HON. BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HAZEN SHOPBELL, et al.,

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE; et al.,

Defendants.

NO. 2:18-cv-1758

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION[1]

In what can only be described as a campaign to ruin the inter-tribal wholesale fish monopoly developed by Tulalip Tribal members Plaintiffs Hazen Shopbell and Anthony Paul, Defendants acted in willful and reckless disregard of state, Tulalip Tribal, and federal law.

While this case was stayed, the Skagit County Superior Court joined the Pierce County Superior Court in dismissing criminal charges arising from Defendants' crusade against Plaintiffs. The Skagit County Superior Court "terminated" criminal proceedings in which Mr. Shopbell and Mr. Paul were each charged with five felony counts of shellfish buying and trafficking, because Defendants destroyed exculpatory evidence and violated their constitutional rights.[2]

In a pointed rebuke of the defense here, Skagit County Superior Court Judge Brian Stiles found it "troublesome" that both Defendant WDFW and the Washington State Attorney General's

[1] Defendants' dismissal motion is substantially similar to their prior motion, with the exception of a new Section III, Part 4 titled, "Everett Boat Launch." *Compare* 68 at 5-6, *with* Dkt. # 30 at 5.
[2] Declaration of Gabriel S. Galanda In Support of Plaintiffs' Opposition to Defendants' Renewed Motion for Partial Summary Judgment ("Galanda Decl."), Exs. 75, 76 at 3 ¶F, H.

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Office engaged in "shopping the prosecution" to three other counties "before the Skagit County Prosecuting Attorney's Office filed the charges" that he ultimately terminated.[3] Judge Stiles' ruling and finding underscore the unapt and cavalier nature of Defendants' behavior towards Plaintiffs over the last four years. Dismissal is unwarranted.

II. BACKGROUND

A. DEFENDANTS REFUSED TO ACCEPT THAT THE ORIGINAL BASIS FOR PROBABLE CAUSE, "ILLEGAL CRAB," WAS NEVER ILLEGAL.

In May 2015, Defendant Olson began a misguided criminal investigation of another Tulalip Tribal member—"an investigation not relating to the Plaintiffs in this case." Dkt. # 30 at 1. Defendants contend this gave a reason to investigate Plaintiffs and misrepresent that Plaintiffs' company, Puget Sound Seafoods Distributors, LLC ("PSSD") bought 444 pounds of "illegal crab" from Joe Hatch, Sr., "one day after the season closed." *Id.* This is not true.

First, Defendants fail to inform the Court that by November 3, 2015, Tulalip Tribes Shellfish Technician Rocky Brisbois advised Defendant Natalie Hale that "somebody from Puget Sound Seafood" called him on May 22, 2015, to determine if it was legal to purchase the crab. Dkt. # 48-1; #34 ¶4. That "somebody" was Mr. Paul, Plaintiff here, who was informed by the Tulalip Tribes that "it was okay for Puget Sound Seafoods to purchase the Dungeness crab from Joey Hatch." Dkt. # 48-2 ¶4. Mr. Brisbois and Tulalip Tribes Shellfish Program Manager Mike McHugh—each "in their regulatory capacity"—likewise advised Defendant Hale "that it is not uncommon for businesses to call about buying crab a day or two after the season closes" and that there is nothing illegal about it. Dkt. # 48-2, Ex. 1; *id.*, Galanda Decl., Ex 81 at 226.

Defendants also fail to inform the Court that Mr. McHugh investigated PSSD's crab purchase—among all other PSSD transactions during the spring 2015 shellfish management periods—and declared: "We have no record of any illegal sales between Tulalip fishers and Puget

[3] *Id.*, 75, 76 at 3 n.2; *see also* Ex. 77 at 29 ("It is troublesome to me about this issue of Fish and Wildlife shopping the prosecution.").

