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10 (also erroneously sued herein as Sacramento
11 County Sheriff's Department); Lou Blanas,
12 John McGinness, Timothy Sheehan, and
13 Fred Mason

14 **UNITED STATES DISTRICT COURT EASTERN DISTRICT**
15 **OF CALIFORNIA SACRAMENTO DIVISION**

16 JAMES ROTHERY, Esq.; ANDREA)
17 HOFFMAN,)
18 Plaintiffs,)
19 v.)
20 Former Sheriff LOU BLANAS; SHERIFF)
21 JOHN MCGINNESS; Detective TIM)
22 SHEEHAN; Detective FRED MASON;)
23 SACRAMENTO COUNTY SHERIFF'S)
24 DEPARTMENT, an independent branch of)
25 government of the COUNTY OF)
26 SACRAMENTO; COUNTY OF)
27 SACRAMENTO; STATE OF CALIFORNIA)
28 ATTORNEY GENERAL JERRY BROWN;)
DOES 1 through 25, unknown co-conspirators;)
ATTORNEY GENERAL MICHAEL B.)
MUKASEY,)
Defendants.)

CASE NO. 2:08-CV-02064-JAM-KJM

Date: May 6, 2009

Time: 9:00 a.m.

Ctrl: 6

Judge: Honorable John A. Mendez

COUNTY DEFENDANTS'
MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF:
MOTION FOR MORE DEFINITE
STATEMENT [FRCP 12(e)]; MOTION
TO STRIKE [FRCP 12(f)]; AND
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
[FRCP 12(b)(6)]

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TABLE OF AUTHORITIES

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2 **United States Supreme Court Cases**

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10 Mathews v. Eldridge, 424 U.S. 319, 332 (1976) 5

11 Meyer v. Nebraska, 262 U.S. 390, 399 (1923) 7

12 Monell v. Department of Social Services, 436 U.S. 658 (1978) 16, 17

13 Nixon vs. Shrink Missouri Government Pac. et al., 528 U.S. 377 (2000) 13

14 Owens v. Okure, 488 U.S. 235, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989) 19

15 Perry v. Sindermann, 408 U.S. 593, 597 (1972) 5

16 Saenez v. Roe, 526 U.S. 489 (1999) 15

17 Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed.
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24 Anderson v. District Bd. of Trustees of Central Florida Comm. College, 77 F.3d 364,
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2 Bowen v. Oistead, 125 F.3d 800, 806 (9th Cir. 1997) 11

3 Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York, 278 F.
4 Supp. 2d 313, 325 (N.D. N.Y. 2003) 2

5 Conway v. King, 718 F.Supp. 1059, 1061 (D.N.H. 1989) 6, 9

6 Del Percio v. Thornsley, 877 F.2d 785 (1989) 19

7 Diaz v. Gates, 380 F.3d 480, 485 (9th Cir. 2004) 9

8 Erdelyi v. O'Brien, 680 F.2d 61, 63-64 (9th Cir. 1982) 6, 7, 8, 15, 17, 18

9 Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993) 2

10 Fullman v. Graddick, 739 F.2d 553, 561 (11th Cir. 1984) 9

11 Guerrero v. Gates, 357 F.3d 911, 920 (9th Cir. 2004) 8, 9

12 Guillory v. County of Orange, 731 F.2d 1379, 1382-83 (9th Cir. 1984) 9

13 Hart v. Baca, 204 F.R.D. 456, 457 (C.D. Cal. 2001) 2

14 Hoffman v. Sumner, 478 F. Supp. 2d 1024, 1028 (N.D. Ill. 2007) 2

15 Lancaster Cmty. Hosp. V. Antelope Valley Hosp., 940 F.2d 397, 404 (9th Cir. 1991) 10

16 Madsen v. Boise State Univ., 976 F.2d 1219 (9th Cir. 1992) 19

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18 Marina Point Dev. Assocs. v. United States, 364 F.Supp. 2d 1144 (C.D.Ca. 2005) 10

19 McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996) 1

20 Nordyke vs. Kane, 319 F.3d 1185 (9th Cir. 2003) 14

21 Oscar v. University Students Co-Operative Ass'n, 965 F.2d 783, 788 (9th Cir. 1992) 9

22 Ove v. Gwinn, 264 F.3d 817, 825 (9th Cir.2001) 8, 10

23 Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) 10, 16

24 Reed v. Village of Shorewood, 704 F.2d 943, 948 (7th Cir. 1983) 7

25 San Diego Gun Rights Committee vs. Reno, 98 F.3d 1121 (9th Cir. 1996) 16

26 Silveira v. Lockyer, 312 F.3d 1062 (9th Cir. 2002) 328 F.3d 567,
27 cert. denied, 124 S.Ct. 803 (2003) 11, 12, 15, 17

28 Soderback v. Siler, 610 F.2d 643, 646 (9th Cir. 1979) 8

United States ex rel Garst v. Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003) 1

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1 United States v Floyd, 228 F2d 913 (1956, CA7 Ill), *cert den* (1956) 351 US 938,
reh den (1956) 351 US 990 10

2 United States v Mattson, 671 F2d 1020 (1982, CA7 Ill) 10

3 United States v Mills, 204 F3d 669, (2000, CA6 Tenn) 2000 FED App 72P 11

4 Warns v. Vermazen, 2003 U.S. Dist. LEXIS 23107 (N.D. Ca. 2003) 16

5 **California State Cases**

6 CBS v. Block, 42 Cal. 3d 646, 654 (Cal. 1986) 5, 6, 18

7 Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1244-1245
(Cal. App. 2d Dist. 1990) 6, 7, 8, 9, 18

8 Stewart v. County of San Mateo, 246 Cal.App.2d 273, 283 (1966) 6

9 Yeoman v. Department of Motor Vehicles, 273 Cal.App.2d 71, 77 (1969) 7

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28

1 DEFENDANTS former SHERIFF LOU BLANAS, SHERIFF JOHN MCGINNESS, TIM
2 SHEEHAN, FRED MASON and COUNTY OF SACRAMENTO (also erroneously sued herein
3 as Sacramento County Sheriff's Department), collectively, "COUNTY DEFENDANTS", bring
4 the above-enumerated motions in response to Plaintiffs' Complaint herein.

5 **I. 12(e) MOTION FOR A MORE DEFINITE STATEMENT**

6 Defendants County of Sacramento, former Sheriff Lou Blanas, Sheriff John McGinness,
7 Tim Sheehan, and Fred Mason ("County Defendants") in response to Plaintiffs' complaint,
8 hereby move pursuant to Federal Rule of Civil Procedure 12(e) for a more definite statement.
9 Rule 12(e) provides, "A party may move for a more definite statement of a pleading to which a
10 responsive pleading is allowed but which is so vague or ambiguous that the party cannot
11 reasonably prepare a response."

12 Rule 8 of the Federal Rules of Civil Procedure sets for the basic standard for pleading in
13 Federal Courts, that all claims or defenses alleged in a pleading shall be set forth in short and
14 plain terms and shall be simple, concise and direct. Plaintiffs' complaint herein, is composed of
15 74 pages and 758 paragraphs of purported allegations dating back as far as 1979. This is an
16 egregious violation of Rule 8's "short and plain" requirements. See McHenry v. Renne, 84 F.3d
17 1172, 1179 (9th Cir. 1996); United States ex rel Garst v. Lockheed-Martin Corp., 328 F.3d 374,
18 378 (7th Cir. 2003). In fact at least one court has stated that a defendant is expected to move for
19 a more definite statement when faced with a lengthy, "shotgun" complaint. Anderson v. District
20 Bd. of Trustees of Central Florida Comm. College, 77 F.3d 364, 366 (11th Cir. 1996).

21 Based upon the massiveness and unwieldy nature of this complaint, County Defendants
22 hereby request the Court order Plaintiffs to plead succinctly and with more specificity in
23 accordance with Rule 8, so that Defendants can reasonably prepare an answer.

24 **II. 12(f) MOTION TO STRIKE**

25 Plaintiffs' complaint herein is based upon the denial of their applications for Carry
26 Concealed Weapons permits. Plaintiffs allege that a reason they were not granted CCW permits
27 is because they did not contribute to the election campaigns of either Sheriff Blanas or Sheriff
28 McGinness, and that if they had done so, they would have been granted a permit. Plaintiffs

1 allege that Sheriff Blanas and/or Sheriff McGinness were “selling” CCW permits in exchange for
2 campaign contributions. These allegations are made in Plaintiffs’ First Cause of Action, under
3 their purported RICO claim.

4 Rule 12(f) of the Federal Rules of Civil Procedure provides that a party may move the
5 court for an order striking portions of a pleading which are immaterial or impertinent to the
6 matters at issue in the case. FRCP 12. The purpose of the motion is to avoid the time, effort,
7 and expense necessary to litigate matters not properly included in the pleading. See Fantasy, Inc.
8 v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), cert. granted, 509 U.S. 903, 113 S.Ct. 2992, 125
9 L.Ed. 2d 687 (1993) and judgment rev’d on other grounds, 510 U.S. 517, 114 S.Ct. 1023, 127
10 L.Ed. 2d 455 (1994). Prejudice to County Defendants will result if the excessive irrelevant and
11 inappropriate allegations are not stricken, and prejudice will likewise result due to the confusion
12 of facts Plaintiffs allege, dating back as far as 1979, the confusion of issues which would result
13 from claims for which these Plaintiffs have no standing to assert, and the probable unnecessary
14 and extensive and burdensome discovery which would result from the inclusion of the
15 inappropriate allegations, all of which would unduly and unjustifiably increase the time and
16 expense to County Defendants. See Hoffman v. Sumner, 478 F. Supp. 2d 1024, 1028 (N.D. Ill.
17 2007); Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York, 278 F. Supp.
18 2d 313, 325 (N.D. N.Y. 2003); Hart v. Baca, 204 F.R.D. 456, 457 (C.D. Cal. 2001).

19 Plaintiffs’ First cause of action, under RICO statutes, has a four-year statute of
20 limitations. Agency Holding Corp. v Malley-Duff & Associates, Inc., 483 U.S. 143 (1987).
21 Therefore, any allegations pertaining to RICO claims are limited to, and cannot extend farther
22 back than the 4-years prior to the filing of this complaint. As a result, all allegations which relate
23 to events prior to September 3, 2004, the reach of the 4-year statute of limitations, must be
24 stricken.

25 Based upon the forgoing, Defendants request that the following paragraphs be stricken
26 from Plaintiffs’ Complaint as they refer to events prior to September 3, 2004, the extent of the 4-
27 year statute of limitations:

28 Paragraphs 56 through 71;

1 Paragraphs 78 through 83;
 2 Paragraphs 90 through 105;
 3 Paragraphs 117 through 562;
 4 Paragraphs 566 through 572;
 5 Paragraph 573 at line 21/22, from "By majority vote," . . . through 581; and
 6 Paragraphs 586 through 596.

7 Next in their RICO claim, Plaintiffs allege concerted actions between Defendants
 8 Sheehan and Mason as co-conspirators. Because Mason retired from the Sheriff's Department in
 9 2003 (beyond the reach of the statute of limitations), and the actions alleged are collaboratively
 10 alleged against Mason and Sheehan, any alleged acts must have necessarily occurred prior to
 11 Mason's retirement in July of 2003. Therefore, all allegations relating to both of these
 12 defendants should be stricken¹. (See Request for Judicial Notice, Exhibit A.)

13 Finally, many of the allegations in the RICO cause of action have been "cut and pasted"
 14 from a prior RICO complaint filed by Plaintiffs' counsel, Gary Gorski, in the case of Barnsdale,
 15 et al. v. Polete, et al, United States District Court for the Eastern District of California, Case No.
 16 07-CV-01636-LKK-KJM. (See Request for Judicial Notice, Exhibit B.) Judgment in favor of
 17 Defendants in the Barnsdale case was entered on February 12, 2008. (See Request for Judicial
 18 Notice, Exhibit C.)

19 Beginning at page 51, line 21 of Plaintiffs' complaint herein, "By majority vote, ...", that
 20 sentence and the following paragraphs, through paragraph 647 on page 61, are cut and pasted
 21 directly from the Barnsdale complaint as follows:

<u>Rothery Complaint Paragraphs</u>	<u>are the same as</u>	<u>Barnsdale Complaint Paragraphs</u>
573, last sentence and 576 through 590		75 through 90
591		96
592		99

27 _____
 28 ¹ These two defendants should also be dismissed from Plaintiffs' RICO claim based upon the statute of limitations.

1	593 through 596	100 through 103
2	597 through 601	188 through 192
3	602 through 606	240 through 244
4	608 through 610	245 through 247
5	613 through 628	249 through 264
6	629 through 643	266 through 280
7	644 through 647	282 through 285

8 These Plaintiffs have no standing to assert the claims that were made in the Barnsdale
9 case which related to the Sacramento County Deputy Sheriff's Association, and which claims
10 have already been adjudicated. Therefore, County Defendants request that from the sentence
11 beginning, "By majority vote, ..." at page 51, line 21 through line 25, and paragraphs 576 through
12 647 be stricken from Plaintiffs' complaint.

13 **III. 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON**
14 **WHICH RELIEF CAN BE GRANTED**

15 Plaintiffs Rothery and Hoffman bring this suit pursuant to 42 USC § 1983, alleging that
16 Defendants violated their constitutional rights under the First, Second, Ninth, and Fourteenth
17 Amendments to the United States Constitution by denying their applications for a Carry
18 Concealed Weapon ("CCW") permit, and by way of actions allegedly subject to Racketeer
19 Influenced and Corrupt Organizations (RICO) under Title 18 United States Code §§ 1961
20 through 1968.

21 Federal Rule of Civil Procedure 12(b)(6) provides for motion to be brought for dismissal
22 of claim(s) based upon failure to state a claim upon which relief can be granted. FRCP 12(b)(6).
23 Sacramento County Defendants bring this motion for dismissal of Plaintiffs' action as discussed
24 below for failure to bring a viable claim against these moving Defendants.

25 Plaintiffs' allege that they were denied CCW permits by the Sacramento County Sheriff's
26 Department because they did not contribute to the campaign for either Sheriff Blanas or Sheriff
27 McGinness, while those who did contribute were "summarily" granted permits. Just because
28 some individuals who did contribute to a campaign were issued permits does not implicate the

1 violation of Plaintiffs' rights by virtue of the denial of their applications, and is not necessarily
2 indicative of a situation that the issuance of CCW permits was done in exchange for campaign
3 contributions. See Buckley vs. Valeo, 424 U.S. 1 (1976).

4 **A. The Injury of Which Plaintiffs Complain Is the Denial of Their Applications**
5 **for a Carry Concealed Weapon Permit, Which Is a Privilege and Not a**
6 **Constitutional Right.**

7 Under 42 U.S.C. § 1983, Plaintiffs allege violations of their constitutional rights with
8 respect to the issuance of CCW permits under the First, Second, Ninth, and Fourteenth
9 Amendments. These claims are based on allegations that preference for CCW permits is given to
10 applicants who made campaign contributions to the Sheriff's election campaigns and those
11 applicants who were presented Honorary Deputy Sheriff Badges. (First Amendment and
12 Fourteenth Amendment). Plaintiffs also allege a generalized claim that they have a right to carry
13 a concealed weapon, (Second Amendment), and that the rights secured by the Ninth Amendment
14 entitle them to a CCW permit. It is a privilege to receive a permit to carry a concealed weapon,
15 not a constitutional right, and reasonable regulations regarding that privilege are permissible and
16 not in violation of the Second Amendment of the United States Constitution. District of
17 Columbia v. Heller, 128 S.Ct. 2783, 2816 (2008); CBS v. Block, 42 Cal. 3d 646, 654 (Cal.
18 1986).

19 **1. A Carry Concealed Weapon Permit or License is Not a Property**
20 **Interest**

21 The privilege to carry a concealed weapon on the person is certainly not property in the
22 ordinary sense. It is not monetary, such as welfare or Social Security benefits (e.g., Goldberg v.
23 Kelly, 397 U.S. 254, 261-262 (1970); Mathews v. Eldridge, 424 U.S. 319, 332 (1976)); it is not a
24 government job (e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972)); and it is not a required
25 license to practice a profession, occupation or business (e.g., Willner v. Committee on Character,
26 373 U.S. 96, 103 (1963)). Plaintiffs do not allege that they cannot practice their business without
27 a license of this type. (See Pen. Code, §§ 12027 (b) [exemption for possession or transportation
28 by merchants of unloaded firearms as merchandise], 12026, 12026.2 (a)(4), 12031 (h)
[exemptions for firearms at place of business].)

1 In the case of Erdelyi v. O'Brien, 680 F.2d 61, 63-64 (9th Cir. 1982), the court rejected the
2 contention that the privilege to carry a concealed weapon was essential to the occupation of
3 private investigator. The court stated, "[I]t is undisputed that many people engage in the
4 occupations of private investigator and criminal defense investigator without a concealed
5 weapons license. Although Erdelyi might not be able to pursue her profession in precisely the
6 way she would like, she has not been entirely, or even substantially, excluded." Id.

7 Licenses to carry a concealed firearm are rarities. The California State statute regulating
8 their issuance (Cal. Penal Code § 12050) leaves their issuance to the unfettered discretion of the
9 sheriff, in the interest of controlling dangerous weapons. CBS, Inc. v. Block, supra, 42 Cal.3d at
10 p. 655. The short duration of a license to carry a concealed firearm further indicates its limited
11 nature. The sheriff is authorized to issue the license for no more than two years. Calif. Pen.
12 Code, § 12050(a)(2)(A)(i). The holder has no legitimate claim under the statute of an entitlement
13 to have the license renewed. Conway v. King, 718 F.Supp. 1059, 1061 (D.N.H. 1989); see Board
14 of Regents v. Roth, 408 U.S. 564, 578 (1972). The holder therefore cannot develop a reasonable
15 expectation that the privilege to carry a concealed firearm will continue.

16 Next, even when issued, the license may be extremely restricted. Subdivision (b) of
17 California Penal Code section 12050 authorizes the inclusion of "any reasonable restrictions or
18 conditions which the issuing authority deems warranted." The sheriff's discretion to confine the
19 license to extremely narrow conditions weighs against characterization of the license as a
20 valuable property right. Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1244-1245
21 (Cal. App. 2d Dist. 1990).

22 Another factor to consider in determining whether a statutory right creates a property
23 interest is the extent to which the statute restricts the discretion of the issuing authority to deny or
24 revoke the right. Just as Penal Code section 12050 contains no meaningful restrictions on the
25 sheriff's discretion to deny a license, Erdelyi v. O'Brien, supra, 680 F.2d at p. 63, it contains no
26 express restrictions on the sheriff's discretion to revoke a license. The statutory scheme does not
27 even mention revocation. Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1244-1245
28 (1990). The power to license, however, implies the power to revoke. Stewart v. County of San

1 Mateo, 246 Cal.App.2d 273, 283 (1966); Yeoman v. Department of Motor Vehicles, 273
2 Cal.App.2d 71, 77 (1969). The fact the Legislature has not restricted the conditions under which
3 a granted license may be revoked shows the Legislature intended the sheriff to have discretion.
4 Under this construction of the statute, state law does not accord a license to carry a concealed
5 firearm the level of security or durability which creates a property interest. Nichols, supra at
6 1244-45. See Beitzell v. Jeffrey, 643 F.2d 870, 874 (1st Cir. 1981); Baer v. City of Wauwatosa,
7 716 F.2d 1117, 1122 (7th Cir. 1983); Reed v. Village of Shorewood, 704 F.2d 943, 948 (7th Cir.
8 1983).

9 The limited nature of a license to carry a concealed firearm which has been issued under
10 Penal Code section 12050 prevents characterizing it as a property right for purposes of
11 constitutional due process. Nichols, supra. See also Erdelyi v. O'Brien, 680 F.2d 61 (9th Cir.
12 1982) (Plaintiff did not have a property or liberty interest in obtaining a license to carry a
13 concealed weapon. . .)

14 **2. A Carry Concealed Weapon Permit or License is Not a Liberty**
15 **Interest**

16 "Liberty" as well as "property" is protected by the due process clause of the United States
17 Constitution. Although liberty is a "broad and majestic term," Roth, supra at 571, it is not all-
18 inclusive. Erdelyi, supra at 63. "While [the U.S. Supreme] Court has not attempted to define
19 with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received
20 much consideration and some of the included things have been definitely stated. Without doubt,
21 it denotes not merely freedom from bodily restraint but also the right of the individual to
22 contract, to engage in any of the common occupations of life, to acquire useful knowledge, to
23 marry, establish a home and bring up children, to worship God according to the dictates of his
24 own conscience, and generally to enjoy those privileges long recognized . . . as essential to the
25 orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). In a
26 Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad
27 indeed. See, e. g., Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Stanley v. Illinois, 405 U.S.
28 645 (1972)." Board of Regents v. Roth, 408 U.S. 564, 572 (1972)

1 A liberty interest does include the right to be free from actions which "impose() 'a stigma
2 or other disability that foreclose(s) (one's) freedom to take advantage of other employment
3 opportunities.'" Id., citing Soderback v. Siler, 610 F.2d 643, 646 (9th Cir. 1979)(quoting Roth,
4 supra, at 573.). Plaintiffs have not alleged that they have absolute liberty interest in a CCW
5 permit, nor that any stigma attached to the denial of their applications, nor that they have been
6 deprived of the rights to engage in "any of the common occupations of life" by virtue of the
7 denial of their CCW applications. Erdelyi, supra. See also Nichols, supra, at 1244-45. As
8 stated in Erdelyi, no liberty interest exists in the issuance of a CCW permit. Plaintiffs applied for
9 and were denied CCW permits and they allege their denials were due to their not having
10 contributed to a sheriff's election campaign. These allegations do not create a liberty interest
11 under the United States Constitution, and therefore form no basis for a cause of action under the
12 due process clause of the Fourteenth Amendment of the United States Constitution.

13 **B. Plaintiffs' First Cause of Action Pursuant to RICO Claims Fails as a Matter**
14 **of Law.**

15 "To state a civil RICO claim, plaintiffs must allege (1) conduct (2) of an enterprise (3)
16 through a pattern (4) of racketeering activity (5) causing injury to plaintiffs' 'business or
17 property.'" Ove v. Gwinn, 264 F.3d 817, 825 (9th Cir.2001); Sedima, S.P.R.L. v. Imrex Co., Inc.,
18 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Additionally, in order to seek a
19 civil remedy for a RICO violation, a "person [must be] injured in his business or property by
20 reason of a violation of section 1962" of the RICO statute. 18 U.S.C. § 1964(c); Sedima, S.P.R.L.
21 v. Imrex Co., 473 U.S. 479, 495, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1984).

22 **1. Plaintiffs do not have standing to maintain a RICO claim.**

23 A private party may bring a civil RICO claim only if it has been "injured in his business
24 or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). The Ninth Circuit has
25 defined "business or property" injury to include only tangible and concrete financial loss.
26 Guerrero v. Gates, 357 F.3d 911, 920 (9th Cir. 2004). One who has not suffered this requisite
27 tangible injury does not have standing to bring a civil RICO claim. Id. Additionally, financial
28 loss that merely flows from and is dependent on an intangible injury is not a cognizable claim of

1 injury to "business or property" under section 1964(c). Guerrero, 357 F.3d at 920-21 (holding
2 that economic injuries flowing from plaintiff's core intangible injury did not confer statutory
3 standing); Diaz v. Gates, 380 F.3d 480, 485 (9th Cir. 2004) ("[The] complaint speaks only of
4 personal harm and pecuniary losses stemming therefrom. This type of injury is not the sort
5 Congress sought to redress in enacting RICO."); Oscar v. University Students Co-Operative
6 Ass'n, 965 F.2d 783, 788 (9th Cir. 1992) (citing with approval a Seventh Circuit case that
7 "reject[ed] a RICO claim for economic losses which derived from a fundamentally personal
8 injury").

9 Plaintiffs' RICO action is based on alleged extortion of funds from private individuals in
10 the form of campaign contributions, by defendants using their authority as public officials. 18
11 U.S.C. § 1951. In exchange for these campaign contributions, plaintiffs allege that defendants
12 issued the contributors concealed weapons permits and Honorary Deputy Sheriff Commissions.
13 Plaintiffs have neither been the subject of, nor participated in, any alleged extortion or bribery on
14 the part of defendants, and therefore have not suffered a direct financial loss due to racketeering
15 activity. Further, there has been no indirect financial loss. Plaintiffs have not established any
16 financial injury to a specific business or property interest, and therefor there is no injury within
17 the meaning of RICO. Diaz, 420 F.3d at 900.

18 The only business or property interest asserted by plaintiffs is a supposed property right to
19 a concealed weapons permit to which plaintiffs have been denied due to the alleged racketeering
20 activity by defendants. It is well established under California Law that an applicant for a license
21 to carry a concealed firearm has no legitimate claim of entitlement to it under state law, and
22 therefore has no "property" interest to be protected by the due process clause of the United States
23 Constitution. Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1241 (1990), citing
24 Erdely v. O'Brien, 680 F.2d 61, 63 (9th Cir. 1982); Guillory v. County of Orange, 731 F.2d 1379,
25 1382-83 (9th Cir. 1984); see also Fullman v. Graddick, 739 F.2d 553, 561 (11th Cir.
26 1984)[Alabama law]; Ass'n of Orange County Deputy Sheriffs v. Gates, 716 F.2d 733, 734 (9th
27 Cir. 1983) [retired peace officer's application pursuant to Pen. Code, section 12027]; Conway v.
28 King, 718 F.Supp. 1059, 1061 (D.N.H. 1989) (license to carry concealed weapon had by its terms

1 expired; no property interest in renewal or new license). Therefore, there has been no injury to
2 any property interest held by the plaintiffs.

3 Overall, plaintiffs' claims are based on some form of alleged government and political
4 corruption in violation of plaintiffs' second and fourteenth amendment rights. The deprivation of
5 the right to honest governmental services is not a tangible and concrete financial loss, and so is
6 not injury to 'business or property' as required by section 1964(c). Marina Point Dev. Assocs. v.
7 United States, 364 F.Supp. 2d 1144 (C.D.Ca. 2005), quoting Ove v. Gwinn, 264 F.3d 817, 825
8 (9th Cir. 2001). Even if plaintiffs were able to successfully allege constitutional violations under
9 section 1983, these violations could not constitute the necessary injury required to maintain a
10 RICO claim.

11 The absence of a financial injury to either a business or property right maintained by
12 plaintiffs establishes that plaintiffs lack standing to assert a RICO claim. Therefore, defendants
13 motion should be granted and Plaintiffs' RICO cause of action dismissed with prejudice.

14 **2. Public Entities cannot be liable under the provisions of RICO.**

15 "Government entities are incapable of forming [the] malicious intent necessary to support
16 a RICO action." Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996); Lancaster Cmty. Hosp. V.
17 Antelope Valley Hosp., 940 F.2d 397, 404 (9th Cir. 1991). For that reason, Plaintiffs fail to state
18 a RICO claim against the County of Sacramento, the Sheriff's Department and all individual
19 Defendants sued in their official capacity.

20 **3. Plaintiff has failed to establish any affect on interstate commerce**
21 **based on the alleged actions of defendants.**

22 Plaintiffs allege that defendants obtained campaign contributions under color of official
23 right in violation of 18 U.S.C.S. §1951. An offense under that section consists of two essential
24 elements: (1) extortion or attempted extortion, and (2) that such extortion or attempted extortion
25 affects interstate commerce. United States v Floyd, 228 F2d 913 (1956, CA7 Ill), cert den (1956)
26 351 US 938, reh den (1956) 351 US 990. Not every act of extortion is punishable under 18
27 USCS § 1951; only obstruction, delay, or affectation of interstate commerce by means of
28 extortion gives federal courts jurisdiction. United States v Mattson, 671 F2d 1020 (1982, CA7

1 Ill)(criticized in United States v Mills, 204 F3d 669, (2000, CA6 Tenn) 2000 FED App 72P).

2 There is no indication from the pleading that any of the alleged activity by defendants in
3 any way impacts interstate commerce. An Honorary Deputy Sheriff Commission (if such a
4 “commission” or status actually exists) is specifically linked to the Sacramento County Sheriff’s
5 Department. Each of the individually named defendants and alleged campaign contributors who
6 allegedly received a “commission” are, or would be, residents of California. All mailings that are
7 the subject of the alleged activities were within the state. Therefore, there has not been even a *de*
8 *minimis* impact on commerce, interstate or otherwise, due to the alleged activities that form the
9 Plaintiffs’ RICO claim.

10 **4. Civil Rights Violations do not constitute racketeering activity.**

11 Civil rights violations do not fall within the statutory definition of racketeering activity.
12 Bowen v. Oistead, 125 F.3d 800, 806 (9th Cir. 1997). Plaintiffs are unable to use any possible
13 violations of their civil rights to maintain a RICO claim.

14 Based upon the foregoing, Plaintiffs’ RICO action fails to state a claim against
15 Sacramento County Defendants and should be dismissed without leave to amend.

16 **C. Plaintiffs’ Second Cause of Action - Equal Protection - Fails to State a Claim**
17 **Against the County Defendants.**

18 The Plaintiffs’ Second Cause of Action alleges a Fourteenth Amendment violation with
19 respect to issuance of CCW permits. The complaint specifically challenges the constitutionality
20 of California Penal Code §§ 12027, 12031(b), 12050-12054. Plaintiffs contend the statutes
21 allowing the issuance of CCW permits by County Sheriffs or Chiefs of Police under *state law* to
22 honorably retired peace officers are unconstitutional and violate the Equal Protection Clause.
23 Plaintiffs allege that retired law enforcement officers are given special treatment in allowing
24 them to carry concealed weapons without having to show good cause for a permit. Specifically,
25 California Penal Code §§ 12027 and 12031(b) state that the statutes prohibiting the carrying of
26 concealed weapons, § 12025, and loaded weapons, § 12031(a), do not apply to peace officers or
27 to honorably retired peace officers.

28 Plaintiffs allege that the case of Silveira v. Lockyer applies in their favor here. 312 F.3d

1 1052 (9th Cir. 2002) reh'g en banc denied, 328 F.3d 567, cert. denied, 124 S.Ct. 803 (2003).
2 Silveira dealt with California's ban on assault rifles, and the court upheld the statute in every
3 respect, except one. The court found no rational basis existed for allowing retired peace officers
4 to possess assault weapons without any restriction on use, when active peace officers were
5 permitted to possess and use such weapons when off-duty only for law enforcement purposes.
6 Id. at 1090-92. The basis for allowing active off-duty officers to possess and use assault weapons
7 was that a peace officer is on call 24-hours a day, and may be called upon at any time to respond
8 to a call for help. The same is not true of retired officers. Because they are not on call at all after
9 retirement, there was no rational basis in allowing retired officers to keep assault weapons. Id.

10 The justification and rationale for exempting retired peace officers from the CCW permit
11 requirements is not the same as for the exception to the assault weapon ban in Silveira. The
12 justification for a CCW is personal protection, not public protection. Peace officers were entitled
13 to carry assault weapons so that they would not be inadequately armed to confront criminals
14 while protecting the public. On the other hand, they are entitled to carry concealed weapons to
15 protect themselves from the enemies they have made in performing their duties. While an
16 officer's duty to respond to the public's calls for help stops when he retires, the threat of danger
17 from enemies he might have made during his service does not. Therefore, there is a rational
18 basis for allowing a retired officer to continue to carry a concealed weapon, even though there
19 was no rational basis for allowing the same officer to keep an assault weapon. See Silveira,
20 supra.

21 The allegation of the complaint herein with respect to these particular plaintiffs, is that
22 they were denied CCW permits upon application. To the extent that the allegations under this
23 cause of action are directed against the County of Sacramento Defendants relating to the
24 California State statutes pertaining to the local issuance of CCW permits/licenses, no such claim
25 can be pled. The complaint alleges at paragraph 654 that the County Defendants' policy with
26 respect to the issuance of CCW permits "mirrors" the Penal Code sections complained of, which
27 thereby directs the core of the complaint back to the statute itself rather than the entity's or
28 individual defendant's actions with respect to the statute. A claim regarding the validity of a

1 State Statute under constitutional standards, does not lie against a County entity or its employees.
2 Therefore, this cause of action should be dismissed with prejudice as pled against the County of
3 Sacramento and its employee-defendants.

4 **D. There Is No First Amendment Implication Based upon Not Contributing to a**
5 **Political Campaign. Therefore Plaintiffs' Third Cause of Action under the**
6 **First Amendment Fails to State A Claim.**

7 The Plaintiffs' Third Cause of Action alleges violation of their rights under the First
8 Amendment Free Speech and Association Clause. The Plaintiffs allege that their First
9 Amendment rights of freedom of expression and association have been violated because
10 Defendants have a policy favoring campaign contributors and political supporters regarding the
11 issuance of CCW permits. Plaintiffs further allege that persons who do not financially support
12 Defendants are "summarily" denied CCW Permits.

13 Plaintiffs contend that their First Amendment rights under the United States Constitution
14 have been violated because they did not receive a concealed weapons permit, while other persons
15 who contributed to a Sheriff's political campaign have received such permits. Plaintiffs cannot,
16 as a matter of law, state a claim for violation of the First Amendment as there is no first
17 amendment implication based upon not contributing to a political campaign.

18 The cases that pertain to the connection between the First Amendment and campaign
19 contributions, and when the First Amendment is implicated, deal with whether or not the First
20 Amendment right to speech and association is violated by state or local statutes which limit
21 campaign contributions and expenditures. For instance, in Nixon vs. Shrink Missouri
22 Government Pac. et al., 528 U.S. 377 (2000), the United States Supreme Court reversed a
23 decision that held that a Missouri state statute violated the First Amendment by limiting
24 campaign contributions to state political candidates. The plaintiff in that case was a candidate for
25 the nomination for Missouri State Auditor. Similarly, in the case of Union Steel Workers of
26 America vs. Sadlowski, 457 U.S. 102 (1982), the court held that a union's decision to adopt a
27 rule prohibiting candidates for union office from accepting campaign contributions from non-
28 members does not violate the First Amendment. In Buckley vs. Valeo, 424 U.S. 1 (1976), the
court found that the Federal Election Campaign Act of 1971's expenditure ceiling violated the

1 First Amendment. These and similar federal cases dealing with the issue of whether the First
2 Amendment was violated in connection with campaign contributions have dealt with statutes or
3 ordinances which limit campaign contributions or expenditures.

4 Defendants know of no reported decision which holds the First Amendment is violated
5 when someone decides not to make a campaign contribution and later feels that he or she was not
6 treated fairly by the government entity represented by the candidate. Therefore, Plaintiffs' have
7 failed to state and cannot state a claim against County Defendants, and this cause of action
8 should be dismissed without leave to amend.

9 **E. Plaintiffs' Fourth Cause of Action Pled Under the Second Amendment to the**
10 **United States Constitution, Fails to State a Claim Because There is No**
11 **Constitutional Right to a Carry Concealed Weapon Permit.**

12 Plaintiffs' Fourth Cause of Action alleges that by reason of the denial of their applications
13 for a CCW permit, that Plaintiffs' Second Amendment Rights have been infringed. Plaintiffs'
14 claims fail as a matter of law, as there is no individual right to a CCW permit under the Second
15 Amendment, and therefore, Plaintiffs have no standing to challenge gun possession issues.

16 In Nordyke vs. Kane, 319 F.3d 1185 (9th Cir. 2003), the plaintiffs were gun traders who
17 brought a suit against a county to prevent enforcement of a county ordinance which made it a
18 misdemeanor to be in possession of a gun on county property. The plaintiffs brought claims
19 under the First and Second Amendments. Even though the court at that time found that the
20 Second Amendment guarantees collective rights of the states to maintain an armed militia, but
21 does not confer individual protection for a person's right to bear arms, it also found that there is
22 no individual standing to bring a claim under the Second Amendment against a local entity based
23 upon *its regulations* with respect to gun ownership or possession. *Id.* at 1192. See also March
24 vs. Rupf, 2001 U.S. Dist. Lexis 14708, wherein the court held that denial of concealed weapons
25 permit is not a violation of the Second Amendment.

26 Most recently, the court in District of Columbia v. Heller ruled that the Second
27 amendment rights are not unlimited. The Court stated:

28 Like most rights, the right secured by the Second Amendment is not
unlimited. From Blackstone through the 19th-century cases, commentators and
court routinely explained that the right was not a right to keep and carry any

1 weapon whatsoever in any manner whatsoever and for whatever purpose.
2 [Citations omitted.] For example, the majority of the 19th-century courts to
3 consider the question *held that prohibitions on carry concealed weapons were*
4 *lawful under the Second Amendment or state analogues.* [Citations omitted.]
5 District of Columbia v. Heller, 128 S.Ct. 2783, 2816; 171 L.Ed. 637, 678 (2008)
6 (Emphasis added).

7 It is obvious that the Supreme Court ruling in Heller confirms that the reasonable regulations
8 placed by the State of California and the County of Sacramento, for the carrying of concealed
9 weapons is a reasonable regulation acceptable under the Second Amendment of the United States
10 Constitution. It is well established law that an individual has no constitutional right to receive a
11 “Carry Concealed Weapons” permit. Erdelyi vs. O’Brien, 680 F.2d 61 (9th Cir. 1982). Based
12 on the foregoing, the Plaintiffs’ Fourth Cause of Action fails to state a claim against County
13 Defendants, and should therefore be dismissed without leave to amend.

14 **F. Plaintiffs’ Fifth Cause of Action under the 14th Amendment, Privileges &**
15 **Immunities Clause Fails to State a Claim Against County Defendants.**

16 Plaintiffs in their fifth cause of action allege that the denial of their CCW applications
17 violates their rights under the Fourteenth Amendment’s Privileges and Immunities Clause.
18 Plaintiffs cite Saenez v. Roe, 526 U.S. 489 (1999) in their claim. Plaintiffs allege that the
19 Privileges and Immunities clause includes a “personal” right to keep and bear arms. The Saenez
20 case deals specifically with the right to travel between states within the United States and the
21 receipt of welfare benefits and the establishment of state residency in order to qualify for those
22 state benefits. There is no identification of the right to a permit to carry a concealed weapon as a
23 “personal right”, nor any treatment of the subject matter of this lawsuit including the issuance or
24 non-issuance of a CCW permit, in the Saenez case. There are no facts plead which implicate a
25 right held by Plaintiffs under the Privileges and Immunities Clause which was allegedly violated
26 by County Defendants.

27 The case of Silveira v. Lockyer, 312 F.3d 1052, a 2002 9th Circuit case, in which
28 Plaintiffs’ counsel herein was also Plaintiffs’ counsel, the court held that “the federal and state
governments have the full authority to enact prohibitions and restrictions on the use and
possession of firearms, subject only to generally applicable constitutional constraints, such as due
process, equal protection, and the like.” Id. at 1060. A CCW permit is issued to entitle the

1 holder to carry a *concealed* firearm. Merely being denied a permit to carry a concealed weapon
2 does not violate the Privileges and Immunities Clause. This cause of action fails to state a claim
3 upon which relief can be granted, and should be dismissed without leave to amend.

4 **G. Plaintiffs' Have No Standing to Plead a Cause of Action under the Ninth**
5 **Amendment.**

6 The Plaintiffs contend that their Ninth Amendment rights were violated by denial of a
7 CCW permit to them. The Ninth Amendment does not encompass an individual right to bear
8 arms, and a Plaintiff lacks standing to challenge local government regulations dealing with fire
9 arm possession on Ninth Amendment grounds. San Diego Gun Rights Committee vs. Reno, 98
10 F.3d 1121 (9th Cir. 1996). As a matter of law, Plaintiffs do not have standing to assert a Ninth
11 Amendment claim, and therefore this cause of action should be dismissed without leave to
12 amend.

13 **H. Plaintiffs' Claims Against the County of Sacramento Fail Pursuant to Statute**
14 **and Monell**

15 The County of Sacramento, as a public entity, is only subject to liability by statute. Cal.
16 Gov't. Code § 815. Further, neither a municipal corporation nor its employees in their official
17 capacities are subject to civil RICO liability. See Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir.
18 1996). Therefore, as both Defendants Blanas and McGinness are sued herein as *Sheriffs* of the
19 County of Sacramento, i.e., in their official capacity, they are immune from suit under a RICO
20 claim. Therefore, the RICO claim should be dismissed as pled against the County of
21 Sacramento, former Sheriff Blanas and Sheriff McGinness.

22 With respect to any claims pertaining to violations of Constitutional rights pled against
23 the County of Sacramento, to impose municipal liability for violation of constitutional rights, the
24 plaintiff must show (1) that the plaintiff possessed a constitutional right of which he was
25 deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate
26 indifference to the plaintiff's constitutional rights; and (4) that the policy was the moving force
27 behind the constitutional violation. Warns v. Vermazen, 2003 U.S. Dist. LEXIS 23107 (N.D.
28 Ca. 2003). The plaintiff has this burden of proof.

The analysis of section 1983 claims against a public entity falls under Monell v.

1 Department of Social Services, 436 U.S. 658 (1978). In order to find the County, or the sheriff in
2 his official capacity, liable under Monell, Plaintiffs must show a constitutional violation
3 caused by a policy, practice, or custom of Sacramento County. Monell v. Department of
4 Social Services, holds that a municipality may not be held liable under respondeat superior for
5 claims pursuant to 42 U.S.C. § 1983; but only when the execution of a government policy or
6 custom inflicted the injury to plaintiff, could the entity be responsible. Id. at 694.

7 According to Monell, a local public entity may only be liable in a Section 1983 action
8 where there is an official policy, custom, or practice of the public entity of *deliberate indifference*
9 to the rights of individuals, and as a result thereof, the plaintiff in the particular litigation suffered
10 a deprivation of his rights. Monell v. New York City Dep't. of Social Services, 436 U.S. 658
11 (1978) (italics added).

12 Both the Ninth Circuit holding in Silveira v. Lockyer, 312 F.3d 1052, in which case
13 Plaintiffs' counsel herein (Gary Gorski) was also Plaintiffs' counsel, and the Supreme Court in
14 Heller, held that "the federal and state governments have the full authority to enact prohibitions
15 and restrictions on the use and possession of firearms, subject only to generally applicable
16 constitutional constraints, such as due process, equal protection, and the like." Silveira. at 1060;
17 Heller at 2816.

18 Plaintiffs' Monell claim against the County of Sacramento falls on the first factor:
19 Plaintiffs have no constitutional right to a CCW permit. It is well established law that an
20 individual has no constitutional right to receive a "Carry Concealed Weapons" permit. Erdelyi
21 vs. O'Brien, 680 F.2d 61 (9th Cir. 1982). The denial of Plaintiffs' applications for such a permit
22 cannot constitute a violation of a constitutional right, and therefore Plaintiffs cannot plead a
23 Monell claim against the County of Sacramento. This cause of action should be dismissed with
24 prejudice.

25 **I. Rothery Lacks Standing to Pursue this Lawsuit.**

26 California Penal Code § 12025 prohibits the carrying of a concealed weapon unless an
27 individual applies for, and receives, permission to do so pursuant to § 12050(a)(1)(A), which
28 states in pertinent part as follows:

1 “The sheriff of a county, upon proof that the person applying is of good moral
2 character, that good cause exists for the issuance,....., **may** issue to that person a
3 license to carry a pistol, revolver, or other firearm capable of being concealed
upon the person.....
(emphasis added)

4 The language of the statute on its face is permissive in nature, a conclusion confirmed by case
5 law, which indicates that the sheriff has “extremely broad discretion” in whether to grant a CCW
6 permit. Nichols v. County of Santa Clara, 223 Cal. App. 3d1236, 1240 (1990); see also CBS Inc.
7 v. Block, 42 Cal. 3d 646,655 (describing sheriff’s discretion as “unfettered”); Erdelyi v. O’Brien,
8 680 F.2d 61, 63 (9th Cir. 1982) (statute explicitly grants discretion to officer issuing CCW
9 license). Plaintiffs nonetheless argue that their constitutional rights were violated because
10 preference was granted to political supporters and/or financial contributors of Sacramento
11 County Sheriffs.

12 In order to proceed with a federal lawsuit alleging violations of the United States
13 Constitution, a plaintiff must identify an injury “fairly traceable” to conduct on the part of
14 Defendant that is unlawful. Valley Forge Christian College v. Americans United for Separation
15 of Church and State, Inc., et al., 454 U.S. 464, 472 (1982). Because this requirement of causal
16 connection has been deemed an indispensable part of any action challenging such violations
17 under 42 U.S.C. § 1983 (see Arnold v. Int’l Business Machines Corp., 637 F.2d 1350, 135 (9th
18 Cir. 1981)), Plaintiff bears the burden of establishing causation in order to invoke federal
19 jurisdiction under § 1983. A plaintiff accordingly lacks standing to seek redress in federal court
20 unless he can make an initial showing that an unconstitutional policy, practice or custom
21 motivated Defendants’ denial of his CCW application.

22 Plaintiff cannot make that showing in this case, as he must in order to proceed with this
23 lawsuit. See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990) (burden of proof in demonstrating
24 standing rests with party asserting jurisdiction). The complaint states that Plaintiff Rothery did
25 not complete the application process available to him, in that he never filed an appeal to the
26 denial of his permit application. (See Complaint, ¶ 11.)

27 Rothery cannot establish standing to assert claims that had no role in the disposition of
28 his particular application. e.g., not contributing to an election campaign. The Ninth Circuit’s

1 decision in Madsen v. Boise State Univ., 976 F.2d 1219 (9th Cir. 1992) supports this conclusion.
2 In Madsen, the plaintiff complained about unconstitutional discrimination in the issuance of
3 disabled parking permits on the Boise State campus. Like Plaintiff Rothery, Madsen filed a civil
4 rights suit under 42 U.S.C. § 1983. The facts, however, revealed that Madsen never completed
5 the formal permit application for obtaining a disabled parking permit. The Court ruled that since
6 he did not complete the formal application process, Madsen was precluded from making a
7 constitutional challenge. As the Ninth Circuit stated: “A plaintiff lacks standing to challenge a
8 rule or policy to which he has not submitted himself by actually applying for the desired benefit.”
9 Id. at 1220.

10 While Madsen may be distinguishable on grounds that the Plaintiff in that case submitted
11 no written application at all (instead making only oral inquiries about handicap parking), the
12 rationale for the Ninth Circuit’s decision is nonetheless applicable here. Both this case and
13 Madsen involved the Plaintiff’s failure to fully avail himself of the administrative application
14 process before escalating his grievances to the Court. Without completing the administrative
15 process, it would be sheer speculation to guess at what the decision on Rothery’s application
16 would have been or what policies (constitutional or otherwise) may have been implicated in the
17 decision. In the absence of completing that process, Plaintiff Rothery cannot show that any
18 unconstitutional policy played any role in the denial of his CCW application. As such, Rothery
19 lacks standing and his complaint against Defendants must be dismissed on that basis without
20 leave to amend.

21 **J. The Statute of Limitations Bars Plaintiffs’ Claims Against Defendants**
22 **Mason, Sheehan and Blanas**

23 Federal statute 42 U.S.C. § 1983 does not provide any limitation period for determining
24 when a party must bring civil action. The courts therefor use the personal injury statute of the
25 state in which the action arose to determine the limitations period for bringing suit. See Owens
26 v. Okure, 488 U.S. 235, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989). The Ninth Circuit holds that §
27 1983 actions in California are governed by the personal injury limitation. See Del Percio v.
28 Thornsley, 877 F.2d 785 (1989). The California statute of limitations for general personal injury

1 claims as of 2003, is two years from the date the claim accrued. California Code of Civil
2 Procedure § 335.1.

3 Plaintiff's Second, Third, Fourth, Fifth and Sixth causes of action are brought pursuant to
4 42 USC § 1983 and specifically pled against defendant former Sheriff Lou Blanas. Lou Blanas
5 retired as Sheriff on July 26, 2006. (See Request for Judicial Notice, Exhibit D.) Plaintiffs'
6 complaint was filed herein on September 3, 2008. Therefore, based upon the two year statute of
7 limitations, all claims pursuant to 42 U.S.C. § 1983 are barred as pled against Lou Blanas.

8 Plaintiffs' First cause of action, under RICO statutes, has a four-year statute of
9 limitations. Agency Holding Corp. v Malley-Duff & Associates, Inc., 483 U.S. 143 (1987).
10 Plaintiffs have included Defendant Fred Mason and Tim Sheehan in their grouping of "NAMED
11 DEFENDANT RACKETEERS". See Complaint at ¶ 20. The only allegations relating to these
12 two defendants are those contained in the First cause of action. Plaintiffs link Fred Mason and
13 Tim Sheehan as "co-conspirators" with respect to alleged RICO claims, and allege these two
14 defendants acted in concert as "co-conspirators". See Complaint at ¶¶ 16 & 17. Defendant Fred
15 Mason retired from the Sacramento County Sheriff's Department in July of 2003. (See Request
16 for Judicial Notice, Exhibit A.) Plaintiffs' complaint herein was filed more than five years after
17 Mason's retirement. If Plaintiffs' allegations are to be believed, any and all actions allegedly
18 taken by Defendants Mason and Sheehan as alleged in Plaintiffs' First Cause of Action (as these
19 two defendants had to have acted in concert according to the complaint) necessarily must have
20 occurred prior to Mason's retirement in July of 2003. Therefore, based upon the four-year statute
21 of limitations, any and all claims against Defendants Fred Mason and Tim Sheehan must be
22 dismissed as they are barred by the statute of limitations.

23 **K. Plaintiffs Have No Standing to Assert A Claim Based Upon Allegations of**
24 **Wrongdoing At the Sacramento County Deputy Sheriffs' Association.**

25 From page 51 at paragraph 573 through paragraph 647 of Plaintiffs' complaint, in
26 Plaintiffs' RICO claim, the allegations pertain to purported events more than four years before
27 the filing of the complaint herein (e.g., January 2004), and which relate to the Sacramento
28 County Deputy Sheriffs' Association. Plaintiffs herein are alleged to be residents of the County

1 of Sacramento who allegedly were denied CCW permits, and are/were not a part of the Sheriff's
2 Department nor the Sacramento County Deputy Sheriffs' Association. These Plaintiffs have no
3 standing to assert the claims that were made in the Barnsdale case which related to the
4 Sacramento County Deputy Sheriff's Association, and which claims have already been
5 adjudicated. Plaintiffs' allegations with respect to union issues and repeated recitation of
6 purported "law" throughout their RICO claim, has nothing to do with these Plaintiffs or the
7 denial of their CCW permit applications. Therefore, Plaintiffs cannot use these allegations in
8 any manner to state a claim against County Defendants and any contrived causes of action should
9 be dismissed without leave to amend.

10 **IV. CONCLUSION**

11 In totality, Plaintiffs' have failed to plead any claims against County Defendants upon
12 which relief can be granted. In addition, much of Plaintiffs' complaint is immaterial to their
13 claim of denial of CCW permits and is based on allegations which they lack standing to pursue.
14 In total, County Defendants see no basis upon which Plaintiffs can maintain this complaint, and
15 respectfully request that County Defendants' motions herein be granted, leave to amend be
16 denied, and this case be dismissed with prejudice.

17
18 DATED: April 2, 2009

LONGYEAR, O'DEA AND LAVRA, LLP

/s/ **Jeri L. Pappone**

19 By:

20 _____
21 JOHN A. LAVRA
22 JERI L. PAPPONE
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24 Attorneys for County of Sacramento, former
25 Sheriff Lou Blanas, Sheriff John McGinness,
26 Timothy Sheehan, and Fred Mason
27
28