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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SEAN O'TOOLE, et al.,  
Plaintiffs,  
v.  
CITY OF ANTIOCH, et al.,  
Defendants.

Case No. 11-cv-1502-PJH

**ORDER RE MOTIONS FOR SUMMARY JUDGMENT**

United States District Court  
Northern District of California

On July 8, 2015, three motions for summary judgment came on for hearing before this court: (1) a motion for partial summary judgment filed by plaintiffs Sean O'Toole, Kelley O'Toole, Steven Daniel Lee, Jennifer Lynn Curtis, and Jack Foster (collectively, "plaintiffs"); (2) a motion for summary judgment filed by defendants Joshua Vincelet, James Wisecarver, Steven Aiello, Steven Bergerhouse, Matthew Koch, Desmond Bittner, Leonard Orman, Ronald Krenz, Danielle Joannides, and Stephanie Chalk (collectively, the "Antioch defendants"); and (3) a motion for summary judgment filed by defendant Norman Wielsch. Plaintiffs appeared through their counsel, Tim Pori. The Antioch defendants appeared through their counsel, Noah Blechman. Defendant Wielsch appeared through his counsel, Robert Henkels. Also before the court is a fourth motion for summary judgment, filed by defendants City of Antioch and James Hyde (referred to as "the Monell defendants"). Having read the papers filed in conjunction with the motions and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

1 **BACKGROUND**

2 This case arises out of a number of allegedly illegal searches and/or seizures.  
3 While the operative third amended complaint (“TAC”) lacks a clear statement of the facts,  
4 the court has pieced together the TAC’s allegations with the facts set forth in the parties’  
5 motion papers. Because the relevant incidents involve non-overlapping sets of plaintiffs,  
6 it is clearer to organize the facts by the groups of plaintiffs, rather than by chronology.

7 The first set of plaintiffs consists of Sean O’Toole, Kelley O’Toole, and Steven  
8 Daniel Lee. The O’Tooles own a business called “Grow It Yourself Gardens” (“GIYG”) in  
9 Antioch, California, which sells hydroponic gardening equipment. Lee is an employee of  
10 GIYG.

11 The O’Tooles also own an adjacent commercial space, which they lease to non-  
12 party Anthony Denner, who runs a clothing business called the “Fashion Statement”  
13 (“FS”) out of that location.

14 On October 14, 2009, officers from the Antioch Police Department<sup>1</sup> executed a  
15 search warrant on FS, looking for counterfeit clothing items. As officers approached the  
16 location, they saw Denner and Kelley O’Toole (“Kelley”) leaving FS. Pursuant to the  
17 search warrant, they were both detained.

18 Officers then searched FS, noticing the smell of marijuana. They found a locked  
19 room (the papers are not clear as to how the officers gained access to the locked room)  
20 containing hydroponic growing equipment and “remnants of marijuana plants.” Officers  
21 also found marijuana user paraphernalia and a loaded shotgun, and found video cameras  
22 throughout the FS location.

23 Vincelet spoke to Denner and Kelley, with Denner stating that he rented the  
24 location from the O’Tooles, that he had no knowledge of the growing equipment, and that  
25 only the O’Tooles had access to the locked room. Kelley confirmed that she and Sean  
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27 <sup>1</sup> The complaint alleges that defendants Wielsch, Vincelet, Wisecarver, Aiello,  
28 Bergerhouse, Orman, Krenz, Koch, Bittner, Joannides, and Chalk were present to  
execute the warrant. TAC, ¶ 19.

1 were the landlords of FS, and that Denner did not have access to the locked room.  
2 Denner also stated that he believed the video cameras were controlled from somewhere  
3 in the GIYG store.

4 There is a dispute about what happened next — defendants claim that Kelley gave  
5 her GIYG keycard to Vincelet and granted him access, while plaintiffs claim that no  
6 consent was given, and that officers “confiscated” the keycard.

7 In any event, officers then went to GIYG, where they asked Sean for consent to  
8 walk through the business. Sean refused. The papers also make clear that, while the  
9 business was open to the public, the front door was secured by an electronic lock, so  
10 customers could enter only if a store employee granted them access. Sean did agree to  
11 give officers access to a back room, but it was the same room that the officers had  
12 already accessed via FS.

13 Vincelet then conferred with Wisecarver about what to do next. At this time,  
14 plaintiff Lee was seen leaving GIYG with a black backpack and placing it in his vehicle.

15 The chronology of events around this time has been muddled by the parties, but at  
16 some point, officers decided to freeze the GIYG location pending the issuance of a  
17 search warrant. Also around this time, officers allegedly obtained consent to search  
18 Lee’s vehicle (including the backpack, which was inside), and found marijuana.

19 Officers pat-searched the employees of GIYG and detained them, pending the  
20 issuance of a search warrant. Officers later obtained a search warrant, and ultimately  
21 found cash, firearms, and marijuana.

22 Lee was later charged with possession of marijuana with the intent to sell, but was  
23 found not guilty.

24 Based on these events, the O’Tooles assert four causes of action: (1) a § 1983  
25 claim against the individual officers involved in the GIYG search<sup>2</sup>, (2) a claim for

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27 <sup>2</sup> The complaint does not actually make clear against whom this claim is brought, as  
28 plaintiffs repeatedly use the blanket term “defendant officers” in the context of this claim.  
The court will more fully address the issue of which claims are brought against which  
defendants in the “discussion” section of this order.

1 conspiracy to violate § 1983 against the same officers, (3) a Monell claim against the City  
2 of Antioch and its police chief<sup>3</sup>, and (4) a civil RICO claim against some subset of the  
3 officers who were present at the search (on the basis that they were involved in a broader  
4 joint venture).

5 Lee asserts the same four causes of action arising out of the GIYG search, but  
6 also adds two additional claims: (5) a malicious prosecution claim against defendants  
7 Vincelet and Aiello, and (6) a retaliatory prosecution claim against Vincelet and Aiello.

8 The second set of plaintiffs is made up of Jennifer Lynn Curtis and Jack Foster.  
9 Their allegations arise out of three separate police searches — two of which involve only  
10 Curtis, and one of which involves both Curtis and Foster.

11 The first search occurred on June 28, 2007, and was conducted by the Contra  
12 Costa County Narcotics Enforcement Team (“CCNET”) at 701 Thompsons Drive,  
13 Brentwood, California. That home was owned by non-party Kevin Ackerman, Curtis’  
14 boyfriend. Curtis was not actually present for the search, but claims that defendants  
15 Vincelet, Wielsch, Lombardi, and Wisecarver took \$20,000 in cash that was either not  
16 accounted for on the search warrant return, or was listed as several different amounts,  
17 with entries being “inexplicably scratched off.” Curtis also claims that a camera and a  
18 digital camcorder were taken, but not listed on the search warrant return.

19 The second search occurred either on August 11, 2008, or sometime in the fall of  
20 2008. There is some confusion here, because while the parties agree that a search was  
21 conducted on August 11, 2008, defendants cite to Curtis’ deposition testimony stating  
22 that no property was taken at that time, and that there was another, later search during  
23 which property was taken. However, in that same deposition, Curtis admits to confusion  
24 about the dates, even stating that she felt tricked by the officers into remembering the

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26 <sup>3</sup> As mentioned above in footnote 1, plaintiffs name the Antioch Police Department as a  
27 defendant in the caption of the TAC, but the body of the complaint does not assert any  
28 claim against the Antioch Police Department. To the extent that plaintiffs intend to assert  
a claim against the Antioch Police Department, the court will presume that only the claim  
which is brought against the City of Antioch (i.e., the Monell claim) is also brought against  
the Antioch Police Department.

1 wrong dates. Putting aside this confusion, Curtis does allege that, sometime in 2008,  
2 defendants Wielsch, Wisecarver, Vincelet, and Lombardi searched Ackerman's home,  
3 and that she was handcuffed and ordered to lay face down on the ground, despite being  
4 seven months pregnant. Curtis also claims that officers took a "Swiss Ice" watch<sup>4</sup> valued  
5 at \$22,500, a necklace, a set of earrings, and "several thousand" dollars in cash. Curtis  
6 claims that no search warrant return was ever filed.

7 Finally, on January 5, 2010, defendants Wielsch and Vincelet served a search  
8 warrant on the residence of plaintiff Foster, who was renting a home owned by  
9 Ackerman. Because Ackerman was in prison at the time, Curtis would check in on the  
10 house and would collect rent. Officers were looking for evidence of marijuana cultivation,  
11 and arrested Foster after finding such evidence. Officers also allegedly took several  
12 shotguns, currency, jewelry, sunglasses, and sports memorabilia without listing them on  
13 a search warrant return. Some of this property belonged to Foster, while some belonged  
14 to Curtis or her son.

15 Curtis arrived at the residence to collect rent, and was detained and handcuffed,  
16 then arrested and eventually released. Curtis alleges that defendants searched her  
17 locked car and seized her wallet, cell phone, and sunglasses, none of which were  
18 documented on a search warrant return.

19 Curtis and Foster each assert four causes of action — Curtis' are based on all  
20 three searches, whereas Foster's are based only on the January 2010 search and arrest.  
21 They both bring the following four claims: (1) a § 1983 against individual officers, (2) a  
22 claim for conspiracy to violate § 1983, (3) a Monell claim against the City of Antioch and  
23 its police chief, and (4) a civil RICO claim.

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28 <sup>4</sup> In 2011, Curtis was asked to identify a watch that was found buried in Lombardi's  
backyard, and positively identified it as the watch taken from Ackerman's house.  
Lombardi claims that the watch was given to him by Wielsch, which Wielsch denies.

1 **DISCUSSION**

2 A. Legal Standard

3 A party may move for summary judgment on a “claim or defense” or “part of . . . a  
4 claim or defense.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there  
5 is no genuine dispute as to any material fact and the moving party is entitled to judgment  
6 as a matter of law. Id.

7 A party seeking summary judgment bears the initial burden of informing the court  
8 of the basis for its motion, and of identifying those portions of the pleadings and discovery  
9 responses that demonstrate the absence of a genuine issue of material fact. Celotex  
10 Corp. v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the  
11 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A  
12 dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable  
13 jury to return a verdict for the nonmoving party. Id.

14 Where the moving party will have the burden of proof at trial, it must affirmatively  
15 demonstrate that no reasonable trier of fact could find other than for the moving party.  
16 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue  
17 where the nonmoving party will bear the burden of proof at trial, the moving party may  
18 carry its initial burden of production by submitting admissible “evidence negating an  
19 essential element of the nonmoving party’s case,” or by showing, “after suitable  
20 discovery,” that the “nonmoving party does not have enough evidence of an essential  
21 element of its claim or defense to carry its ultimate burden of persuasion at trial.” Nissan  
22 Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1105-06 (9th Cir. 2000);  
23 see also Celotex, 477 U.S. at 324-25 (moving party can prevail merely by pointing out to  
24 the district court that there is an absence of evidence to support the nonmoving party’s  
25 case).

