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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JESSE VANG; WANG CHANG; JOUA
CHAO MOUA; ALEXANDER VANG;
DANG XIONG; DOLLARSAI YURGH;
JOUA YENG VANG; MANISY MOUA;
POUA VANG; RICHARD VANG; and
DOES 1-200,

Plaintiffs,

v.

SHERIFF JON LOPEY,
individually and in his
capacity as Sheriff for the
COUNTY OF SISKIYOU; COLLEEN
SETZER; individually and in
her capacity as Clerk for the
COUNTY OF SISKIYOU; ALEX
NISHIMURA, individually and
in his capacity as an agent
of the CALIFORNIA SECRETARY
OF STATE; the COUNTY OF
SISKIYOU; CALIFORNIA
DEPARTMENT OF FORESTRY AND
FIRE PROTECTION; Does 1-20,
in their individual capacity;
and DOES 1-20, inclusive,

Defendants.

No. 2:16-cv-2172-JAM-CMK

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Defendants Sheriff Jon Lopey ("Lopey"), County Clerk Colleen Setzer ("Setzer") and the County of Siskiyou (collectively "Defendants") move to dismiss Plaintiffs' complaint. ECF No. 15. Plaintiffs oppose the motion. ECF No. 31. For the reasons set

1 forth below, the Court GRANTS Defendants' motion to dismiss.¹

2 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

3 Plaintiffs, ten members of the Hmong community, allege that
4 "[t]he local government in Siskiyou County is engaged in a
5 systematic campaign to deprive Plaintiffs, and other members of
6 the Hmong community, of their right to vote, and their right to
7 the exclusive use and enjoyment of their private property."

8 Compl. ¶ 1, ECF No. 1. Plaintiffs further allege that
9 "[D]efendants conspired to disenfranchise Plaintiffs by
10 challenging their status as California residents through racially
11 discriminatory implementation and enforcement of County
12 Ordinances, and as to some plaintiffs, threatened prosecution."
13 Compl. ¶ 2.

14 In the June 2016 primary election, the voters of Siskiyou
15 County approved two ordinances regarding the cultivation of
16 marijuana. Compl. ¶ 4. Siskiyou County Code Section 10-14.030
17 prohibits outdoor cultivation of marijuana. See Defs.' Req. for
18 Judicial Notice ("RJN") Ex. A, ECF 15-2. Section 10-14.090
19 empowers the Board of Supervisors or an enforcing officer to
20 enforce Section 10-14.030 by issuing notices of abatement. Id.

21 Plaintiffs allege that Defendants have disproportionately
22 targeted the Hmong community in enforcing the new ordinances.
23 Compl. ¶ 4. The County has issued several nuisance violation
24 notices and scheduled abatement hearings. Compl. ¶ 29.

25 Plaintiffs also allege that Defendants executed search warrants
26

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for November 15, 2016.

1 on various properties and that during the searches "residents who
2 were present were handcuffed and held at gunpoint while their
3 properties were ransacked." Compl. ¶ 31. Defendants allegedly
4 seized medical marijuana plants during the searches. Compl.
5 ¶ 31. Plaintiffs also allege that individuals with guns came
6 onto their properties to investigate voter fraud. Compl. at 12-
7 21.

8 Plaintiffs bring eleven causes of action: (1) violation of
9 the Fourth Amendment right against unreasonable search and
10 seizure against all defendants, (2) violation of the Fourteenth
11 Amendment against all defendants, (3) municipal liability against
12 the County on a failure-to-train theory, (4) supervisory
13 liability against Lopey, (5) employer liability against the
14 County, (6) negligence against all defendants, (7) negligent
15 hiring and supervision against all defendants, (8) violation of
16 California Elections Code Section 14027 against all defendants,
17 (9) violation of § 2 of the Voting Rights Act against all
18 defendants, (10) negligent infliction of emotional distress
19 against all defendants, and (11) ratification against the County.
20 Compl. at 24-30. Plaintiffs bring their first through fifth and
21 eleventh claims pursuant to § 1983. Id.

22 II. OPINION

23 A. Judicial Notice

24 Defendants ask the Court to take judicial notice of the two
25 Siskiyou County municipal ordinances at issue in this
26 litigation. RJN at 2. Since "[m]unicipal ordinances are proper
27 subjects for judicial notice," Tollis, Inc. v. Cty. of San
28 Diego, 505 F.3d 935, 938 n.1 (9th Cir. 2007), the Court takes

1 judicial notice of Siskiyou County Code Sections 10-14.030 and
2 10-14.090.

3 B. Plaintiffs' § 1983 Claims

4 Before addressing each individual cause of action, the
5 Court addresses three issues raised by Defendants that pertain
6 to all of Plaintiffs' § 1983 claims: (1) claims against
7 individual defendants in their official capacities,
8 (2) qualified immunity, and (3) County liability.

9 1. Plaintiffs' Official Capacity Claims Against
10 Lopey and Setzer

11 Plaintiffs sue Lopey and Setzer in their individual and
12 official capacities. Compl. at 1. Defendants contend that
13 § 1983 claims "cannot be maintained against the Sheriff and
14 Clerk in their official capacities." Mot. to Dismiss at 4.
15 Defendants are correct. "A claim against a state or municipal
16 official in her official capacity is treated as a claim against
17 the entity itself." Rose v. Cty. of Sacramento, 163 F. Supp. 3d
18 787, 793 n.1 (E.D. Cal. 2016) (citing Kentucky v. Graham, 473
19 U.S. 159, 166 (1985)). When a plaintiff sues a local government
20 entity and an officer in his official capacity, "the court may
21 dismiss the officer as a redundant defendant." Ctr. for Bio-
22 Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep't, 533 F.3d 780,
23 799 (9th Cir. 2008). Claims against officers in their personal
24 capacities, however, may remain. Fontana v. Alpine Cty., 750 F.
25 Supp. 2d 1148, 1155 (E.D. Cal. 2010). The Court therefore
26 dismisses Plaintiffs' § 1983 claims against Lopey and Setzer in
27 their official capacities without leave to amend.

1 2. Qualified Immunity

2 Defendants argue that qualified immunity shields Setzer and
3 Lopey from liability for Plaintiffs' § 1983 claims. Mot. to
4 Dismiss at 4. Although § 1983 allows individuals to vindicate
5 their federal rights, qualified immunity protects government
6 officials from liability for damages in certain situations. A.C.
7 v. Griego, 2016 WL 5930592, at *2 (E.D. Cal. Oct. 12, 2016).
8 "Qualified immunity balances two important interests . . . the
9 need to hold public officials accountable when they exercise
10 power irresponsibly and the need to shield officials from
11 harassment, distraction, and liability when they perform their
12 duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231
13 (2009). "Qualified immunity is determined by a two-step inquiry:
14 (1) Are the facts that a plaintiff has alleged or shown
15 sufficient to demonstrate a violation of a constitutional right?;
16 and (2) Was the right at issue 'clearly established' at the time
17 of the defendant's alleged misconduct?" Abudiab v. Georgopoulos,
18 586 F. App'x 685, 686 (9th Cir. 2013).

19 As to Lopey, Defendants argue that he "was not present
20 during the investigations that occurred at the various
21 properties, and it is not unreasonable for a local law
22 enforcement agency to assist an outside agency" in an
23 investigation of possible voter fraud. Mot. to Dismiss 4-5. As
24 to Setzer, Defendants assert that "the allegations simply
25 establish that she had minimal involvement beyond simply
26 performing her statutory duty to report the possibility of voter
27 fraud." Id. at 5.

1 Plaintiffs respond that "Defendants actively participated in
2 the investigations herewith and it is Plaintiffs['] belief that
3 many of the Defendants were present and armed with military-style
4 assault rifles . . . [t]herefore, sufficient facts are alleged to
5 establish that a reasonable officer would believe the conduct in
6 question is unlawful under clearly established law." Opp'n at 4.

