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("San Joaquin Defendants")

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

WINNEMUCCA SHOSHONI, MBS, et al., Plaintiffs, v. SAN JOAQUIN COUNTY BOARD OF SUPERVISORS, et al., Defendants.	Case No. 2:17-CV-02271-KJM-EFB **NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Hearing Date: April 20, 2018 Time: 10:00 a.m. Ctrm: 3 Judge: Hon. Kimberly J. Mueller: Magistrate: Hon. Edmund F. Brennan Trial Date: None Action Filed: October 30, 2017

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 20, 2018, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 3 of the above-entitled Court, located at 501 I Street, Sacramento, California 95814, Defendants SAN JOAQUIN COUNTY BOARD OF SUPERVISORS, SAN JOAQUIN COUNTY COUNSEL, ERIN HIROKO SAKATA, MIGUEL VILLAPUDUA, KATHERINE MILLER, TOM PATTI, BOB ELLIOTT, CHUCK WINN, SAN JOAQUIN COUNTY DISTRICT ATTORNEY, and SAN JOAQUIN COUNTY SHERIFF (collectively "San Joaquin Defendants") will, and hereby do, move to dismiss each attempted claim for relief in Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Complaint fails to state a claim upon which relief can be granted and the individual defendants are entitled to either absolute or qualified immunity.

On and before January 12, 2018, the parties met and conferred by telephone conference in an attempt to resolve the issues raised by the Motion.

The Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, the Request for Judicial Notice, the file and record in this case, and such other points and authorities as the Court may deem fit to consider at the hearing.

Dated: January 16, 2018

COTA COLE & HUBER LLP

By: ***/s/ Ronald J. Scholar***
Ronald J. Scholar
Attorneys for San Joaquin Defendants

{RJS/00055320.2 }

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' Second Amended Complaint ("SAC") is regarding the passage of a county ordinance restricting the growth of, and over the seizure of, a crop of the plant Cannabis sativa L (hereinafter referred to as "Crop" or "Grow"). The Plaintiffs, a cacophony of business entities and individuals, none of whom acknowledge ownership of the Crop they complain were unlawfully seized from them, sue San Joaquin County, including the individual members of the County Board of Supervisors, the County's legal counsel, its Sheriff's Department and its District Attorney's Office. The SAC should be dismissed because while it is long on conclusory accusations, it is short on material, well pled facts that would establish a factual basis for their causes of action. Additionally, the individual defendants are entitled to absolute or qualified immunity. Finally, it should not be lost in this matter that the Crops were and remain illegal at every level. The motion to dismiss should be granted.

II. PLAINTIFFS' COMPLAINT

A. PLAINTIFFS.

The organizational Plaintiffs in this action are Free Spirit Organics, NAC ("FSO"), alleged to be a Nevada corporation and identified as the manager and operator of the 26.19 acre plot of land located in San Joaquin County on which the Crop was grown. SAC ¶ 3. American States University ("ASU") fails to describe what type of entity it is and instead alleges that it is "a California institution of higher education" pursuant to California Food & Agriculture section 81000 et. seq. SAC ¶ 4. HRM Farms ("HRM") is a California Corporation and alleges that it some sort of unspecified "partner" of FSO and ASU. SAC ¶ 5. Plaintiff Cannabis Science Inc. ("CSI") alleges it is a publicly traded Nevada corporation with its principal place of business in Orange County, California. CSI does not allege it is a partner with any other of the Plaintiffs and makes no mention of what its interest, if any, it has in the Crops. SAC ¶ 6. Plaintiff S.G. Farms is a "grow consultant." S.G. Farms allegedly contracted with FSO to assist with the growth of the Crop and conduct unspecified research relating to the Grow. SAC ¶¶ 7, 32.

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The individual Plaintiffs include William Bills, who claims to be the manager of the Grow. SAC ¶¶ 8, 34. Plaintiff Glen Burgin alleges he is the lessee of the 250 acre plot of land upon which the Crops were grown, but the lessor or owner of the property is never identified. SAC ¶ 8; Request for Judicial Notice ("RJN"), Exh. 1 (Burgin Decl., ¶ 20.) The remaining individual Plaintiffs do not allege any interest in the Crop. SAC ¶¶ 8-9. None of the Plaintiffs allege they are the owner of the seized Crops or the land on which they were grown.

B. DEFENDANTS.

Plaintiffs name the entirety of the San Joaquin County Board of Supervisors, Miguel Villapudua, Katherine Miller, Tom Patti, Bob Elliott, and Chuck Winn as defendants. SAC ¶ 11. Also named as a defendant is Erin Hiroko Sakata, an attorney and employee of County of San Joaquin, Office of County Counsel. SAC ¶ 11. Ms. Sakata is alleged to have conspired with "the County Sheriff and other County officials" to pass the ordinance at issue. *Id.* Plaintiffs fail to allege whether any of the individual defendants are sued in the official or individual capacities.[1] The SAC also names the San Joaquin County District Attorney and the San Joaquin County Sheriff as groups of public employees without naming any individuals. SAC ¶¶ 12-13.

C. PLAINTIFFS' ALLEGATIONS.

The Plaintiffs collectively allege that their Constitutional rights were violated by all the Defendants who conspired with each other to present false information to the County Board of Supervisors to interfere with the Plaintiffs extracting "cannabidiol cannabinoid ['CBD'] from their hemp" and "the ability of plaintiffs to complete its agricultural research to provide CBD to patients in need of care." SAC ¶¶ 11-13.

Stripped of its conclusory accusations, the facts as pled allege that the Plaintiffs "leased a wholly tribal owned[2]" 250-acre parcel in San Joaquin County. The Grow was on a 26.19-acre

[1] Plaintiffs allege that the Board of Supervisor members were acting "within their official capacities" but not the capacity in which they are sued.

[2] It is unclear what this means. There is no allegation that the property is sovereign Native American land held in trust by the United State government. The allegation is also false and misleading. According to the declaration of Glen Burgin filed in support of Plaintiffs failed application for a temporary restraining order, "[m]y [Burgin] company, HRM Farms leased the land … from another family member." RJN Exh. 2 (Burgin Decl., ¶ 2.)

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portion of the land. SAC ¶ 27. In June 2017, Plaintiffs began growing hemp. SAC ¶ 34. Plaintiffs claim that their hemp growing activity was approved, yet fail to attach documentation of such approvals. They partially describe a "Declaration of Certification of Industrial Hemp Production, Research and Development Program" from the Nevada Department of Agriculture ("NDA"). SAC ¶ 28; RJN Exh. 1 (Bills' Decl., Exh. A, pp. 2-3.) The Certificate on its face expired on June 20, 2017; was limited to 4 acres of land; and that the certified location of that 4 acres of land. *Id*. Plaintiffs allege the conclusion that HRM was "approved" by the "County Agricultural Commission," but fail to provide any factual details of any such approval. SAC ¶ 34.

Between August 29, 2017 and September 15, 2016, one or more Plaintiffs exchanged correspondence with Ms. Sakata at the San Joaquin County Counsel's Office regarding the legality of the Crop. SAC ¶¶ 37-40. On September 26, 2017, the San Joaquin County Board of Supervisors conducted a public hearing regarding a proposed Interim Urgency Ordinance Declaring a Temporary Moratorium on the cultivation of Industrial Hemp by "Established Agricultural Research Institutions" within Unincorporated Areas of San Joaquin County. SAC Exh. D. Plaintiffs allege that inaccurate information was provided to the Board members regarding the size of the crop area, the distinguishability of marijuana from hemp, that "patients" depend on CBD, that criminal activity may be associated with the growing of hemp and that small marijuana grows are difficult to find. SAC ¶ 42; Exh. D. Plaintiffs also vaguely allege that Ms. Sakata "and/or one of her colleagues, …" misinterpreted California law in order to conclude that the Crop, was in violation of the law. SAC ¶ 23. Thereafter, Sakata drafted a County Ordinance criminalizing the plants and lied at a public meeting to justify its passage. *Id*.

On September 28, 2017, Ms. Sakata sent a letter to Plaintiffs with the Ordinance attached and advising that the planting was in violation of the Ordinance. SAC ¶43; Exh. C. Plaintiffs requested a hearing on the matter which was set for November 7, 2017. On October 6, 2017, Plaintiffs submitted their position in writing to Tim Pelican, the County Agricultural Commissioner, who according to Plaintiff's allegations, had already "approved" Plaintiffs' growing operation. SAC ¶45; Exh. D.

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On October 9, 2017, Agent Michael Eastin was the affiant on a search warrant related to the crops. The warrant specified the property to be searched, suspects and authorizes the seizure[3] of things contained in a list of nine specific categories such as marijuana / hemp; related paraphernalia which is described, personal property indicating ownership, dominion and control of the premises, cultivation equipment and the like. SAC ¶ 46; Exh. E.

D. RELIEF SOUGHT.

Plaintiffs' allegations with respect to relief sought are confusing and inconsistent. Plaintiffs allege that they are bringing this action for injunctive relief, punitive damages and return of the seized plants. SAC ¶¶ 15-16. Yet, elsewhere, Plaintiffs claim they are entitled to $77 million dollars in damages. SAC ¶¶ 58, 66, 74, 77, 85, and in the Prayer.

III. LAW AND ARGUMENT

A. STANDARD OF REVIEW ON MOTION TO DISMISS.

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the legal sufficiency of the allegations in the complaint. See *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199–1200 (9th Cir. 2003). Dismissal is proper when a complaint "either: (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). Review is limited to the contents of the complaint, documents incorporated by reference in the complaint and matters subject to judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

The court "must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true." *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). However, this liberal review does not include the court supplying "essential elements of the claim that were not initially pled." *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Additionally, the court cannot "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, supra*, 266 F.3d at p. 988. On a motion to dismiss, courts are "not bound

[3] Plaintiffs allege that the warrant does not permit any seizure of property. This is incorrect. The second page of the warrant says "AND TO SEIZE IF FOUND…." SAC Exh. E.

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to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); see also *Miranda v. Clark Cty., Nevada*, 279 F.3d 1102, 1106 (9th Cir. 2002) ("[C]onclusory allegations of law and unwarranted inferences will not defeat a motion to dismiss for failure to state a claim.).

The pleading standard requires "more than an unadorned, the-defendant unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp v. Twombly*, *supra,* 550 U.S. at 570). A plaintiff must provide grounds of his entitlement to relief beyond "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp v. Twombly, supra*, 550 U.S. at p. 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, *supra,* 556 U.S. at p. 678. Rather, a plaintiff's allegations must nudge the claims in the complaint "across the line from conceivable to plausible[.]" *Bell Atl. Corp. v. Twombly*, *supra,* 550 U.S. at p. 570. Further, the court may further reject completely baseless allegations, including those which the court finds fanciful, fantastic, or delusional. See *Denton v. Hernandez*, 504 U.S. 25, 32 (1992).

B. APPLICABLE LAW RELATING TO THE GROWING OF INDUSTRIAL HEMP.

1. The Controlled Substances Act of 1970.

The Controlled Substance Act ("CSA") (21 U.S.C. § 801 et seq.) makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance. Marijuana and tetrahydrocannabinols (THC) are Scheduled I controlled substances. 21 U.S.C. § 812(c) (Schedule I (c)(10), (17)). Marijuana is defined to include "all parts of the plant Cannabis sativa L.," except certain components of the plant such as the mature stalks, fiber produced from such stalks, sterilized seeds, and oils from the seeds. 21 U.S.C. § 802(16). The CSA does not distinguish between marijuana and hemp in its regulation. Therefore, the CSA regulates the farming of hemp. *United States v. White Plume*, 447 F.3d 1067, 1073 (8th Cir. 2006); *United States v. Pickard*, 100 F. Supp. 3d 981 (E.D. Cal. 2015). The CSA

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requires a party must apply for and obtain a certificate of registration [DEA permit] issued by the Attorney General. 21 U.S.C. § 822-823.

2. The U.S. Farm Bill of 2014.

Section 7606 of the Agricultural Act of 2014 ("2014 Farm Bill") defines "industrial hemp as the plant Cannabis sativa L…, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 5940(b)(2). Section 7606 did not remove industrial hemp from the controlled substance list under the CSA. Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53395-01 (Aug. 12, 2016). Section 7606 limits activity to institutions of higher education or a state department of agriculture for purposes of agricultural or academic research. 7 U.S.C. § 5940(a)(1). In addition, hemp must be permitted under state law. 7 U.S.C. § 5940(a)(2).

On August 12, 2016, the U.S. Department of Agriculture ("USDA"), with the concurrence of the DEA and the U.S. Food and Drug Administration ("FDA"), issued a Statement of Principles regarding the applicability of federal laws to activities associated with growing and cultivating industrial hemp. According to this statement, "the growth and cultivation of industrial hemp may only take place in accordance with an agricultural pilot program to study the growth, cultivation, or marketing of industrial hemp established by a State department of agriculture or State agency responsible for agriculture in a State where the production of industrial hemp is otherwise legal under State law." Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53395-01 (Aug. 12, 2016). Further, "the State agricultural pilot program must provide for State registration and certification of sites used for growing or cultivating industrial hemp." *Id*. "[T]he Federal Government does not construe Section 7606 of the U.S. Farm Bill to alter the requirements of the CSA that apply to the manufacture, distribution, and dispensing of drug products containing controlled substances. Manufacturers, distributors, dispensers of drug products derived from cannabis plants, as well as those conducting research with such drug products, must continue to adhere to the CSA requirements." 81 Fed. Reg. 53,396 (Aug. 12, 2016). A DEA certificate is still required.

3. The California Industrial Hemp Farming Act of 2013.

The California Industrial Hemp Farming Act ("Hemp Act") was enacted in 2013 and became effective January 1, 2017. The Hemp Act defines "industrial hemp" in a manner consistent with Section 7606 of the U.S. Farm Bill. 7 U.S.C. 5940(b)(2); Cal. Health & Safety Code § 11018.5; Cal. Food & Ag. § 8100(d). Under the Hemp Act, activities associated with the growing and cultivating of industrial hemp are regulated by the California Department of Food and Agriculture ("CDFA") in accordance with the provisions of Division 24 of the Food and Agriculture Code. Cal. Health & Safety Code § 11018.5(b).

The Hemp Act permits the growing of industrial hemp for research by an "established agricultural research institution" and for commercial purposes. A grower of industrial hemp for commercial purposes must register with the commissioner of the county in which the grower intends to engage in industrial hemp cultivation and comply with all growing, importing, and laboratory testing limitations and/or requirements that are statutorily imposed. Cal. Food & Agric. Code § 81002-81007. A grower that is an "established agricultural research institutions" is exempt from such limitations and/or requirements. An "established agricultural research institution" is defined as follows:

> (1) a public or private institution organization that maintains land or facilities for agricultural research, including colleges, universities, agricultural research centers, and conservation research centers; or
>
> (2) an institution of higher education (as defined in Section 1001 of the Higher Education Act of 1965 (20 U.S.C. § 1001)) that grows, cultivates or manufactures industrial hemp for purposes of research conducted under an agricultural pilot program or other agricultural or academic research.

Cal. Food & Agric. Code § 81000(c)(1)-(2).

4. The Higher Education Act of 1965.

An institution of higher education is defined in the Higher Education Act of 1965, 20 U.S.C. 1001(a), as an institution that:

> (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate; or persons who meet the requirements of section 1091(d) of this title;
>
> (2) is legally authorized within such State to provide a program of education beyond secondary education;

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> (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;
>
> (4) is a public or other nonprofit institution; and
>
> (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

5. The San Joaquin County Ordinance.

San Joaquin County Ordinance 4497 is an urgency ordinance enacted by a unanimous vote of the Board of Supervisors per Cal. Gov't Code § 65858. The ordinance acknowledges that the 2014 Farm Bill authorizes, under limited circumstances, the cultivation of industrial hemp and that provisions were added to the California Food and Agriculture Code to reflect this authorization. (SAC Exh. D.) The ordinance notes that under the new California statutes, cultivation of industrial hemp for commercial purposes is prohibited until a state agency, the Industrial Hemp Board, develops regulations for such cultivation, which are not expected to be issued until 2019. (*Id.* ¶¶ C-F.) The ordinance recognizes that the new statutes exempt "established agricultural research institutions" from this prohibition. But it finds that neither the statutes nor the Industrial Hemp Board have adequately defined what types of institutions qualify for the exception. (*Id.* ¶¶ G-L.) The ordinance thus prohibits cultivation of industrial hemp for any purpose, including by established agricultural research institutions, during the moratorium it imposes. In doing so, it finds that the plants grown for industrial hemp look the same as marijuana plants grown for commercial purposes and cannot be distinguished without laboratory testing. (*Id.* ¶ J.) It thus finds the growing of industrial hemp will have the same practical potential to increase criminal activity and create threats to public safety as does the growing of marijuana plants, which the County Code previously prohibited. (*Id.* ¶¶ O-Q.) Because of the pesticides that are known to be used for industrial hemp cultivation, the ordinance also describes a number of deleterious environmental impacts such cultivation could have. (*Id.* ¶¶ R-Z.)

E. THE INDIVIDUAL MEMBERS OF THE BOARD OF SUPERVISORS AND COUNTY COUNSEL SAKATA ARE IMMUNE FROM SUIT FOR THEIR LEGISLATIVE ACTIVITY.

Plaintiffs sue the individual members of the San Joaquin Board of Supervisors for voting on and passing San Joaquin County Ordinance 4497. The law is well settled that "[a]bsolute immunity attaches to all actions taken 'in the sphere of legitimate legislative immunity.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). In *Bogan*, the plaintiff, a former city of Fall River employee, sued the City, its mayor, the vice-president of the city council and other officials for passing a city ordinance which eliminated her position of employment. Plaintiff claimed that the motivation for the ordinance was race discrimination and retaliation for exercise of plaintiff's First Amendment rights. *Id*. at 47-48. The High Court held that the it was the nature of the act itself and not its motivation that was to be considered in the application of legislative immunity. *Id*. at 55-56. Indeed, "the question of intent of the individual defendants is strictly off limits in the legislative immunity analysis." *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 960 (9th Cir. 2010).

In *Bogan*, the Court stated that voting for an ordinance is "quintessentially legislative" and absolutely immune. Similarly, the mayor, an executive official, was also immune for introduction of the budget that eliminated plaintiff's position and signing the ordinance. In so holding the High Court stated, "[t]he ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents." *Bogan v. Scott-Harris*, *supra*, at p. 55-56; see also *Cmty. House, Inc. v. City of Boise, Idaho*, *supra*, at p. 959 ("Local government officials are entitled to legislative immunity for their legislative actions, whether those officials are members of the legislative or the executive branch. [citation omitted] This immunity extends both to claims for damages and claims for injunctive relief.")

Under *Bogan*, the members of the individual members of the County Board are absolutely immune from liability from damages and injunctive relief. The same holds true for County Counsel Sakata, who is sued for allegedly providing false information to the County Board. This is a legislative function by an executive branch officer, just like the mayor in *Bogdan* was immune for introducing the budget which eliminated plaintiff's position with the city. *Aitchison*

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v. Raffiani, 708 F.2d 96, 99 (3d Cir. 1983) (borough attorney acting in the course of legislative drafting and advising the council entitled to absolute legislative immunity).

F. PLAINTIFFS HAVE NOT SUFFERED A CONSTITUTIONAL DEPRIVATION.

1. The County Ordinance is Not Preempted (First Cause of Action).

a. Ordinance 4497 is not preempted by federal law.

Preemption occurs when a law passed by a lower government conflicts with that of a higher authority such that an individual cannot abide by one law without violating the other. Ordinance 4497 would only be preempted if the Farm Bill expressly prohibited state regulation, were so pervasive that it is demonstrates an intention for congress to occupy the whole field of law (field preemption), or if the ordinance conflicts with the federal law. *See Arizona v. United States*, 567 U.S. 387 (2012). There is no explicit preemption language in the 2014 Farm Bill, so express preemption is not applicable. *Gallup Med Flight, LLC v. Builders Tr. of New Mexico*, 240 F. Supp. 3d 1161 (D.N.M. 2017). Nor is there field preemption. The Farm Bill itself indicates a deference to state law, demonstrating Congress fully intended states to engage in this area of regulation. *Arizona v. United States, supra,* at p. 399. For the same reason, it is not possible as a matter of law to indicate that federal and local conflict, as federal law recognizes states—and thus also their political subdivisions—retain the right to regulate within the area of industrial hemp. See, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

b. Ordinance 4497 is not preempted by state law.

Under article XI, section 7 of the California Constitution, "[a] county or city may make and enforce ordinances and regulations not in conflict with general laws." *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993). Under this constitutional provision, a "conflict" exists if a local ordinance: (1) duplicates the state statute, (2) contradicts the statute, or (3) enters an area fully occupied by general law. Cal. Const. art. XI, § 7; *Kirby v. Cty. of Fresno*, 242 Cal. App. 4th 940 (2015).

Ordinance 4497 does not create any such conflict. The ordinance's ban on commercial hemp cultivation is in fact consistent with state law. The state has not yet enacted regulations to enable such commercial cultivation, and thus the Ordinance's temporary prohibition of such

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1 cultivation while those regulations are being considered furthers, rather than contradicts, state
2 goals and policies. The ordinance's prohibition on cultivation by education and research
3 institutions also does not conflict with state law. As Ordinance 4497's findings recited, the state
4 statute definition of "established agricultural research institution" is vague in that it is susceptible
5 of a meaning that would render certain hemp plants to be classified as cannabis. SAC Exh. D
6 (Ord. 4497, ¶ K.) The ordinance does not attempt to contradict or circumvent the state law
7 definition of such institutions. It simply seeks to interpret the definition in a way that allows the
8 County to ensure it may enforce its previously adopted prohibition on commercial cannabis
9 cultivation. *Id.*, ¶¶ L-O. Thus, the ordinance functions within the legislative scheme the state has
10 established and accordingly is not preempted. Finally, it is worth noting that if the County
11 Ordinance is preempted by Federal law, then so must be California's Hemp Act.

12 **2. The County Ordinance is Not Vague (Second Cause of Action).**

13 Plaintiffs contend Ordinance 4497 is void for vagueness. The SAC fails to meet the
14 exacting standard required to support this claim. An ordinance is unconstitutionally vague only if
15 it fails to allow a person to (1) reasonably understand what conduct the ordinance prohibits, or
16 (2) is so indefinite that it is susceptible to arbitrary or discriminatory enforcement. *Human Life of*
17 *Washington Inc. v. Brumsickle*, 624 F.3d 990, 1019–20 (9th Cir. 2010). In considering whether
18 an ordinance fails under either standard, courts are not to expect ordinances to have "perfect
19 clarity" or speak with "mathematical certainty." *California Teachers Ass'n v. State Bd. of Educ.*,
20 271 F.3d 1141, 1150 (9th Cir. 2001); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

21 In asserting Ordinance 4497 is vague, the Plaintiffs engage in a petty game of semantics.
22 They read words and phrases of the ordinance out of context in an effort to create a conflict in its
23 terms. Importantly, the sections of the ordinance Plaintiffs cite (or more accurately, distort) only
24 state its findings. The operative provision of the ordinance is clear that the growth of "industrial
25 hemp for any purposes" is prohibited within the County. SAC Exh. D (Ord. 4479, ¶7.) There is
26 nothing ambiguous about this prohibition. It plainly indicates to any reasonable person that any
27 growing of the hemp plant is prohibited anywhere within the County. The categorical nature of
28 the prohibition also belies any notion the ordinance is indefinite or subject to arbitrary

1 enforcement. The ordinance employs a bright-line standard. It does not require County law
2 enforcement or code enforcement personnel to apply or weigh open-ended factors to determine if
3 a violation exists. Ordinance 4497 is not void for vagueness.

4 **3. The County Ordinance is Not a Bill of Attainder (Third Cause of Action).**

5 Article I, Section 9, Clause 3, of the Constitution provides that "no bill of attainder or ex
6 post facto law shall be passed." *United States v. Lovett*, 328 U.S. 303, 306 (1946). A bill of
7 attainder is a rarely granted cause of action. The "key features of a bill of attainder" are that the
8 challenged law "legislatively determines guilt and inflicts punishment upon an identifiable
9 individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*,
10 433 U.S. 425, 468 (1977). An otherwise valid law is not transformed into bill of attainder merely
11 because it regulates conduct on the part of designated individuals or classes of individuals. U.S.
12 Const. art. I, § 10, cl. 1; *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir.
13 1992). Ordinance 4497 makes no specific mention of any of the Plaintiffs. The ordinance merely
14 prohibits the growth of "industrial hemp for any purposes" within the County. SAC Exh. D (Ord.
15 4479, ¶ 7.) That the Plaintiffs' commercial operation was referenced in the discussions about the
16 ordinance does not make it a bill of attainder. Discussion of real-life examples of the activity
17 sought to be regulated or prohibited is a regular part of the legislative process. A bill of attainder
18 must specify an individual for purposes of punishing them. Ordinance 4497 does not.

19 **4. The County Ordinance is Not an Ex Post Facto Law (Third Cause of Action).**

20 Plaintiffs allege that "the County made something already happening criminal." SAC ¶74.
21 This is not the appropriate inquiry. In order for a criminal or penal law to be ex post facto, it must
22 be retrospective, applying to events occurring before its indictment, and must disadvantage the
23 offender affected by it. U.S. Const. art. I, § 10, cl. 1; *Weaver v. Graham*, 450 U.S. 24, 29 (1981).
24 In other words, the law must punish as a crime and act previously committed, which was innocent
25 when done. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) citing *Beazell v. Ohio*, 269 U.S. 167
26 (1925).

27 The ordinance does nothing of the sort. It is not retrospective in nature. Instead it covers
28 events and actions that occur after its passage. The prohibitory portion of the Ordinance begins

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with the statement, "[d]uring the term of this interim moratorium…." SAC Exh. D. As such, by its own terms, the Ordinance is not retrospective and thus not an ex post facto law. Further, the Ordinance was not applied in a retrospective manner. Ms. Sakata's letter to Plaintiffs about the Ordinance states "[t]he Ordinance became effective immediately. Accordingly, *at this time*, your grow…constitutes a public nuisance. SAC Exh. C (emphasis added). This language of enforcement is clearly applicable to what Plaintiffs were presently doing after passage and not what they had done in the past. Therefore, the Ordinance is not an ex post facto law. Finally, Plaintiffs' commercial hemp enterprise was already illegal as it failed to comply with the CSA, the 2014 Farm Bill, and the Hemp Act.

5. Plaintiffs Were Not Denied Due Process (Fourth Cause of Action).

Plaintiffs plead that they were deprived of due process of law pursuant to the Fifth Amendment. The Fifth Amendment only applies to the federal government, not the states or their political subdivisions. *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008). Even if it did, Plaintiffs have failed to plead a cause of action because they challenge the enactment of an ordinance that was discussed and enacted following a duly noticed public meeting and Plaintiffs were in contact with County officials before and after the ordinance was passed. SAC ¶ 11, 37-43. Plaintiffs' disagreement with the County on issues that were resolved against their pecuniary interests do not establish a due process claim.

6. The Seizure Was Lawful (Fifth Cause of Action).

Plaintiffs allege that the seizure of the Crops violated their Fourth Amendment rights because the warrant lacked specificity, contained inaccurate facts and was served at night without a night service authorization. Plaintiffs are incorrect.

a. The Warrant was Sufficiently Specific.

To be valid, a search warrant need only be reasonably specific in its description of objects of the search. *United States v. Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982); *United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993). Here the search warrant is more than sufficiently specific. It specifies the property to be searched, suspects and authorizes the seizure of things contained in a list of nine specific categories such as marijuana / hemp; related paraphernalia

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which is described, personal property indicating ownership, dominion and control of the premises, cultivation equipment and the like. SAC Exh. F.

b. Plaintiffs Fail to Plead Facts Showing Judicial Deception.

When a warrant has been issued, a plaintiff must allege and prove that the law enforcement officer engaged in "judicial deception" in order to obtain the search warrant. To make a claim for judicial deception, a plaintiff must show that the officer who applied for the warrant "deliberately or recklessly made false statements or omissions that were material to the finding of probable cause." *Smith v. Almada*, 640 F.3d 931, 937 (9th Cir. 2011); *United States v. Leon*, 468 U.S. 897, 920, 923 (1984); *Hervey v. Estes*, 65 F.3d 784, 788–789 (9th Cir. 1995) (plaintiff "alleging judicial deception 'must make a substantial showing of deliberate falsehood or reckless disregard for truth' and 'establish that, but for the dishonesty, the challenged action would not have occurred.'" Further, "plaintiff must show that the investigator 'made deliberately false statements or recklessly disregarded the truth in the affidavit' and that the falsifications were 'material' to the finding of probable cause." *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002). Plaintiffs' generic claim that the warrant "contained inaccurate facts" by the affiant is wholly insufficient upon which to grant any relief whatsoever.

G. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

Qualified immunity is more than just a defense to liability. It is complete immunity from suit. It protects public officials from more than just the risk of money damages. It also protects public officials from the consequences of litigation, "'including the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity grows out of the policy concern that few individuals would enter public service if they risked personal liability for their official decisions. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555

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> U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al–Kidd*, 563 U.S. ——, ——, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

Stanton v. Sims, —— U.S. ——, 134 S.Ct. 3, 4-5 (2013).

The qualified immunity doctrine establishes a presumption of immunity from civil damages. "Therefore, regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991). When qualified immunity is raised, the burden falls upon the plaintiff to establish the existence of a "clearly established" constitutional protection which the plaintiff alleges was violated. See *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir. 1989). To be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Todd v. United States*, 849 F.2d 365, 370–371 (9th Cir. 1988). Before a right can be clearly established, the right the official has allegedly violated must be specific in regard to the kind of action forming the basis for the complaint. See *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100 (9th Cir. 1995). In other words, the unlawfulness must be apparent from pre-existing law. See *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994), citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The inquiry into whether a claimed right was clearly established focuses not on the "general constitutional guarantee … but upon its application to a particular context." *Todd v. United States, supra*, 849 F.2d at p. 370; see *Mullenix v. Luna*, —— U.S. ——, 136 S.Ct. 305, 308 (2015).

1. Defendants Sued In Their Individual Capacities Are Entitled to Qualified Immunity In Their Reliance Upon a Duly Enacted Ordinance.

The SAC is unclear as to what capacity Plaintiffs are suing any of the Defendants; however, to the extent they are sued in their individual capacities, they are entitled to qualified immunity for any alleged conduct after passage of the ordinance. "When a public official acts in

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reliance on a duly enacted statute or ordinance, that official is ordinarily entitled to qualified immunity." *Dittman v. California*, 191 F.3d 1020, 1027 (9th Cir. 1999) citing *Grossman v. City of Portland*, 33 F.3d 1200, 1210 (9th Cir. 1994). This includes any and all law enforcement, district attorneys and County Counsel Sakata.

2. The Law Applicable to the Growing and Harvesting of Cannabis Sativa L is Not Clearly Established in Favor of Plaintiffs.

Irrespective of the 2014 Farm Bill and the 2013 Hemp Act, the plant known as Cannabis sativa L, which is the plant the Plaintiffs were growing, is illegal under the CSA in the absence of a DEA certificate of registration issued by the Attorney General. 21 U.S.C. § 822-823. Plaintiffs do not allege they have any such authorization. Therefore, the Crop was illegal. That said, even if one were to ignore the plain statutory language and guidance from the DEA, FDA and USDA, the law relating to the growth and harvesting of Cannabis sativa L is at best unclear, if not against Plaintiffs.

a. Plaintiffs Are Operating a Commercial Enterprise.

Under the 2014 Farm Bill, an institution of higher education or a state department of agriculture for purposes of research conducted under an agricultural pilot program or other agricultural or academic research can cultivate certain strains of Cannabis sativa L, if permitted under the laws of the state in which such institution of higher education or State Department of Agriculture is located and such research occurs. 7 U.S.C. § 5940(a)(1) & (2). The Hemp Act requires a grower of industrial hemp for commercial purposes to register with the commissioner of the county in which the grower intends to engage in industrial hemp cultivation and comply with all growing, importing, and laboratory testing limitations and/or requirements that are statutorily imposed. Cal. Food & Agric. Code § 81002-81007. Plaintiffs have failed to plead compliance to act as a commercial grower under the Hemp Act.

In an effort to mislead the Court, Plaintiffs plead that they qualify as an "agricultural research institution." SAC ¶ 4. As set forth in the sworn declarations filed on Plaintiffs' failed TRO application, this representation is patently false and misleading. Plaintiffs readily admit that their growing of industrial hemp is a commercial operation as opposed to agricultural research. Plaintiff Bills declared the Plaintiffs sell CBD, which is a product of industrial hemp, to over

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8,000 people. RJN Exh. 1, Bills Decl., ¶ 3. Bills admitted that "…we sell CBD to maintain and grow our business" and that "we have other grows aside from the one which is the subject of this case." RJN Exh. 1, Bills Decl., ¶ 4. Burgin declared "[o]ur ability to get a competitive advantage with the shortage of CBD in the marketplace is also gone." RJN Exh. 2, Burgin Decl., ¶ 12. This is clearly a business enterprise, not an educational or research institution. Further, Plaintiffs' so-called "licenses" are nothing of the sort. SAC ¶ 28. Plaintiff Free Spirit Organics, received a "Declaration of Certification of Industrial Hemp Production, Research and Development Program" from the Nevada Department of Agriculture ("NDA"). RJN Exh. 1. Bills Decl., Exh. A, p. 2. This Certificate does not authorize any activity in California. This is confirmed in the March 21, 2016 letter from the NDA which states that Free Spirit Organics may "participate in the 2016 season of industrial hemp ***research*** and development ***within the state of Nevada***…." RJN Exh. 1, Bills Decl., Exh. A, p. 3 [emphasis added].[4] Additionally, even the most cursory review of the Certificate reveals that it expired on June 20, 2017 and was limited to 4 acres of land. In no way does it authorize any activity in California.

Against this factual and statutory backdrop, no reasonable public official could have known that enacting and enforcing a temporary freeze ordinance on the growing of Cannabis sativa L was unlawful in light of clearly established law.

b. The Law Regarding What is an "Agricultural Research Institution" is Not Clearly Established.

Under the 2014 Farm Bill, an institution of higher education, for purposes of research conducted under an agricultural pilot program or other agricultural or academic research can cultivate certain strains of Cannabis sativa L, if permitted under the laws of the state in which such institution of higher education is located and such research occurs. 7 U.S.C. § 5940(a)(1) & (2). In order qualify under the 2013 Hemp Act, an entity must be either an institution of higher education, which as discussed above, it is not, or "a public or private institution organization that

[4] "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002); *In re Facebook PPC Advert. Litig.*, 709 F. Supp. 2d 762, 768 (N.D. Cal. 2010).

maintains land or facilities for agricultural research, including colleges, universities, agricultural research centers, and conservation research centers." Cal. Food & Agric. Code § 81000(c)(1)-(2).

In yet another attempt to mislead the Court on a material issue, Plaintiffs plead that ASU "is a California institution of higher education." What Plaintiffs fail to disclose in their pleading is that ASU is a California Corporation and its corporate status is "FTB SUSPENDED" meaning that it has been suspended by the California Franchise Tax Board. RJN Exh. 3. A suspended corporation loses its powers, rights, privileges and cannot, legally transact business, enforce contracts, bring an action, or defend itself in court. Cal. Corp. Code § 2205; *Palm Valley Homeowners Ass'n, Inc. v. Design MTC*, 85 Cal. App. 4th 553, 559–561 (2000). As such, ASU cannot meet any of the five requirements under the Higher Education Act of 1965. 20 U.S.C. § 1001(a)(1)-(5). Thus, ASU fails to meet the requirements of the 2014 Farm Bill.

ASU fares no better under the Hemp Act where it must be either an institution of higher education, which as discussed above, it is not, or "a public or private institution organization that maintains land or facilities for agricultural research, including colleges, universities, agricultural research centers, and conservation research centers." Cal. Food & Agric. Code § 81000(c)(1)-(2). ASU cannot do any of the things set forth in Section 81000(c)(1) as a suspended corporation.

Finally, Plaintiffs have failed to plead even the most rudimentary description of the research they had planned to conduct that would utilize 26 acres of Cannabis sativa L.

Against this factual and statutory backdrop, it cannot be said that the law with respect to the growth of Cannabis sativa L is clearly established. Between the CSA, the 2013 Hemp Act and the 2014 Farm Bill, the picture is anything but clear and leans heavily in Defendants' favor. No reasonable public official would have known that they were violating the Plaintiffs' rights through the enactment and enforcement of the county ordinance.

H. PLAINTIFFS LACK STANDING BECAUSE NONE OF THEM HAVE PLED THAT THEY OWN THE CROPS IN QUESTION.

To have Article III standing, a plaintiff has the burden of establishing that it suffered an injury in fact, a causal connection between the injury and defendant's conduct, and the likelihood that the injury will be redressed by a favorable decision. *Spokeo, Inc. v. Robins*, ____ U.S. ____,

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136 S.Ct. 1540, 1547 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992). Additionally, the Court should examine prudential considerations as a check to see if the claims at issue relate to plaintiff's own legal rights and interests. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 14 (2004). Despite being on their third pleading, no Plaintiff has claimed ownership of the Crops. As such, none of the Plaintiffs have standing to request injunctive relief or damages with respect to the loss of the Crops.[5]

I. PLAINTIFFS FAIL TO PLEAD CAUSES OF ACTION AGAINST THE DISTRICT ATTORNEY'S OFFICE AND THE SHERIFF.

Plaintiffs allege that "members from the District Attorney's office conspired with County Counsel and/or the Sheriff to deliver false information to the Board…." SAC ¶¶ 12, 13. This allegation is conclusory offering no factual basis for the claim. As such, Plaintiffs have failed to plead a cause of action. *Sprewell v. Golden State Warriors*, 266 F.3d at 988; *Bell Atlantic Corp. v. Twombly*, *supra,* 550 U.S. at p. 555; *Miranda v. Clark Cty., Nevada, Supra,* 279 F.3d at p.1106 ("[C]onclusory allegations of law and unwarranted inferences will not defeat a motion to dismiss for failure to state a claim). *Ashcroft v. Iqbal*, *supra,* 556 U.S. at p. 678 (The pleading standard requires "more than an unadorned, the-defendant unlawfully-harmed-me accusation.").

IV. CONCLUSION

Plaintiffs have failed to plead facts as opposed to conclusions in support of their causes of action. Additionally, the individual defendants are immune from suit; Plaintiffs' grow was unlawful, and not one plaintiff acknowledges ownership of the Crop. Dismissal is appropriate.

Dated: January 16, 2018

Respectfully submitted,
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By: ***/s/ Ronald J. Scholar***
Ronald J. Scholar
Attorneys for San Joaquin Defendants

[5] The only exception with respect to standing would be the lessor of the land who would have standing with respect to a claim of unlawful entry.

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