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Sound Seafoods." Dkt. # 48-2 (Ex. A at 1).[4] When asked to reconcile WDFW's "illegal crab" position with the Tulalip Tribes' determination "that doesn't show that 444-pound harvest as illegal," Defendants' answer is that they simply disagree with "the Tulalip Tribes' sovereign decision that the purchase . . . of the crab involving Joey Hatch on or around May 22nd, 2015, was legal." Galanda Decl., Ex. 81 at 210, 223.[5] Defendants' position, in other words, is that the Tulalip Tribes "doesn't have the authority to tell [PSSD] it's okay, and from the State's standpoint, it's not okay." *Id*. at 211. It was immaterial to Defendants that neither Tulalip nor the Northwest Indian Fish Commission ("NIFC") ever: (a) "disagree[d] with the information provided to them" by PSSD regarding the crab purchase on May 22, 2015; (b) investigated that purchase; or (c) declared that purchase illegal. *Id*. at 224. Indeed, WDFW never discussed that "discrepancy" or consulted with the NIFC or Tulalip "in a regulatory capacity to investigate that purchase." *Id*. at 226. This, despite Tulalip's co-managerial role per *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974). Defendants'—law enforcement officers—refusal to recognize the law is shocking; but unfortunately, nothing new for Native Americans in this state.[6]

Defendants also fail to advise the Court that after WDFW and Defendant Olson convinced the Pierce County Prosecuting Attorney to charge Mr. Paul with a state felony for unlawful fish trafficking on April 8, 2018, the County summarily dismissed the entire case because it "learned additional information" that Defendants, in their attempt to mislead, did not see fit to share with the County.[7] Dkt. ## 48-4; 48-5; 48-6. That additional information was provided by a letter from Tulalip Chairwoman Marie Zackuse to the Pierce County Prosecuting Attorney, "express[ing] the

[4] The Tulalip Tribes specifically validated the 444-pound Dungeness crab transaction, as documented by PSSD Fish Ticket No. JK94138. Dkt. # 48-2 (Ex. A at page 5 of appended chart "Prepared by Mike McHugh 1/31/2017").
[5] A few deposition transcript pages were not included in Dkt. #48-3. Ex. 81 to Galanda Decl. is a complete set.
[6] *See* M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 701 (2012) (noting "a failure on the part of state law enforcement agencies with jurisdiction in Indian Country to understand or reflect the values of the community they serve").
[7] Defendant Olson's marital property includes Gravelly Beach Seafoods, a non-Indian clam wholesaler that directly competes with Tribal Treaty fisherpersons and buyers. Dkt. # 48-60. WDFW knows and has approved of Defendant Olson's outside businesses activities, despite the conflicts it raises with his law enforcement duties. Dkt. # 48-61.

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Tulalip Tribes' strong objection to [WDFW's] referral of Tulalip fisheries related charges to Pierce County for State prosecution" and demanding the County "withdraw or dismiss the charges." Dkt. # 48-70 at 1-2. Citing a WDFW-Tulalip "Memorandum of Understanding on enforcement protocols" ("MOU"), the Chairwoman wrote: "It is difficult to understand the motivation for the State prosecution . . . other than to undermine the Tulalip justice system and publicly demean the Tribe and its fishing community." *Id*. She asserted that WDFW "violate[d] both the spirit and letter of our enforcement agreement [and] orders of the federal court in *US v. Washington (Boldt decision)* regarding treaty fisheries regulation and enforcement." *Id*. at 2. As detailed in the County's "Dismissal Memo," the County learned of two additional sets of "additional information that was not provided" by WDFW "prior to considering this case":

> (1) **That Fish and Wildlife had signed an MOU with the Tulalip Tribe. As part of the MOU, it says that Fish and Wildlife must bring cases that involve tribal members to the Tribe's Prosecutor first**. **If that office prosecut[es], plea bargains or uses its discretion in filing or not filing charges, Fish and Wildlife is *prohibited* from taking the case to another prosecutor's office**. . . . The Tribal Prosecutor's Office and Tribal Counsel view Fish and Wildlife presenting the case to us as a violation of the MOU that was signed by those parties. The MOU . . . had the signature of the AAG that we have previously meet with [sic]. The [WDFW] Tribal Liaison, who use[d] to work in the Tulalip Tribal Prosecutor's Office, said their practice would be to review the entire case and determine everyone that should be charged and not charged and take action at that time. . . .
>
> ([2]) **In addition, we learned all defendants have a viable defense that we were not told about.** The shellfish season was only 5/22/15. The Hatches had a boat issue on that day, which Fish and Wildlife confirms. The Hatches claim they had permission to harvest late from the Tribal Shellfish manager because of the boat issue. **Paul and Manzanares also contacted the Tribal Shellfish manager to confirm that could purchase the crab in this case and were given authorization because of the boat issue. Defense presented a letter for the Shellfish manager saying the shellfish tickets were *legal* in this case.** We are told the Shellfish manager does not specifically remember these conversations and the custom within the tribe is not to physically document. **However, the Shellfish manager and others would say allowing this would not be unusually [sic]. This would be a complete defense in the case.**