7 Plaintiffs' conclusory and unsupported argument fails.

8 While Plaintiffs assert that "many of the Defendants"
9 investigated Plaintiffs while holding assault rifles, Plaintiffs
10 do not point to any factual allegations showing that either Lopey
11 or Setzer personally participated in such activity. Plaintiffs
12 allege only that Setzer reported suspected voter fraud to Lopey
13 and the California Secretary of State and notified individuals of
14 incomplete voter registration cards. Compl. ¶¶ 18, 19. Setzer
15 simply performed her job duties, and Plaintiffs do not provide
16 any support for their contention that Setzer's actions deprived
17 them of a constitution right. Additionally, some Plaintiffs
18 voted in the June election, belying Plaintiffs' allegations that
19 Setzer infringed upon each Plaintiff's right to vote. See Compl.
20 ¶¶ 45, 64, 79. Qualified immunity shields Setzer from liability,
21 and the Court dismisses all § 1983 claims brought against Setzer
22 with prejudice.

23 As to Lopey, Plaintiffs allege only that he issued press
24 releases and that some of his subordinates visited Plaintiffs'
25 properties. Compl. at 8-9. Plaintiffs fail to allege that Lopey
26 personally violated any of Plaintiffs' constitutional rights and
27 he is also entitled to qualified immunity. All § 1983 claims
28

1 brought against Lopey in his individual capacity are dismissed
2 without leave to amend.²

3 3. County Liability

4 A local government cannot be held liable pursuant to § 1983
5 under a theory of "respondeat superior." Christie v. Iopa, 176
6 F.3d 1231, 1234-35 (9th Cir. 1999). Instead, municipalities are
7 liable only when action pursuant to official municipal policy
8 causes a constitutional violation. Id. at 1235. The "official
9 policy" requirement "distinguishe[s] acts of the *municipality*
10 from acts of *employees* of the municipality," and thereby limits
11 liability to actions for which the municipality is actually
12 responsible. Id. (emphasis in original).

13 Plaintiffs allege an unconstitutional municipal policy or
14 practice only in their third cause of action. Compare Compl.
15 ¶¶ 110, 113 with Compl. ¶ 115. The Court therefore dismisses
16 Plaintiffs' first and second causes of action as brought against
17 the County with leave to amend. The Court also dismisses
18 Plaintiffs' fifth cause of action for "Employer Liability
19 Against County of Siskiyou" without leave to amend because
20 municipalities cannot be held liable under § 1983 merely because
21 they employ people who may have violated constitutional rights.

22 ² A court should freely grant leave to amend "when justice so
23 requires." Fed. R. Civ. P. 15(a)(2). But a court may deny leave
24 to amend when it finds that the plaintiff cannot possibly cure
25 the complaint without contradicting allegations in his original
26 complaint. Garmon v. Cty. of Los Angeles, 828 F.3d 837, 846 (9th
27 Cir. 2016); see also Bolin v. Brown, 2012 WL 2933502, at *5 (E.D.
28 Cal. Jul. 18, 2012). The Court finds that Plaintiffs cannot
amend their claims against Setzer and Lopey without contradicting
the operative complaint's allegations showing that Setzer and
Lopey were not personally involved in the constitutional
violations that Plaintiffs allege.

1 See id.

2 4. Third Cause of Action: § 1983 Municipal Liability
3 Against the County

4 Plaintiffs allege municipal liability against the County
5 based on a failure-to-train theory. Compl. ¶ 115. Plaintiffs
6 allege that the County's training policies "were not adequate to
7 train its sheriff's deputies and police officers to handle voter
8 fraud investigations and building safety code enforcement."
9 Compl. ¶ 115.

10 A public entity's failure to adequately train its employees
11 may create liability under § 1983 when the "failure to train
12 amounts to deliberate indifference to the rights of persons with
13 whom the [employees] come into contact." Myers v. City of
14 Madera, 2011 WL 2361628, at *5 (E.D. Cal. Jun. 9, 2011) (quoting
15 City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989)). "The
16 issue is whether the training program is adequate and, if it is
17 not, whether such inadequate training can justifiably be said to
18 represent municipal policy." Long v. Cty. of L.A., 442 F.3d
19 1178, 1186 (9th Cir. 2006). A plaintiff alleging a failure-to-
20 train claim must show: (1) he was deprived of a constitutional
21 right, (2) the municipality had a training policy that amounted
22 to deliberate indifference to the constitutional rights of the
23 persons' with whom its police officers are likely to come into
24 contact; and (3) his constitutional injury would have been
25 avoided had the municipality properly trained those officers."
26 Blankenhorn v. City of Orange, 485 F.3d 463, 485 (9th Cir.
27 2007).

28 Plaintiffs fail to "identify any specific training that was

1 deficient, or how the policy amounted to deliberate
2 indifference." See Molina v. City of Visalia, 2014 WL 1117005,
3 at *4 (E.D. Cal. Mar. 14, 2014). Absent such allegations this
4 claim cannot survive. The motion to dismiss Plaintiffs' third
5 cause of action is granted with leave to amend.

6 5. Eleventh Cause of Action: Ratification Against the
7 County

8 Plaintiffs allege that "Lopey ratified his subordinates'
9 acts because he knew of and specifically approved of the pattern
10 and practice of sheriff's deputies in Siskiyou County using
11 excessive force while on duty and unlawfully entering onto
12 private property without a search warrant." Compl. ¶ 146.

13 To impose municipal liability under a ratification theory, a
14 plaintiff must show that the authorized policymakers approved a
15 subordinate's decision and the basis for it. Lytle v. Carl, 382
16 F.3d 978, 987 (9th Cir. 2004). Mere failure to overrule a
17 subordinate's actions, without more, cannot support a § 1983
18 claim. Id. Additionally, "the Ninth Circuit 'appears to require
19 something more than a failure to reprimand to establish a
20 municipal policy or ratification.'" Hill v. Fairfield Police
21 Dep't, 2016 WL 2602411, at *3 (E.D. Cal. May 5, 2016) (quoting
22 Kanae v. Hodson, 294 F. Supp. 2d 1179, 1189 (D. Haw. 2003)).
23 Vague and conclusory allegations of official participation in
24 § 1983 violations cannot withstand a motion to dismiss. Arres v.
25 City of Fresno, 2011 WL 284971, at *17 (E.D. Cal. Jan. 26, 2011).

26 Plaintiffs' allegations merely recite the elements of a
27 ratification claim. See Compl. ¶ 146. Plaintiffs provide no
28 facts to support their allegations that Lopey knew of his

1 subordinates' actions or that he approved of such actions. The
2 Court therefore must dismiss Plaintiffs' eleventh claim but does
3 so with leave to amend.

4 C. State Common Law Claims

5 Plaintiffs assert three California state common law claims:
6 negligence (sixth cause of action), negligent hiring/supervision
7 (seventh cause of action), and intentional infliction of
8 emotional distress ("NIED") (tenth cause of action). Compl. at
9 27-29. "It is well-settled that there is no common law tort
10 liability for public entities in California; instead, such
11 liability must be based on statute." Cardinal v. Buchnoff, 2010
12 WL 3609489, at *2 (S.D. Cal. Sept. 14, 2010). Plaintiffs' sixth,
13 seventh, and tenth causes of action are based on common law, not
14 on statute, and thus are dismissed as brought against the County
15 without leave to amend.

16 Defendants next argue that California Government Code
17 section 821 shields both Setzer and Lopey from liability for
18 their actions in investigating potential voter fraud. Mot. to
19 Dismiss at 12. Section 821.6 provides:

20 "[a] public employee is not liable for injury caused
21 by his instituting or prosecuting any judicial or
22 administrative proceeding within the scope of his
23 employment, even if he acts maliciously and without
24 probable cause."

25 California courts construe section 821.6 broadly. Gillan v.
26 City of San Marino, 147 Cal. App. 4th 1033, 1048 (2007). "Section
27 821.6 is not limited to conduct occurring during formal
28 proceedings. It also extends to actions taken in preparation for
formal proceedings. Because investigation is 'an essential step'
toward the institution of formal proceedings, it is also cloaked

1 with immunity." Clark v. Cty. of Tulare, 2010 WL 5437195, at *2
2 (E.D. Cal. Dec. 27, 2010) (quoting Javor v. Taggart, 98
3 Cal.App.4th 795, 808 (2002)) (internal punctuation omitted).

4 Plaintiffs respond by arguing that "the immunities provided
5 under Gov Code section 818.2 829, 820.6 and 845 do not render
6 this Cause of Action non-actionable." Opp'n at 13. But
7 Plaintiff's do not cite to any authority or provide any analysis
8 to support this proposition. Plaintiffs' unsupported argument
9 fails. The facts alleged indicate that Setzer and Lopey acted in
10 furtherance of an investigation into potential voter fraud when
11 they notified the California Secretary of State and provided
12 officers to assist the Secretary of State's investigator.
13 Plaintiffs have not provided any facts or arguments to rebut
14 section 821.6's applicability to this case. The Court finds that
15 Lopey and Setzer are immune from Plaintiffs' state law claims
16 pursuant to section 821.6 and therefore dismisses these claims
17 with prejudice as to these individual defendants.

18 D. Voting Causes of Action

19 Plaintiffs bring two voting claims: violation of California
20 Elections Code section 14027 (eighth cause of action) and
21 violation of § 2 of the Voting Rights Act (ninth cause of
22 action). Compl. at 28-29. As explained below, neither of these
23 causes of action can survive.

24 1. Eighth Cause of Action: Violation of California
25 Elections Code Section 14027

26 Plaintiffs allege that Defendants used an "'at-large
27 election' to pass Measures T and U in an intentional, unlawful,
28 and selective way for the purpose of disenfranchising Plaintiffs

1 specifically, and Hmong residents general[ly]" in violation of
2 California Elections Code section 14027. Compl. ¶ 136.

3
4 Section 14027 of the Elections Code states:

5 An at-large method of election may not be imposed or
6 applied in a manner that impairs the ability of a
7 protected class to elect candidates of its choice or
8 its ability to influence the outcome of an election,
as a result of the dilution or the abridgment of the
rights of voters who are members of a protected class,
as defined pursuant to Section 14026.

9 Cal. Elec. Code § 14027. Section 14026 defines an "at-large
10 election" as:

- 11 (1) One in which the voters of the entire
12 jurisdiction elect the members to the governing
body.
- 13 (2) One in which the candidates are required to
14 reside within given areas of the jurisdiction and
the voters of the entire jurisdiction elect the
15 members to the governing body.
- 16 (3) One which combines at-large elections with
district-based elections.

17 Cal. Elec. Code § 14026.

18 Defendants contend that "Measures T and U were propositions
19 submitted to popular vote, not an 'at-large' election, which has
20 a specific statutory definition. . . . [T]here was simply no
21 'at-large election' regarding Measures T and U." Mot. to Dismiss
22 at 8-9. Plaintiffs assert without authority that Measures T and
23 U were passed through "at-large" methods. Opp'n at 8.

24 At least facially, California Elections Code sections 14026
25 and 14027 apply to elections of *candidates*. Plaintiffs do not
26 cite any authority to support their contention that these
27 sections apply to passage of measures or propositions. Absent
28 such authority, this Court declines to interpret this state

1 statute to apply beyond the statute's plain text and dismisses
2 Plaintiffs' eighth cause of action without leave to amend.

3 2. Ninth Cause of Action: Voting Rights Act

4 Plaintiffs allege that Defendants "imposed voting
5 qualifications and/or prerequisites to voting and/or standards,
6 practices, or procedures in a manner resulting in a denial or
7 abridgement of the right of Plaintiffs, citizens of the United
8 States, to vote on account of race or color" in violation of § 2
9 of the Voting Rights Act. Compl. ¶ 139.

10 Section 2 of the Voting Rights Act states that:

- 11 (a) No voting qualification or prerequisite to voting
12 or standard, practice, or procedure shall be
13 imposed or applied by any State or political
14 subdivision in a manner which results in a denial
or abridgement of the right of any citizen of the
United States to vote on account of race or color
. . . .
- 15 (b) A violation of subsection (a) is established if,
16 based on the totality of circumstances, it is
17 shown that the political processes leading to
18 nomination or election in the State or political
19 subdivision are not equally open to participation
20 by members of a class of citizens protected by
21 subsection (a) in that its members have less
22 opportunity than other members of the electorate
23 to participate in the political process and to
elect representatives of their choice. The
extent to which members of a protected class have
been elected to office in the State or political
subdivision is one circumstance which may be
considered: *Provided*, that nothing in this
section establishes a right to have members of a
protected class elected in numbers equal to their
proportion in the population.

24 52 U.S.C. § 10301.

25 Plaintiffs' ninth claim fails for two reasons. First, § 2
26 expressly applies to elections of representatives. Plaintiffs
27 again fail to supply this Court with any authority to apply § 2
28 to the passage of measures. Second, a plaintiff asserting a § 2

1 violation must establish three threshold conditions: "(1) the
2 racial group is sufficiently large and geographically compact to
3 constitute a majority in a single-member district; (2) the racial
4 group is politically cohesive; and (3) the majority votes
5 sufficiently as a bloc to enable it usually to defeat the
6 minority's preferred candidate." League of United Latin Am.
7 Citizens v. Perry, 548 U.S. 399, 425 (2006) (internal citations
8 and punctuation omitted). "These are the so-called Gingles
9 requirements." Id. "If all three Gingles requirements are
10 established, the statutory text directs us to consider the
11 'totality of circumstances' to determine whether members of a
12 racial group have less opportunity than do other members of the
13 electorate." Id. at 425-26.

14 Plaintiffs do not plead any of the Gingles requirements
15 necessary to state a § 2 violation. Additionally, the Gingles
16 requirements expressly apply to the election of a "minority's
17 preferred candidate." There is no indication in the statute that
18 Congress intended § 2 to apply to the passage of measures, and
19 Plaintiffs have not provided any case law showing that the
20 statute has been interpreted this way by courts. Without any
21 authority that § 2 applies to the passage of measures, this Court
22 declines interpret § 2 so broadly. Plaintiffs' ninth cause of
23 action is dismissed without leave to amend.

24 Because the Court has found that section 14027 of the
25 California Elections Code and § 2 of the Voting Rights Act do not
26 apply to this case, the Court need not address Defendants'
27 arguments regarding Plaintiffs' standing to bring these voting
28 claims.

1 E. Punitive Damages

2 Plaintiffs request "an award of punitive and exemplary
3 damages against Defendants according to proof at trial." Compl.
4 at 31, ¶ 6. California Government Code section 818 states that
5 public entities are not liable for "damages imposed primarily
6 for the sake of example and by way of punishing the defendant."
7 "[A] municipality is [also] immune from punitive damages under
8 42 U.S.C. § 1983." City of Newport v. Fact Concerts, Inc., 453
9 U.S. 247, 271 (1981). Because none of Plaintiffs' claims
10 against Lopey and Setzer survive, only the County—which is
11 immune from all punitive damages—remains as a defendant.
12 Accordingly, the Court strikes Plaintiffs' request for punitive
13 damages from the complaint.

14 F. Attorney's Fees

15 42 U.S.C. § 1988(b) provides that "[i]n any action or
16 proceeding to enforce a provision" of 42 U.S.C. § 1983, "the
17 court, in its discretion, may allow the prevailing party . . .
18 reasonable attorney's fee as part of the costs." A court may
19 award attorney's fees to "a prevailing defendant . . . under
20 § 1983, only upon 'a finding that the plaintiff's action was
21 frivolous, unreasonable, or without foundation.'" Gallardo v.
22 Hanford Joint Union Sch. Dist., 2015 WL 4661636, at *1 (E.D.
23 Cal. Aug. 5, 2015) (quoting Christiansburg Garment Co. v. EEOC,
24 434 U.S. 412, 421 (1978)). Defendants do not argue that
25 Plaintiffs' § 1983 claims are "frivolous, unreasonable, or
26 without foundation" and the Court refuses to make such a
27 finding. Defendants' request for attorney's fees is denied.
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II. ORDER

For the reasons set forth above, the Court GRANTS Defendants' Motion to Dismiss. The following claims are dismissed without leave to amend:

- All causes of action against Lopey and Setzer
- The fifth cause of action as brought against the County
- The sixth, seventh and tenth causes of action as brought against the County
- The eighth and ninth causes of action as brought against the County

The following claims are dismissed with leave to amend:

- The first, second, third, and eleventh causes of action as brought against the County

Setzer and Lopey are dismissed from this case with prejudice. Plaintiffs shall file their amended complaint within twenty days of the date of this Order. The County shall file its responsive pleading twenty days thereafter.

IT IS SO ORDERED.

Dated: January 12, 2017



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE