration and
10 warrant incorrectly identified a third party and Mr. Warkentine as the owner of two properties actually
11 owned by Mr. Tankersly. FAC at ¶ 49.

12 Plaintiffs allege that Defendants appeared at the properties identified in the Warrant and removed
13 personal property outside its scope. FAC at ¶ 51. Plaintiffs further claim that although the Warrant
14 expressly required it be posted for 24 hours prior to execution, Defendants actually served the Warrant
15 three hours into the seizure. FAC at ¶ 49. Plaintiffs allege that a) they were never advised as to how they
16 might recover their property, b) were never provided with a “report of abatement activities” as required
17 by the Mendota City Code, and c) that personal property was retained by Defendants for personal use or
18 disposed of improperly. FAC at ¶¶ 54-57. Plaintiffs further claim that Defendants conducted a hearing
19 which improperly determined that the value of confiscated materials was less than the costs of enforcing
20 the abatements. FAC at ¶ 63. Plaintiffs maintain that they have been unable to recover seized property.
21 *Id.*

22 Plaintiffs originally filed charges against The City, the two rival junkyards and their owners, and
23 fourteen individuals being sued in their official capacities as Mendota City officials (Municipal
24 Defendants) under the Civil Rights Act of 1871 (42 U.S.C. §1983), alleging violations of the Fourth,

25
26 ¹ Plaintiffs name “Daniel Gosserand” as a defendant, however this appears to be a misspelling of “Dan Grasserand,” who was
process served, Doc. 29, and to whom Defendants refer.

1 Fifth, and Fourteenth Amendments in September 2013. Doc. 2. The City and Municipal Defendants
2 filed a Motion to Dismiss in February 2014. Plaintiffs were granted an additional extension of time in
3 February and given the option to provide an amended complaint in lieu of an opposition to Motion
4 Dismiss. Doc. 31. Plaintiffs filed a First Amended Complaint (FAC) on March 25, 2014, alleging the
5 same claims against The City and junkyards, but now bringing charges against the Municipal
6 Defendants in their individual capacities. Doc. 40. The City and Municipal Defendants responded with
7 the instant Motion to Dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Docs 43-
8 44.

9 Defendants Abraham and Felipe Gonzalez, and Gonzalez Towing and Tire Shop, answered
10 separately. Doc. 47. A default judgment was entered against Defendant Smitty's Towing. Doc 41. This
11 Order will not address these defendants' liability.

12 **V. STANDARD OF DECISION**

13 A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is a challenge to the sufficiency of the
14 allegations set forth in the complaint. A dismissal under Rule 12(b)(6) is proper where there is either a
15 "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal
16 theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990). In considering a motion to
17 dismiss for failure to state a claim, the court generally accepts as true the allegations in the complaint,
18 construes the pleading in the light most favorable to the party opposing the motion, and resolves all
19 doubts in the pleader's favor. *Lazy Y. Ranch LTD.*, 546 F.3d 580, 588 (9th Cir. 2008). To survive a
20 Fed.R.Civ.P. 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief
21 that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial
22 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
23 inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662,
24 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a
25 sheer possibility that a defendant has acted unlawfully. *Id.* (citing *Twombly*, 550 U.S. at 556). "Where a
26 complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line

1 between possibility and plausibility for entitlement to relief” *Id.* (citing *Twombly*, 550 U.S. at
2 557). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
3 allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more
4 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
5 *Twombly*, 550 U.S. at 555 (internal citations omitted). Thus, “bare assertions ... amount[ing] to nothing
6 more than a formulaic recitation of the elements ... are not entitled to be assumed true.” *Iqbal*, 129 S.Ct.
7 at 1951. A court is “free to ignore legal conclusions, unsupported conclusions, unwarranted inferences
8 and sweeping legal conclusions cast in the form of factual allegations.” *Farm Credit Services v.*
9 *American State Bank*, 339 F.3d 764, 767 (8th Cir.2003) (citation omitted). In practice, “a complaint ...
10 must contain either direct or inferential allegations respecting all the material elements necessary to
11 sustain recovery under some viable legal theory.” *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc.*
12 *v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.1984)). To the extent that the pleadings can be cured
13 by the allegation of additional facts, the plaintiff should be afforded leave to amend. *Cook, Perkiss and*
14 *Liehe, Inc. v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir.1990) (citations
15 omitted).

16 **VI. DISCUSSION**

17 **A. Section 1983 Claims**

18 **1. Claims Against Individual Defendants**

19 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted under
20 color of state law and (2) the defendant deprived him of rights secured by the Constitution or federal
21 law. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.2006). “A person ‘subjects’ another to
22 the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative
23 act, participates in another’s affirmative acts, or omits to perform an act which he is legally required to
24 do that causes the deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th
25 Cir.1978). “The requisite causal connection can be established not only by some kind of direct, personal
26 participation in the deprivation, but also by setting in motion a series of acts by others which the actor

1 knows or reasonably should know would cause others to inflict the constitutional injury.” *Id.* at 743–44.
2 “[A]n official with no official authority over another actor can also be liable for that actor's conduct if he
3 induces that actor to violate a third party's constitutional rights, provided that the official possesses the
4 requisite intent, such as retaliatory animus.” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916 (9th Cir.
5 2012). In general, section 1983 is not implicated unless a state actor's conduct occurs in the course of
6 performing an actual or apparent duty of her office, or unless the conduct is such that the actor could not
7 have behaved in that way but for the authority of his office. *Carson v. Cnty. of Stanislaus*, 1:10-CV-
8 02133-OWW, 2011 WL 3813193 (E.D. Cal. Aug. 29, 2011) *aff'd*, 532 F. App'x 662 (9th Cir. 2013).

9 Defendants seek dismissal of Plaintiffs’ claims against Municipal Defendants based on a general
10 failure “to link any individual defendant personally to the alleged constitutional violations”, claiming
11 that Plaintiffs “must *establish* legal liability of each person...” and that “a plaintiff must *demonstrate*
12 that each defendant personally participated in the deprivation of his rights.” Doc. 44 at 7 (emphasis
13 added). Defendants apply an evidentiary burden prematurely. Notably, case law cited by Defendants in
14 support of this standard concerns cases at the summary judgment phase or later. *Jones v. Williams*, for
15 example addresses a plaintiff's burden at the pleading stage, and involved an appeal following a jury
16 trial. 297 F.3d 930, 933–34 (9th Cir. 2002). Similarly, defendants cite *Leer v. Murphy* for the theory
17 that “[s]weeping conclusory allegations will not suffice . . .,” leaving out the rest of the court’s holding,
18 “. . . to prevent summary judgment.” 844 F.2d 628, 634 (9th Cir. 1988).

19 The relevant standard, articulated by *Iqbal*, is not that a plaintiff must “establish” liability, rather
20 that he *alleges* it. *Iqbal*, 556 U.S. at 678 (2009). (“A claim has facial plausibility when the plaintiff
21 pleads factual content that allows the court to draw the reasonable inference that the defendant is liable
22 for the misconduct alleged.”). The Ninth Circuit has framed this standard as “alleging enough fact to
23 raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].” *Lacey v.*
24 *Maricopa Cnty.*, 693 F.3d at 924.

25 Plaintiffs allege that several of the Municipal Defendants were involved individually in illegal
26 conduct. For example, Plaintiffs allege that a) Defendants Atkins, Galvin and Soria were involved with

1 the preparation of inadequate 2010 Notice to Abate and/or the 2010 Notice of Hearing, FAC at ¶¶ 30,
2 33, 36; b) Defendants Soria and Chojnacki conducted the 2010 Hearing improperly and that Ms.
3 Chojnacki issued the March 2011 Notice to Abate based on evidence presented at this hearing, FAC at
4 ¶¶ 35-38; c) Defendants Soria, Grasserand, Chojnacki and Atkins participated in the 2011 seizure where
5 valuable personal property beyond the scope of the Notices to Abate was seized, and that each of these
6 Defendants failed to provide adequate pre- or post- deprivation notice; FAC at ¶¶ 43-44; d)
7 Defendants Soria, Grasserand, Galvin, F. Amador, Lemus and Lizarraga violated the scope of the 2012
8 warrant, and e) Defendants Soria, Grasserand, Chojnacki and Atkins failed to provide proper pre- and
9 post-deprivation notice of the 2012 seizure, FAC at ¶¶ 61-63. On this basis, this Court finds that claims
10 alleged against Defendants Atkins, Galvin, Chojnacki, Soria, Grasserand, F. Amador, Lemus and
11 Lizarraga sufficiently allege personal conduct. The motion to dismiss for failure to allege individual
12 liability is DENIED as to these Defendants.

13 Claims against Mendota City Council Members J. Amador, Capuchino, Flores, Riofrio and Silva
14 are more attenuated. Plaintiffs claim that these defendants provided “personal direction” guiding the
15 allegedly unconstitutional abatement proceedings and confiscation and disposal of seized property. FAC
16 at ¶ 71. Plaintiffs further allege that J. Amador made a “public statement singling out [Plaintiffs] for
17 desired prosecution.” These statements go beyond “bare assertions ... amount[ing] to nothing more than
18 a formulaic recitation of the elements.” They allege a causal link between alleged unconstitutional
19 activities and these individuals. If the facts of all allegations are true- if city council member Defendants
20 directed or induced law enforcement Defendants to seize property without notice and beyond the scope
21 of warrants and notices-with the requisite level of intent- then J. Amador, Capuchino, Flores, Riofrio
22 and Silva potentially are subject to liability under Section 1983. Thus, the motion to dismiss for failure
23 to allege individual liability is DENIED as to these defendants.

24 In contrast, Plaintiffs allege no facts alleging that Defendant Korina Zamora was personally
25 involved in the activities at issue. Thus, the motion is GRANTED WITH LEAVE TO AMEND as to
26 any claims against Ms. Zamora.

1 **2. Claims Against The City of Mendota**

2 Defendants argue that Plaintiffs’ claims against The City are not viable because Plaintiffs fail to
3 allege the existence of a policy or custom that was a “moving force” behind alleged constitutional
4 deprivations. Defs’ Mem. at 5.

5 Municipalities and local governments can be liable for damages under Section 1983 when
6 “action pursuant to official municipal policy of some nature cause[s] a constitutional tort.” *Monell v.*
7 *Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 691, (1978). Local governments are not liable,
8 however, for simply employing a tortfeasor. *Id.* at 694-95 (“Instead, it is when execution of a
9 government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may
10 fairly be said to represent official policy, inflicts the injury that the government as an entity is
11 responsible under § 1983).

12 A government entity may be liable under Section 1983 claim if a policy, practice, or custom of
13 the entity can be shown to be a moving force behind a violation of constitutional rights.” *Dougherty v.*
14 *City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011). Details of these policies need to be alleged with
15 enough specificity to raise them beyond a “formulaic recitation of a cause of action’s elements.” *Id.* They
16 must “contain sufficient allegations of underlying facts to give fair notice and to enable the opposing
17 party to defend itself effectively” and “plausibly suggest an entitlement to relief.” *AE ex rel. Hernandez*
18 *v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012).

19 The Ninth Circuit has recognized four distinct ways² to demonstrate a municipal policy or
20 custom:

- 21 (1) “[W]hen execution of a government’s policy or custom, whether made
22 by its lawmakers or by those whose edicts or acts may fairly be said to
23 represent official policy, inflicts the injury . . .”
 (2) where “the constitutional tort was the result of a longstanding practice

24 ² Many cases combine the first two prongs. *See, e.g. Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005). We
25 follow the example laid out in *Price* for simplicity.

1 or custom which constitutes the standard operating procedure’ of the local
government entity . . .”

2 (3) by showing that “the tortfeasor was an official whose acts fairly
represent official policy such that the challenged act constituted an official
3 policy . . .” or

4 (4) by showing that “an official with final policymaking authority either
delegated that authority to, or ratified the decision of, a subordinate.”

5 *Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008) (internal quotation marks
and citations omitted).

6 Liability under the first prong arises through the adoption of a formal policy, defined as “a
7 deliberate choice to follow a course of action ... made from among various alternatives by the official or
8 officials responsible for establishing final policy with respect to the subject matter in question.” *Oviatt*
9 *By & Through Waugh v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992) (citing *Pembaur v. City of*
10 *Cincinnati*, 475 U.S. 469, 483-484 (1986)). Plaintiffs do not allege facts suggesting The City has
11 adopted such a policy, thus they have not established a claim under the first prong.

12 A plaintiff can claim liability under the second prong by alleging that a “longstanding practice or
13 custom” has evolved, but this requires a showing of more than “isolated or sporadic incidents.” *Hunter*
14 *v. Cnty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011). Rather, “the custom must be so ‘persistent
15 and widespread’ that it constitutes a ‘permanent and well settled city policy.’” *Id.* The line between
16 “isolated or sporadic incidents” and “persistent and widespread conduct” is not clearly delineated,
17 although where more than a few incidents are alleged, the determination appears to require a fully-
18 developed factual record. *Compare Davis v. City of Ellensburg*, 869 F.2d 1230, 1233–34 (9th Cir.1989)
19 (single incident of excessive force inadequate to establish liability); *Meehan v. County of Los Angeles*,
20 856 F.2d 102, 107 (9th Cir.1988) (two incidents insufficient) with *Menotti v. City of Seattle*, 409 F.3d
21 1113, 1147 (9th Cir.2005) (triable issue of fact existed as to whether Seattle had an unconstitutional
22 policy or custom of suppressing certain political speech based on the testimony of several individuals
23 that their entry to a particular area was permitted by police only after they removed offending buttons
24 and stickers, coupled with the testimony of the officer in charge that the City would not permit
25 “demonstrations” in the area).

26 It is unclear if Plaintiffs are attempting to assert that The City is liable under the second prong of

1 the analysis. Plaintiffs claim that “the City of Mendota engaged in a policy, custom or practice” of
2 refusing to give post-deprivation notice, or, in the alternative of intentionally violating that policy. FAC
3 at ¶ 58. But, Plaintiffs also allege that whatever policies the City had in this respect were not equally
4 applied to them. FAC at ¶ 107. That is the basis of their Equal Protection Claim. *See Part C, supra.*
5 Plaintiffs cannot have it both ways. Plaintiffs later admit that they were trying to show that Defendants’
6 actions were “of sufficient duration, frequency and consistency that they became [their] custom and
7 practice *when dealing with [Plaintiffs].*” Opposition, Doc. 48, at 9 (emphasis added). An allegation that
8 one is singled out for unique, unlawful treatment is inherently incompatible with an attempt to sustain a
9 pattern and practice claim based upon a theory that one’s own experience is evidence of a widespread
10 custom and practice. *See Engelbrecht v. Clackamas Cnty.*, 2006 WL 2927244 (D. Or. Oct. 11, 2006)
11 (noting contrast between assertion that a practice constituted a widespread custom and allegation that
12 plaintiff was “singled out for unique treatment”). Plaintiffs have pled themselves out of a pattern and
13 practice claim.

14 Liability under the third prong relates to the Supreme Court’s holding “that municipal liability
15 may be imposed for a single decision by municipal policymakers under appropriate circumstances.”
16 *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (“[T]he power to establish policy is no more
17 the exclusive province of the legislature at the local level than at the state or national level.”). This
18 liability only attaches “where the decisionmaker possesses final authority to establish municipal policy
19 *with respect to the action ordered*” and a “deliberate choice to follow a course of action is made from
20 among various alternatives by the official or officials responsible for establishing final policy with
21 respect to the subject matter in question.” *Id.* at 481, 483 (“[W]here action is directed by those who
22 establish governmental policy, the municipality is equally responsible whether that action is to be taken
23 only once or to be taken repeatedly.”). Whether a particular official has final policy-making authority is
24 a question of state law. *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). This determination is
25 necessary because Section 1983 does not encompass vicarious or supervisor liability. *Clouthier v. Cnty.*
26 *of Contra Costa*, 591 F.3d 1232, 1253 (9th Cir. 2010)(“[T]o hold cities liable under section 1983

1 whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would
2 simply smuggle *respondeat superior* liability into section 1983 law creating an end run around
3 *Monell.*”).

4 Plaintiffs allege that the unconstitutional searches and seizure were conducted at the direction of
5 Defendants J. Amador, Capuchino, Flores, Silva and Riofrio, who were members of the Mendota City
6 Council. FAC at ¶ 71. City Council members clearly have policy making authority. MENDOTA, CA.
7 CODE § 2.04.040 (1995).³ Plaintiffs further claim that these individuals directed other municipal
8 employees to dispose of Plaintiffs’ personal property. *Id.* The alleged public statement made by J.
9 Amador (singling out Plaintiffs for prosecution) presents one way in which this directive may have been
10 carried out. *Id.*

11 Paragraphs 77, 85, 100 and 109 attempt to tie these allegations into the framework of *Monell*
12 liability:

13 “Defendants were acting pursuant to an official policy; according to the
14 City’s standard operating procedures; under direction of a City official
15 with final policy making authority; and with the later ratification by a City
16 official when they [deprived Plaintiffs of their personal property without
adequate notice, conducted search and seizures without a warrant, seized
Plaintiffs property without just compensation, demonstrated a continuous
and orchestrated pattern of unequal treatment]. . .”

17 Assuming all facts are true, and the alleged constitutional violations – searches and seizures
18 conducted with improper notice and based on faulty warrants, and selectively enforced nuisance laws-
19 were directed by city council members, Plaintiffs present a plausible scenario that these activities
20 represented a “policy” level decision of The City to target them. While short on details, these facts
21 “give fair notice” and “enable the opposing party to defend itself effectively” under the third prong of
22 *Monell* .

23 The fourth prong reflects the fact that policymakers may delegate their authority to another
24

25 ³ In contrast, Mendota’s Municipal code precludes the City Manager from assuming any policy-making authority.
26 MENDOTA, CA. CODE § 2.12.050 (1995). (“The city manager . . . shall not exercise any policymaking or legislative
functions whatsoever . . .”).

1 official. Liability may arise “if a particular decision by a subordinate was cast in the form of a policy
2 statement and expressly approved by the supervising policymaker ... [or] if a series of decisions by a
3 subordinate official manifested a ‘custom or usage’ of which the supervisor must have been aware.”
4 *Gillette v. Delmore*, 979 F.2d at 1347 (quoting *Praprotnik*, 485 U.S. at 126, 108 S.Ct. at 926). However,
5 a policymaker must “approve a subordinate's decision *and the basis for it* before the policymaker will be
6 deemed to have ratified the subordinate's discretionary decision.” *Id.* at 1348.

7 “[U]nconstitutional discretionary actions of municipal employees generally are not chargeable to the
8 municipality under section 1983.” *Id.* Because there are many factual issues tied up in a resolution of
9 such issues, “[o]rdinarily, ratification is a question for the jury.” *Christie v. Iopa*, 176 F.3d 1231, 1238-
10 39 (9th Cir. 1999).

11 As discussed above, Plaintiffs present a plausible scenario that City Council members made
12 decisions that reflected a policy of targeting Plaintiffs. Plaintiffs also allege that this policy was enacted,
13 in part, by Council Members’ failure to remediate improper behavior. FAC at ¶ 71. (“At minimum, these
14 Defendants knew about the above-alleged constitutional violations yet deliberately and indifferently
15 acquiesced in the conduct . . .”). On this basis, the City of Mendota may be liable under the fourth prong
16 of the *Monell* analysis.

17 Thus, the motion to dismiss for failure to allege The City of Mendota’s liability is DENIED.

18 **B. Takings Claim**

19 Defendants argue that Plaintiffs’ takings claims under the Fifth Amendment (Count 3) should be
20 dismissed because they first need to avail themselves of state law remedies and be denied just
21 compensation. Defs.’ Mem. at 8.

22 The “Takings Clause” of the Fifth Amendment prohibits both the taking of private property for
23 public use without just compensation and the taking of private property for private use. *Armendariz v.*
24 *Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996). As Plaintiffs observe, the obligation to seek compensation
25 does not extend to cases where the taking is for a private purpose. *99 Cents Only Stores v. Lancaster*
26 *Redevelopment Agency*, 60 F. App’x 123, 124 (9th Cir. 2003) (“Because 99 Cents challenged the

1 ordinance as authorizing a private taking, it was not required to exhaust state condemnation proceedings
2 prior to instituting a federal action.”); *Armendariz*, 75 at 1321 (“Because a ‘private taking’ cannot be
3 constitutional even if compensated, a plaintiff alleging such a taking would not need to seek
4 compensation in state proceedings before filing a federal takings claim under the rule of *Williamson*
5 *County Regional Planning Comm'n . . .*”).

6 Because Plaintiffs allege that Defendants “had no public purpose” for confiscating and disposing
7 of their property, FAC at ¶¶ 97, there was no requirement for them to seek compensation at the state
8 level. Thus, the motion to dismiss for failure to allege a claim under the Fifth Amendment is DENIED.

9 **C. Equal Protection Claims**

10 Defendants argue that Plaintiffs Equal Protection claims (Count 4) are not viable because they
11 have not plead adequately the elements establishing them as a “class of one.” Defs’. Mem. at 9. To
12 succeed on a “class of one” equal protection claim, a plaintiff bears the burden to prove that: (1) he/she
13 has been intentionally treated differently than others; and (2) there is no rational basis for the difference
14 in treatment. *Seariver Mar. Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir.2002). The second
15 prong of this analysis turns on “whether there is a rational basis for the *distinction*, rather than the
16 underlying government *action*.” *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1023 (9th Cir.
17 2011)(emphasis in original).

18 The Ninth Circuit holds that to establish a viable claim, a plaintiff “need only allege some facts,
19 either anecdotal or statistical, demonstrating that similarly situated defendants ... could have been
20 prosecuted, but were not.” *Lacey v. Maricopa Cnty.*, at 920. Plaintiffs must also present a claim that is
21 “plausible on its face” that Plaintiffs were singled out for persecution without a rational basis. *Cooper v.*
22 *Clark Cnty., Nevada*, 519 F. App'x 479, 481 (9th Cir. 2013).

23 Plaintiffs allege that they are situated similarly to Defendants Smitty’s Towing and Gonzales
24 Towing in that they operated similar businesses in close proximity. FAC at ¶ 65. Plaintiffs claim that
25 these companies were preferentially granted conditional use permits which were denied to Plaintiffs;
26 though all companies were located in the same municipal zone. FAC at ¶ 68. Plaintiffs further claim

1 they were targeted for prosecution for the benefit of these rival companies. FAC at ¶ 69. These
2 allegations present a plausible scenario that plaintiffs were similarly situated, but treated differently from
3 the rival junkyard operators without a rational basis underlying the distinction. Defendant's motion to
4 dismiss the Equal Protection claim is DENIED.

5 **VII. CONCLUSION AND ORDER**

6 For the reasons discussed, above the Court GRANTS Defendants' Motion to Dismiss as to
7 Korina Zamora, but DENIES Defendants Motion to Dismiss as to all other Defendants. The Court also
8 ORDERS Plaintiff to amend its Complaint, for the limited purpose described above, within FOURTEEN
9 DAYS of entry of this order. This will be the last opportunity to amend. This court does not have the
10 resources to review and write extensive orders on how to write, rewrite and submit pleadings. This order
11 gives the proper direction for the last time.

12 IT IS SO ORDERED.

13 Dated: May 19, 2014

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE