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GERARD GALVEZ; SCOTT RAYBORN; JUSTIN GRANADOS; GIL GRANADOS JR.; GIL GRANADOS; BRUCE GRANADOS; and DOREEN MORALES

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

FREE SPIRIT ORGANICS, NAC; AMERICAN STATES UNIVERSITY; CANNABIS SCIENCE, INC.; HRM FARMS; S.G. FARMS; WILLIAM BILLS; GLEN BURGIN; GERARD GALVEZ; SCOTT RAYBORN; JUSTIN GRANADOS; GIL GRANADOS JR.; GIL GRANADOS; BRUCE GRANADOS; and DOREEN MORALES; Plaintiffs, v. 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; SAN JOAQUIN COUNTY SHERIFF; DOES 1-50, INCLUSIVE, Defendants	Case No. 2:17-CV-02271-KJM-EFB PLAINTIFFS GERARD GALVEZ; SCOTT RAYBORN; JUSTIN GRANADOS; GIL GRANADOS JR.; GIL GRANADOS; BRUCE GRANADOS; and DOREEN MORALES' OPPOSITION TO MOTION TO DISMISS Hearing: April 20, 2018 at 10:00 a.m. in Courtroom 3 before The Honorable Kimberly J. Mueller

INTRODUCTION

Defendants' 12(b)(6) motion argues: (1) plaintiffs' grow was illegal; (2) plaintiffs have not suffered a Constitutional deprivation; (3) the Board is entitled to legislative immunity; (4) the individual board members are entitled to qualified immunity; (5) plaintiffs lack standing because they have not alleged ownership of the crops; and (6) there was no cause of action properly pleaded against the sheriff and the district attorney.

The implications of defendants' argument that because plaintiffs' grow was allegedly illegal, that somehow this justifies defendants' unconstitutional conduct are troubling, to say the least. Notwithstanding this, the issue before the Court is not the legality of plaintiffs' actions, nor even the constitutionality of defendants' actions, but simply whether plaintiffs properly pleaded causes of action against defendants. Inasmuch as defendants are asking this Court to make a determination as to the constitutionality of either defendants' actions or plaintiffs' grow, they are asking this Court to deprive plaintiffs' of their day in Court, to rule summarily without consideration of all the relevant factual evidence. This is beyond the scope of a motion to dismiss, and this Court should decline from so ruling.

With respect to the issue of legislative immunity, the determination of whether this doctrine applies likewise depends on facts beyond the scope of inquiry on a 12(b)(6) motion. Not all governmental acts by a local legislator, or even a local legislature, are necessarily legislative in nature, and acts that are administrative or executive in nature receive less than absolute protection. The issue of whether the board acted in an executive capacity and is thus excepted from legislative immunity requires an examination of the minutes of the board, *inter alia*, factual evidence of which must be presented and challenged, an examination beyond the scope of a motion to dismiss.

On the issue of qualified immunity, where there is a conscious disregard of the constitutional rights of those affected, qualified immunity is inapplicable. There is ample evidence that qualified immunity should *not* be granted in this case - such as the board itself explicitly discussing whether its actions are illegal and violative of plaintiffs' rights at the public

meeting on September 26, 2017. Again, the proper determination of this issue requires a factual inquiry, beyond the four corners of the complaint and for this reason it is also not appropriate for determination on a motion to dismiss.

With respect to standing, plaintiffs repeatedly claimed ownership of the subject crops in the Second Amended Complaint, and defendants' arguments to the contrary are spurious. On the issue of conspiracy, all that is required is pleading an allegation that defendants reached some explicit or tacit understanding or agreement. Plaintiffs so pleaded. To the extent that this Court believes either ownership of the crops or conspiracy wasn't adequately pleaded, plaintiffs request leave to amend to so plead.

Finally, plaintiffs sent a claim to defendants pursuant to California Government Code section 911.2. The claim was rejected on January 30, 2018. Plaintiffs respectfully request leave to amend to incorporate these causes of action in the present case.

STANDARD OF REVIEW

A Rule 12(b)(6) motion is similar to the common law general demurrer - i.e., it tests the legal sufficiency of the claim or claims stated in the complaint. *Strom v. United States* (9th Cir. 2011) 641 F3d 1051, 1067. The sole issue raised by a Rule 12(b)(6) motion is whether the facts pleaded would, if established, support a plausible claim for relief. Thus, no matter how improbable the facts alleged are, they must be accepted as true for purposes of the motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Subject to the plausibility requirement "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable, and that a recovery is very remote and unlikely." *Id.* at 556.

For most cases, "the Federal Rules eliminated the cumbersome requirement that a claimant set out *in detail* the facts upon which he bases his claim." *Id.* at 556 (internal citation omitted; emphasis in original). In addition, with limited exception, the Federal Rules require that all allegations be "short and plain." FRCP 8(a) & (b); *Sheppard v. David Evans & Assocs.,* 694 F3d 1045, 1048-9 (9th Cir.2012); (*see also Kirkpatrick v. County of Washoe* (9th Cir.2015)

792 F3d 1184, 1191 "A pleading need not repeat the same assertion more than once to provide notice.")[1]

Moreover, a plaintiff is not required to plead a *prima facie* case of liability. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 510 (2002). Finally, the Ninth Circuit has emphasized that the rule of liberal construction is particularly important in civil rights cases. *Johnson v. State of Calif.,* 207 F.3d 650, 653 (9th Cir.2000).

ARGUMENT

A. Defendants Have Been Afforded Fair Notice of the Claims Asserted and the Grounds on Which They Rest

A complaint is deemed sufficient if it gives the defendant "fair notice of what the … claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. As long as the facts alleged provide "fair notice" of the claim, a "complaint need not identify the statutory or constitutional source of the claim raised in order to survive a motion to dismiss." *Alvarez v. Hill,* 518 F3d 1152, 1157 (9th Cir.2008).

Defendants' moving papers provide irrefutable evidence that defendants have been afforded fair notice of the claims set forth and the ground upon which they rest by virtue of the extensive discussion of the merits of the case. For this reason, the Second Amended Complaint was pleaded sufficiently.

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[1] The exceptions to this rule are pleading: fraud or mistake; securities fraud under Private Securities Litigation Reform Act (PSLRA); demand futility in shareholder derivative actions; defense of lack of capacity or authority to sue (FRCP 9(a); and an answer denying that conditions precedent to liability have been performed or occurred. None of them apply here.

With respect to the particular arguments themselves:

1. Preemption: Federally, hemp research is permitted if it is allowed on the state level. 7 U.S. Code § 5940. Because it is allowed in California, and because the State of California failed to explicitly permit local governments to enact prohibitions on hemp as it did with marijuana[2], the offending ordinance is not permitted under federal or state law.

A proper analysis of this issue requires the Court look at the language of the AUMA wherein the California legislature specifically delineated that local governments may promulgate laws to limit marijuana, yet specifically failed to do the same for industrial hemp. Moreover, there is evidence of intent and purpose which is relevant to determination of the issue of preemption, provable by legislative commentary, *inter alia*, all of which amounts to factual evidence outside the challenged pleading. Because these are matters outside the complaint, they are not appropriate for a Motion to Dismiss. The only question is whether the preemption argument is plausible. It is. A full briefing of the facts supporting each side and analysis of legislative intent is necessary in order for a determination as to whether the offending ordinance is preempted.

2. Vagueness: Again, the question before this Court is whether plaintiffs have stated a plausible claim for vagueness. They have. It is not necessary for this Court to rule on whether the offending ordinance is vague or not. That said, the full text of the ordinance is part of the Second Amended Complaint and requires no additional facts:

> Section H:
> Industrial hemp is defined under FAC Division 24 and Health and Safety Code Section 11018.5 as "a fiber or oil seed crop, or both, that is limited to types of the plant Cannabis sativa L. having no more than three-tenths of 1 percent (.3%) tetrahydrocannabinol (THC) contained in the dried flowering tops, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every

[2] See AUMA, 11362.2 (b)(l) "A city, county, or city and county may enact and enforce reasonable regulations to reasonably regulate the actions and conduct in paragraph (3) of subdivision (a) of Section 11362.1." No similar provision exists for hemp. Basic statutory construction dictates that because this power was specifically not reserved to local governments, it was not intended for local governments to be allowed to exercise it.

> compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin produced therefrom.
>
> Section I:
> "Cannabis" is defined under the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) codified as Business and Profession's Code Section 26001 as "all parts of the plant Cannabis sativa Linnaeus, Cannabis indica, or Cannabis ruderalis, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin… "cannabis" does not mean "industrial hemp" as defined by Section 11018.5 of the Health and Safety Code.

Looking at these two sections in isolation, it appears that the ordinance is stating that industrial hemp is cannabis, but not all cannabis is industrial hemp. Although this is potentially already outside the ability of the average person to understand, for purposes of this discussion, let's assume it is not. Arguably, the average person can grasp the concept of a lesser included attribute which is not characteristic of the whole. So far, for it to make sense, hemp is defined as being a subset of cannabis. But then we have section J:

> Despite the different definitions, due to the fact that industrial hemp and cannabis are derivatives of the same plant, Cannabis sativa L.,the appearance of industrial hemp and cannabis are indistinguishable. Absent a lab performed chemical analysis for tetrahydrocannabinol (THC) content, the two plants cannot be distinguished.

Section J is now saying that cannabis and hemp are totally different from one another. It is not logically reconcilable that hemp is a type of cannabis and yet hemp and cannabis are different plants. To make matter more confusing, section K states:

> Division 24 of the FAC, allows an "Established Agricultural Research Institution" to cultivate or possess industrial hemp with a greater than .3% THC level, causing such plant to no longer conform to the legal definition of industrial hemp, thereby resulting in such "research" plants constituting cannabis.

Section H stated that hemp is cannabis with less than 0.3% THC, and now section K is stating that hemp with greater than 0.3% THC is cannabis.

The average person trying to understand what hemp is and what the ordinance purports to prohibit cannot make sense of these clauses for good reason: they are logically irreconcilable. The authors of the ordinance sometimes use "cannabis" to mean marijuana and sometimes use "cannabis" to mean the parent plant of both marijuana and hemp. The simple result of this is a total inability of the average reader to understand what is being prohibited.

For this reason, if this Court wishes to rule on the vagueness issue, it should find the Ordinance is genuinely confusing and unconstitutionally vague.

3. Bill of Attainder - defendants argue that because plaintiffs are not named in the ordinance, it is not a bill of attainder. The caselaw is clear that "[i]t is not necessary that the persons to be affected by a bill of attainder should be named in the bill." Cummings v. Missouri, 71 U.S. 277, 287 (1866); *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 (9th Cir.1993). In order for the Court to rule on this issue, it needs to examine the facts surrounding the enactment of the ordinance.

There is a typographical error in the Second Amended Complaint at 19:25. It states that "[a]t least 20% of the meeting during which the offending ordinance was passed was devoted to targeting the subject grow…". This should read "50%" because between 35 and 37 minutes of the 60 minutes devoted to the passage of the offending ordinance was spent specifically discussing plaintiffs' grow. Because evidence of these matters are outside the complaint, they are not appropriate for a motion to dismiss.

4. Due Process - defendants argue that there was no deprivation of due process because the ordinance was enacted following a duly noticed public meeting and plaintiffs and defendants were in contact. What defendants failed to mention is that the duly notice meeting did not include notice of the passage of this ordinance; that when the prospect of amending the ordinance came up at the meeting, it was rejected on the sole basis that it would afford plaintiffs' proper notice; that plaintiffs requested an opportunity to be heard, and it was supposedly granted, only to have defendants act to immediately enforce the ordinance before affording plaintiffs the chance to be heard. It is clear that these matters should be the subject of a factual inquiry in excess of this Court's proper analysis on a 12(b)(6) motion.