26 When the moving party has carried its burden, the nonmoving party must respond  
27 with specific facts, supported by admissible evidence, showing a genuine issue for trial.  
28 Fed. R. Civ. P. 56(c), (e). But allegedly disputed facts must be material – the existence

1 of only “some alleged factual dispute between the parties will not defeat an otherwise  
2 properly supported motion for summary judgment.” Anderson, 477 U.S. at 247-48.

3 When deciding a summary judgment motion, a court must view the evidence in the  
4 light most favorable to the nonmoving party and draw all justifiable inferences in its favor.  
5 Id. at 255; Hunt v. City of Los Angeles, 638 F.3d 703, 709 (9th Cir. 2011).

6 B. Legal Analysis

7 1. Claims asserted by the O’Tooles and Lee

8 The court will first address the claims arising out of the search of Grow It Yourself  
9 Gardens (i.e., the claims brought by Sean O’Toole, Kelley O’Toole, and Steven Daniel  
10 Lee). As mentioned above, the operative complaint is far from clear regarding which  
11 claims are brought by which plaintiffs against which defendants. Under the headings for  
12 the first three causes of action, the complaint states that “plaintiffs Sean O’Toole, Kelley  
13 Barbara O’Toole, Steven Daniel Lee, Jennifer Lynn Curtis, and Jack Foster reallege and  
14 incorporate” all of the previous paragraphs of the complaint. Thus, the court will assume  
15 that each of the first three claims is asserted by all five plaintiffs.

16 Under the heading for the fourth cause of action, the operative TAC states only  
17 that “plaintiffs incorporate by reference rhetorical paragraphs 1-112 as if fully set forth  
18 herein,” but does not name any specific plaintiffs (nor does the TAC explain what is  
19 meant by “rhetorical paragraphs”). To err on the side of over-inclusion, the court will  
20 assume that the fourth cause of action is intended to be asserted by all five plaintiffs.

21 Under the headings for the fifth and sixth causes of action, the TAC states only  
22 that “plaintiff Steven Daniel Lee realleges and incorporates” the previous paragraphs.  
23 Thus, the court will assume that the fifth and sixth causes of action are asserted by  
24 plaintiff Lee.

25 Based on the above, it appears that plaintiffs Sean and Kelley O’Toole each assert  
26 the first four causes of action, and that plaintiff Lee asserts all six causes of action. The  
27 court’s next step is to determine which defendants those claims are asserted against.

28 On the first cause of action, for deprivation of rights under section 1983, the

1 complaint offers no guidance, as it contains only blanket references to “defendant  
2 officers” without making any attempt to name any specific officers. For now, the court will  
3 again err on the side of over-inclusion, and assume that the O’Tooles and Lee intend to  
4 assert their section 1983 claim against all individual officers, but to the extent that certain  
5 officers are not alleged to have participated in the search of GIYG, the court will dismiss  
6 this claim as to them.

7 On the second cause of action, for conspiracy to violate civil rights under section  
8 1983, plaintiffs similarly rely on blanket references to “defendant officers,” though they  
9 also allege that the officers did so under the supervision of defendant Leonard Orman.  
10 Thus, the court will again err on the side of over-inclusion for now, and assume that the  
11 O’Tooles and Lee intend to assert their section 1983 conspiracy claim against all  
12 individual officers, but to the extent that certain officers are not alleged to have  
13 participated in the search of GIYG, the court will dismiss this claim as to them.

14 On the third cause of action, a section 1983 claim brought under a Monell liability  
15 theory, plaintiffs allege that only defendants City of Antioch and Chief James Hyde are  
16 liable under Monell. While plaintiffs do reference the “acts of the defendant officers,” they  
17 do so only to allege that those acts are “the direct and proximate result of the deliberate  
18 indifference and policy and/or practice of conduct of defendants City and Hyde.” Notably,  
19 as mentioned above, plaintiffs do not include the Antioch Police Department as part of  
20 this claim or any other claim, despite its inclusion in the case caption. And as also  
21 mentioned above, the court will assume that plaintiffs’ claims against the Police  
22 Department are co-extensive with their claims against the City, and thus will assume that  
23 plaintiffs intend to assert the Monell claim against the City, the Police Department, and  
24 Chief Hyde.

25 On the fourth cause of action, for violation of civil RICO, plaintiffs do specifically  
26 name the following defendants: Wielsch, Lombardi, Vincelet, Wisecarver, Aiello,  
27 Bergerhouse, Koch, Bittner, and Butler. The court does note that the complaint identifies  
28 only two predicate acts as part of this claim, both of which involved searches of Curtis



1 and/or Foster (i.e., not the search of the O'Tooles and Lee at the GIYG location), but for  
2 now, the court will assume that the O'Tooles and Lee intend to assert this claim against  
3 the named defendants.

4 Finally, on the fifth and sixth causes of action (for malicious prosecution and  
5 retaliatory prosecution, respectively), only defendants Vincelet and Aiello are named.

6 Thus, in sum, the court finds that the following asserted claims arise out of the  
7 search of the O'Tooles and Lee at the GIYG location: (1) a section 1983 claim asserted  
8 by the O'Tooles and Lee against all individual defendants; (2) a claim for conspiracy to  
9 violate section 1983 asserted by the O'Tooles and Lee against all individual defendants;  
10 (3) a Monell claim asserted by the O'Tooles and Lee against the City of Antioch, the  
11 Antioch Police Department, and Chief James Hyde; (4) a civil RICO claim asserted by the  
12 O'Tooles and Lee against Wielsch, Lombardi, Vincelet, Wisecarver, Aiello, Bergerhouse,  
13 Koch, Bittner, and Butler; (5) a malicious prosecution claim asserted by Lee against  
14 Vincelet and Aiello; and (6) a retaliatory prosecution claim asserted by Lee against  
15 Vincelet and Aiello.

16 The court's next step is to determine which defendants are actually alleged to  
17 have been involved in the search of GIYG, based on the parties' representations in the  
18 current motion papers and at the hearing. To the extent that any individual defendants  
19 are not alleged to have been involved in that search, no claim can be asserted against  
20 them by the O'Tooles or Lee.

21 At the hearing, both parties agreed that defendants Vincelet, Wisecarver, Aiello,  
22 Bergerhouse, Krenz, Koch, Bittner, Joannides, Chalk, and Orman were present at some  
23 point during the search of GIYG. The parties also agreed that Wielsch was not present at  
24 the search, and thus, Wielsch's motion for summary judgment is GRANTED as to all  
25 claims asserted by the O'Tooles and Lee. The parties also appear to agree that  
26 defendants Lombardi, Butler, and Hyde were not present at any point during the GIYG  
27 search. As a result, to the extent that the O'Tooles or Lee purport to assert any claims  
28 against Lombardi, Butler, or Hyde (in his individual capacity), those claims are dismissed

1 under Federal Rule of Civil Procedure 41(b), as plaintiffs have not complied with the rules  
2 of pleading as to those defendants.

3 Thus, having parsed the complaint and the parties' papers, the court is now left  
4 with the following claims asserted by the O'Tooles and Lee: two § 1983 causes of action  
5 against defendants Vincelet, Wisecarver, Aiello, Bergerhouse, Krenz, Koch, Bittner,  
6 Joannides, Chalk, and Orman; a Monell claim against defendants Hyde, the City of  
7 Antioch, and the Antioch Police Department; and a RICO claim against defendants  
8 Vincelet, Wisecarver, Aiello, Bergerhouse, Koch, and Bittner. Also remaining are two  
9 additional causes of action asserted by Lee against defendants Vincelet and Aiello,  
10 related to Lee's prosecution. The Antioch defendants and the Monell defendants seek  
11 summary judgment on all claims asserted against them, while plaintiffs move for partial  
12 summary judgment only on the two § 1983 causes of action. The court will now address  
13 the merits of the motions.

14 The allegations surrounding the GIYG search start with the officers' execution of a  
15 search warrant for the Fashion Statement store, and the accompanying detention of  
16 Kelley O'Toole and non-party Denner. Plaintiffs argue that the search warrant is  
17 unsigned and thus invalid, and defendants did not respond to this argument in their reply.  
18 However, defendants have attached the warrant as an exhibit to their counsel's  
19 declaration, which shows that the search warrant affidavit was signed by a magistrate,  
20 although the search warrant form itself is blank. See Dkt. 136-3, Ex. K. Given that the  
21 magistrate signed the search warrant affidavit, combined with the level of detail provided  
22 on the affidavit, the court finds that the officers relied in good faith on the warrant, despite  
23 its apparent facial deficiency. See Ortiz v. Van Auken, 887 F.2d 1366, 1370 (9th Cir.  
24 1989).

25 Plaintiffs then argue that the warrant does not list any names under the heading  
26 for "persons," but they also concede that Kelley O'Toole was seen leaving the store  
27 "accompanying an individual who exhibited ownership or control." Dkt. 158 at 15.  
28 Plaintiffs argue that, "[w]ithout more, her detention was unlawful," but they offer no

1 authority to back up that assertion, and in fact, the authority cited by defendants compel  
2 the opposite result. Specifically, the Supreme Court held in Michigan v. Summers that “a  
3 warrant to search for contraband founded on probable cause implicitly carries with it the  
4 limited authority to detain the occupants of the premises while a proper search is  
5 conducted.” 452 U.S. 692, 705 (1981); see also Ganwich v. Knapp, 319 F.3d 1115, 1120  
6 (9th Cir. 2003). While the Summers Court noted that “special circumstances, or possibly  
7 a prolonged detention, might lead to a different conclusion in an unusual case,” and while  
8 plaintiffs do argue in their opposition brief that Kelley O’Toole’s detention was  
9 “unreasonably prolonged,” plaintiffs provide no support for that assertion – in fact, the  
10 brief does not inform the court of basic facts such as how long the detention lasted. The  
11 court cannot find a triable issue of fact as to whether Kelley O’Toole’s detention was  
12 “unreasonably prolonged” without any testimony regarding the length of the detention, or  
13 any authority supporting a finding that the length of her detention was unreasonably  
14 prolonged. For that reason, the court finds that plaintiffs have failed to raise a triable  
15 issue of fact regarding the constitutionality of the initial entry into the Fashion Statement  
16 and the accompanying detention of Kelley O’Toole.

17 After the detention, defendants somehow gained access to Kelley O’Toole’s  
18 keycard for the GIYG location. There is a dispute over how officers obtained the keycard,  
19 with plaintiffs claiming that the keycard was “confiscated” from Kelley O’Toole, and with  
20 defendants first arguing (in their opening motion) that Kelley O’Toole “agreed to give  
21 Vincelet access to GIYG and gave Vincelet access to the store,” but then arguing in reply  
22 that “it is immaterial if Kelley O’Toole voluntarily provided her key to GIYG to the involved  
23 officers or officers confiscated that key prior to entering the GIYG business” because “the  
24 GIYG business was open for business and to the public at the time of the incident.”

25 The court finds that there is a disputed issue of material fact as to whether Kelley  
26 O’Toole voluntarily gave her keycard to the defendant officers or whether the keycard  
27 was confiscated involuntarily. At her deposition, Kelley O’Toole testified that defendant  
28 Vincelet “didn’t really ask. He took it. I mean, I didn’t offer it freely, obviously,” and that “I

1 didn't volunteer it. None of this interaction was voluntary." Dkt. 159, Ex. 14 at 54:24-25,  
2 55:22-23. In contrast, in defendant Vincelet's deposition, he testified that Kelley O'Toole  
3 "offered the key" to him. Dkt. 136-1, Ex. D at 128:22. Based on this conflicting  
4 testimony, the court finds that defendants cannot establish that Kelley O'Toole consented  
5 to the search of GIYG, nor can plaintiffs establish that Kelley O'Toole withheld consent.

6       Regarding defendants' argument that the consent issue is "immaterial" because  
7 GIYG was open to the public, the court finds two problems with this argument. First, it  
8 was raised for the first time in reply, depriving plaintiffs of an opportunity to respond.  
9 Second, and more importantly, defendants appear to take plaintiffs' quote out of context,  
10 choosing to quote only the words "open to the public," even though plaintiffs stated that  
11 "GIYG was technically 'open to the public,' but kept locked for security." Dkt. 158 at 16.  
12 Defendants attempt to minimize the fact that "the O'Tooles tried to regulate what and  
13 when members of the public could enter with the security door lock," but the fact that the  
14 door was locked serves to distinguish this case from the cases cited by defendants,  
15 which hold that "when a business owner opens his business to the public, he or she has  
16 no reasonable expectation of privacy in the area; accordingly, the government is free to  
17 conduct a search of the items in plain view during normal business hours." See, e.g.,  
18 People v. Potter, 128 Cal.App.4th 611, 617 (2005) (internal citations omitted). By locking  
19 the door, the O'Tooles demonstrated their reasonable expectation of privacy, and  
20 defendants cite no authority for the proposition that a business owner who uses a locked  
21 door to control entry by the public still has "no reasonable expectation of privacy in the  
22 area." Thus, the court finds that there is a triable issue of fact as to whether the "open to  
23 the public" exception applied to the entry of GIYG, and thus, the court does not find it  
24 "immaterial" that Kelley O'Toole testified that her keycard was taken without consent.  
25 Stated another way, the court does not find that defendants have shown, for purposes of  
26 this motion, that Kelley O'Toole consented to the entry of GIYG, or that GIYG was open  
27 to the public.

28       Defendants then offer yet another alternative to justify their entry into GIYG –

1 arguing that “how officers obtained the key to enter is further immaterial as the Antioch  
2 defendants had the lawful right to enter (and could have broken down the front door) to  
3 freeze the location pending the issuance of a search warrant.” Dkt. 163 at 9.  
4 Defendants’ support for “freezing” of the GIYG location comes from Segura v. U.S., 468  
5 U.S. 796 (1984). However, while Segura does allow officers to secure a location in order  
6 to “prevent the destruction or removal of evidence while a search warrant is being  
7 sought,” defendants mischaracterize the Court’s holding by describing Segura as  
8 allowing them to “enter a premises and conduct a protective sweep pending the issuance  
9 of a search warrant.” Dkt. 163 at 10. A close reading of Segura shows that the Court  
10 was careful to not lump together the officers’ right to “enter a premises” versus their right  
11 to “conduct a protective sweep.”

12 Segura reached the Supreme Court after two individuals convicted of drug  
13 trafficking appealed their conviction, arguing that the evidence against them was obtained  
14 through a violation of their Fourth Amendment rights. The facts of Segura are as follows:  
15 officers received information that two individuals (Andres Segura and Luz Maria Colon)  
16 were trafficking cocaine from their apartment. Officers observed a meeting where Colon  
17 and Segura delivered a package to two individuals, and after the meeting, officers  
18 stopped the two individuals and discovered that the package contained cocaine. The  
19 arrestees agreed to cooperate with the police, and provided information regarding Segura  
20 and Colon. Based on that information, the officers went to Segura and Colon’s  
21 apartment, but were unable to secure a search warrant beforehand. The officers  
22 encountered and arrested Segura in the lobby of the apartment, and even though he did  
23 not consent to the officers entering his apartment, they did so anyway. After entering, the  
24 officers found indicia of drug trafficking (i.e., a scale, small plastic bags, etc.) in plain  
25 view, and arrested Colon based on that indicia. At this point, officers still did not have a  
26 search warrant, and in fact, would not obtain one until the next day. Until the warrant was  
27 issued, officers remained in the apartment. When the warrant was finally executed,  
28 officers found nearly three pounds of cocaine, \$50,000 in cash, and records of narcotics

1 transactions.

2 Before trial, Segura and Colon moved to suppress the evidence taken from their  
3 apartment. The district court granted the motion, finding that the officers' initial entry into  
4 the apartment was illegal, as there were no exigent circumstances justifying the entry,  
5 and thus all evidence subsequently found was "fruit" of the illegal search. Although the  
6 district court found that the search warrant that ultimately issued was valid, it found that  
7 the evidence should nevertheless be suppressed, because absent the illegal entry, Colon  
8 might have arranged to have the evidence removed or destroyed.

9 On appeal, the Second Circuit affirmed the finding that the initial entry was illegal  
10 and that any evidence discovered in plain view at that time must be suppressed, but  
11 found that any evidence discovered after the issuance of the search warrant was still  
12 admissible. On the basis of that later-discovered evidence, Segura and Colon were  
13 convicted, and their appeal of that conviction resulted in the cited Supreme Court opinion.

14 Notably, the Court started its analysis by stating that "[a]t the outset, it is important  
15 to focus on the narrow and precise question before us," noting that "the Court of Appeals  
16 agreed with the District Court that the initial warrantless entry and the limited security  
17 search were not justified by exigent circumstances and were therefore illegal." 468 U.S.  
18 at 804. "No review of that aspect of the case was sought by the Government and no  
19 issue concerning items observed during the initial entry is before the Court." Id.

20 The Court's distinction between the entry into the apartment and the "freezing" of  
21 the apartment proved critical to the resolution of the case. First, the Court made clear  
22 that "the wiser course would have been" to avoid entering the apartment, and to instead  
23 "secure the premises from the outside by a stakeout." 468 U.S. at 811. The Court then  
24 again acknowledged that "absent exigent circumstances, the entry may have constituted  
25 an illegal search." Id. However, because the entry's legality was not before the Court, it  
26 focused only on the "seizure" (i.e., the freezing) of the apartment, and held that "the initial  
27 entry – legal or not – does not affect the reasonableness of the seizure," because "both  
28 an internal securing and a perimeter stakeout interfere to the same extent with the

1 possessory interests of the owners.” Id.

2 The Segura defendants argued that the Court’s ruling would “heighten the  
3 possibility of illegal entries” by “holding that the illegal entry and securing of the premises  
4 from the inside do not themselves render the seizure any more unreasonable than had  
5 the agents staked out the apartment from the outside.” 468 U.S. at 811. However, the  
6 Court disagreed, and explained its reasons for believing that there were still sufficient  
7 protections against illegal entries:

8  
9 In the first place, an entry in the absence of exigent circumstances is illegal.  
10 We are unwilling to believe that officers will routinely and purposely violate  
11 the law as a matter of course. Second, as a practical matter, officers who  
12 have probable cause and who are in the process of obtaining a warrant  
13 have no reason to enter the premises before the warrant issues, absent  
14 exigent circumstances which, of course, would justify the entry. . . Third,  
15 officers who enter illegally will recognize that whatever evidence they  
16 discover as a direct result of the entry may be suppressed, as it was by the  
17 Court of Appeals in this case. Finally, if officers enter without exigent  
18 circumstances to justify the entry, they expose themselves to potential civil  
19 liability under 42 U.S.C. § 1983.

20 468 U.S. at 811-812.

21 This closer look at Segura shows that defendants are only half right when they  
22 claim that “officers are lawfully able to enter a premises and conduct a protective sweep  
23 pending the issuance of a search warrant.” Dkt. 163 at 10. Officers may indeed, with  
24 probable cause, conduct a protective sweep while a search warrant is pending; however,  
25 probable cause is not sufficient to justify entry into a location. As the Segura Court  
26 stated, “officers who have probable cause and who are in the process of obtaining a  
27 warrant have no reason to enter the premises before the warrant issues, absent exigent  
28 circumstances which, of course, would justify the entry.” Of course, exigent  
circumstances is not the only justification for a warrantless entry – if officers have consent  
to enter, or if the premises is open to the public, officers may enter without violating the  
Fourth Amendment, and may then secure the location on the basis of probable cause.  
However, as explained above, there remain triable issues of fact surrounding the

1 O'Tooles' alleged consent and the extent to which GIYG was open to the public.

2 In their motion, the Antioch defendants make no effort to argue that their entry was  
3 justified by exigent circumstances. However, in opposition to plaintiffs' motion for  
4 summary judgment, the Antioch defendants include a heading stating that "probable  
5 cause and exigency justified the entry and freezing of GIYG," but do not explain the  
6 source of the exigency. At best, the Antioch defendants imply that the exigency was  
7 created by Lee leaving the store to put a backpack in his car, but that occurred after the  
8 entry, and thus could not have justified the entry itself.

9 In sum, the court finds that the Antioch defendants have not adequately  
10 established that their entry was justified by either consent, the "open to the public"  
11 exception, or exigent circumstances. Thus, defendants are not entitled to summary  
12 judgment on any of those bases.

13 Defendants offer the additional argument that they are entitled to qualified  
14 immunity. The defense of qualified immunity protects "government officials . . . from  
15 liability for civil damages insofar as their conduct does not violate clearly established  
16 statutory or constitutional rights of which a reasonable person would have known."  
17 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The rule of qualified immunity "provides  
18 ample protection to all but the plainly incompetent or those who knowingly violate the  
19 law"; defendants can have a reasonable, but mistaken, belief about the facts or about  
20 what the law requires in any given situation. Malley v. Briggs, 475 U.S. 335, 342 (1986).  
21 "Therefore, regardless of whether the constitutional violation occurred, the [official] should  
22 prevail if the right asserted by the plaintiff was not 'clearly established' or the [official]  
23 could have reasonably believed that his particular conduct was lawful." Romero v. Kitsap  
24 County, 931 F.2d 624, 627 (9th Cir. 1991). Qualified immunity is particularly amenable to  
25 summary judgment adjudication. Martin v. City of Oceanside, 360 F.3d 1078, 1081 (9th  
26 Cir. 2004).

27 A court considering a claim of qualified immunity must determine whether the  
28 plaintiff has alleged the deprivation of an actual constitutional right and whether such right



1 was clearly established such that it would be clear to a reasonable officer that his conduct  
2 was unlawful in the situation he confronted. See Pearson v. Callahan, 555 U.S. 225,  
3 235-36 (2009) (overruling the sequence of the two-part test that required determination of  
4 a deprivation first and then whether such right was clearly established, as required by  
5 Saucier v. Katz, 533 U.S. 194 (2001)). The court may exercise its discretion in deciding  
6 which prong to address first, in light of the particular circumstances of each case. Id.  
7 (noting that while the Saucier sequence is often appropriate and beneficial, it is no longer  
8 mandatory).

9       Regarding the first prong, the threshold question must be: Taken in the light most  
10 favorable to the party asserting the injury, do the facts alleged show that the defendant's  
11 conduct violated a constitutional right? Saucier, 533 U.S. at 201; see Martin, 360 F.3d at  
12 1082 (in performing the initial inquiry, court is obligated to accept plaintiff's facts as  
13 alleged, but not necessarily his application of law to the facts; the issue is not whether a  
14 claim is stated for a violation of plaintiff's constitutional rights, but rather whether the  
15 defendants actually violated a constitutional right) (emphasis in original). "If no  
16 constitutional right would have been violated were the allegations established, there is no  
17 necessity for further inquiries concerning qualified immunity." Saucier, 533 U.S. at 201.

18       The inquiry of whether a constitutional right was clearly established must be  
19 undertaken in light of the specific context of the case, not as a broad general proposition.  
20 Saucier, 533 U.S. at 202. The relevant, dispositive inquiry in determining whether a right  
21 is clearly established is whether it would be clear to a reasonable defendant that his  
22 conduct was unlawful in the situation he confronted. Id.; see also Pearson, 555 U.S. at  
23 243-44 (concluding that officers were entitled to qualified immunity because their conduct  
24 was not clearly established as unconstitutional as the "consent-once-removed" doctrine,  
25 upon which the officers relied, had been generally accepted by the lower courts even  
26 though not yet ruled upon by their own federal circuit). If the law did not put the  
27 defendant on notice that his conduct would be clearly unlawful, summary judgment based  
28 on qualified immunity is appropriate. Saucier, 533 U.S. at 202.

1            “If there are genuine issues of material fact in issue relating to the historical facts  
2 of what the official knew or what he did, it is clear that these are questions of fact for the  
3 jury to determine.” Sinaloa Lake Owners Ass’n v. City of Simi Valley, 70 F.3d 1095, 1099  
4 (9th Cir. 1995). If the essential facts are undisputed, or no reasonable juror could find  
5 otherwise, however, then the question of qualified immunity is appropriately one for the  
6 court. Id. at 1100 (citing Hunter v. Bryant, 502 U.S. 224, 227-28 (1991)). Or the court  
7 may grant qualified immunity by viewing all of the facts most favorably to plaintiff and  
8 then finding that under those facts the defendants could reasonably believe they were not  
9 violating the law. See, e.g., Marquez v. Gutierrez, 322 F.3d 689, 692-93 (9th Cir. 2003);  
10 Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1051-53 (9th Cir. 2002).

11            On the first prong, the court does find that, taken in the light most favorable to the  
12 plaintiffs, the facts alleged show that defendants’ conduct violated a constitutional right.  
13 In that light, the facts show that the Antioch defendants entered the locked door of GIYG  
14 without consent and without exigent circumstances to justify the entry. On the second  
15 prong, the court finds that it would be clear to a reasonable defendant that entering a  
16 locked location, without consent, and with no showing of exigent circumstances would be  
17 unlawful. The Antioch defendants argue on this motion that probable cause justified their  
18 entry, and in fact, would have allowed them to break down the front door. See Dkt. 163  
19 at 9. However, the court finds that it is clearly established that probable cause is  
20 sufficient only to obtain a warrant, not to conduct a warrantless entry, and that something  
21 more (such as consent or exigent circumstances) is needed to enter without a warrant.  
22 Thus, the court finds that defendants have not demonstrated entitlement to qualified  
23 immunity.

24            In sum, given the triable issues of fact regarding the constitutionality of the GIYG  
25 search, and the failure to establish that qualified immunity bars any claims arising out of  
26 that search, the court finds that defendants’ motion for summary judgment must be  
27 DENIED as to the first cause of action asserted by the O’Tooles and Lee. However,  
28 those same triable issues of fact also require that plaintiffs’ motion for partial summary

1 judgment be DENIED.

2 Even if the court were to put aside the issues surrounding the entry into GIYG, the  
3 court also finds triable issues of fact regarding the existence of probable cause to “freeze”  
4 the GIYG location. In their motion, the Antioch defendants attempt to demonstrate the  
5 existence of probable cause by pointing to the “lawful search of the FS location,  
6 conversations with Denner and the O’Tooles, behavior of Sean and Lee, items  
7 consensually searched from the Lee backpack, and other evidence and observations.”  
8 Dkt. 136 at 22. However, as before, defendants have muddled the timeline. In their own  
9 statement of facts, defendants indicate that Lee’s backpack was not searched until after  
10 the GIYG location was frozen, and thus, any items found into the backpack cannot factor  
11 into the probable cause analysis. See Dkt. 136 at 9.

12 Also, defendants’ reference to the “behavior of Sean” appears to refer to the fact  
13 that Sean O’Toole denied the officers consent to search GIYG. At the hearing, the court  
14 walked through the facts that defendants relied upon for their probable cause  
15 determination, and defendants’ counsel identified the fact that Sean O’Toole denied  
16 consent to a search of GIYG. The court indicated that denial of consent cannot give rise  
17 to probable cause, but defendants’ counsel insisted that the officers considered it as a  
18 factor in making their probable cause determination.

19 In short, by including these improper bases for probable cause as part of their  
20 justification for freezing GIYG, the Antioch defendants have muddled the issue, and have  
21 thus failed to adequately demonstrate that they had probable cause to freeze GIYG.  
22 Thus, even if the entry into GIYG were justified, the court finds that summary judgment  
23 on the first cause of action in defendants’ favor would still not be warranted. Though,  
24 again, plaintiffs have also failed to meet their burden to show that the officers did not  
25 have probable cause to freeze GIYG pending the issuance of a search warrant, so  
26 summary judgment in their favor is equally unwarranted.

27 Given the disputed facts surrounding both the entry into GIYG and the freezing of  
28 GIYG, the court does not reach the issue of whether the search of Lee’s backpack was

1 constitutional, because that analysis is dependent on the constitutionality of the entry  
2 and/or the freezing.

3 Moving on from the first cause of action, the second cause of action brought by  
4 the O'Tooles and Lee is for conspiracy to violate section 1983. As mentioned above,  
5 because only Vincelet, Wisecarver, Aiello, Bergerhouse, Krenz, Koch, Bittner, Joannides,  
6 Chalk, and Orman are alleged to have been involved in the GIYG search, the court will  
7 consider this cause of action only as to those defendants.

8 In contrast to the first cause of action, this claim requires not only a constitutional  
9 violation, but an agreement among the defendants to commit the violation. See, e.g.,  
10 Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283, 1301 (9th Cir.  
11 1999) ("To establish the defendants' liability for a conspiracy, a plaintiff must demonstrate  
12 the existence of an agreement or meeting of the minds to violate constitutional rights.").  
13 Plaintiffs have not identified any evidence of an agreement among the defendants  
14 involved with the GIYG search. Thus, defendants' motion for summary judgment is  
15 GRANTED as to the second cause of action brought by the O'Tooles and Lee, and  
16 plaintiffs' motion for partial summary judgment is DENIED.

17 Before turning to the Monell claim, the court will first address the RICO claim (the  
18 fourth cause of action), because it suffers from similar deficiencies as the second cause  
19 of action. In general, RICO makes it criminal to conduct an enterprise's affairs or obtain  
20 benefits through a pattern of "racketeering activity," which is defined as behavior that  
21 violates specific federal statutes or state laws that address specified topics and bear  
22 specified penalties. Rotella v. Wood, 528 U.S. 549, 552 (2000). Section 1961 sets forth  
23 the specific "predicate acts" that may constitute "racketeering activity" for a RICO  
24 violation. 18 U.S.C. § 1961(1). A "pattern" of racketeering activity requires "at least two  
25 acts of racketeering activity." 18 U.S.C. § 1961(5).

26 The RICO statute includes a private right of action "by which '[a]ny person injured  
27 in his business or property' by a RICO violation" may seek damages and the cost of the  
28 suit. Rotella, 528 U.S. at 552 (quoting 18 U.S.C. 1964(c)). Thus, in order to state a claim

1 under RICO, a plaintiff must allege facts that establish a pattern of racketeering activity  
2 based on a minimum of two predicate acts, a criminal enterprise in which the defendants  
3 participated, and a causal relationship between the predicate acts and the harm suffered  
4 by the plaintiff. See 18 U.S.C. §§ 1961-68; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479,  
5 496-97 (1985).

6 The O'Tooles and Lee have failed to provide any evidence of a "pattern of  
7 racketeering activity" involving the officers present at the GIYG search. As will be  
8 discussed further below, plaintiffs' evidence is limited to showing a pattern of racketeering  
9 activity between Wielsch, Lombardi, and Butler, none of whom were present at the GIYG  
10 search. And as mentioned above, while the complaint does provide instances of alleged  
11 racketeering activity, those instances involved Curtis and Foster, not the O'Tooles or Lee.  
12 For those reasons, defendants' motion for summary judgment is GRANTED as to the  
13 fourth cause of action brought by the O'Tooles and Lee.

14 Next, the O'Tooles and Lee assert a Monell claim against the City of Antioch and  
15 Antioch police chief James Hyde. And as mentioned above, the complaint is unclear as  
16 to whether this claim is also asserted against the Antioch Police Department, but for  
17 purposes of this motion, the court will assume that any Monell claim against the police  
18 department is co-extensive with the Monell claim against the city.

19 Local governments are subject to liability under § 1983 where official policy or  
20 custom causes a constitutional tort. See Monell v. Dep't of Social Servs., 436 U.S. 658,  
21 690 (1978). To impose liability under § 1983 for a violation of constitutional rights, a  
22 plaintiff must show: (1) that the plaintiff possessed a constitutional right of which he or  
23 she was deprived, (2) that the municipality had a policy, (3) that this policy amounts to  
24 deliberate indifference to the plaintiff's constitutional rights, and (4) that the policy is the  
25 "moving force" behind the constitutional violation. See Plumeau v. Schl. Dist. #40 County  
26 of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997).

27 To survive summary judgment, a plaintiff must point to an express policy, practice,  
28 or custom, or provide evidence showing an inference that such policy, practice or custom

1 exists informally. See Waggy v. Spokane County, 595 F.3d 707, 713 (9th Cir. 2010). A  
2 policy can be established if one of the following conditions are met: (1) “the city  
3 employee committed the alleged constitutional violations pursuant to the city’s official  
4 policy or custom,” (2) the alleged conduct was “a deliberate choice” made by an  
5 employee with final policymaking authority, or (3) an official with policymaking authority  
6 delegated or ratified the conduct. Fuller v. City of Oakland, 47 F.3d 1522, 1534 (9th Cir.  
7 1995) (citations and quotations omitted).

8 Several key caveats apply to informal municipal policies or customs. For instance,  
9 proof of random acts or isolated incidents of unconstitutional action by a non-  
10 policymaking employee are insufficient to establish the existence of a municipal policy or  
11 custom. See McDade v. West, 223 F.3d 1135, 1142 (9th Cir. 2000). However, a plaintiff  
12 may prove the existence of a custom or informal policy with evidence of repeated  
13 constitutional violations for which the errant municipal officials were not discharged or  
14 reprimanded. See Gillette v. Delmore, 979 F.2d 1342, 1348 (9th Cir. 1992).

15 A local government may be liable for constitutional violations resulting from its  
16 failure to supervise, monitor or train its employees, but only where the failure amounts to  
17 deliberate indifference to the rights of the people with whom the local government comes  
18 into contact. See City of Canton v. Harris, 489 U.S. 378, 388 (1989); Long v. County of  
19 Los Angeles, 442 F.3d 1178, 1188-89 (9th Cir. 2006). Evidence of a city’s failure to train  
20 a single officer, however, is insufficient to establish a municipality’s deliberate policy.  
21 Blankenhorn v. City of Orange, 485 F.3d 463, 484-85 (9th Cir. 2007).

22 In the context of a city’s alleged indifference to its police officers violating the  
23 constitutional rights of its residents, providing evidence of past complaints is generally  
24 insufficient to establish a policy or custom of indifference. See, e.g., Maestrini v. City and  
25 County of San Francisco, 2009 WL 814510 at \*11 (N.D. Cal. March 26, 2009) (“a list of  
26 prior complaints against an officer, without more, is insufficient to create a triable issue of  
27 fact regarding a municipality’s policy of inadequately investigating or disciplining its  
28 officers”); Hocking v. City of Roseville, 2008 WL 1808250 at \*5 (E.D. Cal. April 22, 2008)

1 (holding that custom not established where plaintiff didn't produce evidence showing that  
2 previous complaints should have resulted in discipline).

3 In their motion, the Monell defendants first argue that plaintiffs' Monell claim must  
4 fail because they have failed to establish an underlying constitutional violation. However,  
5 as stated above, the court finds that plaintiffs have raised a triable issue of fact as to the  
6 constitutionality of the GIYG search.

7 Defendants then argue that plaintiffs have failed to identify a policy, practice, or  
8 custom that caused the alleged violation. Defendants argue that plaintiffs must identify  
9 either an "express policy" or a practice that is "so permanent and well-settled as to  
10 constitute a 'custom or usage' with the force of law." Monell, 436 U.S. at 691.  
11 Defendants argue that plaintiffs have failed to provide evidence of either a formal or an  
12 informal policy, and point to an interrogatory response by plaintiffs where, after being  
13 asked for all facts that support the Monell claim, they responded with the following  
14 boilerplate allegations:

15 Defendants Antioch and Hyde, by and through their supervisory officials  
16 and employees, have been given notice on repeated occasions of a pattern  
17 of ongoing constitutional violations and practices by defendant police  
18 officers herein and other Antioch police officers, constituting inter alia, illegal  
19 detentions, searches, and seizures of citizens, the submission of search  
20 warrant affidavits not based upon probable cause, submission of overly  
21 broad search warrants, and submission of false affidavits. Despite said  
22 notice, defendants City and Hyde, have demonstrated deliberate  
23 indifference to this pattern and practice of constitutional violations by failing  
24 to take necessary, appropriate, or adequate measures to prevent the  
25 continued perpetuation of said pattern of conduct by Antioch police officers  
26 and other outside agencies. This lack of adequate supervisory response  
27 by defendants City and Hyde, demonstrates ratification of the defendant  
28 officers' unconstitutional acts, as well as the existence of an informal  
custom or policy which tolerates and promotes the continued conduct  
including illegal detentions, searches, and seizures of the citizens of  
Antioch, the submission of search warrant affidavits not based upon  
probable cause, submission of overly broad search warrants, and  
submission of false affidavits against the citizens by Antioch police officers  
and other outside agencies.

Dkt. 136-6, Ex. BB.

1 Defendants argue that these “general allegations of wrongdoing” are not sufficient  
2 for Monell liability.

3 Defendants then argue that plaintiffs cannot rely on a “failure to train” theory, nor  
4 can plaintiffs show any ratification by defendant Hyde.

5 In their opposition, plaintiffs are not clear as to whether they are challenging an  
6 express policy, an informal practice, and/or a failure to train, and instead make scattered  
7 allegations regarding the Monell defendants’ alleged wrongdoing. For instance, in their  
8 introduction, plaintiffs first assert that the City of Antioch “has no policies governing  
9 search and seizure,” and “no policy to ensure that officers are properly trained on the  
10 Fourth Amendment,” but then argues that “item 10 of policy no. 5” is “facially  
11 unconstitutional.” Dkt. 169 at 1. The court will start by looking at the express policies  
12 challenged by plaintiffs, and then will address the “practice or custom” and “failure to  
13 train” allegations.

14 In their opposition, plaintiffs point to two policies of the City of Antioch: (1) policy  
15 5, section 10, which prohibits “[c]ommission of any act which is violation of any law, statute,  
16 ordinance or procedure, unless it is in the performance of duty and is reasonable and  
17 prudent for the situation,” and (2) policy 52, which provides in relevant part that “[i]t is the  
18 policy of the Antioch Police Department that sworn personnel shall digitally record  
19 contacts with citizens that are controversial or hostile in nature, to include, but not limited  
20 to; traffic stops, detentions, consensual contacts with suspects, witnesses, victims; and  
21 while handling any call that is prone to police/citizen hostility such as domestic violence,  
22 miscellaneous disturbances, DUI, etc.,” and which states that the recordings “may be  
23 subject to discovery and disclosure.” Dkt. 170, Exs. 2, 3.

24 On policy 5, item 10, plaintiffs’ argument appears to be that officers may  
25 “interpret[] item 10 to permit Fourth Amendment violations for ‘good reason.’” Dkt. 169 at  
26 4. However, the fact that an officer may misinterpret the policy does not imply that the  
27 policy itself leads to the violation. As applied to this case, plaintiffs cannot show that item  
28 10 “amounts to deliberate indifference to the plaintiffs’ constitutional rights,” nor that it is



1 the “moving force” behind the alleged constitutional violations. Accordingly, the court  
2 finds that item 10 cannot give rise to Monell liability.

3 As to policy 52, plaintiffs appear to take issue with the fact that it “explicitly  
4 admonishes officers that if they record the recordings may be discoverable which  
5 suggests a culture of subterfuge in Antioch law enforcement.” Dkt. 169 at 12. Again,  
6 plaintiffs’ argument appears to rely on speculation, and nothing about the policy itself  
7 “suggests a culture of subterfuge.” While plaintiffs may rely on other evidence to suggest  
8 such a culture, their attempt to use the policy to do so fails. Plaintiffs have not shown that  
9 policy 52 amounts to deliberate indifference to the plaintiffs’ constitutional rights, or that  
10 the policy is the “moving force” behind the constitutional violation.

11 Thus, the court moves to plaintiffs’ allegations that defendants had a “practice and  
12 custom” of conducting illegal searches and seizures. For support, plaintiffs point to the  
13 “10 or more lawsuits” filed against defendant Hyde and/or the City of Antioch as  
14 “evidence that [they] were on notice of repeated constitutional violations and did nothing  
15 to implement policy on enforcement of the 4th Amendment.” Dkt. 169 at 15. However,  
16 defendants correctly point out that the mere fact that lawsuits were filed does not  
17 establish that a pattern of constitutional violations actually occurred. As mentioned  
18 above, “providing evidence of past complaints is generally insufficient to establish a  
19 policy or custom of indifference.” Plaintiffs provide no information regarding the merits of  
20 any of the lawsuits filed against the City of Antioch, although they do point out that a  
21 lawsuit involving the City of Davis (of which defendant Hyde previously served as police  
22 chief) where a Fourth Amendment violation was found. The court finds that a lawsuit  
23 against the City of Davis cannot serve to put the defendants in this case on notice of  
24 violations by City of Antioch police officers. Overall, the court finds that plaintiffs have  
25 failed to provide “evidence of repeated constitutional violations for which the errant  
26 municipal officials were not discharged or reprimanded.”

27 Next, the court will address the “failure to train” theory. On this issue, the court  
28 finds there to be a lack of evidence from both sides. Defendants rely on individual

1 training logs which contain only a one-line entry for each training subject, and thus fail to  
2 provide any information about the substance of the training. Plaintiffs, for their part, also  
3 fail to provide any specifics on why the training was inadequate, offering only conclusory  
4 assertions that the training was inadequate. Given that the plaintiffs bear the burden of  
5 proving the inadequacy of training at trial, the court finds that the lack of evidence from  
6 both sides requires that summary judgment be granted in defendants' favor. Plaintiffs  
7 essentially seek to shift the burden to defendants, asking them to prove that the training  
8 was adequate, rather than providing the court with specific details regarding why the  
9 current training was inadequate.

10 Moreover, as stated above, plaintiffs must show that the failure to train amounted  
11 to "deliberate indifference to the rights of the people with whom the local government  
12 comes into contact." However, as mentioned above, plaintiffs' attempted showing of  
13 deliberate indifference consists only of "evidence of past complaints," rather than  
14 "evidence showing that previous complaints should have resulted in discipline."

15 Plaintiffs also make a number of arguments directed toward only defendant Hyde,  
16 arguing that he was "on notice of repeated lawsuits against his officers and the City of  
17 Antioch for illegal search and seizure," that he "failed to supervise the training of his  
18 officers," that "he signed a policy which gave officers discretion to record citizens with the  
19 proviso that the recordings could be discoverable." These allegations are substantively  
20 similar to the allegations described above, the only difference being that plaintiffs are  
21 attributing them to defendant Hyde individually, rather than to the City as a whole. The  
22 court finds plaintiffs' allegations to be similarly inadequate.

23 Thus, for the foregoing reasons, the court GRANTS the Monell defendants' motion  
24 for summary judgment as to the third cause of action asserted by the O'Tooles and Lee.

25 Finally, the last of the claims arising out of the GIYG search are the fifth and sixth  
26 causes of action for malicious and retaliatory prosecution, asserted by plaintiff Lee  
27 against defendants Vincelet and Aiello. The complaint alleges that defendant Vincelet  
28 signed a felony complaint against Lee "in furtherance of the ongoing conspiracy" to

1 violate his civil rights and in retaliation for the filing of this civil lawsuit. TAC, ¶ 52. The  
2 complaint further alleges that defendants Vincelet and Aiello falsely testified against him  
3 both at the preliminary hearing and at trial. TAC, ¶¶ 54-55. The opposition brief similarly  
4 contends that “Vincelet and Aiello knowingly withheld information with the intent to harm  
5 him and knowingly supplied false information to the district attorney and the magistrate in  
6 the search warrant,” and that “Vincelet filed an affidavit and statement of probable cause  
7 omitting that before the warrant was signed, Antioch officers conducted a protective  
8 sweep of GIYG and found no marijuana cultivation.” Dkt. 158 at 22.

9 In order to establish a malicious prosecution claim, plaintiff must show that the  
10 defendants prosecuted him with malice and without probable cause, and that they did so  
11 for the purpose of denying him a specific constitutional right. Freeman v. City of Santa  
12 Ana, 68 F.3d 1180, 1189 (9th Cir. 1995).

13 In the complaint, plaintiff asserts that defendants acted with the purpose of  
14 denying (1) his right to be free from unreasonable seizures, (2) his right to be free from  
15 retaliation for exercise of rights, speech, and expression, and (3) his right to be free from  
16 malicious prosecution. The first of these rights was not affected by the prosecution itself.  
17 While the search/seizure of Lee may have been unconstitutional (as discussed above),  
18 there is no evidence to support the assertion that, by prosecuting Lee, defendants were  
19 somehow depriving him of his right to be free of unreasonable seizures. The third listed  
20 right – the right to be free from malicious prosecution – strikes the court as an exercise in  
21 circular reasoning. Essentially, Lee argues that, by maliciously prosecuting Lee,  
22 defendants violated his right to be free from malicious prosecution. If this theory were  
23 sufficient, then any criminal defendant could allege that his prosecution was effected for  
24 the purpose of denying a constitutional right.

25 The strongest of these theories is the second one, that defendants sought to  
26 interfere with Lee’s right to free speech by filing charges in response to Lee’s filing of a  
27 civil lawsuit against the Antioch defendants. Indeed, the timing of Lee’s charges does  
28 appear to be suspicious at best, occurring 15 months after the GIYG search and less

1 than one month after the filing of this lawsuit. However, plaintiff does not offer any  
2 support for the proposition that timing alone can support a finding that defendants acted  
3 “with the purpose” of denying him a constitutional right. Moreover, even if plaintiff could  
4 show that defendants acted with such a purpose, he would still need to show that  
5 defendants acted with malice and without probable cause.

6       Regarding probable cause, defendants point out that Lee was held over for trial  
7 following his preliminary hearing, and indeed, “a decision by a judge or magistrate to hold  
8 a defendant to answer after a preliminary hearing constitutes prima facie – but not  
9 conclusive – evidence of probable cause.” Awabdy v. City of Adelanto, 368 F.3d 1062,  
10 1067 (9th Cir. 2004). In order to rebut the presumption that his prosecution was based  
11 on probable cause, plaintiff could show that “the criminal prosecution was induced by  
12 fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in  
13 bad faith.” Id. Plaintiff has not met this standard. At best, plaintiff has provided evidence  
14 that the GYIG search itself was improperly conducted, but has not shown the type of bad  
15 faith conduct set forth in Awabdy, and instead, relies on a presumption of bad faith.

16       Moreover, even if plaintiff were able to overcome the presumption of probable  
17 cause stemming from the magistrate’s decision, he would still need to overcome the  
18 rebuttable presumption that the prosecutor’s judgment was independent from the  
19 defendants’ alleged bad faith. The Ninth Circuit has identified a “well-settled principle”  
20 that the “filing of a criminal complaint immunizes investigating officers . . . from damages  
21 suffered thereafter because it is presumed that the prosecutor filing the complaint  
22 exercised independent judgment in determining that probable cause for an accused’s  
23 arrest exists at that time.” Harper v. City of Los Angeles, 533 F.3d 1010, 1027 (9th Cir.  
24 2008) (citing Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir.1981)). To rebut the  
25 presumption, a plaintiff must show that “the district attorney was pressured or caused by  
26 the investigating officers to act contrary to his independent judgment.” Smiddy at 266.  
27 Such evidence must be substantial, and cannot consist merely of a plaintiff’s own  
28 account of events. Newman v. County of Orange, 457 F.3d 991, 994-95 (9th Cir. 2006).

1 Not only does plaintiff fail to provide any evidence that the district attorney was  
2 pressured or influenced to act contrary to his independent judgment, but defendants  
3 included with their motion a declaration from the district attorney, affirmatively stating that  
4 he made the independent decision to prosecute Lee without any influence from any  
5 Antioch police officers. Dkt. 136-4, Ex. V. Plaintiff claims in his opposition that he has  
6 “rebutted the presumption of prosecutorial independence by showing that Vincelet and  
7 Aiello knowingly withheld information with the intent to harm him and knowingly supplied  
8 false information to the district attorney,” but these allegations do not overcome the  
9 prosecutor’s own contemporaneous declaration, which states that he made an  
10 independent decision to prosecute Lee.

11 Finally, to the extent that plaintiff’s malicious prosecution claim is based on the  
12 testimony provided by Aiello and Vincelet, the court finds that defendants are entitled to  
13 absolute immunity for their testimony. See Holt v. Castaneda, 832 F.2d 123, 127 (9th  
14 Cir. 1987). Plaintiff argues that Holt is based on the Supreme Court’s opinion in Briscoe  
15 v. LaHue, 460 U.S. 325 (1983), and should thus be similarly limited to cases where the  
16 criminal defendant was actually convicted. However, nothing in Holt indicates that the  
17 court meant to limit its holding to cases involving convicted defendants, and in fact, its  
18 explanation of the rationale behind the “absolute immunity” rule provides no basis for  
19 drawing such a line. The Holt court explained that the purpose behind the rule was to  
20 encourage candid testimony from witnesses, because “a witness who knows he may be  
21 subjected to costly and time-consuming civil litigation for offering testimony that he is  
22 unable to substantiate may consciously or otherwise shade his testimony in such a way  
23 as to limit potential liability.” Holt at 125. If such “shading” were to occur, “the paths  
24 which lead to the ascertainment of truth may be obstructed.” Id. (citing Briscoe at 333-  
25 34). The court finds this rationale to apply equally to instances where the criminal  
26 defendant is not ultimately convicted, and thus, finds that defendants’ testimony at Lee’s  
27 trial cannot give rise to a malicious prosecution claim.

28 Thus, for the foregoing reasons, the court finds that plaintiff Lee has failed to raise

1 a triable issue of fact on his malicious prosecution claim, and thus, defendants' motion for  
2 summary judgment is GRANTED.

3 Plaintiff Lee's sixth cause of action, for retaliatory prosecution, suffers from similar  
4 defects. To establish a retaliatory prosecution claim, a plaintiff must show that his  
5 prosecution was made without probable cause and with a retaliatory motive. Hartman v.  
6 Moore, 547 U.S, 250, 265 (2006). Hartman also noted the difficulty of proving causation  
7 where the retaliatory-prosecution defendant is not the person who ultimately made the  
8 decision to prosecute. As the Court put it, "[e]vidence of an inspector's animus does not  
9 necessarily show that the inspector induced the action of a prosecutor who would not  
10 have pressed charges otherwise." Id. at 263. As a result of this break in the chain of  
11 causation, "[s]ome sort of allegation, then, is needed both to bridge the gap between the  
12 nonprosecuting government agent's motive and the prosecutor's action, and to address  
13 the presumption of prosecutorial regularity." Id.

14 As mentioned above, not only has plaintiff failed to make any allegation to "bridge  
15 the gap" between defendants' motive and the prosecutor's action, but the prosecutor has  
16 affirmatively stated that he was not influenced by defendants and instead made his own  
17 independent decision. For those reasons, the court finds that plaintiff Lee has failed to  
18 raise a triable issue of fact on his retaliatory prosecution claim, and thus, defendants'  
19 motion for summary judgment is GRANTED.

20 2. Claims asserted by Curtis and Foster

21 As before, due to the lack of clarity in the complaint, the court's first step is to  
22 discern which claims are asserted by Curtis and Foster, and which defendants they are  
23 asserted against. And as mentioned above, all five plaintiffs are mentioned under the  
24 heading for the first four causes of action, so for now, the court will assume that both  
25 Curtis and Foster intend to assert each of those claims. Neither Curtis nor Foster is  
26 mentioned as part of the malicious/retaliatory prosecution claims.

27 As discussed above, the complaint is not clear in identifying against whom each  
28 claim is asserted. On the first cause of action, for deprivation of rights under section

1 1983, the complaint makes blanket references to “defendant officers.” On the second  
2 cause of action, for conspiracy to violate civil rights under section 1983, plaintiffs similarly  
3 rely on blanket references to “defendant officers,” though they also allege that the officers  
4 did so under the supervision of defendant Leonard Orman. For these two claims, the  
5 court will err on the side of over-inclusion and consider all individual defendants to be part  
6 of these claims. However, to the extent that certain officers are not alleged to have  
7 participated in the searches of Curtis and/or Foster, the court will grant summary  
8 judgment as to those defendants.

9 On the third cause of action, the complaint refers to defendants City of Antioch and  
10 James Hyde. And finally, on the fourth cause of action, for violation of the civil RICO  
11 statute, the complaint names the following defendants: Wielsch, Lombardi, Vincelet,  
12 Wisecarver, Aiello, Bergerhouse, Koch, Bittner, and Butler.

13 Thus, based on the allegations of the complaint, it appears that the following  
14 claims are asserted by Curtis and Foster: (1) a section 1983 claim asserted against all  
15 individual defendants; (2) a claim for conspiracy to violate section 1983 asserted against  
16 all individual defendants; (3) a Monell claim asserted against the City of Antioch, the  
17 Antioch Police Department, and Chief James Hyde; (4) a civil RICO claim asserted  
18 against Wielsch, Lombardi, Vincelet, Wisecarver, Aiello, Bergerhouse, Koch, Bittner, and  
19 Butler.

20 The court’s next step is to determine which defendants were actually involved in  
21 the searches of Curtis and/or Foster. To the extent that any individual defendants were  
22 not involved in those searches, no claim can be asserted against them by Curtis or  
23 Foster.

24 As discussed in the background section of this order, the Curtis/Foster claims  
25 arise out of three searches: (1) a June 28, 2007 search of the home of Curtis’ boyfriend,  
26 Kevin Ackerman, (2) a search either in August 2008 or fall 2008 of Ackerman’s home,  
27 and (3) a January 5, 2010 search of Foster’s home. In the complaint, plaintiffs allege that  
28 Vincelet, Wielsch, Lombardi, and Wisecarver were present for the first search, that the

1 same four defendants were present for the second search, and that Wielsch and Vincelet  
2 were present for the third search. Plaintiffs' opposition brief also alleges that there was a  
3 scheme between Wielsch, Wisecarver, Lombardi, and Butler, so the court will include  
4 Butler as part of the claims asserted by Curtis and Foster. However, none of the other  
5 defendants (namely, Hyde, Aiello, Bergerhouse, Koch, Bittner, Orman, Krenz, Joannides,  
6 or Chalk) are mentioned at all in the context of the Curtis/Foster searches. Thus, to the  
7 extent that complaint asserts the first, second, or fourth causes of action against them,  
8 defendants' motion for summary judgment is GRANTED.

9 Now having parsed the complaint and the parties' papers, the court is left with the  
10 following claims asserted by Curtis/Foster: (1) a section 1983 claim asserted against  
11 Vincelet, Wielsch, Lombardi, Wisecarver, and Butler; (2) a claim for conspiracy to violate  
12 section 1983 asserted against Vincelet, Wielsch, Lombardi, Wisecarver, and Butler; (3) a  
13 Monell claim asserted against the City of Antioch, the Antioch Police Department, and  
14 Chief James Hyde; (4) a civil RICO claim asserted against Wielsch, Lombardi, Vincelet,  
15 Wisecarver, and Butler. The court will now turn to the merits of these claims.

16 On the first cause of action, defendants' first argument is that any claims arising  
17 out of the 2007 and 2008 searches are time-barred. The statute of limitations for § 1983  
18 claims is based on the state's statute of limitations for personal injury claims, which, in  
19 California, is two years. See Wallace v. Kato, 549 U.S. 384, 387 (2007); Cal. Civ. Proc.  
20 Code § 335.1. This suit was filed on March 29, 2011, more than two years after the 2007  
21 and 2008 searches.

22 Plaintiffs' only response is to argue that "in cases regarding claims of criminal  
23 conspiracy, the statute of limitations begins to run after the commission of the last overt  
24 act." Dkt. 158 at 17. However, the first cause of action is not a conspiracy claim, it is a  
25 claim for deprivation of rights under § 1983, and stems from each of the individual  
26 searches. While the "last overt act" doctrine may be relevant to the second and fourth  
27 causes of action, plaintiffs have provided no authority for applying it to the first cause of  
28 action. Thus, the court finds that, in the context of the first cause of action, any claims



1 arising out of the 2007 and 2008 searches are indeed time-barred. As a result, the first  
2 cause of action can be based only on the 2010 search of Foster's home, during which  
3 Curtis was also present.

4 Defendants do not actually challenge the merits of the 2010 search, and instead  
5 offer only one argument: that plaintiffs' claims are barred by the rule set forth in Heck v.  
6 Humphrey, 512 U.S. 477 (1994). Heck holds that "the district court must consider  
7 whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his  
8 conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff  
9 can demonstrate that the conviction or sentence has been invalidated. But if the district  
10 court determines that the plaintiff's action, even if successful, will not demonstrate the  
11 invalidity of any outstanding criminal judgment against the plaintiff, the action should be  
12 allowed to proceed." 512 U.S. 477, 487 (1994). In short, "the relevant question is  
13 whether success in a subsequent § 1983 suit would 'necessarily imply' or 'demonstrate'  
14 the invalidity of the earlier conviction or sentence." Id.

15 The Ninth Circuit addressed the scope of the Heck bar in Smith v. City of Hemet,  
16 and recognized that there may be different "phases" of conduct during an arrest, and that  
17 the arrestee may challenge conduct that occurred before or after his arrest without  
18 necessarily implicating the Heck bar. 394 F.3d 689 (9th Cir. 2005).

19 Specifically, in City of Hemet, the police responded to a domestic violence report  
20 at the home of the plaintiff, Thomas Smith. When an officer arrived, Smith came to the  
21 door, but was confrontational with the officer, using expletives, refusing to take his hands  
22 out of his pockets, and daring the officer to "come to him." The officer insisted that Smith  
23 remove his hands from his pockets to show that he had no weapons, but Smith continued  
24 to refuse, and even went back inside his house.

25 Smith came back outside and complied with an instruction to remove his hands  
26 from his pockets, but refused to comply with an instruction to put his hands on his head  
27 and approach the officer, and instead continued to insist that the officer enter the home  
28 with him.

1 Another officer then arrived on the scene with a canine unit, and the officers again  
2 told Smith to turn around and place his hands on his head. Smith refused, so the officers  
3 warned him that the canine could be sent to subdue him and might bite. At this time, one  
4 of the officers used pepper spray on Smith. Smith attempted to re-enter the house, but  
5 his wife had locked the door. The officers moved in to subdue him, and also ordered the  
6 canine to attack, resulting in a bite on Smith's arm.

7 Smith filed suit claiming excessive force, based on the pepper spray and the dog  
8 bite. Defendants moved for summary judgment based on Heck, arguing that Smith had  
9 pled guilty to willfully resisting, delaying, or obstructing a police officer, and that success  
10 in Smith's civil suit would undermine the conviction. Defendants emphasized that an  
11 element of the crime was the resistance, delay, or obstruction of a police officer in the  
12 lawful exercise of his duties, so to the extent that Smith claimed excessive force, it would  
13 undermine the "lawful exercise" element of the conviction. The district court agreed, and  
14 granted summary judgment.

15 However, the Ninth Circuit noted that the "lawful exercise of his duties" element  
16 was limited to "the time of the arrest." The court then explained that Smith had engaged  
17 in at least three acts of resisting, delaying, or obstructing before any use of force, and  
18 then continued to resist, delay, or obstruct after the use of force. However, Smith's guilty  
19 plea was not specific as to which conduct formed the basis of the conviction. The court  
20 found this lack of specificity crucial to the Heck analysis, and articulated the distinction as  
21 follows:

22 It is, thus, clear that if Smith pled guilty [] based on his behavior after the  
23 officers came onto the porch, during the course of the arrest, his suit would  
24 be barred by Heck. In such case, a successful § 1983 action by Smith  
25 would necessarily mean that the officers had used excessive force to  
26 subdue him and were therefore acting unlawfully at the time his arrest was  
27 effected. In that circumstance, Smith's conviction under § 148(a)(1) would  
28 have been wrongful and a successful § 1983 suit by him would demonstrate  
its invalidity. . . .Under Heck, Smith would be allowed to bring a § 1983  
action, however, if the use of excessive force occurred subsequent to the  
conduct on which his conviction was based.

1 394 F.3d at 697-98 (emphasis in original).

2 Ultimately, the City of Hemet court held that “[b]ecause on the record before us we  
3 cannot determine that the actions that underlay Smith’s conviction upon his plea of guilty  
4 occurred at the time of or during the course of his unlawful arrest, Smith’s success in the  
5 present action would not necessarily impugn his conviction.” Id. at 699.

6 As a subsequent Ninth Circuit decision described City of Hemet, “an allegation of  
7 excessive force by a police officer would not be barred by Heck if it were distinct  
8 temporally or spatially from the factual basis for the person’s conviction.” Beets v. County  
9 of Los Angeles, 669 F.3d 1038, 1042 (9th Cir. 2012).

10 This case presents a somewhat similar situation. The complaint challenges  
11 multiple types of conduct — in addition to alleging that the search warrant served upon  
12 Foster’s home was “illegally obtained” (which would implicate the Heck bar, as it would  
13 undermine the basis for the arrest), it also alleges that Wielsch and Vincelet took property  
14 that was not listed on the search warrant return, such as cash, jewelry, sunglasses,  
15 sports memorabilia, and a cell phone. TAC, ¶¶ 68, 69, 71, 74. Based on City of Hemet,  
16 the allegations regarding the search warrant would undermine the convictions, but the  
17 allegations regarding property theft would not, as plaintiffs’ conviction related only to  
18 possessing and cultivating marijuana. In other words, plaintiffs can simultaneously argue  
19 that the conviction was valid, but that their property was unlawfully seized as part of the  
20 arrest. To accept defendants’ argument would be to grant carte blanche for officers to  
21 improperly seize whatever they want during an otherwise-valid arrest. If plaintiffs were  
22 challenging the basis for the search/arrest warrant itself, then they would be challenging  
23 the underlying conviction, but to the extent that they challenge only conduct that occurred  
24 after the search warrant issued and while it was being executed, the Heck bar is not  
25 implicated.

26 Because defendants do not make any other argument for summary judgment  
27 relating to the 2010 search (including any qualified immunity defense relevant to this  
28 search), defendants’ motion is DENIED as to the first cause of action, to the extent that it

1 arises out of the 2010 search/seizure. However, as mentioned above, summary  
2 judgment is GRANTED to the extent that the first cause of action arises out of the time-  
3 barred 2007 and 2008 searches, and GRANTED to the extent that the first cause of  
4 action is asserted against defendants with no connection to the search (Hyde, Aiello,  
5 Bergerhouse, Koch, Bittner, Orman, Krenz, Joannides, and Chalk).

6 The court now moves to the second cause of action, for conspiracy to violate civil  
7 rights under § 1983, asserted against Vincelet, Wielsch, Lombardi, Wisecarver, and  
8 Butler. As mentioned above, Wielsch has filed his own motion for summary judgment,  
9 while Wisecarver and Vincelet seek summary judgment via the Antioch defendants'  
10 motion. Neither Butler nor Lombardi have moved for summary judgment.

11 The complaint alleges the existence of an ongoing conspiracy between Wielsch,  
12 Lombardi, and Butler to obtain drugs from illegal searches and seizures and to sell those  
13 drugs for personal gain. See, e.g., TAC, ¶¶ 75-83. Because Wielsch is the only one of  
14 these three to move for summary judgment, the court will reference his motion in  
15 addressing these allegations.

16 Wielsch does not dispute that he, Butler, and Lombardi were involved in criminal  
17 activity of the type alleged by plaintiffs, and admits that the three have each been  
18 convicted of various criminal acts related to the scheme. Wielsch also concedes that he,  
19 Butler, and Lombardi were all involved with at least the January 2007 search. Wielsch  
20 was present in his capacity as CCCNET's commander, Lombardi was a CCCNET agent  
21 and present for the search, and Butler submitted a declaration in support of the warrant.  
22 Dkt. 141 at 3. Wielsch is less clear about his involvement in the two other searches.

23 In general, it appears that Wielsch's main argument is that the criminal acts  
24 perpetrated by him, Butler, and Lombardi were "limited to specific, discrete conduct,  
25 including only: two instances involving the theft of narcotics subject to a destruction  
26 order, four incidents where he used his authority as an officer to steal cash from known  
27 prostitutes, and one instance where he participated in a fake sting operation to scare a  
28 subject out of the narcotics business." Dkt. 141 at 6. In essence, he argues that he may

1 have stolen drugs from police searches, but he did not do so with respect to Curtis or  
2 Foster. The court finds this argument to be unavailing. Plaintiffs have provided evidence  
3 of an admitted conspiracy among Wielsch, Butler, and Lombardi, and have alleged that  
4 the searches at issue in this case were conducted in furtherance of the conspiracy.  
5 Defendants' response is to argue that there was indeed a conspiracy, but that it did not  
6 involve these searches. However, this argument is undermined by the deposition  
7 testimony of the officer assigned to investigate Lombardi. The investigating officer  
8 testified that "Lombardi said it was Wielsch who stole the watch [taken from Curtis] and  
9 provided it to him." Dkt. 136-3, Ex. J at 103:17-19, 104:14-18. As mentioned above, the  
10 watch was found in Lombardi's possession, and was identified by Curtis as the one taken  
11 during the search. The court also finds it significant that the allegations in this case  
12 involve the same type of acts that defendants have admitted to in other instances.

13 Accordingly, the court finds that there is a triable issue of fact as to whether the  
14 searches/seizures of Curtis and Foster were part of the conspiracy between Wielsch,  
15 Butler, and Lombardi. And because the last of these searches occurred within the  
16 limitations period, the "last overt act" doctrine allows the claim to be based on all three  
17 searches. As a result, Wielsch's motion for summary judgment as to the second cause of  
18 action asserted by Curtis and Foster is DENIED. And as mentioned above, neither Butler  
19 nor Lombardi have moved for summary judgment.

20 However, to the extent that plaintiffs attempt to show an agreement beyond  
21 Wielsch, Butler, and Lombardi, they lack evidence of any such agreement. In their  
22 opposition to the Antioch defendants' (i.e., Wisecarver and Vincelet) motion, plaintiffs  
23 include a section titled "relationship between defendants Wielsch, Butler, and  
24 Wisecarver." Dkt. 158 at 5. Much of this section involves allegations of a conspiracy  
25 between Wielsch, Butler, and Lombardi – which, as discussed above, is conceded by the  
26 defendants. The alleged contacts with Wisecarver are far thinner. Plaintiffs allege, in  
27 their opposition to the Antioch defendants' motion, that Wisecarver used to work with  
28 Butler and Wielsch at the Antioch Police Department, that Wisecarver "ran into Lombardi

1 at a minor league baseball game,” that Wisecarver “worked 5-10 cases with Wielsch,”  
2 that Wisecarver “had contact with Lombardi in the form of text messages,” that  
3 Wisecarver and Butler were “friends for years” and “both were bodybuilders who worked  
4 out a lot,” and that “Wielsch saw Wisecarver and Vincelet at countywide narcotics  
5 meetings.” Dkt. 158 at 6-7. None of these allegations come close to establishing that  
6 Wisecarver was involved in any agreement to commit constitutional violations. Plaintiffs’  
7 allegations against Vincelet are similar. Thus, the court finds that plaintiffs have failed to  
8 raise a triable issue of fact that any agreement to violate civil rights involved either  
9 Wisecarver or Vincelet, and as a result, the Antioch defendants’ motion for summary  
10 judgment as to the second cause of action asserted by Curtis and Foster against  
11 Wisecarver and Vincelet is GRANTED.

12 Moving to the fourth cause of action, the court finds that a similar distinction must  
13 be drawn between Wielsch, Butler, and Lombardi on one hand, and Wisecarver and  
14 Vincelet on the other.

15 Regarding Wielsch, Butler, and Lombardi, Wielsch concedes that they engaged in  
16 criminal acts of the type alleged by plaintiffs. However, he argues that their acts did not  
17 constitute an “enterprise,” and “at most, Wielsch, Butler, and Lombardi formed sporadic  
18 associations to accomplish specific, criminal goals.” Dkt. 141 at 14. The court finds no  
19 basis for this distinction. The formation of an association to accomplish specific, criminal  
20 goals is the definition of a RICO enterprise, and the fact that the criminal acts were  
21 “sporadic” does not affect the analysis. The RICO statute does not require constant,  
22 uninterrupted criminal activity.

23 Wielsch also argues that the complaint alleges a broader enterprise, involving  
24 members of the Antioch police department, and that any attempt to “re-define the  
25 complaint” to allege an enterprise involving only Wielsch, Butler, and Lombardi should be  
26 rejected. However, the court finds no basis for this “all or nothing” requirement that  
27 Wielsch seeks to impose. Plaintiffs asserted a RICO claim against a large number of  
28 defendants, and it appears to be the case that there are insufficient allegations against all

1 but three of those defendants. The court sees no reason to grant summary judgment on  
2 a potentially viable claim against certain defendants just because the claim is not viable  
3 as to other defendants.

4 Wielsch then argues that plaintiffs have failed to establish a nexus between the  
5 enterprise and the alleged racketeering activity. Specifically, Wielsch argues that the  
6 agreement between him, Butler, and Lombardi did not come into existence until 2009,  
7 after the first two searches involving Curtis. Thus, the first two searches could not be part  
8 of an “enterprise” that did not yet exist. However, as with the conspiracy claim, the court  
9 finds that Wielsch’s own testimony regarding the lack of an enterprise is insufficient to  
10 warrant summary judgment. All of the alleged searches involve the same type of conduct  
11 that Wielsch admits that he engaged in with Lombardi and Butler – improperly seizing  
12 items and selling them for personal gain. Moreover, as mentioned above, Lombardi was  
13 found with a watch taken from the second search involving Curtis (at Ackerman’s home),  
14 and claimed that it was given to him by Wielsch. If Wielsch gave the watch to Lombardi  
15 after taking it during the search, that certainly lends support to plaintiffs’ claim that the  
16 search and seizure were part of the enterprise. While Wielsch may be correct that the  
17 specific searches alleged in this case were not actually part of the enterprise, the court  
18 finds that to be a question for the jury, and not one suitable for resolution on summary  
19 judgment.

20 Next, Wielsch alleges that “even if such an enterprise did exist, the search of the  
21 Ackerman residence was not enabled by the existence of the enterprise,” because the  
22 search was enabled by a valid search warrant. However, even if the search itself was not  
23 part of the enterprise, plaintiffs allege that items were improperly seized as part of the  
24 enterprise.

25 Wielsch then raises two other challenges to the RICO claim – that plaintiffs cannot  
26 establish the required predicate acts, and that plaintiffs cannot establish an injury.  
27 Starting with the “predicate acts” argument, the complaint alleges that the June 2007 and  
28 January 2010 searches involved violations of 18 U.S.C. § 1512(b)(2)(B), which applies to

1 “[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person,  
2 or attempts to do so, or engages in misleading conduct toward another person, with  
3 intent to . . . cause or induce any person to . . . alter, destroy, mutilate, or conceal an  
4 object with intent to impair the object’s integrity or availability for use in an official  
5 proceeding.” Wielsch claims that plaintiffs cannot establish that he ever used  
6 “intimidation, threats, or corruption” to persuade any other person to “alter, destroy, or  
7 mutilate” an object for the purpose of obstructing an official proceeding. At best, plaintiffs  
8 allege that Wielsch himself falsified the Notice of Asset Forfeiture, which “does not  
9 involve any attempt to persuade someone else to falsify a document.” However, Wielsch  
10 overlooks the “engages in misleading conduct” portion of the statute, which is much  
11 broader than using “intimidation, threats, or corrupt persuasion” against another person.  
12 Wielsch also overlooks the fact that defendant Butler provided a declaration in support of  
13 the warrant, and thus could have engaged in “misleading conduct toward another person,  
14 with intent” to “cause or induce any person” to “conceal” the seized objects. Even if  
15 Wielsch himself did not commit that predicate act, it is enough that he was part of an  
16 enterprise, and that a member of the enterprise committed a predicate act. Accordingly,  
17 combined with the unchallenged allegation that the second search constituted a  
18 “robbery,” the court finds that plaintiffs have sufficiently raised a triable issue of fact as to  
19 whether the enterprise engaged in the two required predicate acts.

20 Turning to the “injury” requirement, Wielsch first focuses on the 2007 search,  
21 during which Curtis claimed that \$20,000 was taken from her. Wielsch argues that  
22 “Curtis cannot establish that the alleged predicate act directly led to her injuries,”  
23 because, even if the money was taken, “she did not lose the \$20,000 because of the  
24 falsification or destruction of any records,” and instead, “the seizure of money in 2007  
25 occurred as the direct result of a lawful search and the confiscation of assets pursuant to  
26 California forfeiture law.” However, Curtis challenges that the money was properly  
27 seized, and more importantly, argues that the money should have been listed on the  
28 notice of asset forfeiture, so that it could have been returned after an official proceeding.



1 Wielsch characterizes any expectation of getting the money back as “optimistic at best,”  
2 but in the absence of any evidence that Curtis would not have received the money back,  
3 the court finds Curtis’ allegations sufficient to constitute an “injury.”

4 As to the 2008 search, Wielsch argues that the watch that Curtis claims to have  
5 been taken actually belonged to Ackerman, not to Curtis. However, the complaint also  
6 alleges that a necklace, an earring set, and “several thousand dollars” were also taken,  
7 which is sufficient to constitute an “injury.”

8 In sum, as to Wielsch, Butler, and Lombardi, the court finds that plaintiffs have  
9 raised a triable issue of fact regarding a pattern of racketeering activity based on a  
10 minimum of two predicate acts, a criminal enterprise in which the defendants participated,  
11 and a causal relationship between the predicate acts and the harm suffered by the  
12 plaintiffs. Accordingly, Wielsch’s motion for summary judgment as to the fourth cause of  
13 action asserted by Curtis and Foster is DENIED. To the extent that the fourth cause of  
14 action is asserted against any defendant other than Wielsch, Butler, and Lombardi,  
15 defendants’ motion is GRANTED.

16 Moving back to the third cause of action, as mentioned above, the complaint  
17 appears to indicate that this claim is asserted by all five plaintiffs, including Curtis and  
18 Foster. However, in their opposition to defendants’ motion for summary judgment,  
19 plaintiffs confined their arguments to the O’Tooles and Lee, and did not mention Curtis or  
20 Foster at all. Thus, it appears that plaintiffs do not intend to assert this claim on behalf of  
21 Curtis and Foster; however, even if they did, the claim would fail for the same reasons set  
22 forth earlier in this order. Accordingly, defendants’ motion for summary judgment is  
23 GRANTED as to the third cause of action to the extent asserted by Curtis and Foster.

24 **CONCLUSION**

25 For the reasons stated, plaintiffs’ motion for summary judgment is DENIED; the  
26 Antioch defendants’ motion for summary judgment is GRANTED in part and DENIED in  
27 part; Wielsch’s motion for summary judgment is GRANTED in part and DENIED in part;  
28 and the Monell defendants’ motion for summary judgment is GRANTED.

1           The court is left with two distinct sets of claims. With respect to the GIYG search,  
2 there remains one cause of action (for deprivation of rights under § 1983) asserted by the  
3 O'Tooles and Lee against defendants Vincelet, Wisecarver, Aiello, Bergerhouse, Krenz,  
4 Koch, Bittner, Joannides, Chalk, and Orman. With respect to the searches of Curtis and  
5 Foster, there remain three causes of action: (1) deprivation of rights under § 1983, based  
6 on only the 2010 search, and asserted against Vincelet, Wisecarver, Wielsch, Butler, and  
7 Lombardi; (2) conspiracy to violate rights under § 1983, asserted against Wielsch, Butler,  
8 and Lombardi; and (3) a civil RICO violation asserted against Wielsch, Butler, and  
9 Lombardi. Because the two sets of claims involve no overlapping allegations, the court is  
10 inclined to sever them for trial, but it is not clear that severance is practicable given the  
11 custodial nature of several of the parties. The court will discuss this further with the  
12 parties at the pretrial conference before a final determination is made.

13           **IT IS SO ORDERED.**

14           Dated: September 1, 2015



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PHYLLIS J. HAMILTON  
United States District Judge

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