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14 **UNITED STATES DISTRICT COURT**

15 **DISTRICT OF ARIZONA**

16 Javier Torres, Alma Santiago and Lia
Rivadeneira on behalf of themselves and
17 others similarly situated,

18 Plaintiffs,

19 v.

20 Terry Goddard, Attorney General of the
State of Arizona, in his individual and
21 official capacities; and Cameron (“Kip”)
Holmes, in his individual capacity,

22 Defendants.
23

No. CIV-06-2482-PHX-PGR

**DEFENDANTS’ RULE 12(b)(6)
MOTION TO DISMISS PLAINTIFFS’
CLAIMS FOR MONETARY RELIEF**

(Oral Argument Requested)

24 COME NOW the Defendants, pursuant to Rule 12(b)(6), Federal Rules of Civil
25 Procedure, and hereby move to dismiss those portions of Plaintiffs’ Complaint which
26 assert claims for monetary relief, due to failure to state a claim upon which relief can be

1 granted.

2 Government attorneys are absolutely immune from suits for monetary damages for
3 actions in their role as advocates for the State. Attorney General Terry Goddard and
4 Assistant Attorney General Cameron Holmes are being sued for seeking and obtaining
5 warrants in state court to seize property for forfeiture and for executing those warrants.
6 Are they entitled to absolute immunity?

7 Because the answer is “yes,” Goddard and Holmes move to dismiss Plaintiffs’
8 Complaint insofar as it seeks monetary relief. To the extent the Complaint seeks
9 prospective relief against Attorney General Goddard in his official capacity, Goddard
10 intends to file an Answer and, in due course, to move for dismissal of the remainder of the
11 Complaint.

12 **I. *The Plaintiffs’ Complaint.***

13 The Complaint states that the present action is brought to redress alleged violations
14 of civil and constitutional rights of the putative Plaintiff class and representative Plaintiffs,
15 allegedly committed by the Defendants during the past several years in the course of the
16 Arizona Attorney General’s efforts to seize for forfeiture electronic money transfers
17 related to criminal activity. Complaint, ¶ 1. The Plaintiffs claim that a series of “criteria-
18 based” seizure warrants involving wire transfers obtained from the Arizona Superior
19 Court and executed by the Defendants since 2004 has resulted in the seizure of substantial
20 sums of money from innocent persons engaged in legal transactions. Complaint, ¶¶ 9-24.

21 Arizona’s statutes give the Attorney General and other prosecutorial agencies the
22 authority to initiate legal proceedings to seize and forfeit money and other property
23 involved in criminal activity. A.R.S. §§13-4301, *et. seq.*; §§13-2314 – 2315. Such
24 proceedings are civil actions. A.R.S. §13-4303; §13-2314. The Plaintiffs admit that the
25 seizure warrants they complain of were obtained by the Attorney General’s Office with
26 the objective of seizing funds allegedly involved in crimes such as money laundering,

1 participating in or assisting a criminal syndicate, fraudulent schemes and practices,
2 illegally conducting an enterprise, tampering with a public record, taking the identity of
3 another, smuggling of human beings, and attempt, solicitation, facilitation or conspiracy
4 in connection with such offenses. Complaint, ¶ 17. The Plaintiffs further admit that all of
5 the seizures complained of were executed in accordance with warrants that had been
6 reviewed and formally issued by the Superior Court of Arizona. Complaint, ¶¶ 9 – 17.
7 The Complaint does not allege that the seizures of wire transfers carried out by the
8 Attorney General’s Office exceeded the scope of the warrants that the Superior Court had
9 approved.

10 Plaintiffs allege that the seizures violated their rights under the Fourth and
11 Fourteenth Amendments as well as the Commerce Clause. Their lawsuit apparently arises
12 under 42 U.S.C. §1983, although the Complaint does not specifically invoke it, because
13 that statute provides a cause of action for the deprivation of federal rights. The Plaintiffs
14 seek “restitution” of monies which were allegedly wrongfully seized (compensatory
15 damages), as well as consequential damages from Attorney General Goddard and
16 Assistant Attorney General Holmes. Complaint, ¶¶ 7-8, Prayer for Relief, ¶¶ C & D.
17 They also seek prospective declaratory and injunctive relief from Goddard in his official
18 capacity as Arizona’s Attorney General. Complaint, ¶ 8, Prayer for Relief, ¶ B.

19 Defendants Goddard and Holmes do not concede that all of the Plaintiffs’ factual
20 allegations are true. However, the Defendants acknowledge that, for purposes of this
21 Motion to Dismiss, the Court must presume the allegations of the complaint to be true.
22 *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1154 (9th Cir., 2000).

23 **II. *Government attorneys are absolutely immune from liability for litigation-related***
24 ***activities carried on in the course of their official duties.***

25 In order to state a claim for relief under §1983, the Plaintiffs must plead and prove
26 that they have been deprived of a federal protected right and that the deprivation was

1 under color of state law. 42 U.S.C. §1983. A state prosecutor is entitled to absolute
2 immunity from liability under §1983 when he engages in activities “intimately associated
3 with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424 U.S. 409, 96
4 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). Absolute immunity extends to all activities “of
5 the prosecutor in his role as advocate for the State. . . .” *Id.*, n. 33.

6 In *Imbler*, the Supreme Court stated that §1983 was not intended to nullify the
7 immunities from liability that the common law had traditionally accorded to public
8 officials. *Id.*, 96 S.Ct. at 989. The Court recognized that prosecutors engaged in the
9 judicial phase of the criminal process had traditionally been held immune from tort
10 claims, and the Court ruled that such immunity should also be recognized in suits for
11 monetary relief pursuant to 42 U.S.C. §1983. *Id.*, 96 S.Ct. at 993-94. The Court found
12 that if a prosecutor was accorded anything less than absolute immunity in connection with
13 litigation-related activities, “. . . the threat of section 1983 suits would undermine
14 performance of his duties no less than would the threat of common-law suits for malicious
15 prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding
16 which suits to bring and in conducting them in court. The public trust of the prosecutor’s
17 office would suffer if he were constrained in making every decision by the consequences
18 in terms of his own potential liability in a suit for damages.” *Id.*, 96 S.Ct. at 992.

19 A prosecutor asserting immunity has the burden of demonstrating that absolute
20 immunity is justified for the function in question. *Buckley v. Fitzsimmons*, 509 U.S. 259,
21 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993). Prosecutors enjoy absolute immunity for
22 actions associated with judicial proceedings, and qualified immunity for administrative
23 and investigative activities. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502,
24 139 L.Ed.2d 471 (1997); *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547
25 (1991). The Court’s decisions reflect this functional approach; that is, the availability of
26 absolute immunity turns on the nature of the function performed, not on the fact that a

1 prosecutor performs it. *Kalina*, 118 S.Ct. at 508; *Botello v. Gammick*, 413 F.3d 971, 975-
2 76 (9th Cir. 2005).

3 In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the
4 Supreme Court held that absolute immunity from §1983 suits should be accorded not only
5 to prosecutors, but also to government attorneys involved in civil administrative
6 enforcement proceedings. The Court noted that attorneys involved in administrative
7 enforcement matters perform functions which are substantially the same as those carried
8 out by a criminal prosecutor. *Id.*, 98 S.Ct.at 2915-16. The Court ruled that government
9 attorneys were entitled to absolute immunity both for the decision to initiate
10 administrative enforcement proceedings and for their activities in litigating enforcement
11 actions. *Id.*

12 Applying the Supreme Court's precedents, the Ninth Circuit Court of Appeals has
13 repeatedly held that government attorneys who initiate or handle civil litigation are
14 immune from liability for damages claims arising from their activities. *See, e.g., Flood v.*
15 *Harrington*, 532 F.2d 1248 (9th Cir. 1976) (Internal Revenue Service attorneys involved
16 in civil collection proceedings and related litigation); *Demery v. Kupperman*, 735 F.2d
17 1139 (9th Cir. 1984) (Deputy California Attorney General involved in professional
18 disciplinary proceedings against a medical doctor); *Fry v. Melaragno*, 939 F.2d 832 (9th
19 Cir. 1991) (Internal Revenue Service attorneys involved in civil litigation relating to tax
20 assessments); *Bly-Magee v. California*, 236 F.3d 1014 (9th Cir. 2001) (California
21 Attorney General and Assistant Attorneys General involved in civil litigation arising
22 under the False Claims Act). In *Fry*, the Court stated emphatically that the litigation-
23 related activities of government attorneys are protected by absolute immunity regardless
24 of the type of proceeding they are engaged in:

25 We therefore agree with the Second Circuit, as it stated in
26 *Barrett v. United States*, 798 F.2d 565, 572-73 (2d Cir., 1986),
 that the principles outlined in *Butz* should a fortiori apply to
 the government attorney's initiation and handling of civil

1 litigation in a state or federal court. Whether the government
2 attorney is representing the plaintiff or the defendant, or is
3 conducting a civil trial, criminal prosecution or an agency
4 hearing, absolute immunity is “necessary to assure that ...
5 advocates ... can perform their respective functions without
6 harassment or intimidation.” *Butz*, 438 U.S. at 512, 98 S.Ct. at
7 2913. Given the similarity of functions of government
8 attorneys in civil, criminal and agency proceedings, and the
9 numerous checks on abuses of authority inherent in the
10 judicial process, we reiterate our statement in *Flood* that “[t]he
11 reasons supporting the doctrine of absolute immunity apply
12 with equal force regardless of the nature of the underlying
13 action.” 532 F.2d at 1251. If the government attorney is
14 performing acts “intimately associated with the judicial phase”
15 of the litigation, that attorney is entitled to absolute immunity
16 from damage liability.

17 939 F.2d at 837.

18 After the *Fry* case, courts in the Ninth Circuit began to use a shorthand formulation
19 of the rule of absolute immunity for the litigation-related activities of government
20 attorneys. In *Bly-Magee*, *supra*, the Court held that the California Attorney General and
21 his assistants are “absolutely immune for conduct during performance of official duties.”
22 236 F.3d at 1018. *See also*, *Yoonessi v. Albany Medical Center*, 352 F.Supp.2d 1096,
23 1103 (C.D. Cal. 2005) (“An attorney in the Attorney General’s Office is immune from
24 lawsuits for any action she commits in discharging her litigation-related duties. . . .[I]f
25 sued in her individual capacity, the attorney is ‘similarly absolutely immune for conduct
26 during performance of official duties’ [quoting *Bly-Magee*].”)

27 **III. *Activities of government attorneys involved in the seizure and forfeiture of
28 property are protected by absolute immunity.***

29 Although the issue has apparently not been directly addressed by the Ninth Circuit,
30 federal courts in the Third, Fourth, Sixth, Seventh and Tenth Circuits have ruled that
31 government attorneys who initiate and carry on legal proceedings involving the seizure
32 and forfeiture of property are absolutely immune from liability for their activities.

33 In *Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991), the plaintiff sued an

1 Assistant United States Attorney (“AUSA”) for having initiated an *in rem* seizure and
2 forfeiture action against corporate stock and property of the plaintiff’s business, allegedly
3 because the stock and property had been acquired with the proceeds of illegal drug
4 transactions. The AUSA moved to dismiss the plaintiff’s lawsuit, asserting absolute
5 immunity. In response to the motion to dismiss, the plaintiff argued that the seizure of the
6 business property for forfeiture was an “investigative” act similar to the execution of a
7 search warrant, and therefore was not the kind of litigation-related activity entitled to
8 absolute immunity. The district court denied the motion. The Third Circuit reversed the
9 trial court’s ruling and remanded the case with instructions to dismiss the complaint on the
10 ground of absolute immunity. 948 F.2d at 1422.

11 The *Schrob* Court noted that, while *in rem* forfeitures are often undertaken in
12 conjunction with criminal prosecutions, there is no reason that they necessarily have to be.
13 The Court pointed out that *in rem* actions are separate proceedings against the property
14 itself:

15 . . . The property sought under the seizure warrant is
16 considered tainted upon the commission of the wrongful act
17 and the government’s interest in the property vests at the time
18 of the act. *See* 21 U.S.C.A. §881(h). The prosecutor is not
19 gathering evidence under a seizure warrant, but has already
20 decided to bring an action for forfeiture against the guilty
21 property. Thus, a seizure warrant is a necessary first step in
the statutory forfeiture process. The *in rem* complaint and the
seizure warrant are intimately connected – one follows the
other and effectuates it.

948 F.2d at 1416.

22 Because *in rem* proceedings are independent actions in and of themselves, the Court
23 concluded that government attorneys carrying out *in rem* seizures and forfeitures are
24 entitled to absolute immunity:

25 . . . We believe that under the unique procedures of forfeiture,
26 the seizure warrant is an integral part of the forfeiture
complaint and the decisions to file the complaint and seek the
warrant should be considered as one. The “investigative”

1 label placed on a prosecutor's actions in seeking arrest and
2 search warrants does not apply in the forfeiture context. We
3 also believe that the procedural safeguards under the forfeiture
4 laws reduce the need for private damage actions as a means of
redressing unconstitutional conduct by a prosecutor. *See Butz*,
438 U.S. at 512, 98 S.Ct. at 2913.

5 For all of the above reasons, we hold that a prosecutor
6 seeking a seizure warrant is performing "the preparation
7 necessary to present a case" and such preparation is
8 encompassed within the prosecutor's advocacy function.
9 (Citation omitted.) . . . Absolute immunity applies if the
action at issue was taken in furtherance of prosecutorial duties
even though the prosecutor inadvertently injures an innocent
person. (Citation omitted.) Thus, Catterson is also protected
by absolute immunity for his actions in seeking the seizure
warrant.

10 948 F.2d at 1416-17.

11 Like the *Schrob* Court, the other courts that have addressed the issue of immunity
12 in the context of seizure of property for forfeiture have applied the principles established
13 in the Supreme Court's *Imbler* and *Butz* decisions in extending absolute immunity to the
14 government attorneys involved. *See, e.g., Cooper v. Parrish*, 203 F.3d 937, 947 (6th Cir.
15 2000) ("We agree that the prosecutors in this case may still be absolutely immune even
16 though the alleged constitutional violations occurred when the officials were pursuing a
17 civil action. Indeed, as long as the prosecutors were functioning in an enforcement role
18 and acting as advocates for the state in initiating and prosecuting judicial proceedings,
19 they are entitled to an absolute immunity defense."); *Mendenhall v. Goldsmith*, 59 F.3d
20 685, 691 (7th Cir. 1995) ("We conclude that absolute immunity attached to Goldsmith's
21 conduct in filing for an injunction, the forfeiture of Mendenhall's property, and the seizure
22 of the property subject to forfeiture. Goldsmith acted pursuant to the authority vested in
23 him under Indiana law, functioning purely in his capacity as an advocate for the state.");
24 *Ehrlich v. Giuliani*, 910 F.2d 1220, 1222 (4th Cir. 1990) ("Because we find that locating
25 and preserving assets of indicted defendants for forfeiture proceedings falls within a
26 prosecutor's advocacy duties, we agree that Giuliani and Shannon are entitled to absolute

1 immunity from liability for their actions and affirm the dismissal by the district court.”);
2 *Cole v. Sharp*, 898 F. Supp. 799, 803 (D. Kan. 1995) (“In accordance with the analysis
3 and conclusion of the decisions in *Schrob* and *Mendenhall*, the court finds that defendant
4 Barrett is entitled to absolute immunity for his actions in seeking forfeiture of plaintiffs’
5 property and in seizing that property without notice to the plaintiffs. In this conduct,
6 defendant Barrett was acting pursuant to the authority vested in him under Kansas law,
7 functioning purely in his capacity as an advocate for the state.”)

8 The Plaintiffs in the present case have alleged that the challenged seizures of wire
9 transfers were accomplished pursuant to warrants that were overbroad and lacking in
10 probable cause. Complaint, ¶¶ 51 & 53. As a result, the Plaintiffs contend, money
11 belonging to innocent persons was seized for forfeiture. Because of this alleged harm to
12 innocent parties, the Plaintiffs may argue that absolute immunity for the Defendants is not
13 justified in the present case. This line of argument was rejected by the Fourth Circuit in
14 *Ehrlich v. Giuliani*. In that case, federal prosecutors had obtained restraining orders under
15 the civil racketeering statutes to freeze the investment accounts of several defendants who
16 had been indicted in a securities fraud case. In the process, the prosecutors had
17 inadvertently frozen an account belonging to an innocent person whose name was similar
18 to one of the indicted defendants. When the error came to light, the owner of account
19 filed a civil rights suit for damages. The Fourth Circuit ruled that, despite their mistake,
20 the government’s attorneys were entitled to absolute immunity:

21 . . . Potential defendants fearing forfeiture proceedings may
22 try to hide their assets, forcing the prosecutor to cast a broad
23 net in the search for information about those assets. While
24 care should be taken before requesting a restraining order, the
25 potential for a mistake could deter a prosecutor from
26 exercising independent judgment if not shielded from liability.
 Courts issuing restraining orders should review the application
 to minimize the risk of error, but if a mistake is made and the
 wrong asset is frozen, the prosecutor should not have to face
 personal liability. (Citation omitted.)

* * * * *

1 As a final consideration, we note that it does not matter in
2 this case that the plaintiff was not an indicted defendant. The
3 prosecutors intended to act only against indicted persons.
4 However, absolute immunity applies if the action at issue was
5 taken in furtherance of prosecutorial duties even though the
6 prosecutors inadvertently injured an innocent person.
7 (Citation omitted.)

8 Accordingly, we affirm the district court's conclusion that
9 defendants are entitled to absolute immunity from liability in
10 this case.

11 910 F.2d at 1223-24.

12 Taking into account all of the precedents discussed above, it is clear that the
13 Plaintiffs' complaint fails to state a claim upon which relief can be granted. The
14 Defendants used powers conferred upon them by the laws of the State of Arizona to
15 initiate and prosecute *in rem* actions with the objective of intercepting and seizing for
16 forfeiture monies involved in serious criminal offenses, including human smuggling, drug
17 trafficking and money laundering. As recognized in *Mendenhall v. Goldsmith, supra*,
18 forfeiture actions are "civil proceeding[s] with a law enforcement purpose." 59 F.3d at
19 691. The challenged actions of Defendants Goddard and Holmes were "intimately
20 associated with the judicial phase" of those proceedings, and are therefore protected by
21 absolute immunity. *Schrob v. Catterson, supra; Mendenhall v. Goldsmith, supra; Cooper*
22 *v. Parrish, supra.*

23 **IV. Conclusion.**

24 In the present case, the Plaintiffs have sued Defendants Goddard and Holmes for
25 initiating and carrying on *in rem* civil proceedings for the seizure and forfeiture of
26 property involved in criminal activity. The Plaintiffs acknowledge that such proceedings
are authorized by Arizona law, that the Defendants were acting in their role as advocates
for the State of Arizona, and that the seizures in question were authorized by the Superior
Court. In light of the authorities cited above, it is clear that Goddard and Holmes are
entitled to absolute immunity from damage claims for the activities described in the

1 Plaintiffs' Complaint. All portions of the Complaint which assert claims for monetary
2 relief must be dismissed.

3 RESPECTFULLY SUBMITTED this 20 day of November, 2006.

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