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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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AUGUSTA MILLENDER, BRENDA  
MILLENDER, WILLIAM JOHNSON,

Plaintiffs,

v.

COUNTY OF LOS ANGELES, ET  
AL.,

Defendants.

Case No. CV 05-2298 DDP (RZx)

ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION; (2) GRANTING IN PART AND DENYING IN PART INDIVIDUAL DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND/OR SUMMARY ADJUDICATION OF ISSUES; and (3) GRANTING IN PART AND DENYING IN PART MUNICIPAL DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES

[Motions filed on September 18, 2006]

This matter comes before the Court on: (1) Plaintiffs' Notice of Motion and Motion for Summary Adjudication ("P's MSJ"); (2) Individual Defendants' Notice of Motion and Motion for Summary Judgment and/or Summary Adjudication of Issues ("ID's MSJ"); and (3) Municipal Defendants' Notice of Motion and Motion for Summary Judgment or, in the Alternative, for Summary Adjudication of Issues ("MD's MSJ"). After reviewing and considering the materials

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

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1 submitted by the parties and hearing oral argument, the Court  
2 adopts the following order.

3  
4 **I. Background**

5 On March 28, 2005, Augusta Millender, Brenda Millender and  
6 William Johnson (collectively referred to as "Plaintiffs") filed a  
7 Civil Rights Complaint with State Law Claims ("Compl.") against The  
8 County of Los Angeles, the Los Angeles County Sheriff's Department,  
9 and Sheriff Leroy Baca (collectively referred to as "Municipal  
10 Defendants"), and 27 Los Angeles County deputies<sup>1</sup> (collectively  
11 referred to as "Individual Defendants"). Specifically, Plaintiffs'  
12 complaint includes three causes of action under 42 U.S.C. § 1983  
13 for violations of the Fourth and Fourteenth Amendments and for  
14 conspiracy to deprive them of their civil rights based on their  
15 race (including Monell claims against the County of Los Angeles and  
16 the Sheriff's Department, and supervisory liability claims  
17 against Sheriff Baca in his official and individual capacities).  
18 The Complaint also includes supplemental claims for: violations of  
19 the California Constitution; violations of civil rights under  
20 *California Civil Code* §§ 52.1 & 51.7; negligence; and conspiracy.  
21 Plaintiffs allege the following in their Complaint.

22 Plaintiffs allege that the violations of their rights caused  
23 Plaintiffs special and general damages, physical injuries and  
24 extreme emotional distress including, but not limited to, fright,

25  
26 <sup>1</sup> While, at one time, there were 27 individual deputy  
27 Defendants, 16 of them have been terminated from the Complaint.  
28 Therefore, the following 11 Individual Defendants remain: Jack  
Demello, Robert J. Lawrence, Curt Messerschmidt, Donald Nichiporuk,  
David O'Sullivan, Rick Rector, James Ritenour, Richard Schlegel,  
Ian Stade, Brice Stella, and Scott Walker.

1 shock, embarrassment, anger and other emotional distress.  
2 (Complaint ¶ 22). Augusta Millender was hospitalized, and Brenda  
3 Millender and William Johnson moved. (Id.)

4  
5 **II. Statement of Facts**

6 Unless otherwise noted, the following facts are undisputed:

7 Augusta Millender ("Mrs. Millender") was 73 years old on  
8 November 6, 2003 and was being treated for diabetes and high blood  
9 pressure. (Plaintiffs' Statement of Uncontroverted Material Facts  
10 and Conclusions of Law ("P's SUF"), No. 1). She also had metal  
11 pins in her femur and used a walker. (Id.) On November 6, 2003,  
12 Mrs. Millender was living with her 47 year-old daughter, Brenda,  
13 who was being treated for high blood pressure and insulin-dependent  
14 diabetes. (P's SUF No. 2). On November 6, 2003, Mrs. Millender's  
15 grandson, William Johnson, who was Brenda's son, was also living at  
16 the house with Mrs. Millender and Brenda. (P's SUF No. 3). He was  
17 20 years old at the time. (Id.) The Millenders lived at 2234 East  
18 120th Street in Los Angeles, California (the "120th Street Address"  
19 or the "Millender Residence"). (P's SUF No. 4).

20 In 1982, Mrs. Millender first met her foster son, Jerry Bowen,  
21 who was 13 years old. (P's SUF No. 5). He lived with her until he  
22 was about 19 years old, which would have been 1987 or 1989. (Id.)  
23 The next time Bowen stayed at Mrs. Millender's home was from  
24 January or February to March of 2003, when he stayed there only  
25 temporarily. (P's SUF No. 6; Individual Defendants' Statement of  
26 Material Uncontroverted Facts and Conclusions of Law ("ID's SUF")  
27 No. 10). When Bowen stayed at the house in 2003, he stayed in the  
28 back house, not in the main house. (P's SUF No. 7). Because, at

1 that time, Bowen did not have a regular address, he received mail  
2 from the State of California and/or the County of Los Angeles at  
3 the 120th Street Address. (P's SUF No. 8; ID's SUF No. 10).

4 On October 17, 2003, while Shelly Kelly was moving out of her  
5 apartment at 1425 W. 97th Street in Los Angeles ("the 97th Street  
6 Address"), Bowen assaulted her. (P's SUF No. 11; ID's SUF No. 1).  
7 Due to Bowen's violent tendencies and some prior physical assaults  
8 on her, Kelly had called the Sheriff's Department to stand by while  
9 she moved her belongings out of her apartment. (ID's SUF No. 2).  
10 Approximately twenty minutes after the deputies arrived, they were  
11 called away on an emergency of a child not breathing. (ID's SUF  
12 No. 3).

13 Kelly stated that, as soon as the deputies left the location,  
14 Bowen appeared and the altercation began. (Id.) Bowen bit Kelly  
15 and attempted to push her down the stairs. (ID's SUF No. 1).  
16 Kelly managed to get away from Bowen. (P's SUF No. 12). Bowen  
17 grabbed Kelly by the front of her shirt with both of his hands.  
18 (ID's SUF No. 3). He also grabbed Kelly by the hair and tried to  
19 pull her into the residence. (Id.) Kelly straddled the doorway  
20 with her legs to keep him from pulling her inside. (Id.) Bowen  
21 then grabbed both of her arms, at which time she was able to pull  
22 out of her shirt and run to her vehicle. (ID's SUF No. 4). Bowen  
23 went into the apartment and came back out with a sawed-off shotgun  
24 with a pistol grip. (Id.) He stood in front of Kelly's vehicle  
25 and told her he would kill her if she left. (Id.) Kelly laid down  
26 on her seat and "punched it." (Id.) As she drove away in her car,  
27 Bowen shot at her with the black sawed-off shotgun. (P's SUF NO.  
28 12; ID's SUF Nos. 1 & 4). Kelly located police officers a short

1 time later. (ID's SUF No. 4). When they later interviewed Kelly  
2 about the incident, deputies immediately recognized her and the  
3 location as the same individual and address they had left earlier.  
4 (ID's SUF No. 5). Kelly provided the deputies with four  
5 photographs of the suspect to aid them in their investigation.  
6 (Id.)

7 Curt Messerschmidt was the detective assigned to the case, and  
8 he eventually authored a search warrant affidavit. (P's SUF No.  
9 14; ID's SUF No. 6). Before meeting with Kelly, Messerschmidt  
10 reviewed the incident report and a supplemental report prepared by  
11 Deputy Hector Garcia regarding the assault incident. (ID's SUF No.  
12 6).

13 On October 22, 2003, Messerschmidt met with Kelly at the  
14 Lennox Sheriff's station, reviewed the incident report, and  
15 verified the facts of the incident with her. (ID's SUF Nos. 8 &  
16 13). During her interview, Kelly told Messerschmidt that Bowen did  
17 not live at the 97th Street Address and was staying at the 120th  
18 Street Address. (Id.) She also told Messerschmidt that "if she  
19 wasn't mistaken," Bowen was "hiding out" at the Millender  
20 Residence, which was his foster mother's house. (P's SUF No. 15;  
21 ID's SUF No. 8). Messerschmidt did not ask and Kelly did not tell  
22 him why she believed this to be true. (P's SUF No. 16).  
23 Therefore, this information is not in Messerschmidt's warrant  
24 affidavit. (Id.) Although Kelly allegedly told Messerschmidt that  
25 she had been to the Millender Residence with Bowen prior to the  
26 assault, he did not document it. (P's SUF No. 18; Deposition of  
27 Curt Alan Messerschmidt, June 27, 2006 ("Messer. Depo."), attached  
28 as Exh. X to Declaration of Robert Mann in Support of Plaintiffs'

1 Motion for Summary Adjudication ("Mann Decl."), at 51:23-52:9).  
2 However, Mrs. Millender testified that she saw Kelly at her house  
3 on at least two occasions. (ID's SUF No. 10). Kelly did not  
4 actually use the term residence in telling Messerschmidt where she  
5 thought Bowen could be found. (P's SUF Nos. 19 and 20). Kelly was  
6 a drug dealer for 18 years, but had been clean for 8 years before  
7 the incident with Bowen. (P's SUF No. 22).

8 Messerschmidt took photographs of the bruises and bite mark on  
9 Kelly. (ID's SUF No. 13). Messerschmidt also reviewed the  
10 photographs that Kelly had given the deputies. (Id.) Kelly  
11 identified Bowen in a "six pack" line up after signing the "Witness  
12 Admonition Mug Show Ups" form. (ID's SUF No. 14). Bowen was a  
13 known Mona Park Crip gang member. (Id.)

14 Messerschmidt prepared a supplemental report of the interview  
15 with Kelly and began doing further research to verify if the 120th  
16 Street Address was a good address for Bowen. (ID's SUF No. 16).  
17 According to his affidavit, Messerschmidt searched "departmental  
18 records, state computer records and other police agency records" to  
19 verify Bowen's address. (P's SUF No. 23). The affidavit does not  
20 state with any further specificity what databases Messerschmidt  
21 searched or what the records revealed. (Id.) Messerschmidt  
22 states, however, that he searched DMV records, Cal-Gangs data  
23 entries, California criminal history records and the National  
24 Criminal Index Center. (ID's SUF No. 17). He also did a computer  
25 search to verify Bowen's name, address and date of birth. (ID's  
26 SUF No. 18). He checked the Consolidated Criminal History  
27 Reporting System ("CCHRS"), which indicated that Bowen was on  
28 summary probation for a spousal battery and an unlicensed driver

1 charge. (Id.) Messerschmidt checked Bowen's rap sheet/criminal  
2 history on the California Law Enforcement Teletype System  
3 ("CLETS"), which indicated Bowen's violent history and multiple  
4 felony and misdemeanor arrests. (ID's SUF No. 6).

5 Based upon the computer searches, the 97th Street Address was  
6 the most current, not the 120th Street Address. (P's SUF No. 24).  
7 The Department of Motor Vehicles records Messerschmidt searched  
8 indicated the most recent address for Bowen, as of September 3,  
9 2003, was the 97th Street Address, not the 120th Street Address.  
10 (P's SUF No. 25). However, they also indicated that, as of March  
11 27, 2003, Bowen's address was the 120th Street Address. (ID's SUF  
12 No. 18; P's SUF No. 26). Furthermore, Bowen went back to the 97th  
13 Street Address a week or two prior to the search warrant and  
14 verified that Bowen was not staying there. (ID's SUF No. 8).

15 The Gang Profile Records showed that, on May 17, 2003, Bowen  
16 verbally told Century deputies that his address was the 120th  
17 Street Address. (P's SUF No. 27; ID's SUF No. 18). According to a  
18 restraining order issued May 16, 2003, Bowen's address at that time  
19 was on Marvin Avenue. (P's SUF No. 28). The computer records  
20 Messerschmidt searched did not indicate Bowen's current residence  
21 address. (P's SUF No. 29).

22 In training, police officers are taught that the successful  
23 use of informants is critical in developing accurate information  
24 pertaining to a case. They are taught that informants are  
25 information providers who could be a citizen victim, witness, paid  
26 informant or suspect charged with a crime. (ID's SUF No. 9). In  
27 this case, the informant was the victim, Kelly. (Id.)

28

1 After Messerschmidt interviewed everybody and did all the  
2 computer checks, he started gathering all his information and  
3 prepared his search warrant affidavit for the issuance of an arrest  
4 warrant for Bowen and a search warrant for the 120th Street  
5 Address. (ID's SUF No. 21). Messerschmidt requested a Ramey  
6 Warrant be issued for Bowen for his involvement in the assault.  
7 (Id.) The warrant affidavit was reviewed and approved by Sergeant  
8 Lawrence, Messerschmidt's team sergeant at Lennox Operation Safe  
9 Streets, and Lieutenant Ornales. (Id.) Deputy District Attorney  
10 Janet Wilson also reviewed and approved the warrant. (Id.)

11 On November 3, 2003, Messerschmidt consulted with Lieutenant  
12 Maxwell of the Sheriff's Department Special Enforcement Bureau  
13 ("SEB") SWAT Team. (Id.) As a result of that consultation, the  
14 SEB SWAT team's Blue Team, under team leader Sergeant Walker, was  
15 requested to assist with the warrant service at the 120th Street  
16 Address. (Id.; ID's SUF No. 27).

17 Messerschmidt applied for and obtained an arrest warrant for  
18 Bowen and a search warrant for the Millender residence on November  
19 4. (P's SUF No. 37; ID's SUF No. 26). Messerschmidt sought, and  
20 the warrant authorized, night time service. (P's SUF No. 38; ID's  
21 SUF No. 23). The warrant authorized seizure of:

22 All handguns, rifles, or shotguns of any  
23 caliber, or any firearms capable of firing  
24 ammunition, or firearms or devices modified  
25 or designed to allow it to fire ammunition.  
26 All caliber of ammunition, miscellaneous gun  
27 parts, gun cleaning kits, holsters which  
28 could hold or have held any caliber handgun

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1 being sought. Any receipts or paperwork  
2 showing the purchase, ownership, or possess-  
3 ion of the handguns being sought. Any fire-  
4 arm for which there is no proof of ownership.  
5 Any firearm capable of firing or chambered  
6 to fire any caliber ammunition.

7 (Mann Decl., Exh. J). The warrant further authorized the seizure  
8 of "[a]rticles of evidence showing street gang membership or  
9 affiliation with any street gang to include but not limited to any  
10 reference to 'Mona Park Crips', including writings or graffiti  
11 depicting gang membership, activity or identity." (Id.) The  
12 warrant also authorized "[a]rticles of personal property tending to  
13 establish the identity of persons in control of the premise or  
14 premises." (Mann Decl., Exh J). The warrant authorized the  
15 seizure of any photographs which appeared relevant to gang  
16 membership, might depict the item being sought, or might depict  
17 any, undefined, criminal activity. (P's SUF No. 45; ID's SUF No.  
18 25). Messerschmidt had no reason to believe Bowen's crime was a  
19 "gang" crime. (P's SUF No. 42). Defendants respond that evidence  
20 of gang affiliation is an enhancement to criminal charges.

21 Several days before the warrant service, the SEB SWAT  
22 personnel began the information and planning process based on the  
23 information given to them by Messerschmidt regarding the wanted  
24 suspect, warrant location, and date and time of service. (ID's SUF  
25 No. 34). The information was recorded on the SEB Activation  
26 Request - Preliminary Data Form. (Id.) The SEB SWAT personnel  
27 reviewed the search warrant, search warrant checklist, Bowen's  
28 criminal history, the operations plan from Messerschmidt's unit,

1 and photographs. (Id.) Based on this, they developed a tactical  
2 plan. (Id.) Walker took Bowen's criminal history and active gang  
3 membership into consideration in formulating the plan for warrant  
4 service. (Id.) Walker reviewed the search warrant and supporting  
5 affidavit with his team before it was served to be sure that they  
6 knew what was included in the warrant, explained the plan and  
7 briefed everybody on their assigned role. (ID's SUF Nos. 29 & 34).  
8 After the search was completed, information regarding the tactical  
9 plan was filled out in the Team Activation Packet. (ID's SUF Nos.  
10 30 & 34). The mission for SEB personnel was "to safely execute the  
11 search warrant, detain all the occupants on the property and secure  
12 the location for investigators." (Id.). Once that was  
13 accomplished, the investigators would continue their investigation.  
14 (Id.) The "Plans to Accomplish the Mission" section of the Team  
15 Activation Packet stated that:

16           Once containment personnel are in place, the  
17           entry team will approach the front of the  
18           location on the armored rescue vehicle. The  
19           entry team, along with the front containment  
20           team will off load from the vehicle and  
21           approach the front door. Knock and notice  
22           announcements will be given via a pre-recorded  
23           taped announcement on a PA system as well as  
24           verbal announcements at the front door. If  
25           there is no acknowledgment at the door by  
26           the occupants, the team will breach the front  
27           door and make limited penetration into the  
28           house. In addition, the window near the front

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1 door will be ported so that we can provide  
2 cover for the breaching team as well as  
3 providing us the opportunity to prevent  
4 injury to occupants inside. If occupants are  
5 encountered, they will be directed towards us  
6 and lead outside to a safe area. Once the  
7 occupants are out, the team will clear the  
8 location and render it safe for the handling  
9 detectives.

10 (ID's SUF No. 31). The following SEB SWAT Team Blue Team personnel  
11 were assigned positions as follows: Entry Team - Walker, Rector,  
12 Nichiporuk, Schlegel, Stella, Demello, O'Sullivan and Ritenour;  
13 Containment Team - Wilber, Harris, Stade, Murray, Foisner, Bones,  
14 Geisler, Desmarteau, Parga, Hayes and Conti; Emergency medical  
15 personnel: Harrell and McCabe. (ID's SUF No. 32).

16 On November 4, 2003, two days before the service of the  
17 warrant, Walker drove by the Millender residence in an undercover  
18 vehicle in order to obtain photographs for the warrant service  
19 planning. (ID's SUF No. 35). He was accompanied by Deputies  
20 Rector, Nichiporuk, Stella and Stade. (Id.) They took photographs  
21 and looked at the area in order to determine how they were going to  
22 serve the warrant. (Id.) They did not have contact with anyone  
23 from the residence on that date. (Id.)

24 On November 5, 2003, Walker, Stella, Rector and Nichiporuk  
25 drove around the area of the Millender Residence for an opportunity  
26 to arrest Bowen if they happened to see him. (P's SUF No. 31; ID's  
27 SUF No. 36). Deputies Stella and Walker contacted four to five  
28 male blacks who were shooting dice on the sidewalk directly in

1 front of the Millender Residence. (ID's No. 36). Deputies Stella  
2 and Walker spoke with the males, a couple of whom matched Bowen's  
3 general description, while Deputies Rector and Nichiporuk walked  
4 down the Millender's driveway. (Id.) Stella and Walker determined  
5 that Bowen was not part of the group. (Id.) The deputies  
6 approached the house in broad daylight without their weapons drawn.  
7 (P's SUF No. 32). Deputies Rector and Nichiporuk spoke with Mrs.  
8 Millender and Brenda on their driveway. (P's SUF No. 33; ID's SUF  
9 No. 36). Walker saw an older woman who he now believes was Mrs.  
10 Millender speaking to them, but could not hear what they were  
11 saying. (ID's SUF No. 36). Walker saw another female outside who  
12 he now believes was Brenda Millender. (Id.) Rector talked to  
13 either Mrs. Millender or Brenda Millender and asked her about the  
14 men in front of the house. (Id.) The woman said she did not know  
15 the men and did not give them permission to be there. (Id.) The  
16 SEB deputies who were at the Millender Residence on November 5,  
17 2003, the day before the search warrant execution, did not document  
18 what occurred there and did not tell Messerschmidt anything about  
19 it. (P's SUF No.34).

20 At approximately 5:00 a.m. on November 6, 2003, the SEB Blue  
21 Team served a high-risk search and arrest warrant at 2234 E. 120th  
22 Street. (P's SUF No. 47; ID's SUF No. 28). Messerschmidt and  
23 Detective Pickett were positioned in the middle of the street to  
24 the east of the location in order to stop traffic. (ID's SUF No.  
25 28).

26 The residence was occupied by the Millender Family. (ID's SUF  
27 No. 28). Mrs. Millender, Brenda and William were asleep when the  
28 deputies arrived. (P's SUF No. 48). Defendants played a pre-

1 recorded announcement over a PA system from a radio car parked in  
2 the street. (P's SUF No. 49; ID's SUF No. 39). When there was no  
3 response from the interior of the main house, Walker ordered  
4 O'Sullivan to "break and rake" the front window. (ID's SUF No.  
5 40). Deputies also forced open the front security door. (Id.) As  
6 the team entered the house, they continued to identify themselves  
7 as law enforcement personnel and said that they had a search  
8 warrant. (ID's SUF No. 42). Rector, Nichiporuk and Walker were  
9 the first three through the door. (Id.) Upon entering the house,  
10 deputies encountered Mrs. Millender, Brenda and William, who all  
11 followed the deputies instructions and went outside to wait. (P's  
12 SUF No. 55; ID's SUF Nos. 42, 44 & 45).

13 The deputies proceeded to search and clear the house, which  
14 took approximately 20 minutes. (P's SUF No. 56; ID's SUF No. 49).  
15 Once the main house was cleared, the entry team went to the east  
16 side of the house and exited the kitchen, which led to the entrance  
17 of a large addition that was attached to the house but had its own  
18 outside entrance. (ID's SUF No. 49). Mrs. Millender's adult sons  
19 resided there. (P's SUF No. 57). Rector made the announcement for  
20 the people inside the addition to come out. (ID's SUF No. 49).  
21 The deputies did not forcibly enter the back house. (P's SUF No.  
22 58). At the back house, the deputies waited for over a minute for  
23 the occupants to get dressed and come out, which all seven of them  
24 did without incident. (P's SUF No. 59; ID's SUF No. 49). None of  
25 the people in the addition are plaintiffs in this action. (ID's  
26 SUF No. 50).

27 Walker recorded on audio tape the entry on November 6, 2003.  
28 (ID's SUF No. 53). The SEB Team left the 120th Street Address

1 after the warrant service somewhere past 5:45 in the morning.  
2 (ID's SUF No. 54). Walker did not handcuff anyone, or have any  
3 contact with any occupants after they were directed outside of the  
4 house. (ID's SUF No. 51). He did not participate in searching the  
5 house. (Id.)

6 When exiting the house, Brenda Millender told the deputy she  
7 did not want to step outside the house onto the porch, because she  
8 was a diabetic and there was glass on the ground. One of the  
9 officers took a rug from her mother's living room and threw it over  
10 the glass. (ID's SUF No. 46). The officer who escorted her out  
11 helped her walk across the glass. (Id.) Mrs. Millender, Brenda  
12 and William waited outside until the house was secured, most of the  
13 time being allowed to sit inside patrol cars because they were  
14 cold. (P's SUF No. 62; ID's SUF Nos. 45 & 48). Brenda asked a  
15 deputy for a blanket, and he gave her one. (ID's SUF No. 47).  
16 While outside, Mrs. Millender told the deputies she needed to use  
17 the restroom. (P's SUF No. 63). Because the deputies would not  
18 allow her back into the house until the SWAT Team was done clearing  
19 and securing the location, Mrs. Millender relieved herself in the  
20 street. (Id.; ID's SUF No. 45). For at least some portion of  
21 time, William Johnson was handcuffed. (P's SUF No. 65). During  
22 the time that Brenda and Mrs. Millender were sitting in the police  
23 cars, Brenda did not complain that she had injuries, and Mrs.  
24 Millender never told the deputies that she had to go to the  
25 hospital. (ID's SUF No. 56).

26 After the location was secured, the deputies brought Mrs.  
27 Millender, Brenda and William into the living room while they  
28 completed the search of the house. (P's SUF No. 64; ID's SUF No.

1 55). Brenda was allowed to go to the restroom and to go to her  
2 room to get some shoes and a blanket. (ID's SUF No. 55). Lawrence  
3 watched the occupants in the living room. (ID's SUF No. 57). He  
4 did not apply handcuffs to anyone, or arrest anyone, and did not  
5 point his weapon at anyone. (Id.) Stade was assigned to  
6 containment outside the east side of house. (ID's SUF No. 57). He  
7 did not apply handcuffs to anyone, arrest anyone, or participate in  
8 the search of the residence. (Id.)

9 Faulkner, Ortega, Pickett, Valento, Cale and Bercini searched  
10 the house. (ID's SUF No. 59). When the search was over,  
11 Messerschmidt gathered the pieces of evidence being seized, had the  
12 property receipt signed and left. (ID's SUF No. 59). The deputies  
13 seized Mrs. Millender's personal shotgun, a State of California  
14 Social Services letter addressed to Bowen, and .45 caliber  
15 "American Eagle" ammunition. (P's SUF No. 66; ID's SUF No. 60).

16 Bowen was not found at the location. (P's SUF No. 60).  
17 Bowen's black, sawed-off shotgun was not found at the location.  
18 (P's SUF No. 61). On November 19, 2003, after the search of the  
19 Millender Residence, Messerschmidt, without SWAT assistance,  
20 arrested Bowen in the middle of the day. (P's SUF No. 36). He was  
21 hiding under a bed in a motel room occupied by Bowen and his wife,  
22 after knocking and being admitted by Bowen's wife. (Id.)

23 One of the occupants of the back house was Mrs. Millender's  
24 son, Willie Millender, who was arrested for being under the  
25 influence. (P's SUF No. 67). Criminal charges were filed against  
26 Willie Millender in People v. Millender, Case No. 3CM09209 in the  
27 California Superior Court of the South Central Judicial District of  
28 the County of Los Angeles. (P's SUF No. 68). Mr. Millender,

1 represented by a public defender, made a motion to suppress based  
2 upon lack of probable cause in Messerschmidt's warrant affidavit.  
3 (P's SUF No. 69). The court granted Mr. Millender's motion to  
4 quash the warrant on the grounds that the affidavit did not  
5 establish probable cause to believe Bowen would be found at  
6 Plaintiffs' home. (P's SUF No. 70). The case was dismissed and  
7 not refiled. (Id.). Detective Messerschmidt was the investigator  
8 on the case. (P's SUF No. 71). Messerschmidt testified under oath  
9 in the hearing on Mr. Millender's motion to suppress. (P's SUF No.  
10 72). The hearing transcript is 80 pages and includes direct and  
11 redirect examination of the People's witness, Messerschmidt, as  
12 well as cross examination of both Mrs. Millender and Brenda, and a  
13 closing argument. (P's SUF No. 74).

14 Sheriff Leroy Baca was sued in his official capacity.  
15 (Municipal Defendants Statement of Uncontroverted Facts and  
16 Contentions of Law ("MD's SUF") No. 5). Plaintiffs' complaint does  
17 not involve allegations of interference with Plaintiffs' rights "to  
18 make and enforce contracts , to sue, be parties, give evidence, and  
19 to the full and equal benefit of all laws and proceedings for the  
20 security of persons and property." (MD's SUF No. 6). Plaintiffs'  
21 complaint does not involve allegations of interference with  
22 Plaintiffs' rights "to inherit, purchase, lease, sell, hold, and  
23 convey real and personal property." (MD's SUF No. 8). Plaintiffs  
24 allege that "wrongs" were done to them on or about November 4, 2003  
25 or November 6, 2003. (MD's SUF No. 15).

26 Plaintiffs' Count Six names only the County of Los Angeles as  
27 a defendant. (MD's SUF No. 23). Plaintiffs' Count Seven names  
28 only the County of Los Angeles as a defendant. (MD's SUF No. 26).

1 The deputies of the Los Angeles County Sheriff's Department  
2 received extensive training prior to and during their tenure in  
3 compliance with the established standards for California peace  
4 officer training (P.O.S.T. standards). (MD's SUF No. 28).  
5

6 **III. Legal Standard on a Motion for Summary Judgment**

7 Under the Federal Rules of Civil Procedure 56(c), summary  
8 judgment is proper only where "the pleadings, depositions, answers  
9 to interrogatories, and admissions on file, together with the  
10 affidavits, if any, show that there is no genuine issue as to any  
11 material fact and that the moving party is entitled to a judgment  
12 as a matter of law." Fed. R. Civ. P. 56. The moving party has the  
13 burden of demonstrating the absence of a genuine issue of fact for  
14 trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256  
15 (1986). If the moving party satisfies the burden, the party  
16 opposing the motion must set forth specific facts showing that  
17 there remains a genuine issue for trial. See id.; Fed. R. Civ. P.  
18 56(e).

19 A non-moving party who bears the burden of proof at trial to  
20 an element essential to its case must make a showing sufficient to  
21 establish a genuine dispute of fact with respect to the existence  
22 of that element of the case or be subject to summary judgment. See  
23 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Such an issue  
24 of fact is a genuine issue if it reasonably can be resolved in  
25 favor of either party. See Anderson, 477 U.S. at 250-51. The non-  
26 movant's burden to demonstrate a genuine issue of material fact  
27 increases when the factual context renders her claim implausible.  
28 See Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475

1 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Thus, mere  
2 disagreement of the bald assertion that a genuine issue of material  
3 fact exists, no longer precludes the use of summary judgment. See  
4 Harper v. Wallingform, 877 F.2d 728 (9th Cir. 1989); California  
5 Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.,  
6 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006  
7 (1988).

8 If the moving party seeks summary judgment on a claim or  
9 defense on which it bears the burden of proof at trial, it must  
10 satisfy its burden by showing affirmative, admissible evidence.  
11 Unauthenticated documents cannot be considered on a motion for  
12 summary judgment. See Hal Roach Studios v. Richard Feiner and Co.,  
13 896 F.2d 1542, 1550 (9th Cir. 1987); Canada v. Blain's Helicopters,  
14 Inc., 831 F.2d 920, 925 (9th Cir.1987). A document is  
15 authenticated when it is has the proper foundation. Canada, 831  
16 F.2d at 925; Hamilton v. Keystone Tankship Corp., 539 F.2d 684, 686  
17 (9th Cir.1976); United States v. Dibble, 429 F.2d 598, 601-02 (9th  
18 Cir.1970).

19 On a motion for summary judgment, admissible declarations or  
20 affidavits must be based on personal knowledge, must set forth  
21 facts that would be admissible evidence at trial, and must show  
22 that the declarant or affiant is competent to testify as to the  
23 facts at issue. See Fed. R. Civ. P. 56(e). Declarations on  
24 "information and belief" are inappropriate to demonstrate a genuine  
25 issue of fact. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.  
26 1989).

27

28

1 **IV. Discussion**

2 **A. Failure to Meet and Confer**

3 Before discussing the merits of the Parties' cross-motions for  
4 summary judgment, the Court notes that Plaintiffs argue that  
5 Municipal Defendants' Motion must be denied in its entirety,  
6 because Defendants failed to meet and confer regarding the issues  
7 included in the Motion.<sup>2</sup> Central District Local Rule 7-3, ("Local  
8 Rule 7-3"), provides, in relevant part, that "counsel contemplating  
9 the filing of any motion shall first contact opposing counsel to  
10 discuss thoroughly, preferably in person, the substance of the  
11 contemplated motion and any potential resolution. Local Rule 7-3.

12 In support of their argument that Defendants failed to meet  
13 and confer regarding Municipal Defendants' Motion, Plaintiffs note  
14 that defense counsel, Trevor Grimm, sent two letters to Plaintiffs'  
15 counsel. The first letter, dated July 10, 2006, listed several  
16 grounds for Defendants' proposed motion for summary judgment,  
17 including: (1) Deputy Messerschmidt made a reasonable  
18 investigation, which gave him probable cause to believe that Bowen  
19 would be at the Millender residence; (2) the search of databases  
20 for Bowen's criminal history was a reasonable and reliable step to  
21 determine Bowen's residence; (3) Messerschmidt investigated the  
22 fact that one of the documents searched suggested that Bowen  
23 resided at the 97th Street address (Kelly's apartment); (4) the

24  
25 <sup>2</sup> The specific issues in Municipal Defendants' Motion are:  
26 (1) Monell liability; (2) Plaintiffs' various conspiracy theories;  
27 (3) that Sheriff Baca is not a proper Defendant; (4) racial  
28 discrimination; (5) claims for damages under the California  
Constitution; and (6) County's alleged immunity for negligent  
employment and immunity under the Eleventh Amendment. (Plaintiffs'  
Opposition to the County Defendants' Motion for Summary Judgment  
("Plaintiff's Opp."), 1:9-12).

1 fact that a state criminal court judge denied the validity of the  
2 warrant for other purposes, is not dispositive of the validity of  
3 the warrant for purposes of searching for Bowen; (5) the warrant  
4 execution was carried out in a reasonable manner; (6) there need  
5 only have been a "fair probability" that Bowen and the items to be  
6 seized were at the Millender residence; and (7) the length of time  
7 between the knock/notice and entry was reasonable. (Declaration of  
8 Donald W. Cook in Support of Plaintiffs' Opposition to Defendants'  
9 Motions for Summary Adjudication ("Cook Decl."), Exh. JJ at 49-51).

10 The second letter, dated August 29, 2006, repeated the first  
11 letter verbatim, but added the issue of qualified immunity for the  
12 Individual Defendants based upon their reliance on the warrant.  
13 (Cook Decl. Exh. JJ at 52-54). Thus, Plaintiffs contend that,  
14 because none of the issues in the Municipal Defendants' Motion were  
15 addressed by Defendants at any time, Plaintiffs did not have  
16 sufficient opportunity to prepare to oppose these issues.

17 According to Grimm, he discussed the lack of municipal  
18 liability with Plaintiffs' counsel at the same time that  
19 Plaintiffs' counsel discussed their theories as to why there is  
20 municipal liability. (Declaration of L. Trevor Grimm in Support of  
21 Defendants Reply ("Grimm Decl."), ¶ 14). Grimm also contends in  
22 his Reply that, at the very least, these issues were discussed in  
23 detail in the context of meeting and conferring regarding  
24 Plaintiffs' Motion for Summary Judgment. (MD's Reply at 2:22-3:7).

25 Furthermore, as Defendants point out, Defense counsel's July  
26 10, 2006 meet and confer correspondence advised Plaintiffs that  
27 Defendants intended to "file a motion for summary judgment for an  
28 order adjudicating this case summarily in all defendants' favor."

1 (Cook Decl., Exh. JJ at 49). The reasons listed in such letter go  
2 to Municipal Defendants' liability as well as the liability of  
3 Individual Defendants. (Id. at 49-51). Therefore, the court  
4 declines to deny Municipal Defendants' Motion for Summary Judgment  
5 on the basis of Local Rule 7-3. This Court does remind the  
6 Parties, however, that it expects full compliance with Local Rule  
7 7-3.

8 **B. Probable Cause to Establish that Bowen Could be Found at**  
9 **the Millender Residence**

10 Plaintiffs move for summary adjudication on their claim that  
11 the affidavit did not establish probable cause to believe that  
12 Bowen could be found at the Millender Residence.

13 **1. Collateral Estoppel**

14 As an initial matter, Plaintiffs point out that, in People v.  
15 Millender, Case No. 3CM09290, the Los Angeles Superior Court  
16 quashed the warrant to search the Millender Residence, because the  
17 affidavit did not establish probable cause to believe Bowen would  
18 be found there. (Mann Decl., Exh. T at 75:6-77:14). In  
19 particular, Judge Johnson found that there was insufficient  
20 probable cause, because the affidavit referred only to the search  
21 of generic records (i.e., departmental records, state computer  
22 records and police agency records), rather than pointing to the  
23 specific records searched. (Id.) Because the only thing left in  
24 the affidavit was Kelly's statement, which he determined was not  
25 enough, Judge Johnson granted Defendant's motion to quash the  
26 warrant.<sup>3</sup> (Id. at 76:2-77:6). As a result of the ruling, the

27 \_\_\_\_\_  
28 <sup>3</sup> It should be noted that, at the same hearing, Judge  
(continued...)

1 People were unable to proceed, and the court granted defendant  
2 Willie Millender's motion to dismiss. (Id. at 77:8-14). Plaintiffs  
3 indicate in their current Motion, and Defendants do not dispute,  
4 that no appeal was taken and there have been no further  
5 proceedings. (P's MSJ at 9:3). Therefore, Plaintiffs contend that  
6 Defendants are collaterally estopped from re-litigating the  
7 affidavit's sufficiency in the current Action.

8       The Full Faith and Credit Clause of the United States  
9 Constitution requires that federal courts "must give to a state-  
10 court judgment the same preclusive effect as would be given that  
11 judgment under the law of the State in which the judgment was  
12 rendered." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S.  
13 75, 80 (1984). Under California law, collateral estoppel applies  
14 if: "(1) the issue necessarily decided at the previous [proceeding]  
15 is identical to the one which is sought to be relitigated; (2) the  
16 previous [proceeding] resulted in a final judgment on the merits;  
17 and (3) the party against whom collateral estoppel is asserted was  
18 a party or in privity with a party at the prior [proceeding]."  
19 Lombardi v. City of El Cajon, 117 F.3d 1117, 1121 (9th Cir. 1997)  
20 (citing People v. Sims, 32 Cal. 3d 468, 484, 186 Cal. Rptr. 77, 87,  
21 1651 P.2d 321 (1982)). Plaintiffs argue that "[since there was a  
22 final judgment as to one relevant, identical issue, the only  
23 question is privity." (P's MSJ at 9:15-16). The Court disagrees.

24

25

26       <sup>3</sup> (...continued)  
27 Johnson also (1) denied Willie Millender's motion to traverse  
28 (ruling that the information supposedly left out of the affidavit  
would not have made a difference); and (2) denied Willie  
Millender's motion that the entry team violated the knock notice  
rules. (Mann Decl., Exh. T at 74:13-75:5).

1 Even though the Parties do not raise the question of the  
2 "finality" of the state court's decision, the Ninth Circuit has  
3 previously held that "suppression rulings under Cal. Penal Code §  
4 1538.5, if not followed by a conviction or an acquittal, are not  
5 final judgments under California law and therefore are without  
6 collateral estoppel effect in a subsequent civil suit."<sup>4</sup> Lombardi,  
7 117 F.3d at 1121 (citing Heath v. Cast, 813 F.2d 254, 258 (9th Cir.  
8 1987)). Here, as in Lombardi, the criminal case against Willie  
9 Millender was dismissed before it was decided on the merits.  
10 Therefore, Willie Millender was not convicted or acquitted, and  
11 there was no final judgment for collateral estoppel purposes.  
12 Because, there was no final judgment, this Court need not address  
13 the other elements of collateral estoppel.

14 Defendants are not precluded from relitigating the sufficiency  
15 of the affidavit in this Court. Accordingly, Plaintiffs' Motion to  
16 this effect is denied.

17 **2. Sufficiency of the Affidavit**

18 Plaintiffs next argue that, if collateral estoppel does not  
19 preclude Defendants from re-litigating the issue, this Court must  
20 find that, as a matter of law, the affidavit did not establish  
21 probable cause. Defendants similarly move for summary adjudication  
22 on the issue of whether the affidavit was sufficient to establish  
23 probable cause.

24 Plaintiffs first contend that, on its face, the affidavit did  
25 not establish probable cause to believe Bowen would be found at the

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26  
27 <sup>4</sup> California Penal Code § 1538.5, which covers motions to  
28 suppress evidence, includes both motions to quash, Cal. Penal Code  
§ 1538.5(a)(1)(B)(I), and motions to traverse, Cal. Penal Code §  
1538.5(a)(1)(B)(iii).

1 Millender Residence. Second, Plaintiffs argue that the affidavit  
2 contained misrepresentations and that Messerschmidt omitted  
3 relevant facts, and that, therefore, Messerschmidt misled the  
4 issuing magistrate.

5 **a. Facial Challenge**

6 It is undisputed that the "statement of probable cause" in the  
7 affidavit prepared and submitted by Detective Messerschmidt  
8 contained the following information relevant to the determination  
9 of Bowen's whereabouts: (1) Kelly, the victim of the physical  
10 assault allegedly perpetrated by Bowen, is Bowen's former  
11 girlfriend and identified him immediately in a "six pack" photo  
12 line up; (2) Kelly provided Messerschmidt with a current address of  
13 the suspect's residence - the 120th Street Address; (3) Kelly  
14 stated that she had been told by her neighbors that the suspect had  
15 been seen coming back to the 1425 W. 97th Street Address, where the  
16 assault occurred; (4) the affiant, Messerschmidt, conducted an  
17 extensive background search on Bowen by utilizing departmental  
18 records, state computer records, and other police agency records;  
19 and (5) based on the extensive search and information provided by  
20 the victim, Messerschmidt determined that Bowen resides at 2234 E.  
21 120th Street in Los Angeles. (Mann Decl. Exh. J). Plaintiffs  
22 contend that, as a matter of law, this information was not enough  
23 to establish probable cause, while Defendants make the opposite  
24 argument.

25 Illinois v. Gates sets forth the appropriate standard for  
26 determining whether an affidavit provides sufficient probable cause  
27 to justify a search warrant. 462 U.S. 213 (1983). In Gates, the  
28

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1 United States Supreme Court applied a "totality-of-the-  
2 circumstances" analysis and held that:

3 [t]he task of the issuing magistrate is simply  
4 to make a practical, common-sense decision  
5 whether, given all the circumstances set forth  
6 in the affidavit before him, including the  
7 'veracity' and 'basis of knowledge' of persons  
8 supplying hearsay information, there is a fair  
9 probability that contraband or evidence of a  
10 crime will be found in a particular place.  
11 And the duty of the reviewing court is simply  
12 to ensure that the magistrate had a 'substantial  
13 basis for conclud[ing]' that probable cause  
14 existed.

15 Id. at 238-39. The Gates Court further stated that "[s]ufficient  
16 information must be presented to the magistrate to allow that  
17 official to determine probable cause" and that "his action cannot  
18 be a mere ratification of the bare conclusions of others." Id. at  
19 239.

20 The Gates Court made clear that the probable cause standard is  
21 a "practical, nontechnical conception" that deals with  
22 probabilities rather than hard certainties. Id. at 231.  
23 "Veracity" or "reliability" and "basis of knowledge" should be  
24 understood as "relevant considerations in the totality-of-the-  
25 circumstances analysis" such that "a deficiency in one may be  
26 compensated for, in determining the overall reliability of a tip,  
27 by a strong showing as to the other, or by some other indicia of  
28 reliability." Id. at 233. In Gates, the Court also "recognized

1 the value of corroboration of details of an informant's tip by  
2 independent police work," noting that "an officer may rely upon  
3 information received through an informant, rather than upon his  
4 direct observations, so long as the informant's statement is  
5 reasonably corroborated by other matters within the officer's  
6 knowledge." Id. at 242 (citations omitted). Finally, the Court  
7 emphasized the importance of deferring to the magistrate's decision  
8 regarding probable cause, stating that "we have repeatedly said  
9 that after-the-fact scrutiny by courts of the sufficiency of an  
10 affidavit should not take the form of *de novo* review," that a  
11 "magistrate's determination of probable cause should be paid great  
12 deference by reviewing courts," and that "courts should not  
13 invalidate warrants by interpreting affidavits in a hypertechnical,  
14 rather than a commonsense, manner." Id. at 236.

15 Plaintiffs argue that the affidavit did not provide probable  
16 cause for a warrant, because (1) Messerschmidt's reference to  
17 unidentified police records was inadequate in that it did not name  
18 the specific records searched and told the magistrate nothing; and  
19 (2) Kelly's claim of residence had virtually no value, since the  
20 affidavit stated nothing about her "basis of knowledge."  
21 Defendants, on the other hand, contend that the same information  
22 did, as required by Gates, support a "fair probability" that Bowen  
23 would be found at the Millender Residence. Additionally,  
24 Defendants state that: (1) the computer records searched included  
25 Department of Motor Vehicles ("DMV") and Cal Gangs records; (2)  
26 Kelly told Messerschmidt that Bowen was not staying with her at the  
27 97th Street Address and was staying with his foster mother at the  
28 120th Street Address, and that she had been to the Millender

1 Residence with Bowen prior to the assault; and (3) Messerschmidt  
2 went to the 97th Street Address a week or two prior to the search  
3 and verified that Bowen was not staying there. While this  
4 information is certainly relevant, Plaintiffs are correct that  
5 "[i]n reviewing the validity of a search warrant, a court is  
6 limited to the information and circumstances contained within the  
7 four corners of the underlying affidavit." United States v.  
8 Stanert, 762 F.2d 775, 778 (9th Cir. 1985).

9       Considering only the information specifically included in the  
10 affidavit, this Court finds that the question of whether such  
11 affidavit supported a finding of probable cause is a very close  
12 one. Plaintiffs are correct that it would not have been difficult  
13 for Messerschmidt to question Kelly as to her exact basis of  
14 knowledge on Bowen's whereabouts and to include that information in  
15 the affidavit. Such information, if reliable, would have bolstered  
16 the affidavit. That being said, this Court also feels that,  
17 considering Kelly's relationship to Bowen, the magistrate could  
18 have reasonably determined that her statement was reliable.  
19 Furthermore, the magistrate could reasonably have determined that  
20 Messerschmidt's statement that he had "conducted an extensive  
21 background search on the suspect by utilizing departmental records,  
22 state computer records, and other police agency records" provided  
23 adequate police corroboration. This Court disagrees with  
24 Plaintiffs that Messerschmidt's failure to specify the exact  
25 records searched renders the affidavit invalid on its face. Had  
26 the magistrate felt it necessary to know this information, he could  
27 simply have said so. Therefore, keeping in mind the statements of  
28 the Gates Court regarding deference to the issuing magistrate, this

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1 Court finds that the warrant was, as a matter of law, facially  
2 valid.

3 **b. Judicial Deception**

4 Plaintiffs next argue that, even if the affidavit was valid on  
5 its face, it is in fact, invalid because it was based on  
6 misrepresentations, in that it includes false statements and/or  
7 fails to include relevant facts. Plaintiffs contend, therefore,  
8 that Messerschmidt misled the magistrate and that, in its corrected  
9 form, the affidavit does not establish probable cause.<sup>5</sup>  
10 Defendants, on the other hand, contend that Messerschmidt did not  
11 mislead the magistrate.

12 In support of their contention that Messerschmidt misled the  
13 issuing magistrate, Plaintiffs argue that "Messerschmidt  
14 misrepresented what Kelly said" and that "Messerschmidt  
15 misrepresented the information in police records." (Plaintiffs'  
16 MSJ at 16:13-17:5). Plaintiffs rely on law addressing both  
17 misrepresentations and omissions.

18 The first misrepresentation of fact to which Plaintiffs point  
19 is Messerschmidt's statement that Kelly provided him with "a  
20 current address of the suspect residence." (Mann Decl. Exh. J)  
21 (emphasis added). Specifically, during her interview with  
22 Messerschmidt, Kelly did not use the word "reside" or "residence."  
23 (Videotape of Messerschmidt's October 22, 2003 Interview with  
24 Shelly Kelly, attached as Exh. C to the Mann Decl.). Rather, she  
25 simply said that Bowen was "staying at" or "hiding out at" the  
26

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27 <sup>5</sup> Plaintiffs also contend that, under California law, the  
28 "corrected form" of the affidavit need not even be considered  
because Messerschmidt made knowing/intentional misrepresentations.

1 120th Street Address. (Id.) Plaintiffs contend that a lay person  
2 cannot reliably opine as to what constitutes a residence, that even  
3 judges sometimes disagree on this question, and that Bowen did not  
4 "reside" with the Millenders. The Parties do not dispute the fact  
5 that, in the videotaped interview, Kelly did not actually use the  
6 word "reside."<sup>6</sup> (Id.) Thus, the question is whether  
7 Messerschmidt's use of the word "reside" was a misrepresentation  
8 that misled the magistrate.

9       Additionally, Plaintiffs argue that Messerschmidt misled the  
10 magistrate because (1) He did not include in the affidavit that,  
11 when asked during the videotaped interview if Bowen was staying at  
12 the 120th Street Address, Kelly responded "I believe so, if I'm not  
13 mistaken. I believe that's where he is hiding out at." (Mann Decl.  
14 Exh. C); and (2) Messerschmidt unequivocally represented that  
15 police records showed that the 120th Street Address was Bowen's  
16 "residence," rather than including that Bowen's most recent address  
17 was the 97th Street Address, that such records last associated  
18 Bowen with the 120th Street Address in May, and that the records  
19 also showed that Bowen was using a Marvin Avenue address in May.

20       It is undisputed that the DMV records Messerschmidt searched  
21 indicated that Bowen's most recent address, as of September 3,  
22 2003, was the 97th Street Address where the assault occurred, and  
23 that his next most recent address was the 120th Street Address  
24 (March 27, 2003). (Mann Decl. Exh. G at 52; Messerschmidt Decl.

25

26       <sup>6</sup> Defendants have objected to Plaintiffs' submission of a  
27 transcript of the videotaped interview, which they created  
28 themselves on the grounds that the videotape itself is the best  
evidence. The Court notes that it does not rely on the transcript  
for any determinations made in this Order. Rather, the Court  
relies on the videotape itself, which both Parties submitted.

1 Exh. F). It is also undisputed that, according to Bowen's "Gang  
2 Member Subject File Report" in the Cal Gangs records, Bowen  
3 verbally told Century deputies on May 17, 2003, that his address  
4 was the 120th Street Address. (Mann Decl. Exh. G at 50;  
5 Messerschmidt Decl. Exh. G at 61). Similarly, Bowen's Consolidated  
6 Criminal History Reporting System ("CCHRS") record indicated that  
7 the Millender Residence was his address as of May 17, 2003. (Mann  
8 Decl. Exh. G at 64). Finally, Messerschmidt also checked the  
9 County Warrant System and found documentation of a restraining  
10 order issued on May 16, 2003. That printout indicated an address  
11 of 2303 South Marvin Avenue. (Mann Decl. Exh. G at 44;  
12 Messerschmidt Depo. at 62:16-63:11). None of this information was  
13 included in the affidavit. Thus, Plaintiffs ask this Court to find  
14 that the affidavit did not establish probable cause that Bowen  
15 could be found at the Millender Residence, and the search was,  
16 therefore, unreasonable in violation of the Fourth Amendment to the  
17 United States Constitution and California Constitution Article I,  
18 section 13.

19 **(1) The Federal Standard**

20 As discussed above, Plaintiffs argue that Messerschmidt  
21 submitted false and misleading information in, and/or omitted  
22 relevant information from, his affidavit to the magistrate, who  
23 then relied upon that information, or lack thereof, in finding  
24 probable cause for the search warrant. To prove such a claim under  
25 federal law, Plaintiffs "must make (1) a substantial showing of  
26 deliberate falsehood or reckless disregard for the truth, and (2)  
27 establish that but for the dishonesty, the challenged action would  
28

1 not have occurred." Butler v. Elle, 281 F.3d 1014, 1024 (9th Cir.  
2 2002).

3 "In this variety of Fourth Amendment case, alleging judicial  
4 deception in the procurement of a search warrant, we confront a  
5 situation where . . . a state-of-mind question is embedded in the  
6 underlying constitutional issue, i.e., whether or not in allegedly  
7 omitting relevant information from his affidavit in support of the  
8 application for a search warrant," Messerschmidt acted "with  
9 deliberate falsehood or reckless disregard for the truth." Id.  
10 The question of "state of mind" is one of fact, while the question  
11 of materiality, whether the warrant would have in fact been issued  
12 in light of these false statements and/or omissions, is one of law  
13 for the court. Id. at 1025-26.

14 False Statements and/or Omissions

15 The first question that this Court must answer is whether  
16 there were, in fact, misrepresentations and/or omissions.  
17 Plaintiffs first argue that Messerschmidt made a misrepresentation  
18 by using the word "reside" or "residence" in the affidavit.  
19 Plaintiffs acknowledge that the legal definition of residency may  
20 be complicated, but argue that the basic concept is not. In  
21 support of their position, Plaintiffs point to the standard  
22 dictionary definitions of "reside" and "resident." Plaintiffs'  
23 focus on the technical definition of these words is a red herring.  
24 While Kelly may not actually have used the word "reside," she  
25 confirmed that Bowen was "staying at" or "at" the 120th Street  
26 Address. At one point in particular during the interview, Kelly  
27 confirmed without hesitation, after explaining that Bowen did not  
28 live at the 97th Street Address, that he was at the 120th Street

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1 Address - his foster mother's house. (Mann Decl. Exh. C).  
2 Considering all of the undisputed evidence in the light most  
3 favorable to Plaintiffs, the Court finds that the terms "reside"  
4 and "residence" are sufficiently ambiguous such that  
5 Messerschmidt's use of them does not, as a matter of law, amount to  
6 a false statement or a misrepresentation.<sup>7</sup>

7 The remainder of the misrepresentations and/or omissions of  
8 which Plaintiffs complain relate to the fact that Messerschmidt  
9 failed to include certain information in the affidavit. For  
10 instance, Plaintiffs point to the undisputed fact that  
11 Messerschmidt did not include the actual words that Kelly used -  
12 "staying at," "if I'm not mistaken," and "hiding out at."  
13 Similarly, Plaintiffs contend that Messerschmidt misled the  
14 magistrate by not including in the affidavit the undisputed fact  
15 that his computer searches revealed, in addition to the 120th  
16 Street Address, more recent and alternative addresses for Bowen.  
17 Plaintiffs' argument is, in essence, that Messerschmidt misled the  
18 magistrate by making unqualified statements without representing  
19 all the facts. Therefore, these "misrepresentations" are more  
20 properly characterized as omissions than false statements. It is  
21 undisputed that Messerschmidt had this information and did not  
22 include it in the affidavit. Therefore, these were omissions as a  
23 matter of law.

24  
25  
26

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27 <sup>7</sup> Even if this did amount to a false statement, the Court  
28 agrees with Defendants that Messerschmidt's use of the word  
"reside" rather than "staying at" was reasonable, because both  
clearly indicate the place where Bowen could be found.

1 State of Mind

2 Next, because the Court has found that there were omissions,  
3 it must address the question of whether Messerschmidt acted with  
4 "deliberate falsehood" or "reckless disregard for the truth." If  
5 he did not act dishonestly or recklessly, then Messerschmidt's  
6 actions were reasonable, and there was no constitutional violation.  
7 See Butler, 281 F.3d at 1024. It appears that Plaintiffs'  
8 arguments regarding Messerschmidt's state of mind are that he had a  
9 duty to investigate further and that he knew, but failed to  
10 include, all of these facts. Thus, Plaintiffs infer that, because  
11 Messerschmidt knew the facts and did not include them and because  
12 he could have easily investigated further, but did not,  
13 Messerschmidt must have acted with "deliberate falsehood or  
14 reckless disregard for the truth." This is not enough to establish  
15 or make a "substantial showing" as to Messerschmidt's state of  
16 mind.

17 In support of their Motion, Defendants submit evidence that  
18 Messerschmidt reasonably excluded the information that his computer  
19 search revealed the 97th Street Address as Bowen's most recent  
20 address, because Kelly had told him, and he had verified, that  
21 Bowen was not living there. (Messerschmidt Decl. ¶¶ 12 & 22).  
22 Defendants further argue, as discussed earlier, that  
23 Messerschmidt's use of the word "reside" rather than "staying at"  
24 or "hiding out at" was reasonable, because both clearly indicate  
25 the place where Bowen could be found.

26 The ultimate issue here is Messerschmidt's failure to qualify  
27 his statements with information that Kelly may have been something  
28 less than 100 percent certain as to Bowen's whereabouts and that

1 his computer searches revealed other addresses in addition to the  
2 120th Street Address. The Court reviewed the videotaped testimony  
3 of Shelly Kelly three times before it heard the words "if I'm not  
4 mistaken." Therefore, it is quite possible that Messerschmidt did  
5 not even hear Kelly say this. Significantly, earlier in the  
6 interview, Kelly had indicated unequivocally and without  
7 hesitation, that Bowen was at the 120th Street Address. (Mann  
8 Decl. Exh. C). Additionally, Kelly had been Bowen's girlfriend for  
9 approximately six months at the time of the interview and, as a  
10 result, was in a position to have this information about him. The  
11 120th Street Address was that of Bowen's foster mother, someone  
12 with whom he presumably had a very close relationship. Therefore,  
13 it was a logical place for Bowen to be staying, and was the most  
14 recent address for Bowen other than the 97th Street Address, where  
15 Messerschmidt knew Bowen was not staying. Finally, at least one of  
16 the computer records searched indicated that, less than six months  
17 earlier, Bowen had, himself, reported the Millender Residence as  
18 his address.

19       Considering all of this undisputed evidence in the light most  
20 favorable to Plaintiffs, this Court finds that Messerschmidt acted  
21 reasonably as a matter of law. Because Messerschmidt's conduct was  
22 reasonable, it did not violate Plaintiffs' constitutional rights as  
23 a matter of law, and it is unnecessary to reach the question of  
24 materiality. Thus, as to Plaintiffs' federal claims for violation  
25 of 42 U.S.C. § 1983, the Court finds that, while there were  
26 omissions, Messerschmidt acted reasonably as a matter of law in  
27 making such omissions, such that there was no constitutional  
28

1 violation. Accordingly, Plaintiffs' Motion as it relates to this  
2 issue is denied and Defendants' is granted.

3 (2) **State Standard**

4 Plaintiffs argue that the same misstatements and/or omissions  
5 discussed above also violate their right to be free from  
6 unreasonable searches and seizures under the California  
7 Constitution.<sup>8</sup> While the facts discussed above apply equally to  
8 this claim, the law under California state law is somewhat  
9 different. Furthermore, as the Parties' point out, the law varies  
10 slightly depending on whether we are discussing misstatements or  
11 omissions. In the case of misstatements, People v. Cook, 22 Cal.  
12 3d 67, 583 P.2d 130 (1978) provides the appropriate standard, while  
13 in the case of omissions, People v. Kurland, 28 Cal. 3d 376, 618  
14 P.2d 213 (1980) governs. The Court has already determined that  
15 there were no false statements in the affidavit. Therefore, the  
16 Court must only apply the law as it applies to omissions.

17 The Kurland court recognized that misstatements and omissions  
18 may not be treated in an identical manner, because "[i]ntentional  
19 omissions, unlike the intentional misstatements considered in Cook,

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20  
21 <sup>8</sup> It should be noted that Plaintiffs do not assert claims  
22 for violation of the California Constitution against any of the  
23 Individual Defendants. Rather, Plaintiffs name only the County of  
24 Los Angeles as a Defendant in the following claims for violation of  
25 state law: (1) Count Four - Violation of California Constitution,  
26 Article I, §§ 1, 7, and 13; (2) Count Five - Violation of Civil Code  
27 Section 52.1(b); (3) Count Six - Violation of Civil Code Section  
28 51.7; and (4) Count Seven - Negligence (Civil Code § 1714).

25 Therefore, this analysis under state law is only relevant to  
26 the extent that the question of whether Individual Defendants'  
27 violated Plaintiffs' constitutional rights ultimately bears on the  
28 question of whether the County is liable under *respondeat superior*.  
Furthermore, to the extent Plaintiffs do attempt to allege state-  
law claims against the Individual Defendants, they are precluded  
from doing so by the allegations of their Complaint.

1 are not necessarily an effort to mislead the magistrate." Id. at  
2 387. Rather, "[t]hey may arise from a correct, or at least  
3 reasonable, conclusion that the omitted facts were immaterial or  
4 privileged." Id. Kurland sets forth a two-step process. First,  
5 the reviewing court must determine whether any omissions asserted  
6 are material, i.e., whether "their omission would make the  
7 affidavit substantially misleading." Id. at 385, 387. Second,  
8 "[i]f an omission is found material, the [fact-finder] must []  
9 determine . . . whether it arose innocently or from culpable  
10 conduct." Id. at 387. Specifically, it must be determined  
11 "whether the material omission was either (1) reasonable, (2)  
12 negligent, or (3) recklessly inaccurate or intentionally  
13 misleading." Id. at 387-88. Furthermore, that "the omission  
14 itself was 'intentional' rather than inadvertent may be relevant to  
15 those issues, but may not alone be dispositive." Id. at 388.

16 Pursuant to Kurland, "[a] material omission is reasonable when  
17 despite the exercise of due care, [the] affiant was ignorant of the  
18 omitted fact or forgot to include it, or his conclusion that it was  
19 privileged or immaterial was reasonable even if incorrect." Id.  
20 Where the material omissions are determined to be reasonable,  
21 regardless of whether they were volitional or inadvertent, there is  
22 no sanction and the warrant should be left in its original form.  
23 Id. "Negligent omissions, on the other hand, occur when the  
24 affiant is unreasonably ignorant of facts, unreasonably forgets to  
25 include them, or makes a good faith but unreasonable decision that  
26 they need not or should not be included." Id. In such a case, the  
27 omissions should be added to the affidavit and it should be  
28 retested for probable cause. Id. Finally, if an "affiant

1 intentionally omits any fact for the purpose of deceiving the  
 2 magistrate or recklessly disregards the accuracy and completeness  
 3 of the affidavit," the warrant should be quashed "regardless of  
 4 whether the omission ultimately is deemed material." Id. at 390.

5 The Court reaches the same determination under California law  
 6 that it reached under federal law. As previously discussed,  
 7 Messerschmidt's decision to omit the facts at issue here was  
 8 reasonable as a matter of law. Because the omissions were  
 9 reasonable, the Court need not reach the issue of materiality.  
 10 Accordingly, Plaintiffs' Motion as it relates to the claims  
 11 pursuant to the California Constitution is denied and Defendants'  
 12 Motion to the same effect is granted.

### 13 3. Qualified Immunity as to Messerschmidt

14 Defendants have also moved for summary adjudication of the  
 15 issue on the grounds that Messerschmidt is entitled to qualified  
 16 immunity on the federal claims.<sup>9</sup> Because the Court has already  
 17 determined that Messerschmidt acted reasonably and that there was  
 18 no constitutional violation, the issue of qualified immunity as it  
 19

---

20  
 21 <sup>9</sup> In their Opposition, Plaintiffs state that "[q]ualified  
 22 immunity is not a defense to the Millenders' state law claims  
 23 (violations of the California Constitution, Article I, §§ 1, 7 &  
 24 13, California Civil Code §§ 52.1(b) and 51.7, negligence and  
 25 conspiracy). (Plaintiffs' Opp. at 14:26-15:1). Specifically, they  
 cite Ogborn v. City of Lancaster for the proposition that "[t]he  
 doctrine of qualified governmental immunity is a federal doctrine  
 that does not extend to state court claims against government  
 employees." 101 Cal. App. 4th 448, 460 (2002).

26 Once again, this Court notes that Plaintiffs bring such state  
 27 claims against the County only under a theory of *respondeat*  
 28 *superior*. (See Complaint ¶¶ 27-31). Thus, the Individual  
 Defendants' arguments that they are entitled to qualified immunity  
 pertain only to the federal claims brought against them.

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1 relates to probable cause to believe that Bowen could be found at  
2 the Millender Residence is moot.

3 **C. Nighttime Service**

4 Plaintiffs move this Court to summarily adjudicate the  
5 question of whether the affidavit was insufficient to support  
6 nighttime service. Defendants also move for summary adjudication  
7 of this issue, arguing that the facts in the affidavit did, as a  
8 matter of law, justify nighttime service.

9 California Penal Code § 1533 provides as follows: "Upon a  
10 showing of good cause, the magistrate may, in his or her  
11 discretion, insert a direction in a search warrant that it may be  
12 served at any time of the day or night. In the absence of such  
13 direction, the warrant shall be served only between the hours of 7  
14 a.m. and 10 p.m." Cal. Penal Code § 1533 (West 2000). Section  
15 1533 further states that "[w]hen establishing 'good cause' under  
16 this section, the magistrate shall consider the safety of the peace  
17 officers serving the warrant and the safety of the public as a  
18 valid basis for nighttime endorsements." Id.

19 "The proper standard for 'good cause' as specified in Penal  
20 Code section 1533 is as follows: the affidavit furnished the  
21 magistrate must set forth specific facts which show a necessity for  
22 service of the warrant at night rather than between the hours of 7  
23 a.m. and 10 p.m." Tuttle v. Superior Court, 120 Cal. App. 3d 320,  
24 327-28 (1981) (citing People v. Watson, 75 Cal. App. 3d 592, 598  
25 (1977)). Furthermore, "[a]llegations in an affidavit with respect  
26 to safety of officers must inform the magistrate of specific facts  
27 showing why nighttime service would lessen a possibility of violent  
28 confrontation, e.g. that the particular defendant is prepared to

1 use deadly force against officers executing the warrant." Id. at  
2 239.

3 It is undisputed that the magistrate endorsed the warrant for  
4 night service (Mann Decl. Exh. J at 88), and that the sworn  
5 affidavit includes the following language in specific support of  
6 Messerschmidt's request for night service:

7 Your Affiant request [sic] that this Search  
8 Warrant be endorsed for night service due to  
9 the fact that the investigation has shown that  
10 the primary suspect in this case has gang ties  
11 to the Mona Park Crip gang based on information  
12 provided by the victim and the cal-gang  
13 database. Also your Affiant believes the  
14 nature of the crime (Assault with a deadly  
15 weapon) goes to show that night service would  
16 provide an added element of safety to the  
17 community as well as for the deputy personnel  
18 serving the warrant, based on the element of  
19 surprise.

20 (Id. at 97). In deciding whether a nighttime search is justified,  
21 a magistrate need not "rely solely upon the facts the affiant  
22 expressly articulates as being those which justify nighttime  
23 service." People v. Lopez, 173 Cal. App. 3d 125, 138 (1985).  
24 "Instead, the magistrate reviews the entire affidavit, as well as  
25 any other evidence properly before him, in determining whether  
26 sufficient specific facts exist which reveal a necessity for  
27 nighttime service." Id. Thus, the following information which is  
28 undisputedly included in the sworn affidavit, should also be

1 considered in determining whether night service was justified: (1)  
2 that the alleged crimes were spousal assault and assault with a  
3 deadly weapon (Mann Decl. Exh. J at 94); (2) that the suspect had a  
4 violent temper and nature (Id.); (3) that the suspect had committed  
5 "some previous physical assaults" on the victim (Id.); and (4) that  
6 the suspect utilized a "black sawed off shotgun with a pistol grip"  
7 in the commission of the crime, which he fired at the victim and/or  
8 her car five times (Id. at 95).

9 Plaintiffs argue that this information was not enough to  
10 justify night service because the allegations regarding officer  
11 safety were not specific enough. In particular, Plaintiffs argue  
12 that the affidavit was insufficient, because it did not include  
13 specific facts that Bowen was likely to use force against officers  
14 as required by Tuttle. In support of this argument, Plaintiffs  
15 cite Messerschmidt's deposition testimony that he had "no specific  
16 information . . . that Bowen would be a threat to the officers."  
17 (Mann Decl., Exh. X at 120:11-121:18). This argument is  
18 unpersuasive.

19 Tuttle did not require that an affiant provide specific facts  
20 or evidence of violence or a tendency of violence against officers.  
21 The facts in the affidavit, that Bowen physically assaulted his  
22 girlfriend, shot at his girlfriend with a black sawed-off shotgun,  
23 had violent tendencies, had assaulted his girlfriend in the past,  
24 and was a member of the Mona Park Crip gang, were sufficient to  
25 show the likelihood that he would also use violence against  
26 officers.

27 Plaintiffs further argue that the fact that deputies later  
28 arrested Bowen at a motel during the day shows that night service

1 was not justified. However, the facts as to how Bowen's arrest was  
2 ultimately achieved do not bear on whether the issuance of a  
3 warrant for night service was justified. Plaintiffs' argument that  
4 deputies went to the Millender Residence in broad daylight and  
5 spoke with Mrs. Millender and Brenda is equally unavailing.

6 Finally, the cases upon which Plaintiffs rely in support of  
7 their argument are not convincing. In Tuttle, unlike this case,  
8 the only facts in the affidavit were the nature of the contraband  
9 (marijuana) and the type of crime (cultivation). The only  
10 reference to firearms was general in nature, that "instances of  
11 escape and carrying of firearms are becoming more common in the  
12 service of search warrants on remote cultivation sites in  
13 California." Tuttle, 120 Cal. App. 3d at 328. None of the facts  
14 included were specific to the suspect at issue. Plaintiffs also  
15 cite United States v. Nielson for the proposition that Bowen's  
16 affiliation with a "gang," and the fact that he was accused of  
17 assaulting his girlfriend with a deadly weapon were insufficient to  
18 justify night service. 415 F.3d 1195 (10th Cir. 2005). Nielson  
19 does not support this proposition. In fact, the issue of night  
20 service is not even mentioned in Nielson, which deals with the  
21 question of whether police were justified in making a "no-knock"  
22 entry to execute a warrant. Id.

23 Based on the foregoing, this Court finds that the facts  
24 specified in the sworn affidavit were sufficient to justify  
25 issuance of a warrant endorsed for night service. Accordingly,  
26 this Court denies Plaintiff's Motion and grants Defendants' Motion  
27 in this regard.

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1           **D. Probable Cause to Search For and Seize the Items**  
2                   **Specified in the Warrant**

3           Plaintiffs and Defendants each move for summary adjudication  
4 on the question of whether the warrant established probable cause  
5 to search for the items specified in the warrant. It is undisputed  
6 that "Attachment 2" to the Search Warrant contained the following  
7 language in regards to the property to be searched for and seized:

8                   All handguns, rifles, or shotguns of any caliber,  
9                   or any firearms capable of firing ammunition,  
10                  or firearms or devices modified or designed to  
11                  allow it to fire ammunition. All caliber of  
12                  ammunition, miscellaneous gun parts, gun cleaning  
13                  kits, holsters which could hold or have held any  
14                  caliber handgun being sought. Any firearm for  
15                  which there is no proof of ownership. Any  
16                  firearm capable of firing or chambered to fire  
17                  any caliber ammunition.

18  
19                  Articles of evidence showing street gang member-  
20                  ship or affiliation with any Street Gang to  
21                  include but not limited to any reference to  
22                  'Mona Park Crips,' including writings or  
23                  graffiti depicting gang membership, activity, or  
24                  identity. Articles of personal property tending  
25                  to establish the identity of persons in control  
26                  of the premises. Any photographs or photograph  
27                  albums depicting persons, vehicles, weapons or  
28                  locations, which may appear relevant to gang

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1 membership, or which may depict the item being  
2 sought and or believed to be evidence in the  
3 case being investigated on this warrant, or  
4 which may depict evidence of criminal activity.  
5 Additionally to include any gang indicia that  
6 would establish the persons being sought in this  
7 warrant, affiliation or membership with the  
8 'Mona Park Crips' street gang.

9 (Mann Decl. Exh. J at 91).

10 "In order for a search to be reasonable, the warrant must be  
11 specific." In re Grand Jury Subpoenas Dated December 10, 1987, 926  
12 F.2d 847, 856 (9th Cir. 1991). "Specificity has two aspects:  
13 particularity and breadth." Id. "Particularity is the requirement  
14 that the warrant must clearly state what is sought." Id. "Breadth  
15 deals with the requirement that the scope of the warrant be limited  
16 by the probable cause on which the warrant is based." Id.

17 Plaintiffs argue that the warrant was overbroad in that it  
18 authorized the seizure of articles without probable cause to  
19 believe such items were likely to be found in the Millender  
20 Residence or were related to the crime at issue. In conjunction  
21 with this argument, they contend that the warrant did not describe  
22 the items to be seized with sufficient particularity. In support  
23 of their argument, Plaintiffs point to the undisputed facts that:  
24 (1) according to the affidavit, Bowen was accused of assaulting  
25 Kelly with a deadly weapon, a specifically-described black, sawed-  
26 off shotgun with a pistol grip (Mann Decl. Exh. J at 94); (2)  
27 Defendants knew exactly what the gun looked like because Kelly gave  
28 them a photograph of Bowen with the gun (Id. at 95); (3) the

1 affidavit did not mention any other weapons or crimes (Id. at 88-  
2 97); and (4) the affidavit did not assert that Bowen's alleged gang  
3 membership had anything to do with the crime, and Messerschmidt  
4 admitted that it did not. (Id.; Mann Decl. Exh. X at 119:9-120:10).  
5 Based on these facts, Plaintiffs argue that the warrant authorizing  
6 the seizure of "everything having to do with any weapon," "evidence  
7 of any crime," and "any evidence of gang paraphernalia" was not  
8 supported by probable cause. (P's MSJ at 19:9-11). Therefore,  
9 Plaintiffs contend that Defendants should not have seized Mrs.  
10 Millender's Mossberg shotgun or the .45 caliber ammunition and  
11 should not have been looking through the Millenders' family  
12 photograph albums. (Id. at 11-13).

13 Plaintiffs further argue that the authorization to search for  
14 "[a]rticles of personal property tending to establish the identity  
15 of the person in control of the premise or premises" was  
16 oppressively overbroad. (Id. at 19:14-15; Mann Decl. Exh. J at  
17 91). First, Plaintiffs argue that evidence of "control of the  
18 premises" was irrelevant, and would only be relevant if "one were  
19 looking for a murder weapon but did not know who had used it" or if  
20 "one were searching a house full of contraband." (P's MSJ at 20:2-  
21 7). Plaintiffs contend that there was no question here of who used  
22 the shotgun and that, even if there were, evidence of control of  
23 the premises would not tie the gun to Bowen, only to Mrs.  
24 Millender. Plaintiffs further argue that it was quite apparent  
25 that Defendants knew that Mrs. Millender was in control of the  
26 home, because they did not take anything tending to show that;  
27 rather, "they just used the warrant as an excuse to turn Mrs.  
28 Millender's home upside down." (Id. at 20:10-14).

1 Second, Plaintiffs argue that "[g]eneric classifications in a  
2 warrant are acceptable only when a more precise description is not  
3 possible." United States v. Hill, 459 F.3d 966, 976 (9th Cir.  
4 2006). Thus, Plaintiffs contend that, at the very least, "the  
5 warrant should have authorized the seizure of evidence tending to  
6 establish control of the black, sawed-off shotgun, if one were  
7 found." (P's MSJ at 20:21-23).

8 As an initial matter, the Court notes that, in making their  
9 argument, Plaintiffs have made several misstatements. First, the  
10 warrant did not authorize the seizure of "everything having to do  
11 with any weapon." Rather, its authorization was limited to  
12 firearms and things related to firearms, presumably on the grounds  
13 that a firearm was used in the commission of the alleged crime.  
14 (Mann Decl. Exh. J at 91). Second, the warrant did not authorize  
15 "evidence of any crime," but instead authorized seizure of "[a]ny  
16 photographs or photograph albums . . . which may depict evidence of  
17 criminal activity." (Id.) Therefore, to summarize, Plaintiffs'  
18 chief complaints are that the warrant was overbroad in its  
19 authorization of: (1) the seizure of all firearms and firearm-  
20 related items; (2) the seizure of articles of evidence showing or  
21 relevant to gang membership; and (3) the seizure of articles of  
22 personal property tending to establish the identity of persons in  
23 control of the premises.

24 The Ninth Circuit has made abundantly clear that "[t]he scope  
25 of the warrant, and the search, is limited by the extent of the  
26 probable cause," and that "probable cause must exist to seize all  
27 the items of a particular type described in the warrant." In re

28

1 Grand Jury Subpoenas, 926 F.2d at 857. Therefore, this Court must  
2 look at each of Plaintiffs' complaints.

3 First, as to Plaintiffs' contentions regrading the search for  
4 firearms, it is undisputed that: (1) Bowen was accused of  
5 assaulting Kelly with a specifically-described sawed-off shotgun;  
6 (2) that Kelly gave Defendants a photograph of Bowen with the  
7 shotgun; and (3) that the affidavit did not mention any other  
8 weapons or crimes. (Mann Decl. Exhs. C & J). Defendants argue  
9 that, even so, the warrant was reasonably specific, because "any  
10 caliber of shotgun or receipts would show possession of and/or  
11 purchase of guns." (Defendants' Opp. at 18:28-19:1). This  
12 argument is nonsensical and unpersuasive. The crime specified here  
13 was a physical assault with a very specific weapon. Therefore,  
14 Defendants were not entitled to search for all firearms and the  
15 warrant was overbroad in this respect.

16 Second, Plaintiffs argue that the authorization to seize gang-  
17 related information was overbroad, because, as Messerschmidt  
18 admitted, there was no evidence that the crime at issue was gang-  
19 related. (See Messerschmidt Depo. at 119:9-120:10). In response,  
20 Defendants make the unsupported statement that "[t]he photos sought  
21 re gang membership could be linked with other gang members,  
22 evidencing criminal activity as gang affiliation is an enhancement  
23 to criminal charges." (Defendants' Opp. at 19:1-3). This argument  
24 is unconvincing. Plaintiffs are correct that California Penal Code  
25 § 186.22(b)(1) limits gang enhancements to cases where the  
26 underlying crime was gang-related. Specifically, it states that  
27 "any person who is convicted of a felony committed for the benefit  
28 of, at the direction of, or in association with any criminal street

1 gang, with the specific intent to promote, further, or assist in  
2 any criminal conduct by gang members," may, at the court's  
3 discretion, be punished with an additional term of two to ten years  
4 depending on the nature of the underlying crime. Cal. Penal Code §  
5 186.22(b)(1) (West Supp. 2007). Defendants do not point to any  
6 other basis for their argument or make any additional arguments.  
7 Therefore, this Court finds that the warrant was overbroad in its  
8 authorization to seize gang-related items.

9 Finally, Plaintiffs argue that the warrant was overbroad in  
10 its authorization to seize evidence of who controlled the premises,  
11 because such evidence was irrelevant in that Defendants already  
12 knew that the shotgun at issue was Bowen's and evidence of who  
13 controlled the premises would only tie the gun to Mrs. Millender  
14 and not to Bowen. The Court is not convinced. Plaintiffs  
15 acknowledge that evidence of who controlled the premises would be  
16 relevant "if incriminating evidence were found and it became  
17 necessary to tie that evidence to a person." (Plaintiffs' MSJ at  
18 20:2-4). The mere fact that Defendants had a picture of Bowen with  
19 the shotgun and testimony of the victim, did not prevent them from,  
20 in an abundance of caution, seeking additional ways of tying Bowen  
21 to the weapon. In fact, failure to seek all potential evidence  
22 tying Bowen to the weapon would likely have subjected them to  
23 criticism as well. Finally, that Defendants may have known that  
24 Mrs. Millender owned the residence is irrelevant. Bowen, too,  
25 could have had control of the premises to some extent, such that he  
26 could have stored a weapon there. In fact, this explains why  
27 Defendants did not seize evidence that Mrs. Millender controlled  
28 the premises and only seized evidence that *tended to establish* that

1 Bowen controlled the premises.<sup>10</sup> Therefore, the Court finds that,  
2 as a matter of law, the warrant was not overbroad in respect to its  
3 authorization to seize evidence tending to establish who controlled  
4 the premises.

5 Defendants contend, though, that even if it was overbroad, the  
6 warrant was valid, because "[a]n affidavit providing more guidance  
7 than an overbroad warrant may cure the warrant's overbreadth" if  
8 "(1) the warrant expressly incorporated the affidavit by reference  
9 and (2) the affidavit either is attached physically to the warrant  
10 or at least accompanies the warrant while agents execute the  
11 search." United States v. Bridges, 344 F.3d 1010, 1018 (9th Cir.  
12 2003). In support of this argument, Defendants point to the  
13 language of Attachment 2, which is set out above. That language is  
14 the very "overbroad" language to which Plaintiffs are referring  
15 and, therefore, does nothing to cure the warrant.

16 The Court notes that the Search Warrant does specifically  
17 incorporate Messerschmidt's "Statement of probable cause" which  
18 includes specific information about the crime at issue, the weapon  
19 used, Bowen's gang membership, etc. (Mann decl. Exh. J at 88, 94-  
20 97). However, Defendants make no effort to explain how such  
21 Statement cures the warrant's overbreadth, and this Court finds  
22 that, as a matter of law, it does not.

23 \_\_\_\_\_  
24 <sup>10</sup> Plaintiffs note that Defendants did seize a letter  
25 addressed to Bowen, which they claim was not authorized, because it  
26 did not tend to establish who was "in control of the premises."  
27 Specifically, they argue that not everyone who receives mail at a  
28 location is in control of that location. While this may be true,  
this Court disagrees with Plaintiffs' assertion. Although  
ultimately it may be determined that a person receiving mail at a  
certain address was not in control of the premises, the receipt of  
mail at a certain location certainly may tend to establish such  
control.

1 Accordingly, this Court grants Plaintiff's Motion for Summary  
2 Adjudication on the issue of the overbreadth of the warrant as it  
3 relates to its authorization to seize all firearms and firearm-  
4 related items and all gang-related evidence. However, the Court  
5 grants Defendants' Motion for Summary Adjudication as it relates to  
6 the authorization to seize evidence tending to establish the  
7 identity of persons in control of the premises.

8 **E. Knock and Announce/Unlawful Entry**

9 Plaintiffs next argue that, as a matter of law, Defendants  
10 violated California Penal Code § 1531, the California Constitution  
11 and the Fourth Amendment to the United States Constitution, because  
12 they broke into the Millender Residence without giving Plaintiffs  
13 an opportunity to open the door. Defendants, on the other hand,  
14 argue that the entry was lawful and that they are entitled to  
15 summary adjudication in that regard.

16 "The Fourth Amendment to the Constitution protects '[t]he  
17 right of the people to be secure in their persons, houses, papers,  
18 and effects, against unreasonable searches and seizures.'" Wilson  
19 v. Arkansas, 514 U.S. 927, 931 (1995). The "common-law 'knock and  
20 announce' principle forms a part of the reasonableness inquiry  
21 under the Fourth Amendment," such that "the reasonableness of a  
22 search of a dwelling may depend in part on whether law enforcement  
23 officers announced their presence and authority prior to entering."  
24 Id. at 929, 931. Nevertheless, not "every entry must be preceded  
25 by an announcement" and "breaking is permissible in executing an  
26 arrest under certain circumstances." Id. at 934 (internal  
27 citations omitted). "An officer's noncompliance with the knock and  
28 announce rule is excused . . . if exigent circumstances exist."

1 United States v. Reilly, 224 F.3d 986, 991 (9th Cir. 2000).  
2 "Exigent circumstances are 'circumstances that would cause a  
3 reasonable person to believe that entry was necessary to prevent  
4 physical harm to the officers or other persons, the destruction of  
5 relevant evidence, the escape of the suspect, or some other  
6 consequence improperly frustrating legitimate law enforcement  
7 efforts.'" Id. (internal citations omitted). "The determination  
8 of exigent circumstances is a mixed question of law and fact." Id.

9 Similarly, under California law, "[t]he officer may break open  
10 any outer or inner door or window of a house, or any part of house,  
11 or anything therein, to execute the warrant, if, after notice of  
12 his authority and purpose, he is refused admittance." Cal. Penal  
13 Code § 1531 (West 2000). "An unreasonable delay in responding to a  
14 knock and announce is tantamount to a refused admittance." People  
15 v. Hoag, 83 Cal. App. 4th 1198, 1207 (2000). Defendants  
16 contend that they were entitled to "break in," because they were  
17 refused admittance. Plaintiffs, however, argue that this Court  
18 should reject such claim, because it is undisputed that Defendants  
19 did not give Plaintiffs sufficient time to open the door. Both  
20 Parties submitted an audio recording of the entry, which they agree  
21 took place at approximately 5:00 in the morning. (Mann Decl. Exh.  
22 L; Declaration of Scott William Walker ("Walker Decl."), ¶¶ 12 and  
23 27 and Exh. AA attached thereto).

24 Based on that audio recording, Plaintiffs argue that  
25 Defendants began breaking in as soon as the pre-recorded  
26 announcement began to play. (Mann Decl. Exh. L). Walker states  
27 that the SWAT team personnel provided knock-notice both verbally  
28 and by way of a public address system, and that, after the

1 occupants failed to comply with notice and waiting a reasonable  
2 amount of time, the team made a forcible entry. (Walker Decl. ¶  
3 13 & 14). Defendants claim that the length of time between the  
4 knock/notice and entry was reasonable, because Walker received  
5 information that there was a light on and movement in the house.  
6 (Id. at ¶ 12). Defendants further claim that approximately 20  
7 seconds elapsed from the time Walker asked for the pre-recorded  
8 announcements to be started to the time when they actually gained  
9 entrance into the residence after porting the window and breaking  
10 the door. (Id. at ¶ 14). In response to Walker's estimate of  
11 time, Plaintiffs correctly argue that Walker's "stop" and "start"  
12 points are wrong. "The proper trigger point . . . is when those  
13 inside should have been alerted that the police wanted entry to  
14 execute a warrant." United States v. Smith, 63 F.3d 956, 962 (10th  
15 Cir. 1994). Furthermore, common sense and the policy behind the  
16 knock and announce requirement of avoiding needless destruction of  
17 private property, dictate that the "ending point" should be the  
18 point at which Defendants began the forcible entry. See Hoag, 83  
19 Cal. App. 4th at 1211; see also United States v. Chavez-Miranda,  
20 306 F.3d 973, 980 (9th Cir. 2002).

21 After listening to the audio tape, this Court finds that the  
22 forcible entry began somewhere between 2 and 9 seconds after the  
23 announcements began playing (and between 5 and 12 seconds after  
24 Walker called for the announcements). (Mann Decl. Exh. L; Walker  
25 Decl. Exh. AA). It is impossible to determine from the audio  
26 recording exactly when the "breaking in" began. However, banging  
27 of some sort can be heard no more than 2 seconds after the  
28 announcements began, deputies were ordered to "break and rake"

1 (meaning break the front window) 5 seconds after the announcements  
2 began, and the window can be heard breaking 9 seconds after  
3 announcements began. (Id.) The first verbal announcements that  
4 can be heard (aside from the pre-recorded announcements from the PA  
5 system) come at approximately the same time as the window can be  
6 heard breaking. (Id.) Walker states, however, that several verbal  
7 announcements were made before he ordered the deputies to "break  
8 and rake." (Walker Decl. ¶ 13). In listening to the audio tape,  
9 background noises including voices can be heard at certain points,  
10 but it is impossible to ascertain what exactly is being said.  
11 Therefore, considering the evidence in the light most favorable to  
12 the non-moving party (in the case of Plaintiffs' Motion), it is  
13 possible that additional announcements were made, which cannot be  
14 heard on tape. Finally, the announcement that the doors were open  
15 came approximately 13 seconds after the pre-recorded announcements  
16 began. (Id.)

17 While it is true that "[t]here is no established time that the  
18 police must wait" in order to constructively infer refused  
19 admittance, "the lapse of time must be reasonable considering the  
20 particular circumstances of the situation." Chavez-Miranda, 306  
21 F.3d at 980. "When evaluating reasonableness, we consider such  
22 circumstances as (1) the size and layout of the residence; (2) the  
23 time of day; (3) the nature of the suspected offense; (4) the  
24 evidence demonstrating guilt; and (5) the officers' other  
25 observations that would support forced entry." Id. While it is  
26 undisputed that members of the entry team drove by the Millender  
27 Residence two days before the execution of the warrant and took  
28 photographs, there is no evidence that they knew anything about the

1 layout of the house. Therefore, this information cannot be applied  
2 in this case in order to determine how long officers should  
3 reasonably have waited before entering forcibly. As for the time  
4 of day, it is reasonable to believe that, at 5:00 a.m. the  
5 occupants would be asleep. On the other hand, it is not unheard of  
6 that people begin to wake up at this time of day in order to get  
7 ready for work. Therefore, this information is likewise not  
8 particularly helpful in this case. Defendants, however, present  
9 evidence of the final three factors in support of their position.

10 As to the "nature of the suspected offense" and the "evidence  
11 demonstrating guilt," it is undisputed that the underlying crime  
12 was assault with a deadly weapon, namely a sawed-off shotgun, and  
13 that the victim of the alleged crime specifically testified to that  
14 fact. (Mann Decl. Exhs. C & J). The victim also testified to the  
15 facts that Bowen had violent tendencies and had assaulted her on  
16 prior occasions. (Mann Decl. Exh. J). Finally, it is undisputed  
17 that Bowen had a violent history including multiple felony and  
18 misdemeanor arrests involving weapons (Messerschmidt Decl. ¶ 11,  
19 Exh. G), was a three-strike candidate (Messerschmidt Decl. ¶ 25),  
20 and was a known member of the Mona Park Crips gang. (Id.; Mann  
21 Decl. Exhs C & J).

22 Additionally, Defendants argue that there was other evidence  
23 to support forced entry in that, as the entry team was approaching  
24 the house, a member of the containment team communicated by radio  
25 that he saw a light on and movement in the back of the house.  
26 (Walker Decl. ¶ 12; Deposition of Rick O'Neill Rector, August 2,  
27 2006 ("Rector Depo."), Exh. U to Declaration of Eugene Ramirez  
28 ("Ramirez Decl."), 62:4-63:5; Deposition of John Stuart Bones,

1 August 1, 2006 ("Bones Depo."), Exh. W to Ramirez Decl. at 38:12-  
 2 39:21, 41:1-23, 43:1-3; Deposition of Brice Alan Stella, August 3,  
 3 2006 ("Stella Depo."), Exh. X to Ramirez Decl., 55:19-23; County of  
 4 Los Angeles Sheriff's Department Supplemental Report, attached as  
 5 Exh. KK to Ramirez Decl.). Officer Bones specifically testified  
 6 that he was the deputy who radioed, indicating that he saw movement  
 7 at the back of the house. (Bones Depo. at 38:12-39:21, 41:1-23).  
 8 He could not remember whether he also reported seeing light. (Id.  
 9 at 43:1-3). At least three other deputies also testified that this  
 10 communication was made. Based on this information, Walker inferred  
 11 that someone was up and moving, potentially Bowen. He considered  
 12 the possibility that the historically violent suspect would have  
 13 the opportunity to arm himself,<sup>11</sup> and the safety of officers and  
 14 other residents. Therefore, in his opinion, the circumstances  
 15 became exigent. (Walker Decl. ¶ 12).

16 The supplemental report regarding the service of the search  
 17 warrant states that "when there was no response from the interior  
 18 of the main house and when containment personnel began to see  
 19 movement in the addition on the east side of the house, Deputies .  
 20 . . began to try to force upon the front security door." (Ramirez  
 21 Decl. Exh. KK). However, Plaintiffs point out that this  
 22 information was not included in the Team Activation Packet, which  
 23 simply states the reason for forcible entry as refused admittance.  
 24 (Mann Decl., Exh. K). Similarly, the communication was not

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26 <sup>11</sup> "[I]f an occupant is predisposed to resist an entry by  
 27 police, a substantial delay between announcement and entry could  
 28 only give him time to prepare." (People v. Trujillo, 217 Cal. 3d  
 1219, 1227 (1990) (citing People v. Tacy, 195 Cal. App. 3d 1402,  
 1420 (1987) (quoting Bustamante-Gamez, 488 F.2d at 11)).

1 recorded or documented by the deputy whose job it was to document  
2 everything on the radio log. (Cook Decl. Exh. GG).

3 While Defendants argue that this justified the forcible entry  
4 as a matter of law, Plaintiffs contend that generic movement,  
5 without more, is not enough. See People v. Trujillo, 217 Cal. App.  
6 3d 1219, 1226-27 (1990). This Court notes, however, that, in  
7 Trujillo, the court specifically mentioned that the movement could  
8 have been a dog whereas here Bones specifically testified that the  
9 movement was "human." Furthermore, the policy behind the knock and  
10 announce rule of preventing injury to the police or citizens who  
11 would react aggressively to a surprise entry is served when the  
12 police actually announce their presence. Id. at 1227. Even so,  
13 this Court finds that it is unable to reach a decision at this time  
14 as to whether or not the forced entry was reasonable as a matter of  
15 law. There are genuine issues of material fact that bear on this  
16 decision including, for instance, whether the "movement" appeared  
17 to be based upon knowledge of the Sheriff's Department's presence,  
18 what exactly the movement was and when exactly it occurred, when  
19 exactly Defendants began breaking in versus simply banging on the  
20 door, why the communication regarding movement at the back of the  
21 house was not documented in all relevant places, and the exact  
22 timing of various actions by deputies. The Court finds that these  
23 facts and others are in dispute and that it is necessary to hear  
24 testimony from the parties and witnesses in order to provide  
25 further information and to assess credibility.<sup>12</sup> Accordingly, this

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26 \_\_\_\_\_  
27 <sup>12</sup> The Court notes that the Parties also submitted an  
28 expert report and deposition testimony indicating that the entry  
team acted reasonably in executing the warrant. The Court's  
(continued...)

1 Court denies both Plaintiffs' and Defendants' Motions regarding the  
2 lawfulness of the entry.

3 **F. Qualified Immunity for Individual Defendants**

4 In a suit against an officer for an alleged violation of a  
5 constitutional right, the court must consider, as a threshold  
6 matter, whether the officer is entitled to qualified immunity. See  
7 Saucier v. Katz, 533 U.S. 194, 200 (2001). Qualified immunity is  
8 "an immunity from suit rather than a mere defense to liability."  
9 Id. (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). The  
10 first inquiry under a qualified immunity defense is whether the  
11 facts alleged, in the light most favorable to plaintiff, show the  
12 officer's conduct violated a constitutional right. See id. at 201.  
13 If no constitutional right would have been violated, then the  
14 inquiry ends, and the defendant is entitled to qualified immunity.  
15 See id. Assuming the plaintiff clears the first hurdle of the  
16 qualified immunity defense, the second inquiry is whether the right  
17 was clearly established. Id. "The contours of the right must be  
18 sufficiently clear that a reasonable official would understand that  
19 what he is doing violated that right." Id. The inquiry is whether  
20 it would be clear to a reasonable officer that his conduct was  
21 unlawful in the situation he confronted. See id. Therefore, "law

22

23 <sup>12</sup> (...continued)  
24 opinion was not influenced in either direction by that evidence.  
25 Nevertheless, this evidence may be relevant in making a final  
26 determination.

27 Similarly, Plaintiffs make the argument that there was  
28 "evidence of improper motivation" on the part of Defendants,  
because when they visited the Millender Residence prior to the  
search, they allegedly "laughed" when Mrs. Millender told the  
deputies that they could come in if they had a warrant. This is  
not undisputed evidence, but could impact the ultimate decision as  
to reasonableness.

1 enforcement officers are entitled to qualified immunity if they act  
2 reasonably under the circumstances, even if the actions result in a  
3 constitutional violation." Wilson v. Layne, 526 U.S. 603, 614  
4 (1999). SCANNED

5 The Individual Defendants move this Court for summary judgment  
6 on the issue of qualified immunity as it relates to each of  
7 Plaintiffs' federal claims against them.

8 **1. Probable Cause to Believe that Bowen Would be Found**  
9 **at the Millender Residence**

10 In addressing the issue of whether the affidavit established  
11 probable cause to believe that Bowen would be found at the  
12 Millender Residence, this Court determined that the affidavit was  
13 valid as a matter of law. Thus, there was no constitutional  
14 violation in this respect. Accordingly, all Individual Defendants  
15 are entitled to qualified immunity as a matter of law, and  
16 Defendants' Motion to such effect is granted.

17 **2. Nighttime Service**

18 In this Order, the Court has already considered the question  
19 of whether the facts specified in the affidavit were sufficient to  
20 justify issuance of a warrant endorsed for night service. In doing  
21 so, the court concluded that, as a matter of law, the affidavit was  
22 sufficient in this respect and that, therefore, there was no  
23 resulting constitutional violation. Accordingly, all Defendants  
24 are entitled to qualified immunity, as a matter of law, and  
25 Defendants' Motion to such effect is granted.

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1                   **3. Probable Cause to Search For and Seize the Items**  
2                   **Specified in the Warrant**

3           Once again, this Court has already considered the question of  
4 whether the warrant established probable cause to search for the  
5 items specified in the warrant. In doing so, this Court determined  
6 that the warrant was overbroad in its authorization to seize all  
7 firearms and firearm-related items and gang-related items.  
8 Defendants made no additional arguments as to why, even if the  
9 warrant was overbroad, the officers acted reasonably, without  
10 knowing that what they were doing was wrong. However, it is  
11 undisputed that the SWAT Defendants did not participate in the  
12 actual search for and seizure of evidence. (Walker Decl. ¶¶ 19-21,  
13 24). Therefore, the SWAT Defendants are entitled to qualified  
14 immunity. Accordingly, Defendants' Motion is granted as it relates  
15 to SWAT Defendants and denied as it relates to the remaining  
16 Individual Defendants.

17                   **4. Unlawful Entry/Knock and Announce**

18           Defendants assert that the SWAT Defendants are entitled to  
19 qualified immunity on Plaintiffs' claims for unlawful entry,  
20 because they did comply with the knock/notice requirements and,  
21 even if there was a constitutional violation, they acted reasonably  
22 under the circumstances. Once again, the Court has discussed the  
23 issue of unlawful entry in detail and determined that questions of  
24 fact remain on a number of issues, including the alleged "movement"  
25 in the back of the house just prior to execution of the warrant.  
26 As previously discussed, these issues also go to the  
27 "reasonableness" of the SWAT Defendants' actions in the case that a  
28 constitutional violation is found. Therefore, facts material to

1 the question of qualified immunity are in dispute. Accordingly,  
2 this Court denies Defendants' Motion as it relates to the SWAT  
3 Defendants.

4 The Court further notes that it is unable to find any specific  
5 allegations in regards to the other Individual Defendants, namely  
6 Messerschmidt and Lawrence, on the unlawful entry claim.

7 Therefore, Defendants Motion on the grounds of qualified immunity  
8 is granted as it relates to Defendants Messerschmidt and Lawrence.

9 **5. Unreasonable Detention/Excessive Force**

10 Plaintiffs assert that, during the search, Defendants  
11 illegally detained them in violation of their constitutional  
12 rights, (Complaint ¶ 18), and that Defendants subjected Plaintiffs  
13 to excessive force including but not limited to pointing firearms  
14 at them. (*Id.* at ¶ 19). Individual Defendants argue that they are  
15 entitled to qualified immunity because their detention of  
16 Plaintiffs was reasonable, and they did not use excessive force.  
17 In support of this contention, Individual Defendants rely on  
18 Muehler v. Mena, 544 U.S. 93 (2005). In Mena, the United States  
19 Supreme Court held that "officers executing a search warrant []  
20 have the authority to detain the occupants of the premises while a  
21 proper search is conducted." *Id.* at 98 (internal citations and  
22 quotations omitted). The Court further explained that "the  
23 detention of an occupant is surely less intrusive than the search  
24 itself, and the presence of a warrant assures that a neutral  
25 magistrate has determined that probable cause exists to search the  
26 home." *Id.* Therefore, such detentions are appropriate "because  
27 the character of the additional intrusion caused by the detention  
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1 is slight and because the justifications for detention are  
2 substantial." Id.

3 Following is Plaintiffs' opposition in its entirety:

4 The Millenders claim their detention was  
5 unreasonable because there was no probable  
6 cause to support the warrant in the first  
7 place, and because defendants failed to  
8 give proper knock-notice before breaking  
9 into the house. *Muehler v. Mena*, 544 U.S.  
10 93 (2005), is distinguishable. Being  
11 required to stay outside for two hours in  
12 the cold without being able to use the  
13 bathroom was unreasonable.

14 (Plaintiffs' Opp. at 13:18-23). Plaintiffs first argument,  
15 therefore, is that Plaintiffs' detention was unreasonable as a  
16 matter of law (and, regardless of the particular facts), because  
17 there was no probable cause to support the warrant in the first  
18 place, and because the Entry Team violated established "knock and  
19 announce" rules. Plaintiffs are correct that Mena presupposes a  
20 valid warrant. Here, though, the Court has already determined that  
21 there was probable cause to believe that Bowen was at the Millender  
22 Residence and that, therefore, the warrant was valid. Furthermore,  
23 that a triable issue of fact remains as to whether the entry was  
24 unlawful does not bear on the reasonableness of the detention.  
25 Plaintiffs, themselves, argue that they were not given sufficient  
26 time to answer the door before Defendants broke in. Thus, it is  
27 clear that Defendants ultimately would have gained entry to the  
28 Millender Residence, and Plaintiffs would have been detained.

1 Plaintiffs' second argument in opposition to Defendants'  
2 Motion is that the detention was unreasonable, because Plaintiffs  
3 were required to stay outside for two hours in the cold without  
4 being able to use the bathroom. RECEIVED

5 In Mena, the court held that officers executing a search  
6 warrant may detain the occupants of the premises while conducting a  
7 proper search. Id. at 98. In reaching this decision, the court  
8 also held that officers may use reasonable force to effectuate the  
9 detention, including the use of handcuffs. Id. Thus, in Mena, a 2  
10 to 3 hour detention in handcuffs was reasonable. This was  
11 particularly true where the "governmental interests in not only  
12 detaining, but using handcuffs, are at their maximum" because "a  
13 warrant authorizes a search for weapons and a wanted gang member  
14 resides on the premises." Id. at 100.

15 It is undisputed that, while they were not allowed to retrieve  
16 shoes or coats, Plaintiffs were allowed to sit in patrol cars for  
17 the majority of this time and were given blankets. One deputy even  
18 turned on the heat for Johnson. Furthermore, in reviewing the  
19 audio tape of the entry, it appears to the Court that the SWAT  
20 Defendants were very courteous to Plaintiffs. Plaintiffs do not  
21 argue otherwise. It is also undisputed that SWAT Defendants only  
22 pointed their weapons at or in the direction of Plaintiffs for a  
23 short period of time, while they were clearing and securing the  
24 premises. While Johnson was handcuffed for at least a portion of  
25 the time, Plaintiffs have not pointed to evidence of injury.  
26 Furthermore, as provided in Mena, Defendants were entitled to  
27 handcuff Plaintiffs during the search. It is also undisputed that  
28 the suspect sought was, in fact, a known gang member.

1 Plaintiffs complain about the amount of time they were  
2 required to stay outside. There is some dispute on this issue  
3 Defendants appear to argue that Plaintiffs were allowed to come  
4 into the living room once the main and back houses were secured,  
5 which was approximately 45 minutes after the initial entry.  
6 However, Plaintiffs argue that they were required to remain outside  
7 for almost two hours. Even if Plaintiffs are correct, this was not  
8 unreasonable considering that Plaintiffs were allowed to sit in  
9 patrol cars and were given blankets. Furthermore, it is undisputed  
10 that Plaintiffs were ultimately brought back into the house while  
11 the search was still being conducted.

12 Additionally, Plaintiffs focus on the fact that Mrs. Millender  
13 was not allowed back into the house to go to the bathroom. Mrs.  
14 Millender simply testifies that she told an officer that she needed  
15 to use the restroom, and he told her that she could not go back  
16 into the house. Therefore, in her words, she "couldn't do anything  
17 but use the restroom in the street." (Augusta Millender  
18 Deposition, April 14, 2006, (A. Millender Depo.), 51:14-21, Exh. U  
19 to Mann Decl.). Defendants present testimony, however, that she  
20 was told she would be able to go into the house and use the  
21 restroom as soon as the house was secured. While neither party  
22 points to evidence of timing, Augusta Millender's deposition  
23 testimony appears to be that she made her request approximately 30  
24 minutes after she was taken outside (approximately 5:30 a.m.). It  
25 is undisputed that the SWAT Defendants did not finish securing the  
26 residence until approximately 5:45 a.m. Therefore, it was not  
27 unreasonable for Defendants to require Mrs. Millender to wait until  
28 the house was secure, before returning to use the restroom. It

1 would have been unsafe to allow Mrs. Millender back into the house,  
2 before it had been secured.

3 Therefore, considering all of the evidence presented in the  
4 light most favorable to Plaintiffs, this Court finds that, as a  
5 matter of law, Defendants' detention of Plaintiffs was not  
6 unreasonable. Accordingly, Individual Defendants are entitled to  
7 qualified immunity in this respect, and Individual Defendants'  
8 Motion on this issue is granted.

9 **6. Unreasonable Destruction of Property**

10 Defendants next argue that they are entitled to qualified  
11 immunity on the issue of wrongful or unreasonable destruction of  
12 property. It is undisputed that, at the very least, the following  
13 property was damaged in the execution of the search warrant: (1)  
14 "Metal security door, bent down the center with two holes, in the  
15 screen, towards the locking mechanism"; (2) "4'-6' plate glass  
16 window, broken"; and (3) "Wooden door jam and locking plate,  
17 splintered and broken." (Ramirez Decl. Exh. KK). In their  
18 Opposition, Plaintiffs contend that Defendants made a mess of the  
19 house, broke down a bedroom door even though the other door to the  
20 same bedroom was open, and broke the front door and the living room  
21 picture window.

22 Nevertheless, Defendants argue that they acted reasonably  
23 because "officers executing a search warrant occasionally must  
24 damage property in order to perform their duty." Dalia v. United  
25 States, 441 U.S. 238, 258 (1979). They contend that "only  
26 unnecessarily destructive behavior, beyond that necessary to  
27 execute a warrant effectively, violates the Fourth Amendment."  
28 Mena v. City of Simi Valley, 226 F.3d 1031, 1041 (9th Cir. 2000).

1 Defendants are correct that not all destruction of property  
2 violates the Fourth Amendment. However, this Court has ruled that  
3 questions of fact exist as to whether the SWAT Defendants violated  
4 knock and announce requirements. Therefore, it logically follows  
5 that, questions of fact exist as to whether SWAT Defendants acted  
6 reasonably in regards to the destruction of property. In other  
7 words, if the SWAT Defendants are not entitled to qualified  
8 immunity on the unlawful entry claim, then they cannot be entitled  
9 to qualified immunity on the destruction of Plaintiffs' plate glass  
10 window. Thus, Defendants Motion in this regard is denied.

11 Plaintiffs, however, have not made any allegations against the  
12 remaining Individual Defendants other than, potentially, that they  
13 "made a mess of the house." Plaintiffs do not provide anything  
14 more concrete. As unfortunate as it is, searches often result in  
15 messes being made, and this alone does not amount to unreasonable  
16 destruction of property. Therefore, this Court finds that the  
17 remaining Individual Defendants, namely Messerschmidt and Lawrence,  
18 are entitled to qualified immunity. Therefore, Individual  
19 Defendants' Motion in this respect is granted as to Messerschmidt  
20 and Lawrence only.

## 21 7. Conspiracy

22 In support of their argument that they are entitled to  
23 qualified immunity on Plaintiffs' conspiracy claim, Individual  
24 Defendants make the bare assertion that:

25 Defendants conspired to deprive them of  
26 their Fourth Amendment rights. (Count 1.)  
27 The conspiracy claim fails as there is no  
28 evidence of an underlying constitutional

1 violation.  
2 (ID's MSJ at 24:18-21). However, this Court has found that  
3 questions of fact exist as to whether there is an underlying  
4 constitutional violation. Because Defendants fail to make any  
5 further arguments regarding the conspiracy claim, summary judgment  
6 is not warranted at this time.

7 **G. Monell Claims**

8 In Count Three of their Complaint, Plaintiffs assert that  
9 "[a]ny governmental entity defendant and any police supervisory  
10 defendant is liable to each plaintiff for all wrongs alleged" in  
11 the Complaint under Monell v. New York Dept. of Social Services,  
12 436 U.S. 658 (1978). More specifically, Plaintiffs allege that:

13 Defendants County of Los Angeles, Los Angeles  
14 County Sheriff's Department, Leroy Baca and Does  
15 are alleged to have maintained or permitted an  
16 official policy or custom or practice causing or  
17 permitting the occurrence of the types of wrongs  
18 set forth herein below knowingly, with gross negligence,  
19 or with deliberate indifference and,  
20 based on the principles set forth in *Monell v.*  
21 *New York City Department of Social Services*, 436  
22 U.S. 658 (1978), and *City of Canton v. Harris*,  
23 489 U.S. 378 (1989), are liable for all injuries  
24 sustained by any plaintiff as set forth herein  
25 below.

26 (Complaint ¶ 10).

27 In order to sustain their Monell claims against the Municipal  
28 Defendants under 42 U.S.C. 1983, Plaintiffs must show that

1 Municipal Defendants had in effect a custom, policy, or practice  
2 that caused a violation of their federal constitutional rights.  
3 Monell, 436 U.S. at 691, 694. Evidence of a single alleged  
4 constitutional violation cannot establish a custom, policy or  
5 practice under Monell. Oklahoma City v. Tuttle, 471 U.S. 808, 823-  
6 24 (1985); Nadell v. Las Vegas Metropolitan Police Dept., 268 F.3d  
7 924, 929-30 (9th Cir. 2001). "Several requirements must be  
8 satisfied for a municipality to incur liability. First, the injury  
9 must amount to a constitutional deprivation." Jackson v. Gates,  
10 975 F.2d 648, 654 (9th Cir. 1992). "Second, the municipality will  
11 be held to have caused an injury only when the acts which produce  
12 it were sanctioned by the municipality." Id. Finally, "[t]he  
13 third requirement specifies that only municipal officials who have  
14 'final policy-making authority' may, by their actions, subject the  
15 municipality to § 1983 liability." Id. (quoting Pembaur v. City  
16 of Cincinnati, 475 U.S. 469, 480 (1986)).

17 Plaintiffs ask this Court to summarily adjudicate the question  
18 of whether Defendants acted pursuant to custom, practice and  
19 policy. Municipal Defendants, on the other hand, move for summary  
20 judgment on the Monell claims on the following grounds: (1)  
21 Plaintiffs cannot establish Monell liability against them because  
22 they have failed to identify or present evidence of a  
23 constitutionally infirm policy; (2) Municipal Defendants cannot be  
24 held liable, because Individual Defendants did not commit any  
25 constitutional violations; (3) Municipal Defendants cannot be held  
26 liable, because Individual Defendants are entitled to qualified  
27 immunity; and (4) Sheriff Baca is not a proper Defendant.

28

1           **1. Whether the Individual Defendants Acted Pursuant to**  
2           **Custom, Practice or Policy**

3           In support of their Motion, Plaintiffs contend that competent  
4 testimony that the conduct in question was in accord with or  
5 pursuant to the entity's customs, practices or policies is direct  
6 evidence of the entity's customs, practices or policies. See  
7 LaLonde v. County of Riverside, 204 F.3d 947, 961-62 (9th Cir.  
8 2000); see also Clipper v. Takoma Park, Maryland, 876 F.2d 17 (4th  
9 Cir. 1989). In both of these cases, the court determined that  
10 evidence that an officer believed his actions were in accordance  
11 with custom, practice, and policy was relevant to the plaintiff's  
12 Monell claims. Furthermore, Plaintiffs argue that "ratification"  
13 is also evidence of custom, practice and policy. See, e.g.,  
14 McRorie v. Shimoda, 795 F.2d 780, 784 (9th Cir. 1986) (stating that  
15 "[p]olicy or custom may be inferred if," after the questioned  
16 action, officials "took no steps to reprimand" or "otherwise failed  
17 to admit . . . conduct was in error.") Therefore, Plaintiffs  
18 submit evidence that the Individual Defendants have acknowledged  
19 that their actions were in accordance with Department policy and  
20 claim they acted properly. Specifically, Plaintiffs point to the  
21 following testimony:

- 22           • Messerschmidt's testimony that as far as he was aware his  
23 investigation was done and his affidavit written in  
24 accordance with the training he received, and that no one  
25 ever told him otherwise. (Messerschmidt Depo. at 140:15-  
26 24);
- 27           • Walker's testimony that the actions he took prior to the  
28 execution of the warrant were in accordance with the

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training he received, that no one ever told him otherwise, and that his training has not changed since then. (Walker Depo. at 137:19-138:22);

- Walker's testimony that the actions he took in "forcing entry" into the Millender Residence (including the amount of time he waited after the announcements, pointing a firearm at Plaintiffs, searching for people, and reporting of the warrant execution) were in accordance with his training and no one ever told him otherwise. (Id. at 138:23-140:25);
- Rector's testimony that his scouting of the Millender Residence, contact with the Millenders on the day before the search, forced entry into the Millender Residence, amount of time waited before breaking in, pointing of firearm in specific manner, and documentation of the execution were in accordance with the training he received and that no one ever told him otherwise. (Rector Depo. at 98:5-99:17);
- Stella's testimony that his scouting, contact with the men shooting dice, forced entry, amount of time waiting before entering, search for people, and reporting were in accordance with the training he received and that no one ever told him otherwise. (Stella Depo. at 94:20-97:2);
- Nichiporuk's testimony that his scouting, forced entry, amount of time waited before forcing entry, manner of pointing firearms, and search were in accordance with the training he received and no one every told him otherwise. (Nichiporuk Depo. at 85:10-87:21).

1 Plaintiffs also submit evidence that Messerschmidt's  
2 superiors, Lawrence, Ornales and Deputy D.A. Wilson reviewed the  
3 warrant affidavit before it was submitted and that Lieutenants  
4 Maxwell and Evans reviewed audiotapes and reports regarding the  
5 entry. (Messerschmidt Depo. at 30:25-32:22; Deposition of Patrick  
6 Edward Maxwell, August 8, 2006 ("Maxwell Depo."), attached as Exh.  
7 CC to the Mann Decl., 36:15-37:5, 51:17-53:11, 55:10-25, 81:13-21,  
8 138:12-129:3, & 37:23-39:13).

9 Plaintiffs are correct that this testimony is relevant to  
10 their Monell claims. However, this Court cannot determine, based  
11 on this evidence alone, that Individual Defendants acted pursuant  
12 to County policy, custom or practice. Rather, the evidence shows  
13 that these particular Individual Defendants believe they acted in  
14 accordance with such policy. Therefore, the Court denies  
15 Plaintiffs' Motion for Summary Adjudication on this issue.

16 **2. Whether Plaintiffs Have Presented Sufficient**  
17 **Evidence of a Constitutionally Infirm Policy to**  
18 **Withstand Summary Judgment on Their Monell Claims**

19 Municipal Defendants contend that they are entitled to summary  
20 judgment on Plaintiffs' Monell claims because Plaintiffs fail to  
21 present any evidence of a custom, policy or practice that caused a  
22 violation of federal constitutional rights. Defendants argue that  
23 Plaintiffs have, likewise, failed to establish that Individual  
24 Defendants committed some wrong, and that the Municipal Defendants'  
25 policy was the "moving force" behind that conduct.

26 A policy is a "deliberate choice to follow a course of action  
27 . . . made from among various alternatives by the official or  
28 officials responsible for establishing final policy with respect to

1 the subject matter in question." Fairley v. Luman, 281 F.3d 913,  
2 918 (9th Cir. 2002) (per curiam) (internal citations omitted).  
3 Therefore, liability may attach when an employee acts pursuant to  
4 an "expressly adopted official policy," Lytle v. Carl, 382 F.3d  
5 978, 982 (9th Cir. 2004), or where an employee committed a  
6 constitutional violation pursuant to a "long standing practice or  
7 custom." Webb v. Sloan, 330 F.3d 1158, 1164 (9th Cir. 2003), cert.  
8 denied, 540 U.S. 1141 (2004). Regardless, the policy or practice  
9 must be so "persistent and widespread" that it constitutes a  
10 "permanent and well settled city policy." Fairley, 281 F.3d at  
11 918. The custom, policy or practice need not, in and of itself, be  
12 unconstitutional in order to permit Monell liability. City of  
13 Canton v. Harris, 489 U.S. 378, 386 (1989). Additionally, such  
14 policy may be one of action or inaction. Long v. County of Los  
15 Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006).

16 Plaintiffs contend that they may establish Municipal liability  
17 by showing any one of the following three things: (1) a custom,  
18 practice or policy, which caused a constitutional violation; (2)  
19 that "the County was deliberately indifferent to a need to properly  
20 train its employees," Canton, 489 U.S. at 387; Fairley, 281 F.3d at  
21 917; or (3) that the County "ratified the unconstitutional  
22 conduct." Larez, 946 F.2d at 630. While this Court agrees with  
23 Plaintiffs' general premise that a municipality may, in certain  
24 circumstances, be liable on Monell claims where it ratified  
25 unconstitutional conduct or failed to act, the requirement of a  
26 "custom, practice or policy" is present under all such theories.

27 For instance, "[t]o impose liability against a county for its  
28 failure to act, a plaintiff must show: (1) that a county employee

1 violated the plaintiff's constitutional rights; (2) that the county  
2 has *customs or policies* that amount to deliberate indifference, and  
3 (3) that these customs or policies were the moving force behind the  
4 employee's violation of constitutional rights." Long, 442 F.3d at  
5 1186 (emphasis added). Likewise, under the "ratification" theory,  
6 municipal liability attaches only where "a deliberate choice is  
7 made from among various alternatives by the official or officials  
8 responsible for establishing final policy with respect to the  
9 subject matter in question." See Gillette v. Delmore, 979 F.2d  
10 1342, 1347 (9th Cir. 1992); see also Larez, 946 F.2d at 645 (in  
11 which the court held that Chief Gates could be officially liable  
12 based on his ratification of a decision that deprived plaintiffs of  
13 their constitutional rights if the ratification was "attributable  
14 to an official policy or custom.")

15 Therefore, that Plaintiffs are proceeding in their Monell  
16 claims under these particular theories does not eliminate the fact  
17 that they must submit evidence of an official policy or custom.  
18 Plaintiffs have not done so here. They have not clearly and  
19 expressly articulated the policy they are challenging. While  
20 Plaintiffs do submit evidence in the form of testimony that tends  
21 to support their arguments of failure to act and that Individual  
22 Defendants acted according to custom and policy in committing the  
23 alleged constitutional violations in this case, evidence of a  
24 single alleged constitutional violation cannot establish a custom,  
25 policy or practice under Monell.

26 In an attempt to demonstrate a custom, practice or policy,  
27 Plaintiffs submit evidence of what they contend are incidents

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1 similar to what occurred at the Millender Residence.<sup>13</sup>  
2 Specifically, Plaintiffs cite four cases in which they claim  
3 announcements were made almost simultaneously with breaking in  
4 "several incidents" where reports indicate that officers waited  
5 approximately 20 or more seconds and then broke in, and other  
6 incidents where the plan was to set a hook on the door before  
7 announcing their presence, resulting in unnecessary property  
8 destruction. (Declaration of Samantha Koerner and Exhibits in  
9 Support of Plaintiffs' Supplemental Brief ("Koerner Decl.") ¶¶ 4-  
10 16).

11 This evidence does not create a genuine issue of fact. The  
12 numbers that Plaintiffs present regarding potentially similar  
13 incidents are entirely without context. For instance, no evidence  
14 is presented regarding the overall number of warrants issued of the  
15 same five-year period at issue. Furthermore, all of the specific  
16 circumstances of each incident have not been verified and  
17 disclosed. Significantly, Plaintiffs have not provided evidence as  
18 to the resolution of these claims. Without such information, mere  
19 evidence that claims were made is meaningless and unpersuasive.  
20 Nevertheless, because there is outstanding discovery, which  
21 Plaintiffs contend will support their Monell claims, this court  
22 defers its ruling on these claims until discovery is complete.

23 \_\_\_\_\_  
24 <sup>13</sup> Because there were outstanding discovery issues at the  
25 time Plaintiffs opposed Defendants' Motion for Summary Judgment,  
26 the Court requested that the Parties submit supplemental briefing  
27 on the status of such issues, and how they impacted the Parties'  
28 ability to move for and oppose summary judgment. In their  
supplemental briefing, Plaintiffs note that, since the time they  
filed their Opposition, they have received additional discovery in  
the form of Search Warrant Service Packages. Thus, in their  
supplemental brief, Plaintiffs submit additional argument based on  
the newly discovered evidence.

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1 Defendants are hereby ordered to provide forthwith whatever  
2 outstanding, responsive evidence they can locate with due  
3 diligence.

4 **3. Whether Sheriff Baca is a Proper Defendant**

5 Defendants argue that Sheriff Baca is not a proper Defendant,  
6 because Plaintiffs' claim against him in his official capacity is  
7 redundant of their claim against the County. In support of their  
8 argument, Municipal Defendants rely on Robinette v. Barnes, in  
9 which the court dismissed an official because there was no  
10 procedural or remedial advantage to the plaintiff. 854 F.2d 909,  
11 911 n.1 (6th Cir. 1988). This Court agrees with Defendants that  
12 Plaintiffs' claims against Sheriff Baca are superfluous.  
13 Therefore, Municipal Defendants' Motion for Summary Judgment on  
14 Plaintiffs' claim against Defendant Baca is granted.

15 **H. Count Three - Violation of the 14th Amendment/42 U.S.C. §**  
16 **1985(3)**

17 Municipal Defendants move for summary judgment on Count Three,  
18 brought against all Defendants. They argue that it creates  
19 confusion, because although they appear to be asserting a  
20 "conspiracy" claim under 42 U.S.C. § 1985(3), Plaintiffs assert in  
21 the body of the count that "each police officer defendant is liable  
22 to Plaintiffs under 42 U.S.C. 1981, 1982, and 1985." (Complaint ¶  
23 26). Still later in the same paragraph, Plaintiffs further allege  
24 that all Defendants are liable "pursuant to 42 U.S.C. 1986." (Id.)  
25 Defendants contend that, regardless of what Plaintiffs are actually  
26 attempting to allege, they cannot maintain their claims under any  
27 of the cited code sections.

28

1           **1. Plaintiffs' Claim for Conspiracy Under 42 U.S.C.**  
2           **§ 1985(3)**

3           To state a claim for violation of 42 U.S.C. § 1985(3), a  
4 plaintiff must allege and prove the following four elements:

- 5           (1) a conspiracy; (2) for the purpose of  
6           depriving, either directly or indirectly  
7           any person or class of persons of the equal  
8           protection of the laws, or of the equal  
9           privileges and immunities under the laws;  
10          and (3) act in furtherance of the conspiracy;  
11          (4) whereby a person is either injured in  
12          his person or property or deprived of any  
13          right or privilege of a citizen of the  
14          United States.

15 United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S.  
16 825, 828-29 (1983). Furthermore, a claim under § 1985(3) can only  
17 be maintained if there is "some racial, or perhaps otherwise class-  
18 based, invidiously discriminatory animus behind the conspirators'  
19 action." Id. at 834 (quoting Griffin v. Breckenridge, 403 U.S. 88,  
20 102-103 (1971)).

21          To prove a "conspiracy" under § 1985, "the plaintiff must show  
22 an agreement or meeting of the minds by the defendants to violate  
23 his constitutional rights." Caldeira v. County of Kauai, 866 F.2d  
24 1175, 1181 (9th Cir. 1989), cert. denied, 493 U.S. 817 (1989).  
25 "[E]ach participant must at least share the common objective of the  
26 conspiracy." United Steel Workers of Am. V. Phelps Dodge, 865 F.2d  
27 1539, 1541 (9th Cir. 1989). "A mere allegation of conspiracy

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1 without factual specificity is insufficient." Karim-Panahi v. Los  
2 Angeles Police Dept., 839 F.2d 621, 625 (9th Cir. 1988).

3 Defendants argue that Plaintiffs set forth no specific facts  
4 or evidence that Defendants' alleged actions were racially  
5 motivated or class-based. Defendants, on the other hand, point to  
6 the testimony of Walker and Messerschmidt that the preparation and  
7 execution of the search warrant had nothing to do with the  
8 Millenders' race. (Messerschmidt Decl. ¶ 39; Walker Decl. ¶ 22).  
9 Similarly, Plaintiffs have provided no evidence of a "conspiracy,"  
10 a "meeting of the minds," or any act "in furtherance of the  
11 conspiracy."

12 In Opposition to Defendants' Motion, Plaintiffs contend that:  
13 (1) Defendants' failure to provide timely discovery responses has  
14 impacted Plaintiffs' ability to oppose the Motion; (2) Regardless  
15 of discovery issues, Plaintiffs have a list of personnel complaints  
16 provided by Defendants, which includes 15 complaints, many of which  
17 directly mention racial discrimination; and (3) this was not your  
18 typical police misconduct case in which police come upon a suspect  
19 without any previous contact. (Plaintiff's Opp. to MD's MSJ at  
20 6:19-8:4).

21 Because of the discovery issues complained of, Plaintiffs have  
22 submitted supplemental briefing since the filing of their  
23 Opposition. In that Supplemental Briefing, Plaintiffs acknowledge  
24 that Defendants have provided 73, out of a supposed 90, claims  
25 dating between 11/16/98 and 10/9/03 and alleging wrongful search  
26 and/or entry . (Plaintiffs' Supp. Brief at 10:4-16). Plaintiffs  
27 note that, among these, "2 specifically allege race discrimination;  
28 2 allege retaliation for not allowing sheriffs into the house

1 because they don't have a warrant; and 1 alleges retaliation for  
2 having previously filed a lawsuit against the Sheriff's  
3 Department." (Koerner Decl. ¶ 19). As to the 15 personnel  
4 complaints Plaintiff already had, claims include "traffic  
5 citation," "traffic citation/discrimination," "traffic stop,"  
6 improper search," "racial profiling," "improper detention," "use of  
7 force," etc. Plaintiffs contend that there are "clearly"  
8 complaints of overt racial discrimination and that others, if  
9 probed further, would most likely include racial discrimination a  
10 well. By the Court's count, one of the claims includes a specific  
11 reference to race in the actual "title" of the Complaint (racial  
12 profiling), and one more specifically mentions discrimination  
13 (traffic citation/discrimination). This list appears to include  
14 complaints against the 27 originally named Individual Defendants  
15 for a period of at least 1999 through November 2003. (Cook Decl.  
16 Exh. LL).

17 Plaintiffs appear to be arguing that they are part of a  
18 protected class in that they are African-American. (Complaint ¶  
19 26). They may even be arguing that they are protected in the sense  
20 that they are being retaliated against because a family member  
21 filed and won a lawsuit against the LASD and/or they would not let  
22 the officers search their home without a warrant. This is unclear,  
23 because Plaintiffs do not specifically state any information about  
24 the "protected class" in their Opposition. Rather, the Court has  
25 made these assumption based on Plaintiffs' discussion of the claims  
26 and lawsuits against Defendants. Plaintiffs make no link, however,  
27 between these claims and any actions taken against Plaintiffs.  
28 This Court agrees with Defendants that Plaintiffs have made no

1 specific allegations as to how Defendants conspired together, and  
2 have submitted no evidence that any actions they took were based on  
3 race or other "membership" in a protected class. SCAMPEL

4 In their Opposition, Plaintiffs' appear to be arguing that the  
5 "conspiracy" is based on the following facts: (1) Messerschmidt  
6 worked up his case for a couple of weeks; (2) several people looked  
7 at his affidavit; (3) Messerschmidt asked around and was informed  
8 that the Millender Residence was a "problem" house; (4) the entry  
9 team met at the Millender residence the day before the search and  
10 spoke with Mrs. Millender and Brenda; (5) according to Mrs.  
11 Millender (but disputed by Defendants), deputies asked if they  
12 could come in to her house, she said only with a warrant, and they  
13 laughed; and (6) after meeting with the Millenders, Defendants  
14 spent the day planning how they would serve the warrant knowing  
15 they would have the opportunity to teach Mrs. Millender a lesson  
16 for her failure to cooperate. Plaintiffs do not cite evidence in  
17 support of any of these statements.

18 Plaintiffs cannot rely merely on the fact that they are  
19 African American and that Defendants planned for and executed a  
20 search of their residence. Thus, Plaintiffs have provided no  
21 evidence whatsoever of any racial or other class-based motivations,  
22 a conspiracy, or any acts in furtherance of a conspiracy.  
23 Considering the evidence presented in the light most favorable to  
24 Plaintiffs, this Court finds that Plaintiffs have not presented  
25 evidence sufficient to create a genuine issue of material fact and  
26 grants Defendants' Motion for Summary Judgment on Plaintiffs claim  
27 under 42 U.S.C. § 1985(3).

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1                   **2. Plaintiffs' Claim Under 42 U.S.C. § 1981**

2           Count Three also states that "each police officer defendant is  
3 liable to Plaintiffs under 42 U.S.C. 1981 . . . ." (Complaint ¶  
4 26). Section 1981 provides in relevant part:

5           All persons within the jurisdiction of the  
6 United States shall have the same right in  
7 every State and territory to make and enforce  
8 contracts, to sue, be parties, give evidence,  
9 and to the full and equal benefit of all laws  
10 and proceedings for the security of persons  
11 and property as is enjoyed by white citizens,  
12 and shall be subject to like punishment,  
13 pains, penalties, taxes, licenses, and  
14 exactions of every kind, and to no other.

15 42 U.S.C. § 1981 (West 2003). "An important purpose of section  
16 1981 is to eliminate race based interference with the right of each  
17 citizen to contract." Imagineering, Inc. v. Kiewit Pacific Co.,  
18 976 F.2d 1303, 1318 (9th Cir. 1992). Plaintiffs make no  
19 allegations in this regard. Furthermore, Plaintiffs do not  
20 specifically oppose Defendants Motion in this regard. Accordingly,  
21 this Court grants Defendants' Motion for Summary Judgment on  
22 Plaintiffs' claim under 42 U.S.C. § 1981.

23                   **3. Plaintiffs' Claim Under 42 U.S.C. § 1982**

24           Count Three also states that "each police officer defendants  
25 is liable to Plaintiffs under 42 U.S.C. . . . 1982 . . . ." (Complaint ¶  
26 26). Section 1982 provides that: "All citizens of the  
27 united States shall have the same right, in every State and  
28 Territory, as is enjoyed by white citizens thereof to inherit,

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1 purchase, lease, sell, hold, and convey real and personal  
2 property." 42 U.S.C. § 1982 (West 2003).

3 "Racial discrimination must be shown to state a colorable  
4 Section 1982 claim." W. Coast Theater Corp. v. City of Portland,  
5 897 F.2d 1519, 1527 (9th Cir. 1990). Conclusory allegations and/or  
6 unwarranted inferences are insufficient. Sprewell v. Golden State  
7 Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Defendants move this  
8 Court for Summary Judgment on this claim, because Plaintiffs make  
9 no allegations whatsoever regarding their right to "inherit,  
10 purchase, lease, sell, hold, and convey real and personal  
11 property." Furthermore, Plaintiffs do not specifically oppose  
12 Defendants Motion in this regard. Accordingly, this Court grants  
13 Defendants' Motion for Summary Judgment on Plaintiffs' claim under  
14 42 U.S.C. § 1982.

15 **4. Plaintiffs' Claim Under 42 U.S.C. § 1986**

16 Finally, Plaintiffs' Count Three states that "any governmental  
17 any [sic] supervisorial police defendant who had the power to but  
18 who did not prevent the violations of § 1985 are liable to each  
19 plaintiff pursuant to 42 U.S.C. 1986." (Complaint ¶ 26). Section  
20 1986 provides that:

21 Every person who, having knowledge that any  
22 of the wrongs conspired to be done are about  
23 to be committed, and having power to prevent  
24 or aid in preventing the commission of the  
25 same, neglects or refuses so to do, if such  
26 wrongful act be committed, shall be liable to  
27 the party injured . . . .

28



1 Angeles only. Municipal Defendants move for summary judgment, on  
2 this claim on two grounds.

3 First, Municipal Defendants argue that, to the extent  
4 Plaintiffs seek to maintain their claims for damages directly under  
5 the California Constitution rather than an enabling statute, such  
6 as Civil Code section 52.1, such claims must fail, because an  
7 action for monetary damages is not available. Plaintiffs respond  
8 that all provisions of the California Constitution are self-  
9 executing and, therefore, support claims for declaratory relief or  
10 injunction. Katzberg v. Regents of the University of California,  
11 29 Cal. 4th 300, 306 (2002). Thus, Katzberg establishes a  
12 framework for determining the relevant question - whether money  
13 damages are available under the specific constitutional provision  
14 at issue for the specific wrong alleged. Under such framework, a  
15 court considering this question must first "look at the language  
16 and history of the provision for an affirmative intent to authorize  
17 a claim for damages." Reinhardt v. Santa Clara County, 2006 WL  
18 662741, \*8 (N.D. Cal.) (applying Katzberg, 29 cal. 4th at 317).  
19 Where there is no such affirmative intent, the court must consider  
20 whether an adequate remedy exists, the extent to which a  
21 constitutional tort action would change established tort law, and  
22 the nature and significance of the constitutional provision." Id.  
23 Finally, "if these factors weigh against the recognition of a right  
24 to damages, the inquiry ends. If, however, the factors weigh in  
25 favor of recognizing such a right, the court should also consider  
26 any special factors counseling hesitation in recognizing a damages  
27 action." Id.

28

1 As to Article I, § 7, the Katzberg court found that this  
2 section did not manifest an intent to create an independent damages  
3 remedy, and that alternative remedies were available under Cal.  
4 Civ. Code § 52.1 and 42 U.S.C. § 1983. 29 Cal. 4th at 318-24.  
5 Likewise, this Court finds that such alternative remedies are  
6 available and that Plaintiffs have, in fact, brought claims under §  
7 1983 and California Civil Code § 52.1. Therefore, Municipal  
8 Defendants are entitled to summary judgment on Plaintiffs' claim  
9 under California Constitution Article I, § 7.

10 Plaintiffs' Count Four, however, also alleges violations of  
11 California Constitution Article I, §§ 1 & 13. The California  
12 Supreme Court has held that a plaintiff can bring a private action  
13 for injunctions under Article I, Section 1 for alleged violations  
14 of privacy. Hill v. Nat'l Collegiate Athletic Assoc., 7 Cal. 4th  
15 1, 8, 20 (1994). However, no California state court has ruled on  
16 this issue and neither has the Ninth Circuit. This Court notes,  
17 however, that Judge Phillips of the Central District of California  
18 has addressed this question, and the question as it relates to  
19 Article I, § 13. Smith v. County of Riverside, No. EDCV 05-00512  
20 VAP, at \*16-18 (C.D. Cal. May 16 2006). While the Smith opinion is  
21 not binding on this Court, Judge Phillips reasoning is persuasive  
22 and applies to the facts of this case.

23 As to Article I, § 1, Plaintiffs have provided no reason as to  
24 why this Court should allow an action for monetary damages.<sup>15</sup>  
25 Furthermore, as with Plaintiffs Article I, § 7 claim, alternative  
26

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27 <sup>15</sup> Plaintiffs contend that, in Porten v. Univ. of San  
28 Francisco, the court held that Article I, Section 1, supported an  
action for money damages. However, this Court does not agree.

1 remedies are available to Plaintiffs under Cal. Civil Code § 52.1  
2 and 42 U.S.C. § 1983. Allowing Plaintiffs to sue for money damages  
3 for an alleged state constitutional privacy violation would create  
4 a new cause of action, altering established tort law in California.  
5 Therefore, the Court grants Defendants' Motion for Summary Judgment  
6 in regard to Plaintiffs' claims for violation of the California  
7 Constitution, Article I, § 1.

8 Finally, the Court must consider Plaintiffs' claims under  
9 Article I, § 13. As Plaintiffs point out, the Katzberg court  
10 specifically differentiated the rights flowing to a victim of an  
11 illegal search and seizure from the remedies available under a due  
12 process liberty rights violation. 29 Cal. 4th at 321-24. Relying  
13 on an opinion from the New York Court of Appeals, the California  
14 Supreme Court in Katzberg stated that there was "historical support  
15 for an implied remedy in damages" in the English common law. Id.  
16 at 322 (quoting Brown v. New York, 674 N.E. 2d 1129, 1139 (1996)).  
17 Thus, the Katzberg court noted that its holding that no damages  
18 remedy was available under Article I, § 7 was based in part on the  
19 lack of evidence as to any "similar history with respect to the  
20 liberty interest," indicating that he would have found a damages  
21 remedy under Article I, § 13. 29 Cal. 4th at 323. In the absence  
22 of an actual California Supreme Court decision, this Court Must  
23 apply the law as we believe the California Supreme Court would  
24 apply it." Astaire v. Best Film & Video Corp., 116 F.3d 1297, 1300  
25 (9th Cir. 1997).

26 Therefore, this Court finds that Plaintiffs are entitled to  
27 assert a claim for monetary damages under Article I, § 13 of the  
28 California Constitution. Accordingly, Defendants' Motion for

1 Summary Judgment on Plaintiffs' Count Four is denied as it relates  
2 to Article I, § 13.

3 Because Plaintiffs' claim for violation of California  
4 Constitution, Article I, § 13, remains, this Court must address  
5 Defendants' second argument. Municipal Defendants argue that  
6 Plaintiffs' claim under the California Constitution is based on the  
7 very same allegations as are Counts One and Two under the Federal  
8 Constitution and Section 1983. Specifically, the common  
9 allegations are that Defendants allegedly "interfere[d] with  
10 Plaintiffs' rights to be free from unreasonable invasions of their  
11 privacy and unreasonable search and seizure and to be accorded due  
12 process." (Complaint ¶¶ 24, 25 & 27). Thus, Municipal Defendants  
13 argue that, because the claims are the same, the analysis is the  
14 same and "[j]ust as defendants did not violate plaintiffs' federal  
15 constitutional rights, so too was there no violation of state  
16 constitutional rights."

17 Plaintiffs generally agree with Defendants, but make the  
18 opposite argument - that because Plaintiffs have stated  
19 constitutional violations under the Fourth and Fourteenth  
20 Amendments, so to have they stated claims under the California  
21 Constitution. Additionally, Plaintiffs assert that the protections  
22 of the California Constitution are broader than the United States  
23 Constitution. People v. Brisendine, 13 Cal. 3d 528 (1975).  
24 However, they make no argument as to how, if true, this should  
25 impact the Court's analysis. Therefore, this Court interprets this  
26 as an agreement by the Parties' that the Court's findings on the  
27 probable cause and unreasonable search and seizure claims in regard

28

1 to the federal constitutional claims should apply equally to the  
2 state claims.

3 **J. Count Five - Violation of Civil Code Section 52.1(b)**

4 In Count Five of their Complaint, Plaintiffs assert a claim  
5 for violation of Civil Code Section 52.1(b) against the County of  
6 Los Angeles only. Section 52.1(b) provides in pertinent part:

7 Any individual whose exercise or enjoyment of  
8 rights secured by the Constitution or laws of  
9 the United states, or of rights secured by the  
10 Constitution or laws of this state, has been  
11 interfered with, as described in subdivision(a),  
12 may institute and prosecute in his or her own  
13 name and on his or her own behalf a civil  
14 action for damages . . . .

15 Cal. Civil Code § 52.1(b) (West Supp. 2007). Thus, when read in  
16 conjunction with Section 52.1(a), Plaintiffs constitutional rights  
17 must have been interfered with "by threats, intimidation, or  
18 coercion." See Cal. Civil Code § 52.1(a). (West Supp. 2007).

19 Defendants move for summary judgment on this claim. In  
20 support of their Motion, Defendants argue that none of Plaintiffs'  
21 constitutional rights were interfered with by the County of Los  
22 Angeles. Similarly, Plaintiffs move for summary adjudication on  
23 the issue of whether Defendants are liable under *respondeat*  
24 *superior*.

25 Plaintiffs argue that Individual Defendants violated their  
26 constitutional rights. Thus, Plaintiffs claim that the County is  
27 liable for such violations under the doctrine of *respondeat*  
28 *superior*. Plaintiffs are correct that, under California law, the

1 county may be liable for the Individual Defendants' interference  
2 with Plaintiffs' constitutional rights by threats, intimidation, or  
3 coercion under the doctrine of *respondeat superior*. See Venegas v.  
4 County of Los Angeles, 32 Cal. 4th 820, 843 (2004). Furthermore,  
5 this Court has found that genuine issues of material fact exist as  
6 to whether various Individual Defendants committed certain  
7 constitutional violations. Accordingly, Municipal Defendants'  
8 Motion for Summary Judgment on Plaintiffs' claim for violation of  
9 Section 52.1(b) is denied. However, while this Court concludes  
10 that the doctrine of *respondeat superior* is applicable if  
11 constitutional violations are proven, this Court cannot at this  
12 time determine that, as a matter of law, Defendants are liable  
13 under the doctrine and entitled to relief under California Civil  
14 Code § 52.1. Therefore, Plaintiffs' Motion for Summary  
15 Adjudication is also denied.

16 **K. Count Six - Violation of Civil Code Section 51.7**

17 In Count Six of their Complaint, Plaintiffs assert a claim for  
18 violation of California Civil Code Section 51.7 against the County  
19 of Los Angeles only. Section 51.7 provides in relevant part:

20 (a) All persons within the jurisdiction of  
21 this state have the right to be free from  
22 any violence, or intimidation by threat of  
23 violence, committed against their persons or  
24 property because of political affiliation,  
25 or on account of any characteristic listed  
26 or defined in subdivision (b) or (e) of  
27 Section 51, or position in a labor dispute,  
28 or because another person perceives them to

1 have one or more of those characteristics.

2 The identification in this subdivision of

3 particular bases of discrimination is

4 illustrative rather than restrictive.

5 Cal. Civil Code § 51.7 (West Supp. 2007). Subdivisions (b) and (e)

6 of Section 51 list the characteristics as "sex, race, color,

7 religion, ancestry, national origin, disability, medical condition,

8 marital status, or sexual orientation. Cal. Civil Code §§ 51(b) &

9 (e) (West Supp. 2007).

10 Municipal Defendants move for summary judgment on this claim  
11 on the grounds that Plaintiffs' allegation of "invidious racial  
12 animus," (Complaint ¶ 29), are entirely unsupported. Specifically,  
13 Defendants claim that Plaintiffs present no evidence that they were  
14 subject to any violence, or threat of violence, because of their  
15 race. Plaintiffs respond with the argument that they were unable  
16 to prepare adequately enough to oppose a motion on this issue due  
17 to Defendants' failure to provide discovery.

18 As this Court previously discussed in regards to Plaintiffs'  
19 claim for conspiracy under 42 U.S.C. § 1985(3), Plaintiffs'  
20 argument must fail. At the Court's request, Plaintiffs submitted  
21 supplemental briefing on the status of outstanding discovery and  
22 its impact on their ability to move for or oppose summary judgment.

23 In such briefing, Plaintiffs set forth further evidence that  
24 Defendants had provided through discovery. That evidence and its  
25 application to Plaintiff's "racial animus" claims is discussed in  
26 greater detail in regard to Plaintiffs' 42 U.S.C. § 1985(3) claim.  
27 Such evidence, however, does not create a triable issue of fact on  
28 this issue. Furthermore, Plaintiffs only remaining issue with

1 discovery is that Defendants have not provided all of the  
2 responsive documents, claims, etc. Thus, if and when Defendants  
3 further comply, Plaintiffs will simply receive more personnel  
4 complaints, claims, etc. in regard to the department as a whole.  
5 Such claims are not final judgments and can not establish that  
6 Individual Defendants acted in a racially discriminatory manner.  
7 Plaintiffs do not argue that they are awaiting discovery on  
8 anything else, which would bear on these claims. Furthermore, as  
9 the Court discussed earlier, Plaintiffs have provided no specific  
10 allegations or evidence regarding racial animus on the part of  
11 these particular Individual Defendants. Accordingly, Defendants'  
12 Motion for Summary Judgment on Plaintiff's claim for violation of  
13 California Civil Code § 51.7 is granted.

14 **L. Count Seven - Negligence (Civil Code § 1714)**

15 In Count Seven of their Complaint, Plaintiffs assert a claim  
16 for negligence against the County of Los Angeles only. (Complaint  
17 ¶¶ 30 & 31). Defendants move for summary judgment on the  
18 negligence claim on the grounds that the County is immune pursuant  
19 to California Government Code § 815. Section 815 provides that  
20 "[e]xcept as otherwise provided by statute, a public entity is not  
21 liable for an injury, whether such injury arises out of an act or  
22 omission of the public entity or a public employee or any other  
23 person." California Government Code § 815 (West 1995). In  
24 response, Plaintiffs argue that the County is, in fact, liable  
25 under the doctrine of *respondeat superior*.

26 At the outset, the Court notes the confusion among the Parties  
27 as to what is actually alleged. Defendants correctly argue that  
28 the County cannot be held directly liable for its own acts or

1 omissions, because it is immune under Section 815. However, in  
2 their Opposition, Plaintiffs concede that they are not claiming  
3 that the County is directly liable for negligence. Rather, STAMPED  
4 Plaintiffs contend, pursuant to California Government Code § 815.2,  
5 that the County is liable for the negligence of its employees based  
6 on the theory of *respondeat superior*. Section 815.2 provides that:

7           a public entity is liable for injury proximately  
8           caused by an act or omission of an employee of  
9           the public entity within the scope of his  
10          employment if the act or omission would, apart  
11          from this section, have given rise to a cause of  
12          action against that employee or his personal  
13          representative."

14 California Government Code § 815.2 (West 1995). Thus, Plaintiffs  
15 claim that the County is liable for the negligent acts or omissions  
16 of its employees, such as detaining and threatening to use force  
17 against Plaintiffs and for their negligent hiring, training,  
18 supervision and discipline of other employees of the County.

19           Accordingly, Municipal Defendants' Motion for Summary Judgment  
20 as to Count Seven is denied, on the grounds that they have not  
21 properly challenged Plaintiffs' claims under Government Code §  
22 815.2. However, this Court notes that, should Plaintiffs have any  
23 intention of asserting a claim of direct negligence against the  
24 County, they are precluded from doing so as a matter of law  
25 pursuant to Government Code § 815.

26           **M. Eleventh Amendment Immunity**

27           The Municipal Defendants' final argument is that they are  
28 absolutely immune from tort liability under the Federal Civil

1 Rights Act. Specifically, Municipal Defendants argue that, based  
2 on the California Supreme Court's holding in Venegas v. County of  
3 Los Angeles, the Sheriff's Department and Sheriff Baca were acting  
4 on behalf of the State of California while conducting criminal  
5 investigations and performing law enforcement activities. 32 Cal.  
6 4th 820 (2004). The Venegas court held that "sheriffs act on  
7 behalf of the state when performing law enforcement activities,"  
8 such that, "when acting in their law enforcement roles, California  
9 sheriffs are . . . absolutely immune from prosecution for asserted  
10 violations of [42 U.S.C. § 1983]." Id. at 826.

11 This Court agrees with Plaintiffs, however, that "[q]uestions  
12 regarding section 1983 liability implicate federal, not state law."  
13 Brewster v. Shasta County, 275 F.3d 803, 811 (9th Cir. 2001). The  
14 Ninth Circuit has specifically held that, "[a]lthough we must  
15 consider the state's legal characterization of the government  
16 entities which are parties to these actions, federal law provides  
17 the rule of decision in section 1983 actions." Streit v. County of  
18 Los Angeles, 236 F.3d 552, 560 (9th Cir. 2001). Based on Streit,  
19 LASD and Sheriff Baca are not arms of the state and are not  
20 entitled to Eleventh Amendment immunity. Accordingly, Municipal  
21 Defendants' Motion for Summary Judgment in this regard is denied.  
22 However, to the extent that this Court has already granted  
23 Municipal Defendants' Summary Judgment on Plaintiffs Monell claims,  
24 this issue is moot.

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1 **V. Conclusion**

2 For all the foregoing reasons, this Court (1) Grants in part  
3 and denies in part Plaintiffs' Notice of Motion and Motion for  
4 Summary Adjudication; (2) Grants in part and denies in part  
5 Individual Defendants' Notice of Motion and Motion for Summary  
6 Judgment and/or Summary Adjudication of Issues; and (3) Grants in  
7 part and denies in part Municipal Defendants' Notice of Motion and  
8 Motion for Summary Judgment or, in the Alternative, for Summary  
9 Adjudication. The Court defers its ruling on Municipal Defendants'  
10 Motion as it relates to Plaintiffs' Monell claims until discovery  
11 is complete. Defendants are hereby ordered to provide forthwith  
12 all outstanding, responsive discovery they can locate with due  
13 diligence.

14 The Court sets a status conference for 11:00 a.m. on Monday,  
15 March 26, 2007 to discuss the status of discovery and possible  
16 bifurcation of Plaintiffs' Monell claims.

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18 IT IS SO ORDERED.

19 Dated: \_\_\_\_\_

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DEAN D. PREGERSON  
United States District Judge

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