B. The Applicability of Legislative Immunity and Qualified Immunity Require a Factual Analysis Beyond the Scope of the Complaint

Not all governmental acts by a local legislator, or even a local legislature, are necessarily legislative in nature, and acts that are administrative or executive in nature receive less than

absolute protection. "[A]n act which applies generally to the community is a legislative one, while an act directed at one or a few individuals is an executive one." *Trevino By & Through Cruz v. Gates,* 23 F.3d 1480, 1482 (9th Cir. 1994). Plaintiffs herein contend that the actions of board were executive in nature because the offending ordinance was targeted at plaintiffs. The determination of legislative immunity thus depends on facts beyond the scope of inquiry on a 12(b)(6) motion.

On the issue of qualified immunity, where there is a conscious disregard of the constitutional rights of those affected, qualified immunity is inapplicable. There is ample evidence that qualified immunity should *not* be granted because the board members specifically considered that their actions may be illegal and in violation of plaintiffs constitutional rights, yet recklessly disregarded this risk when they enacted the offending ordinance. Again, this is a fact which is likely disputed and is not the proper subject of the present motion - beyond that it is *plausible* that this *could have* occurred.

C. Ownership of the Subject Grow Was Sufficiently Pleaded

The Second Amended Complaint is replete with mentions of ownership of the subject crops:

"The entirety of the Native American grow was stolen from them." Second Amended Complaint at 7:24;

"On October 3, 2017, plaintiffs again had <u>their crops</u> analyzed…" 13:25.

"…the County informed plaintiffs that they could come to the meeting on November 7, 2017 to voice their concerns whilst simultaneously planning to preemptively enter onto their land with a fraudulently obtained search warrant, exceed its stated scope, and unlawfully seize <u>their hemp crops</u> without affording them one second of time at a board meeting to be heard." 16:12-16. These are but a few examples of ownership being adequately pleaded and defendants' argument to the contrary is without merit.

D. Conspiracy Was Sufficiently Pleaded

In California, where a cause of action for civil conspiracy is pleaded, explicit details concerning the manner in which the defendants conspired are not required. *Bradley v. Hartford Accident & Indem. Co.*, 30 Cal.App.3d 818, 825 (1973) (*overruled on other grounds,* 50 Cal.3d 205 (1990). A plaintiff's Complaint is adequate if it "sufficiently apprises the defendants of the character and type of the facts and circumstances upon which he relies to establish the conspiracy ...." *Id.*; *see also Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503 (1994) (stating the elements of a civil conspiracy).

For this reason, specific allegations of facts to show the details of the conspiracy are not required. It is enough to allege that there was an agreement. It was so alleged in the Second Amended Complaint at 4:23, 5:5, and 5:10. For this reason, defendants' corresponding argument should be overruled.

E. Plaintiffs Request Leave To Amend to Include State Law Claims

Plaintiffs sent a claim to defendants within six months of the unlawful raid pursuant to California Government Code section 911.2. The claim was rejected on January 30, 2018. Plaintiffs respectfully request leave to amend to incorporate these causes of action in the present case.

CONCLUSION

This is not the first time a defendant has used a Motion to Dismiss as a vehicle to attempt bypass a plaintiffs' right to have the relevant issues determined by a trier of fact. Although some of the issues can in fact be determined as a matter of law based on the face of the complaint, all but one of them require facts be presented in order for a proper analysis. The remaining issue, vagueness, is not necessary for this Court to determine on the merits in order for it to determine whether it was sufficiently pleaded. That said, the subject offending ordinance is beyond the ability of the average person to comprehend, and it is unconstitutionally vague.

For all these reasons, plaintiffs respectfully request this Honorable Court overrule defendants Motion to Dismiss. Plaintiffs also respectfully request leave to amend to include state law claims, now ripe for pleading, with the understanding that defendants be precluded from moving to dismiss any pre-existing cause of action which has not been altered in future pleadings. Finally, these opposing plaintiffs hereby submit these issues to the Court without requesting a hearing.

Respectfully submitted,
LAW OFFICES OF JOSEPH SALAMA

April 6, 2018

__/s/ Joseph Salama_____
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