

1 PAUL B. BEACH, State Bar No. 166265
pbeach@lbaclaw.com
2 ALEXANDRA B. ZUIDERWEG, State Bar No. 270177
azuideweg@lbaclaw.com
3 LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
4 Glendale, California 91210-1219
Telephone No. (818) 545-1925
5 Facsimile No. (818) 545-1937

6 Attorneys for Defendant
County of Los Angeles
7

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

11 NADIA NAFFE, an individual,

12 Plaintiff,

14 vs.

15 JOHN PATRICK FREY, an
16 individual, and the COUNTY OF LOS
ANGELES, a municipal entity,

17 Defendants.
18

) Case No. CV 12-8443 GW (MRWx)

) Honorable George H. Wu

) **DEFENDANT COUNTY OF LOS**
) **ANGELES' NOTICE OF MOTION**
) **AND MOTION TO DISMISS**
) **PLAINTIFF'S FIRST AMENDED**
) **COMPLAINT PURSUANT TO**
) **FED. R. CIV. P. 12(b)(6);**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES; DECLARATION**
) **OF ALEXANDRA B. ZUIDERWEG**
) **AND EXHIBITS IN SUPPORT**
) **THEREOF**

) *[[Proposed] Order filed concurrently*
) *herewith]*

) Date: February 21, 2013
) Time: 8:30 a.m.
) Crtm: 10

22 _____
23
24
25 TO THE HONORABLE COURT, ALL PARTIES, AND TO THEIR
26 COUNSEL OF RECORD:

27 ///

28 ///

1 PLEASE TAKE NOTICE that on February 21, 2013 at 8:30 a.m., or as
2 soon thereafter as the matter may be heard in Courtroom 10, United States
3 District Court, located at 312 N. Spring Street, Los Angeles, California, 90012,
4 Defendant County of Los Angeles (“Defendant” or “County”) will and hereby
5 does move the Court to dismiss Plaintiff Nadia Naffe’s (“Plaintiff”) First
6 Amended Complaint (“FAC”) against it pursuant to Fed. R. Civ. P. Rule 12(b)(6)
7 on the following grounds:

- 8 1. Plaintiff’s claim pursuant to 42 U.S.C. § 1983 must fail because she
9 has not and cannot allege that her constitutional rights were violated
10 as a result of any policy, practice, or custom of the County;
- 11 2. Plaintiff fails to state a claim pursuant to 42 U.S.C. § 1983 because
12 she has not alleged facts sufficient to establish that the alleged acts
13 were under color of law;
- 14 3. Plaintiff’s § 1983 claim fails because she has not and cannot allege
15 that she suffered the deprivation of any constitutional right;
- 16 4. Plaintiff’s state law claims fail because the alleged acts were not
17 within the course and scope of Patrick Frey’s employment with the
18 County of Los Angeles;
- 19 5. Plaintiff’s state law claims have no statutory basis;
- 20 6. Plaintiff’s state law claims are barred by California Government
21 Code § 821.6; and,

22
23 ///

24 ///

25 ///

26

27

28

1 7. Plaintiff may not recover punitive damages against a public entity.¹

2 This Motion will be based upon this Notice of Motion, the attached
3 Memorandum of Points and Authorities and Declaration of Alexandra B.
4 Zuiderweg, the pleadings on file herein, and upon such further evidence as may
5 be presented at or before the hearing. This Motion is made following counsel for
6 Defendant’s unsuccessful attempt to informally resolve issues pursuant to Local
7 Rule 7-3. (See, Declaration of Alexandra B. Zuiderweg [“Zuiderweg Decl.”], ¶ 2;
8 Exhibit “A”.)

9
10 Dated: January 11, 2013

LAWRENCE BEACH ALLEN & CHOI, PC

11
12
13 By /s/ Alexandra B. Zuiderweg
14 Alexandra B. Zuiderweg
15 Attorneys for Defendant
16 County of Los Angeles
17
18
19
20
21

22 ¹ Alternatively, Defendant seeks to dismiss Plaintiff’s improper request for
23 exemplary damages via a motion to strike pursuant to Fed. R. Civ. P. Rule 12(f).
24 In the Ninth Circuit, there is a split in authority regarding the appropriate vehicle
25 by which to seek dismissal of damages sought that are not recoverable as a matter
26 of law. Compare, *Whittlestone Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974-75
27 (9th Cir. 2010) (discussing motion to strike); *Arres v. City of Fresno*, 2011 WL
28 284971 *6 (E.D. Cal. 2011), with, *Dorger v. City of Napa*, 2012 WL 3791447 *7
(N.D. Cal. 2012) (discussing motion to dismiss). Accordingly, out of an
abundance of caution, Defendant moves to strike Plaintiff’s improper prayer for
relief via both Fed. R. Civ. P. Rule 12(b)(6) and Fed. R. Civ. P. Rule 12(f).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES..... 1

I. Introduction. 1

II. Plaintiff’s FAC Fails To State A § 1983 Claim Against The County. 2

 A. Plaintiff Has Not, And Cannot, Allege That The Purported Constitutional Violations Occurred Pursuant To A Policy, Practice, Or Custom Of The County Of Los Angeles. 2

 B. The Actions Alleged In Plaintiff’s FAC Are Not Under Color Of State Law. 3

 C. Plaintiff’s FAC Does Not Set Forth Facts Illustrating A Deprivation Of A Constitutional Right..... 6

III. Plaintiff’s State Law Claims Fail As A Matter Of Law..... 8

 A. Frey Was Not Acting Within The Course And Scope Of His Employment When He Posted On His Personal Blog..... 8

 B. Plaintiff’s State Law Claims Against The County Have No Statutory Basis. 10

 C. Plaintiff’s State Law Claims Are Barred By Government Code § 821.6..... 11

IV. Punitive Damages Are Not Recoverable Against A Public Entity..... 12

V. Conclusion..... 13

DECLARATION OF ALEXANDRA B. ZUIDERWEG 14

TABLE OF AUTHORITIES

Cases

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Alma W. v. Oakland Unified School Dist.,
123 Cal.App.3d 133 (1981) 11

Amylou R. v. County of Riverside,
28 Cal.App.4th 1205 (1994) 15

Anderson v. Warner,
451 F.3d 1063 (9th Cir. 2006) 4

Arres v. City of Fresno,
2011 WL 284971 (E.D. Cal. 2011) 3

Board of County Comm’rs v. Brown,
520 U.S. 397, 117 S. Ct. 1382 (1997) 3

Carlos v. Santos,
123 F.3d 61 (2d Cir. 1997) 5

City of Canton v. Harris,
489 U.S. 378, 109 S. Ct. 1197 (1989) 3

Cochran v. Herzog Engraving Co.,
155 Cal.App.3d 405 (1984) 12

Compare, Whittlestone Inc. v. Handi-Craft Co.,
618 F.3d 970 (9th Cir. 2010) 3

Dorger v. City of Napa,
2012 WL 3791447 (N.D. Cal. 2012) 3

Farmers Ins. Group v. County of Santa Clara,
11 Cal.4th 992 (1995) 11

Gillan v. City of San Marino,
147 Cal.App.4th 1033 (2007) 14

Hoblitzell v. City of Ione,
110 Cal.App.4th 675 (2003) 10

Ivey v. Bd. of Regents of the Univ. of Alaska,
673 F.2d 266 (9th Cir. 1982) 7

Linda R.S. v. Richard D.,
410 U.S. 614, 93 S. Ct. 1146 (1973) 9

Lopez v. Southern Cal. Rapid Transit Dist.,
40 Cal.3d 780 (1985) 13

Mark v. Borough of Hatboro,
51 F.3d 1137 (3d Cir. 1995) 4

1 *McCrary v. County of Nassau*,
 493 F.Supp.2d 581 (E.D.N.Y. 2007).....9

2

3 *Mendocino Envtl. Ctr. v. Mendocino Cnty.*,
 192 F.3d 1283 (9th Cir. 1999).....8

4 *Monell v. New York City Dept. of Social Services*,
 436 U.S. 658, 98 S. Ct. 2018 (1978)3

5

6 *Morgan v. Tice*,
 862 F.2d 1495 (11th Cir. 1989).....5

7 *Newport City v. Fact Concerts, Inc.*,
 453 U.S. 247, 101 S. Ct. 2748 (1981)16

8

9 *Patterson v. City of Los Angeles*,
 174 Cal.App.4th 1393 (2009).....14

10 *Peter W. v. San Francisco Unified School Dist.*
 60 Cal.App.3d 814 (1976).....13

11

12 *Price v. Hawaii*,
 939 F.2d 702 (9th Cir. 1991).....7

13 *Ramsey v. City of Lake Elsinore*
 220 Cal.App.3d 1530 (1990).....12

14

15 *St. Louis v. Praprotnik*,
 485 U.S. 112, 108 S. Ct. 915 (1988)3

16 *Screws v. United States*,
 325 U.S. 91, 65 S. Ct. 1031, (1945)4

17

18 *Simmons v. Sacramento County Superior Court*,
 318 F.3d 1156 (9th Cir. 2003).....7

19

20 *Staley v. Grady*,
 371 F.Supp.2d 411 (S.D.N.Y. 2005).....10

21 *Susman v. City of Los Angeles*,
 269 Cal.App.2d 803 (1969).....13

22

23 *Trujillo v. City of Ontario*,
 428 F.Supp.2d 1094 (C.D. Cal. 2006).....15

24 *Trump v. Montgomery County Sheriff*,
 2010 WL 1278596 (W.D. VA 2010).....9

25

26 *United States v. Classic*,
 313 U.S. 299, 61 S. Ct. 1031 (1941)4

27 *Van Ort v. Estate of Stanewich*
 92 F.3d 831 (9th Cir. 1996).....12

28

1	<i>West v. Atkins,</i>	
2	487 U.S. 42, 108 S. Ct. 2250 (1988)	4
3	<i>Westlands Water Dist. V. Amoco Chemical Co.,</i>	
4	953 F.2d 1109 (9th Cir. 1991).....	16
5	Statutes	
6	42 U.S.C. § 1983.....	2
7	California Government Code § 818.....	13
8	California Government Code § 815.2.....	11
9	California Government Code § 821.6.....	2
10	California Government Code § 26500.....	9
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction.**

3 Plaintiff Nadia Naffe (“Plaintiff”) alleges that Patrick Frey (“Frey”), a private
4 citizen who also happens to be employed as a deputy district attorney, violated her
5 rights when the two engaged in an online debate regarding Plaintiff’s allegations
6 against James O’Keefe, a well-known conservative activist. Although the
7 allegations in Plaintiff’s FAC make it clear that Frey’s blog posts regarding Plaintiff
8 were entirely unrelated to his employment with the Los Angeles County District
9 Attorney’s Office (and Frey’s blog even includes an express disclaimer stating as
10 much), Plaintiff still improperly attempts to hold the County liable for Frey’s
11 protected speech. In fact, in addition to the disclaimer that regularly appears on
12 Frey’s blog stating that his statements are made in his personal capacity, Frey also
13 included such statements disclaiming any association between his blog and his
14 employer in many of the posts Plaintiff references in her FAC (yet Plaintiff
15 conveniently declined to attach to her FAC).

16 In its tentative ruling on Frey’s motion to dismiss Plaintiff’s original
17 complaint, the Court denied leave to amend. Only after oral argument, during
18 which counsel for Plaintiff affirmatively represented to the Court that he could
19 plead a wealth of factual allegations in support of Plaintiff’s claims, did the Court
20 graciously grant Plaintiff leave to amend. However, the Court warned Plaintiff that
21 she would have one and only opportunity to add these factual allegations. Despite
22 the Court’s clear and unequivocal admonitions, Plaintiff added no such factual
23 allegations in the FAC. Rather, Plaintiff simply repeatedly alleged, in a conclusory
24 manner, that Frey was acting in his capacity as a deputy district attorney. Such
25 conclusory allegations, unsupported by any factual allegations and largely made
26 based on information and belief, are insufficient, irrespective of how many times
27 they are repeated in the FAC.

1 Plaintiff's FAC includes the following seven claims against the County:
2 violations of 42 U.S.C. § 1983, public disclosure invasion of privacy, false light
3 invasion of privacy, defamation, intentional infliction of emotional distress,
4 negligence, and negligent supervision. Simply put, Plaintiff's FAC suffers from all
5 the same deficiencies as Plaintiff's original complaint, which was dismissed by the
6 Court.

7 As was the case in her original complaint, Plaintiff's claim pursuant to 42
8 U.S.C. § 1983 fails for a number of reasons. Plaintiff has failed to allege that the
9 purportedly wrongful conduct occurred pursuant to any policy, practice, or custom
10 of the County and further failed to allege facts sufficient to illustrate that Frey's
11 speech was under the color of law. Moreover, Plaintiff's allegations simply do not
12 constitute a constitutional violation. Similarly, Plaintiff's state law claims fail
13 because she has failed to allege facts showing that Frey acted within the course and
14 scope of his employment with the County when he posted on his personal blog.
15 Plaintiff's state law claims fail on the additional ground that they lack a statutory
16 basis, and the County is immune under California Government Code § 821.6.
17 Finally, Plaintiff is not entitled to recover exemplary damages against the County of
18 Los Angeles.

19 **II. Plaintiff's FAC Fails To State A § 1983 Claim Against The County.**

20 **A. Plaintiff Has Not, And Cannot, Allege That The Purported**
21 **Constitutional Violations Occurred Pursuant To A Policy,**
22 **Practice, Or Custom Of The County Of Los Angeles.**

23 The County is not vicariously liable under Section 1983 for an injury
24 purportedly inflicted by individual district attorneys, irrespective of whether the
25 alleged acts occurred under the color of law. It is well-settled that a municipality
26 cannot be held liable under Section 1983 on a respondeat superior theory. *Monell*
27 *v. New York City Dept. of Social Services*, 436 U.S. 658, 690-91, 98 S. Ct. 2018,
28 2036 (1978). Instead, Plaintiff must not only prove a violation of her

1 Constitutional rights, but also that such violation was a direct result of a
2 government policy, practice, or custom. *Id.* 690-91, 694. Moreover, where a
3 plaintiff seeks to predicate *Monell* liability on the isolated acts of a government
4 employee, a plaintiff must show that the employee acted with final policymaking
5 authority for the entity. *See, St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.
6 Ct. 915, 924 (1988).

7 Here, Plaintiff has not, because she cannot, alleged that her Constitutional
8 rights were violated because of a government policy or custom, nor has Plaintiff
9 alleged that Frey has final policymaking authority for the District Attorney's
10 Office. Rather, Plaintiff's latest pleading again seeks to hold the County liable
11 for the personal pursuits of Frey. (FAC, ¶¶ 9-68, 72-75.) Therefore, Plaintiff's
12 Section 1983 claim against the County fails as a matter of law. *See, Board of*
13 *County Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 1387-88 (1997);
14 *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203 (1989);
15 *Monell*, 436 U.S. at 694.

16 **B. The Actions Alleged In Plaintiff's FAC Are Not Under Color Of**
17 **State Law.**

18 Additionally, in order to allege a claim under § 1983, a plaintiff must establish
19 that: (1) a right under the Constitution of the United States was violated, and (2) the
20 defendant violated that right acting under "color of state law." *West v. Atkins*, 487
21 U.S. 42, 48, 108 S. Ct. 2250, 2255 (1988). The United States Supreme Court has
22 explicitly held that though "under color of law" means under pretense of law, "**acts**
23 **of officers in the ambit of their personal pursuits are plainly excluded.**" *Screws*
24 *v. United States*, 325 U.S. 91, 111, 65 S. Ct. 1031, 1040 (1945) (emphasis added);
25 *see, Anderson v. Warner*, 451 F.3d 1063, 1069 (9th Cir. 2006) (to constitute action
26 under color of law, "the challenged conduct must be related in some meaningful way
27 to either the officer's governmental status or the performance of his duties.")
28 (internal quotations and citations omitted). Indeed, "[a]n otherwise private tort is

1 not committed under the color of law simply because the tortfeasor is an employee
2 of the state.” *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1150-51 (3d Cir. 1995).
3 Rather, in order for a tortfeasor to be acting under color of law, his act must entail
4 “misuse of power, possessed by virtue of state law and **made possible only because**
5 **the wrongdoer is clothed with the authority of state law.**” *Id.* (quoting *United*
6 *States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043 (1941); *see, Carlos v.*
7 *Santos*, 123 F.3d 61, 65 (2d Cir. 1997) (holding acts of town board members were
8 not under color of law because “any citizen may perform the [acts alleged]; they
9 were not made possible only because” the wrongdoers were clothed with official
10 authority); *Morgan v. Tice*, 862 F.2d 1495, 1499 (11th Cir. 1989), *cert. denied*, 493
11 U.S. 813 (1989) (a public official was not acting under color of law when he went to
12 newspaper publisher, presented his business card as town manager, and made
13 defamatory statements regarding the plaintiff).

14 Here, Plaintiff only alleges in a conclusory manner that Mr. Frey acted under
15 the color of state law and “act[ed] within the scope of their authority as an agents
16 [*sic*] and employees with the permission and consent of COOLEY and the
17 COUNTY.” (FAC, ¶¶ 8, 29, and 72.) Yet, by Plaintiff’s own admission, Frey
18 posted a disclaimer on his personal blog.² (FAC, ¶ 14.) This disclaimer clearly
19 states that his blog contains “personal opinions . . . not made in any official
20 capacity.” (Zuiderweg Decl., ¶ 4; Exhibit “D,” ¶ 38.) Moreover, many of the blog
21 posts discussed and quoted in Plaintiff’s FAC further disclaim association between
22 the blog and the District Attorney’s Office. For example, in his March 23, 2012
23 post³ discussed in paragraph 45 of Plaintiff’s FAC, Frey explicitly states “I offer no
24

25 ² Interestingly, Plaintiff alleged some of the terms of the disclosure in her
26 original complaint, but omitted it from her FAC. (Zuiderweg Decl., ¶ 4; Exhibit
27 “D,” ¶ 38.)

28 ³ Plaintiff erroneously alleges that the blog entry was posted on February 28,
2012, but the content of the March 23, 2012 directly mirrors the content alleged

1 opinion on that, as this post (like all my posts!) is written in my private capacity, as
2 an exercise of my rights as a private citizen under the First Amendment.” (FAC, ¶
3 45; Zuiderweg Decl., ¶ 3; Exhibit “B” at 3.)⁴ Similarly, in his May 27, 2010 post
4 discussed in paragraph 28 of the FAC, Frey writes “ . . . I am not a wiretap
5 violations prosecutor but a gang murder prosecutor, **speaking in my private**
6 **capacity, as I always do on this blog.**” (Zuiderweg Decl., ¶ 3; Exhibit “C” at 3.)
7 (emphasis added).

8 Such allegations that Frey posted a blog regarding his personal beliefs with
9 “permission and consent” of the County, when taken in conjunction with Frey’s
10 many statements to the contrary, cannot establish that Frey acted under color of law.
11 Plaintiff does not allege that state authority enabled Frey to post statements
12 regarding Plaintiff on his blog, nor does Plaintiff allege that the permission and
13 consent of the County is required under state law to post such statements. For this
14 reason, Plaintiff’s allegations that Frey stated that he is employed as a district
15 attorney in his blog posts or the claim that third parties identified Frey as a district
16 attorney are equally unavailing. Mere reference to Frey’s employment did not cloth
17 him with the power to make purportedly defamatory statements about Plaintiff, nor
18 did any of the excerpts of the blog appearing in Plaintiffs’ FAC even remotely

19
20 in paragraph 45 of Plaintiff’s FAC. (FAC, ¶ 45; Zuiderweg Decl., ¶ 3; Exhibit
21 “C”.)

22 ⁴ Tellingly, Plaintiff chose not to attach these documents to her FAC. Although
23 motions to dismiss are normally limited to allegations and documents contained
24 within the four corners of the complaint, where a plaintiff refers to a document in
25 the complaint, a defendant may attach the document to a Rule 12(b)(6) motion to
26 show that they do not support the plaintiff’s claim. *See, Marder v. Lopez*, 450
27 F.3d 445, 448 (9th Cir. 2006). “The court may treat such a document as part of
28 the complaint, and thus may assume that its contents are true for purposes of a
motion to dismiss under Rule 12(b)(6).” *Id.* (internal quotations and citations
omitted.)

1 provide his readers with the impression that his blog was posted as a part of his job
2 duties. Simply put, Frey’s publication of his blog expressing his personal beliefs is
3 entirely unrelated to his employment with the County.

4 Plaintiff’s conclusory allegations, devoid of any factual particularity,
5 without more, are insufficient to state a § 1983 claim against the County of Los
6 Angeles. *See, Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268
7 (9th Cir. 1982) (“Vague and conclusory allegations of official participation in
8 civil rights violations are not sufficient” to withstand dismissal of a § 1983
9 claim); *see also, Simmons v. Sacramento County Superior Court*, 318 F.3d 1156
10 (9th Cir. 2003) (conclusory allegations that attorney was acting under color of law
11 through conspiracy with state actors was insufficient to state a §1983 claim);
12 *Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991) (conclusory allegations of
13 action under color of state law, unsupported by facts, are insufficient to state
14 claim under § 1983). Therefore, because the speech complained of was not under
15 color of law, Plaintiff’s § 1983 claim must fail on this additional ground.

16 **C. Plaintiff’s FAC Does Not Set Forth Facts Illustrating A Deprivation**
17 **Of A Constitutional Right.**

18 Finally, even assuming *arguendo* that Defendant Frey’s personal blog posts
19 were under color of law,⁵ Plaintiff has not, because she cannot, allege that such
20 conduct caused a violation of her Constitutional rights. Plaintiff attempts to allege a
21 Constitutional deprivation under two theories, both of which fail.

22 Plaintiff first alleges that Defendant Frey’s blog entries violated her First
23 Amendment rights by “intimidating her into silence regarding O’KEEFE [sic]
24 wiretapping of Congresswoman Waters.” (FAC, ¶ 73). To establish a § 1983 claim
25 on a theory that Plaintiff’s First Amendment rights were chilled, she must establish

26
27 ⁵ Because Plaintiff’s claims against the County are based solely on the speech of
28 Frey, if the Court dismisses the instant action against Frey, then Plaintiff’s claims
against the County also fail.

1 that the complained-of actions “would chill or silence a person of ordinary firmness”
2 from making their intended speech and her speech was, in fact, chilled. *Mendocino*
3 *Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

4 Plaintiff’s FAC is devoid of any factual allegations that Frey’s speech
5 objectively would have caused her speech to be chilled. Moreover, Plaintiff failed
6 to allege specific facts that show that her speech was actually chilled by Frey’s
7 actions, and the facts she does allege directly contradict any such allegations that
8 Plaintiff could make. By Plaintiff’s own admission, she engaged in the following
9 activities: (1) she publicly threatened to report Mr. Frey to the District Attorney’s
10 Office and to the State Bar (FAC, ¶ 48); (2) she publicly filed a claim with the
11 County against Mr. Frey (FAC, ¶ 69); and (3) she publicly filed her lawsuit, which
12 extensively describes her complaints against Frey and James O’Keefe, a third party.
13 Plaintiff cannot, in one breath, claim to have been “intimidated into silence” by
14 Defendant Frey, then in the next breath claim to have made numerous public threats
15 and complaints about Frey’s purported wrongful acts, including threatening to
16 complain to Frey’s employer (the very same office that Plaintiff speculates would
17 not treat her fairly) .

18 Plaintiff further alleges that Frey violated her due process rights by: (1)
19 somehow “presenting a public face” of the District Attorney’s Office in which she
20 “believed she would not receive fair treatment” from the County; (2) “implying that
21 any case in which PLAINTIFF was involved would be prejudged”; (3) “suggesting
22 PLAINTIFF herself might be investigated or prosecuted”; and (4) creating an
23 atmosphere under which PLAINTIFF feared retaliation.” (FAC, ¶ 74.) Yet,
24 Plaintiff does not (because she cannot) allege any factual basis for her vague,
25 unreasonable subjective beliefs.

26 Even if the Court reads Plaintiff’s FAC to suggest that the District Attorney’s
27 Office might not adequately investigate or pursue her allegations that Mr. O’Keefe
28 wiretapped the offices of Representative Waters, such allegations do not constitute a

1 due process violation. Plaintiff has no right, due process or otherwise, to any
2 investigation or prosecution of Mr. O’Keefe. *Linda R.S. v. Richard D.*, 410 U.S.
3 614, 619, 93 S. Ct. 1146, 1149 (1973) (“[A] private citizen lacks a judicially
4 cognizable interest in the prosecution or nonprosecution of another.”); *Trump v.*
5 *Montgomery County Sheriff*, 2010 WL 1278596, *1 (W.D. Va. 2010) (rejecting §
6 1983 claim and holding that the plaintiff “as a private citizen, he has no right to
7 compel law enforcement officers or officers of the court to investigate or bring
8 criminal charges against another person. Therefore, he cannot bring a lawsuit to
9 enforce his desire for prosecution of that person.”); *McCrary v. County of Nassau*,
10 493 F.Supp.2d 581, 588 (E.D.N.Y. 2007) (“A private citizen does not have a
11 constitutional right to compel government officials to arrest or prosecute another
12 person.”); *Staley v. Grady*, 371 F.Supp.2d 411, 415 (S.D.N.Y. 2005) (stating same
13 rule in rejecting § 1983 action premised on nonprosecution).

14 Plaintiff’s FAC effectively seeks to hold the County liable under § 1983
15 simply because she may not have felt welcome at the District Attorney’s Office.
16 However, Plaintiff’s speculative fear is irrelevant, and it certainly did not prevent
17 her from threatening to report Defendant Frey to his employer. (FAC, ¶ 48.)
18 Simply put, Plaintiff has failed to allege facts sufficient to show that either her First
19 Amendment or due process rights were violated. Therefore, this Court should
20 dismiss Plaintiff’s § 1983 claim for the additional reason that she fails to state facts
21 supporting a violation of her Constitutional rights.

22 **III. Plaintiff’s State Law Claims Fail As A Matter Of Law.**

23 **A. Frey Was Not Acting Within The Course And Scope Of His** 24 **Employment When He Posted On His Personal Blog.**

25 Because Defendant Frey’s blog is unrelated to his employment with the
26 County of Los Angeles, Plaintiff’s state law claims against the County must also
27 fail.
28

1 Under California law, a public entity is only vicariously liable for the conduct
2 of an employee if the employee was acting within the course and scope of his
3 employment. California Govt. Code § 815.2; *Hoblitzell v. City of Ione*, 110
4 Cal.App.4th 675, 680 (2003). Moreover, “the law is clear that an employer is not
5 strictly liable for all actions of its employees during work hours.” *Id.* at 681
6 (internal quotations omitted). Rather, vicarious liability will not stand where the
7 employee’s conduct “**substantially deviates** from the employment duties for
8 personal purposes,” even if the complained of conduct occurred during work hours.
9 *Farmers Ins. Group v. County of Santa Clara*, 11 Cal.4th 992, 1005 (1995)
10 (emphasis in original) (citations omitted). Therefore, if the employee “inflicts an
11 injury out of personal malice, not engendered by the employment or acts out of
12 personal malice unconnected with the employment, or if the misconduct is not an
13 outgrowth of the employment, the employee is not acting within the scope of
14 employment.” *Id.* Simply put, “if an employee’s tort is personal in nature, mere
15 presence at the place of employment and attendance to occupational duties prior or
16 subsequent to the offense will not give rise to a cause of action against the employer
17 under the doctrine of respondeat superior.” *Alma W. v. Oakland Unified School*
18 *Dist.*, 123 Cal.App.3d 133, 140 (1981).

20 Here, as discussed above, Plaintiff’s allegations that Frey spoke on his blog
21 while at work and stated that he is employed as a district attorney are insufficient to
22 establish that Frey was acting within the course and scope of his employment. Frey,
23 like all deputy district attorneys, are employed for the purpose of prosecuting
24 individuals for criminal activity on behalf of the People of the State of California.
25 *See*, California Govt. Code § 26500. Indeed, engaging in online political debate via
26 his own personal blog is far outside the scope of these duties. Accordingly, Plaintiff
27 has not and cannot allege that Frey posted on his blog regarding his personal
28 political beliefs as part of his duties as a deputy district attorney, nor has Plaintiff

1 alleged that Frey’s speech somehow furthered any goals of the District Attorney’s
 2 Office. In fact, Frey disclaimed any association whatsoever between his blog and
 3 the District Attorney’s Office.⁶ (FAC, ¶ 14.) Accordingly, Plaintiff’s state law
 4 claims against the County fail.

5 **B. Plaintiff’s State Law Claims Against The County Have No**
 6 **Statutory Basis.**

7 In California, a governmental entity may only be sued in tort pursuant to an
 8 authorizing statute or enactment. *See, Ramsey v. City of Lake Elsinore*, 220
 9 Cal.App.3d 1530, 1536 (1990) (“Public liability for personal injuries is defined
 10 and limited by statute.”); *Cochran v. Herzog Engraving Co.*, 155 Cal.App.3d 405,
 11 409 (1984) (“In short, sovereign immunity is the rule in California; governmental
 12 liability is limited to exceptions specifically set forth by statute.”); *Van Ort v.*
 13 *Estate of Stanewich*, 92 F.3d 831, 840 (9th Cir. 1996).

14 Specifically, Government Code § 815 provides: “Except as otherwise
 15 provided by statute: (a) A public entity is not liable for an injury, whether such
 16 injury arises out of an act or omission of the public entity or a public employee or
 17 any other person.” “[B]ecause under the Torts Claims Act all governmental
 18 liability is based on statute, the general rule that statutory causes of action must be
 19 pleaded with particularity is applicable.” *Lopez v. Southern Cal. Rapid Transit*
 20 *Dist.*, 40 Cal.3d 780, 795 (1985). Accordingly, “every fact material to the
 21 existence of [the government defendant’s] statutory liability must be pleaded with
 22

23
 24 ⁶ Plaintiff’s allegations regarding the purported role of the County in Frey’s blog
 25 are largely contradictory. On the one hand, Plaintiff alleges that the County
 26 “consent[ed]” to Frey’s personal blog (an allegation that is irrelevant for purposes
 27 of evaluating whether Frey was acting within the course and scope of his
 28 employment). (FAC, ¶ 8.) Yet, this claim cannot be reconciled with Plaintiff’s
 allegation that Frey felt that he needed to “engage in ‘damage control
 so as to not lose his job with the COUNTY,” which indicates that the County did
 not, in fact, approve or consent to Frey’s personal blog. (FAC, ¶ 52.)

1 particularity.” *Peter W. v. San Francisco Unified School Dist.* 60 Cal.App.3d
2 814, 819 (1976); *Susman v. City of Los Angeles*, 269 Cal.App.2d 803, 809 (1969).

3 Here, there is simply no statutory basis for Plaintiff’s six state law claims
4 (i.e. public disclosure invasion of privacy, false light invasion of privacy,
5 defamation, intentional infliction of emotional distress, negligence, or negligent
6 supervision based on the personal blog posts of an individual employed by a
7 public entity). *Van Ort*, 92 F.3d at 840-41. Presumably, Plaintiff concedes this
8 point since her FAC makes no reference whatsoever to any statute. Therefore,
9 absent any authorizing statute or enactment for Plaintiff’s state law claims, they
10 fail as a matter of law. *See, Ramsey*, 220 Cal.App.3d at 1541 (“[D]isregard of
11 statutes is fatal to a plaintiff’s claim of public liability.”).

12 **C. Plaintiff’s State Law Claims Are Barred By Government Code §**
13 **821.6.**

14 Even assuming *arguendo* Frey was acting within the course and scope of
15 his employment (which he was not) and Plaintiff had plead statutes authorizing
16 her state law claims (which she has not), the County of Los Angeles is immune
17 from those claims. Pursuant to California Government Code § 815.2, subdivision
18 (b), “[e]xcept as otherwise provided by statute, a public entity is not liable for an
19 injury resulting from an act or omission of an employee of the public entity where
20 the employee is immune from liability.” Furthermore, under California
21 Government Code § 821.6, “a public employee is not liable for any injury caused
22 by his instituting or prosecuting any judicial or administrative proceeding within
23 the scope of his employment even if he acts maliciously and without probable
24 cause.”

25 It is well-established that “Section 821.6 extends to actions taken in
26 preparation for formal proceedings, including investigation which is an ‘essential
27 step’ toward the institution of formal proceedings.” *Patterson v. City of Los*
28 *Angeles*, 174 Cal.App.4th 1393, 1405 (2009) (sergeant and city were immune

1 from liability under Section 821.6 for intentional infliction of emotional distress
2 or negligent supervision arising from sergeant's investigation of employee's sick
3 time abuse); *see, Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 1049-50
4 (2007) (city and its officers who made press releases and other public statements
5 in the course of their investigation of criminal activity of high school coach were
6 immune from liability for defamation and intentional infliction of emotional
7 distress, irrespective of whether statements were reasonable or made maliciously
8 as a part of threatened prosecution); *Amylou R. v. County of Riverside*, 28
9 Cal.App.4th 1205, 1209-10 (1994) (county was immune from liability for
10 officer's conduct when questioning victims and percipient witnesses during
11 investigation); *Trujillo v. City of Ontario*, 428 F.Supp.2d 1094, 1124 (C.D. Cal.
12 2006) (officers had immunity under Section 821.6 from claims arising from secret
13 taping of a locker room, as conduct was carried out in the course of criminal
14 investigation).

15 Here, Plaintiff, who admittedly engaged in illegal conduct (FAC, ¶¶ 30-
16 32), predicates her state law claims on her allegation that Frey began probing into
17 her allegations regarding O'Keefe and her participation in the wiretapping
18 incident. (FAC, ¶¶ 45, 48, 81, and 85.) Accordingly, if the Court finds that
19 Plaintiff's allegations establish that Frey was acting within the course and scope
20 of his employment when posting blog entries about Naffe (which they do not),
21 such conduct constitutes preliminary investigation regarding Plaintiff's criminal
22 misconduct and, thus, falls squarely within the immunity conferred by Govt.
23 Code § 821.6. As such, the County is immune from liability for Frey's speech
24 regarding Naffe's admitted participation in criminal activity.

25 **IV. Punitive Damages Are Not Recoverable Against A Public Entity.**

26 Finally, Plaintiff's FAC includes an improper prayer for exemplary
27 damages against the County. It is hornbook law that punitive damages are not
28 recoverable against public entities under both federal and state law. Cal. Govt.

1 Code § 818; *Newport City v. Fact Concerts, Inc.*, 453 U.S. 247, 270, 101 S. Ct.
2 2748, 2761 (1981); *Westlands Water Dist. V. Amoco Chemical Co.*, 953 F.2d
3 1109, 1113 (9th Cir. 1991). Accordingly, the County respectfully requests that
4 the Court dismiss Plaintiff's claims for exemplary damages against it.

5 **V. Conclusion.**

6 Based on the foregoing, this Court should again dismiss Plaintiff's latest
7 pleading against the County of Los Angeles, this time without leave to amend.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: January 11, 2013

LAWRENCE BEACH ALLEN & CHOI, PC

By /s/ Alexandra B. Zuiderweg
Alexandra B. Zuiderweg
Attorneys for Defendant
County of Los Angeles

1 **DECLARATION OF ALEXANDRA B. ZUIDERWEG**

2 I, Alexandra B. Zuiderweg, hereby declare:

3 1. I am an attorney at law, duly licensed to practice before this Court and
4 all of the courts of the State of California, and an associate of the law firm of
5 Lawrence Beach Allen & Choi, PC, attorneys of record for Defendant County of
6 Los Angeles (“Defendant”) in the above-captioned matter. I have personal
7 knowledge of the facts stated herein, except those stated upon information and
8 belief and, as to those matters, I believe them to be true. If called upon to testify
9 to the matters herein, I could and would competently do so.

10 2. This Motion is made after an unsuccessful effort to resolve the issues
11 informally with Plaintiff’s counsel, as required by Local Rule 7-3. On January 3,
12 2013, I sent Plaintiff’s counsel, James B. Devine, a meet and confer letter
13 specifically addressing the grounds for Defendant’s contemplated motion.
14 Attached hereto as Exhibit “A” is a true and correct copy of my January 3, 2013
15 letter to Mr. Devine. My office never received a response to the meet and confer
16 letter.

17 3. Plaintiff’s FAC discusses and quotes many of Frey’s blog posts, but
18 fails to attach them. Attached hereto as Exhibit “B” is a true and correct copy of
19 Frey’s May 27, 2010 blog post, discussed in paragraph 28 of the FAC. This
20 article can be found online at: [http://patterico.com/2012/03/23/tommy-
21 christopher-fails-to-vet-nadia-naffe-1-crowdsourcing/](http://patterico.com/2012/03/23/tommy-christopher-fails-to-vet-nadia-naffe-1-crowdsourcing/). Attached hereto as Exhibit
22 “C” is a true and correct copy of Frey’s March 23, 2012 blog post discussed in
23 paragraph 45 of the FAC. This article can be found online at found online at:
24 [http://patterico.com/2010/05/27/brad-friedman-press-release-confirming-well-
25 known-fact-that-okeefe-intended-to-do-undercover-sting-vindicates-me-
26 somehow-alternate-post-title-brad-friedman-is-a-huge-liar/](http://patterico.com/2010/05/27/brad-friedman-press-release-confirming-well-known-fact-that-okeefe-intended-to-do-undercover-sting-vindicates-me-somehow-alternate-post-title-brad-friedman-is-a-huge-liar/). To avoid burdening
27 the Court, the blog entries are included in their entirety, but the many pages of
28 comments have been omitted.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. Attached hereto as Exhibit "D" are true and correct copies of excerpts of Plaintiff's original Complaint in this action.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on January 11, 2013, at Glendale, California.

 /s/ Alexandra B. Zuiderweg
ALEXANDRA B. ZUIDERWEG