Dkt. # 48-6 at 1-2 (emphasis added). Pierce County exposed WDFW's lack of ethics. *See id.*

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B. DEFENDANTS' "CONFIDENTIAL SOURCE" IS PSSD'S NON-INDIAN COMPETITOR, WHO WDFW ADMITTED COULD NOT BE RELIED UPON TO ESTABLISH PROBABLE CAUSE.

Defendants claim that based on the initial "illegal crab" investigation, "Detective Willette then began an investigation that included discrepancies between the amount of fish purchased by PSSD and the amount accounted for in its required paperwork." Dkt. # 30 at 1. This, too, is a misrepresentation. The only "discrepancies" were those falsely claimed by Jonathan Richardson, a non-Indian PSSD competitor and personal friend of Defendant Rothaus—discrepancies that lacked a basis in fact **and that Defendants have since recanted**. Dkt. # 48-11 at 3.

On February 29, 2016, Mr. Richardson called Defendant Rothaus, "ask[ing] him if he had heard about what happened to [PSSD]." Dkt. # 48-71 at 10. Defendant Rothaus "had not." *Id*. Mr. Richardson "then told Rothaus that several Tulalip tribal crab fishermen had been underpaid by [PSSD] during the course of the last crab season . . . the October through December 2015 season." *Id*. He lied "that Tulalip tribal crab fishermen told him that they had been paid $0.75 to $1.00 less per pound of crab by [PSSD] than other commercial crab buyers during the same fishery." *Id*. at 10-11; Dkt. # 48-8 ¶3. He further lied to "Rothaus that the fishers had contacted the Tribal Council to complain of the underpayments by Puget Sound Seafood Dist. LLC" and that "the tribe then demanded that [PSSD] pay back the crab fisherman they had shorted." Dkt. # 48-71 at 11. He "called these 'retro' payments." *Id*. But there were no such complaints about PSSD. Dkt. # 48-8 ¶¶3-4. Those are, according to Mr. Shopbell, "bald-faced lie[s]." *Id*.

Defendant Rothaus provided Defendant Willette with Mr. Richardson's "name and number." Dkt. # 48-71 at 11. Defendant Willette "received notification from a biologist that works in [her] office that he had heard about an anonymous individual that was reporting information relevant to the retro payments and [PSSD]." Dkt. # 48-3 at 112. Defendant Rothaus claims that he had "no personal participation in the facts that give rise to Plaintiffs' alleged civil rights violations." Dkt. # 30 at 16. This is disingenuous, at best. In early 2016, Defendant

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Rothaus and Mr. Richardson started the so-called underpayment narrative that escalated into Defendants' "multi-faced operation" against Plaintiffs. Dkt. # 44 ¶6. Their text messages prove, particularly under the summary judgment standard, there is more to his role in this story.[8]

On March 1, 2016, Defendant Willette called and spoke with Mr. Richardson, inquiring about "another seafood company he may have some information about." Dkt. # 48-71 at 11. He "volunteered [PSSD] without [her] prompting [him]." *Id*. He "expressed his desire to remain anonymous since he still buys crab from tribal members and did not want to jeopardize his position." *Id*. Having locked arms against Plaintiffs, Defendants maintain Mr. Richardson's anonymity to this day, even under false pretense. Dkt. # 48-9.

Mr. Richardson falsely told Defendant Willette "that several Tribal crab fishermen, six to eight, had called him in December and told him that [PSSD] had been underpaying them as much as $.075 to $1.00 a pound for crab." Dkt. # 48-71 at 11. He intentionally misrepresented PSSD's business practices by telling her "the fisherman told him that they had contacted the tribe and that [PSSD] was told to pay back the fisherman they had shorted . . . as 'retro' payments." *Id*. According to Defendant Willette, he "would not name the fisherman that had told him of the retro payments"—because no PSSD underpayments, or calls to Mr. Richardson, existed. *Id*.

Mr. Richardson then revealed his true concern, telling Defendant Willette "that because of the initial desire to 'sell to their own'"—*i.e*., Tulalip fisherman selling crab to PSSD—"a lot of

[8] During material times, Defendant Rothaus and Mr. Richardson regularly text messaged each other. Dkt. # 48-62. By March 31, 2017, Defendant Rothaus text messaged Richardson, complaining about "the situation" they both created. *Id.* By then, "the situation" had escalated into litigation by Mr. Shopbell and Mr. Paul against WDFW. Dkt. # 48-64. Mr. Richardson, whose identity was the subject of Tribal Court motion practice, felt things "should have never got to this." Dkt. # 48-62. Defendant Rothaus sympathized with him: "I understand." *Id*. Things further escalated in 2016 when Plaintiffs sued Mr. Richardson in Tulalip Tribal Court for business interference, trade libel, slander, and defamation. Dkt. # 48-65. WDFW eventually paid Plaintiff Shopbell, and Mr. Richardson paid Plaintiffs Paul and Shopbell $15,000, in settlement of their respective cases. Dkt. ## 48-66, 48-67. Deflecting any responsibility for having helped start this saga with his friend, Defendant Rothaus calls Plaintiffs' allegations regarding his "conduct in this matter . . . conspiracy theory fabrications." Dkt. # 48-63. Defendant Rothaus is partially correct. There is a conspiracy—against Mr. Paul and Mr. Shopbell; but they do not and need not fabricate—WDFW's record says it all. Defendant Rothaus has personally gone to great lengths to "protect" Mr. Richardson and honor "the promise of anonymity" that he made to Mr. Richardson over for years ago. Galanda Decl., Ex. 78.

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other [non-Indian] buyers had opted out of purchasing any crab at all, since no one would sell to them at the offloads." *Id*. He "stated that his company was one of only a few left that had not succumbed to the apparent monopoly that [PSSD] was attempting to create." Dkt. # 48-71 at 12. Mr. Richardson's core concern was that "Tulalip and other tribal fishers account for approximately 60% of his income." Dkt. # 48-10 ¶3. Knowing that was false, Defendant Willette nonetheless denoted: "[PSSD] repeatedly **underpaid** the fishermen they purchased shellfish and fish" in late 2015. Dkt. # 48-7 at 7 (emphasis in original). Mr. Richardson's narrative fed into how she had already framed her investigation: "Why is PSSD selling crab to other wholesalers while monopolizing the Tulalip crab fishery? Why has PSSD taken all business from other established buyers?" Dkt. # 48-15. She later admitted to lacking "names of the fisherman the source spoke to, dates when those conversations occurred, or any direct evidence to support his claims." Dkt. # 48-10 ¶5. She further admitted to relying on "purely anecdotal" hearsay for "a potential explanation for the discrepancies in payments" PSSD made to Tulalip fisherman. *Id*.

As a result of Defendant Willette's solecisms, WDFW eventually recanted the entire "discussion of the apparent underpayments," upon which she relied to "support probable cause" when she "requested warrants relating to Plaintiffs and PSSD in the relevant jurisdictions over the course of the next several months" in 2016. Dkt. ## 48-11 at 3; 44 ¶4. More specifically, WDFW has now admitted: "underpayments seen in the financial records for PSSD can be accounted for as bait sales." Dkt. # 48-12 at 4 ¶7. As she now confesses, there were no illegal underpayments:

> Q. Other than bait as a commodity being given to fishermen to offset what you believe to be underpayments, were there -- was cash offered to offset those alleged underpayments?
>
> A. I think in some instances, there was cash paid. There was, I think, gas on a few notes, and maybe some boat work, like mechanic work done in lieu of payment.
>
> **Q. Is there anything illegal about paying somebody in gas, or bait, or mechanical work?**
>
> **A. No.**

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Dkt. # 48-3 at 108 (emphasis added); *see also id.*, at 114-115 ("Q. So a retro payment is not taking advantage of a tribal fisherman; correct? A. [N]o, I don't think so."). WDFW further admitted that Mr. Richardson's story about underpayments—upon which probable cause was based—"is not sufficient to allow any conclusion that these underpayments represent criminal violations." Dkt. # 48-11 at 3. In violation law, Defendant Willette did not return to the courts given WDFW's *post-hoc* admission that there was no probable cause. *Lison v. City of Riverside*, 120 F.3d 965, 973-74 (9th Cir. 1996) (officers are obliged to "correct[] and supplement[]" probable cause materials); *State v. Maddox*, 152 Wn.2d 499, 508, 98 P.3d 1199 (2004).

In all, Defendants lacked probable cause by way of either the "illegal crab" or so-called underpayments to obtain or "execute the search warrants on three separate locations on June 13, 2016" or the subsequent **thirty-four warrants** Defendant Willette caused multiple local courts to issue against Plaintiffs by 2017. *See* Dkt. #56. Taking full advantage of a leadership vacuum in WDFW, Defendant Willette sought and obtained those warrants *ex parte* and without seeking advice from any WDFW Assistant Attorney General ("AAG"). Dkt. # 44.

C. DEFENDANTS' ARREST, SEARCH, AND SEIZURE WAS UNCONSTITUTIONAL (AND INEPT).

By June 9, 2016, Defendant Willette obtained search warrants from both the King County Superior Court ("Superior Court Warrant") and Tulalip Tribal Court ("Tribal Court Warrant") for: (1) an industrial building in Tacoma, WA, which PSSD had long since abandoned ("Tacoma Building"); (2) Mr. and Mrs. Paul's home in a gated Lake Tapps community ("Paul Home"); and (3) Mr. Shopbell and Ms. Anderson's duplex in public housing on Tulalip Reservation trust lands ("Shopbell Home"). Dkt. ## 48-7 at 1-2; 48-71 at 1-2; 48-13 at 1-2. The warrants gave rise to the "multi-faceted operation" that started at 8 AM on June 13, 2016, with Defendant Willette's briefing to 30 WDFW and other officers. Dkt. #44 ¶4; 48-3 at 178-81, 190. Both warrants were simultaneously executed against all three premises. Dkt. # 44 ¶8.

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1. Defendant Willette Abused And Disregarded Tribal Court Warrant Process.

On June 9, 2016, Defendant Willette obtained the Tribal Court Warrant for the search of the Shopbell Home. Dkt. # 48-13. Failing to cite any provision of Tulalip law for Defendants' alleged "illegal crab" and underpayments in her original warrant papers—because there was none—and citing instead provisions of state statutes inapplicable at Tulalip, the Tulalip Tribal Court *Pro Tem* Judge forced Defendant Willette to redraft her warrant papers. *Id.*, Dkt. # 48-14 at 11. Defendant Willette interlineated a citation to an inapposite Tulalip statute regarding petty theft in her papers. *See* Dkt. # 48-13 at 1. She also misstated dollar amounts and transaction totals for the since-recanted underpayments. Dkt. # 48-14 at 14. Defendants later admitted to a "different total underpayment amount" and "an updated number of transactions" than what Defendant Willette first intentionally misrepresented to the courts. *Id*.

Further, although Defendant Willette's companion, June 7, 2016, Superior Court Warrant affidavit provided: "*Due to concerns regarding confidentiality, the Tulalip Tribal Council will not be contacted regarding this matter until after service of the search warrant,*" she omitted that Tribal sovereignty affronting language from her affidavit to the Tulalip *Pro Tem* Judge. Dkt. # 44-1 at 14 (emphasis in original). Defendant Willette feigns that her confidentiality concerns existed "because there were Tribal Council elections going on." Dkt. # 48-3 at 155-56. However, elections are held every March—not in June. *Id.* at 156.[9] Her excuse rings untrue.

Defendant Willette obtained the Tribal Court Warrant *ex parte*, but failed to date it. Dkt. # 48-13 at 4. She also failed to leave *anything* on file with either the Tribal Court or Judge *Pro Tem*—not her original set of warrant papers; not her corrected, second set of warrant papers; not even a copy of the signed Tribal Court Warrant. Dkt. ## 48-16, 48-17. That left the Tribal Court unable to even ascertain the date of issuance. Dkt. # 48-16. Despite clear instruction from

[9] *See* CONST. AND BYLAWS OF THE TULALIP TRIBES OF WASH., art. III, § 4, *available at*, https://www.codepublishing.com/WA/Tulalip/?Tulalip02/Tulalip0205.html.

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Tulalip to file the "original" and "duplicate original warrant," as well affidavit "testimony or documentary evidence,"[10] Defendant Willette refused to file *any* warrant papers.

On June 13, 2016, Defendants executed the Tribal Court Warrant upon the Shopbell Home. *See* Dkt. # 44. That Tribal Court Warrant instructed WDFW: "Promptly return this warrant to [the Judge] or clerk of this court; the return must include an inventory of all property seized." Dkt. # 48-13 at 3 ¶3. Defendant Willette has admitted that the word "promptly" meant "something like" three days. Dkt. # 48-3 at 163. It in fact meant three days. *State v. Wallway*, 415, 865 P.2d 531 (Wash. App. 1994). Defendant Willette, however, failed to file Tribal Court Warrant return or seized property inventory until five weeks later. Dkt. # 48-17.[11]

2. Defendant Willette's Superior Court Warrant Lacked Jurisdiction.

On June 7, 2016, Defendant Willette obtained the Superior Court Warrant, also *ex parte*. Dkt. # 48-7. The Superior Court Warrant authorized a search of the Shopbell Home on Tulalip Reservation trust lands. *Id.* at 1-2. But **Washington State does not possess jurisdiction to impose its criminal process on Tulalip land**. *State v. Boyd*, 109 Wn.App. 244, 247 n. 2, 34 P.3d 912 (2001). Likewise, the only way the Superior Court could *arguably* authorize a search of the Shopbell Home was if WDFW followed codified Tulalip search warrant process—which, as discussed above, did not happen. *State v. Clark*, 178 Wn.2d 19, 308 P.3d 590 (2013). The Superior Court Warrant was "facially overbroad." Dkt. # 44; *see also, e.g., U.S. v. Michaelian*, 803 F.2d 1042, 1046 (9th Cir. 1986); *U.S. v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986).

What is more, each of the eleven Defendants that signed prepared declarations in support of Defendants' Motion—all of which uniformly provide, "I examined the warrants relevant to the investigation of the Plaintiffs here and saw nothing that lead [sic] me to believe the warrants were

[10] TTC § 2.25.030(3), *available at*, https://www.codepublishing.com/WA/Tulalip/?Tulalip02/Tulalip0205.html.
[11] Defendant Willette's dereliction as to the Tribal warrant and in its return caused the Tulalip Tribal Council to amend the Tribes' search warrant law in late 2016, to impose specific warrant protocols upon state law enforcement. TTC § 2.25.030(7), *available at*, https://www.codepublishing.com/WA/Tulalip/?Tulalip02/Tulalip0205.html.

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either properly issued or lacked probable cause in any manner"—failed to acknowledge the jurisdictional defect in Superior Court Warrant, which any officer exercising his or her professional judgment would have appreciated, had they been adequately trained. Dkt. ## 31 ¶2; 32 ¶3; 33 ¶3; 34 ¶3; 35 ¶4; 36 ¶3; 37 ¶2; 38 ¶3; 39 ¶3; 43 ¶4; 44 ¶4.

By 2017, under guise of alleged "money laundering" emanating from the "illegal crab" and so-called underpayments, Defendant Willette obtained dozens of other search warrants for the Pauls' financial records—each that contained a "gag order." Dkt. # 48-53 at 47-68; *id.*, Ex. 56. WDFW shopped its purported money laundering case to prosecutors in King, Pierce, Snohomish, Kitsap, and Skagit Counties, all of whom declined. Dkt. # 48-3 at 65.

3. Defendants Searched An Industrial Building On The Puyallup Reservation, Knowing PSSD Had Vacated The Property Months Earlier.

In support of the both the Superior Court and Tribal Court Warrants, Defendant Willette lied under oath by testifying that the Tacoma Building was PSSD's "primary business location." Dkt. ## 44-3 at 2, 44-2 at 1. On the morning of June 13, 2016, Defendant Willette also "briefed" her colleagues that at the Tacoma Building, PSSD "[v]ehicles will be parked" and "[b]ait owned by PSSD stored." Dkt. ## 38 ¶7; 48-18 at 8. Although PSSD once leased the Tacoma Building, it vacated six months to one year prior. *See* Dkt. # 44 at 5. While Defendants mischaracterize the Tacoma Building as the "PSSD office," Dkt. # 30 at 2, and say nothing of the building's location on the Puyallup Reservation, Defendant Willette admits that the search was carried out after WDFW knew PSSD had vacated the property: "WDFW . . . served a search warrant at the building that was thought to be PSSD's office. . . . Hae Park, owner of 'Be Happy Seafoods,' . . . was interviewed as his business currently occupied the location (as opposed to PSSD)." *Id.* After cutting Mr. Park's lock and raiding his business, eight WDFW agents found neither PSSD vehicles nor PSSD bait—yet they still refused to believe that the Tacoma Building was not occupied by PSSD. Dkt. # 48-24. Mr. Park explained to Detective Cook: "Mr. Paul was a

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previous tenant but there had been another tenant here before I got here in January . . . I told them Puget Sound Seafood and Mr. Paul had not been here for several months." *Id*. WDFW took Mr. Park's "business records and searched [his] office and the entire buildings" anyway. *Id.*

4. Defendants Falsely Arrested Plaintiffs During A "Lucrative" Crab Opener.

June 13, 2016, was the day of the Tulalip crab fishery "opener"—a day Defendants knew was a very "lucrative day" for Tulalip crab fisherman and PSSD. Dkt. # 48-3 at 190; Dkt. # 48-18 at 12. By mid-morning and at the direction of either Defendant Willette or Maurstad,[12] Defendants arrested Mr. Paul and Mr. Shopbell at the Port of Everett Marina. Dkt. ## 32 ¶5; 35 ¶5; 36 ¶5; 37 ¶¶4-6; 53 ¶2. That was not coincidental.[13] Dkt. # 48-3 at 190. Defendants Myers, Jaros, Vincent, and Clementson jointly "detained [them] for questioning," by handcuffing them, placing them into WDFW patrol cars, and/or transporting them to the Marysville Jail.[14] *Id*.

Defendants Golden and Cenci soon realized that Mr. Paul and Mr. Shopbell had been falsely arrested; they called Defendant Myers, who in turn advised Defendants Vincent and Jaros, of "a change in plans." Dkt. # 48-19 at 1; *see also* Dkt. # 36 ¶5. Admitting to the false arrests, Defendants acknowledge "there was a miscommunication with officers about what they were supposed to do." Dkt. # 48-3 at 191. Defendants returned Mr. Paul and Mr. Shopbell to the marina, and released them from custody. Dkt. ## 32 ¶5; 35 ¶5; 37 ¶¶5-6; Dkt. # 48-20 ¶8. Still, they seized their cell phones without serving them with warrant papers. Dkt. ## 44 ¶12; 48-20 ¶3.

Critically for summary judgment purposes, Defendants Myers, Jaros, Vincent, Clementson, Golden, and Cenci all provide conflicting stories of what happened when they unlawfully detained Plaintiffs. Some of the Defendants thought they had probable cause to arrest,

[12] Without further discovery, this fact remains unclear.

[13] Defendant Willette previously delayed the execution of the warrants over concerns (having nothing to do with Plaintiffs) about "salmon harvest," but saw no reason to wait until even the day after the lucrative, June 13, 2016, crab fishery opener to conduct her sting against Plaintiffs. Galanda Decl., at 52, 190.

[14] These Defendants were previously instructed to read Mr. Paul and Mr. Shopbell their *Miranda* rights, but they did not do so. *See id.*; Dkt. # 48-18 at 9; Dkt. # 48-26 ¶2.

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while others did not. Dkt. ## 31 ¶5, 35 ¶6. Defendants also give conflicting accounts of where Plaintiffs' interviews occurred. Dkt. ## 35 ¶7, 2 ¶5. Some Defendants report telling Plaintiffs that they were free to leave; others recount they told Plaintiffs they were not free to leave. Dkt. ## 33 ¶5; 35 ¶5; 32 ¶4. Some Defendants say they handcuffed Plaintiffs; others say that they did not. Dkt. ## 35 ¶6; 32 ¶5; 37 ¶5; 43 ¶5. It also remains unclear who instructed these Defendants to interview Plaintiffs, and what those instructions were. Dkt. ## 31 ¶5; 32 ¶4-5; 35 ¶¶5-6; 37 ¶4.

5. Defendants "Rifled Through" Plaintiffs' Homes.

By late that morning—despite knowing that the probable cause that the warrants were based on had been discredited, but without informing the issuing courts—Defendants executed both the Superior Court and Tribal Court Warrants on each of the Paul and Shopbell Homes. Dkt. # 44 ¶8. Defendants Cenci, Golden, Olson, Hale, and other unknown officers searched the Paul home. Dkt. ## 31 ¶5; 34 ¶7. Mrs. Paul was seven months pregnant and accompanied by her two-year-old son and four-year-old daughter, as Defendants were briefed that morning.[15] *Id.*, Dkt. ## 48-23 ¶12; 48-18 at 8. While driving, Ms. Paul received a call from an alarm company with word that her home alarm had been set off. Dkt. # 48-23 ¶2. She returned home to find eight WDFW vans and at least ten WDFW officers "in bullet-proof vests," with some wearing "black and camouflage uniforms." *Id.* ¶¶2-12. She felt "overwhelmed by panic, nausea and dizziness," not "know[ing] why Anthony would be arrested." *Id.* ¶12. Defendants seized her cell phone and, when Ms. Paul's father arrived to care for her and his grandchildren, they also "searched both him and his car for weapons." *Id.* ¶16. Mrs. Paul described Defendants' raid as "chaotic." *Id.* ¶8.

Around the same time, Ms. Anderson received a call from a neighbor who told her officers

[15] On August 19, 2016, Mr. and Mrs. Paul received an unannounced visit at the Paul Home from a Washington State Department of Social and Health Services Child Protective Services ("CPS") Social Service Specialist. Dkt. # 48-32 ¶¶3-4. Defendant Willette had falsely informed CPS that the Pauls' two children were in danger, causing CPS to perform the welfare check and interview both children. Dkt. # 44 ¶13. The Paul and their children were forced to meet with CPS twice, subjecting them to numerous "demeaning, insulting, and culturally insensitive" interviews. Dkt. # 48-32 ¶¶3-7. CPS did not take any action against the Pauls.

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were at the Shopbell Home. Dkt. # 48-21 ¶2. She was running errands with her six-month-old son, while her four other children were at school. *Id*. She arrived home to "several tribal police, plain-clothed, drug task force members, and four WDFW officers." *Id*. ¶3. Defendants Maurstad, Peters, Vincent, Jaros, and other unknown officers searched the Shopbell home. Dkt. #35 ¶8. Ms. Anderson "observed WDFW officers riffling through everything in [the] home, including a box of family photos" and "all of our electronic devises, including [the] children's tablets." *Id*. ¶7. She left the home with her son during the search, rather than having "to remain in a single room under the supervision of an officer." *Id*. ¶8. When she returned, she found their "personal and business papers intermingled and thrown on a bed in the spare room." *Id*.

In September of 2016, after Mr. Paul filed a replevin action against WDFW in Thurston County and Mr. Shopbell filed a companion complaint against WDFW in Tribal Court, WDFW voluntarily returned some—but not all—of the property that Defendants illegally seized from Plaintiffs.[16] Dkt. ## 48-64, 48-28. In keeping with the incompetent and reckless searches, Defendants misplaced and destroyed much of Plaintiffs' property.

6. Defendants Lost And Destroyed Plaintiffs And PSSD's Properties.

Defendants seized a personal safe from the Paul Home that was not authorized by either the Superior Court or Tribal Court Warrants. *See* Dkt. ## 48-7; 48-13; 48-25 ¶3. Mr. Paul's lawyer immediately advised Defendant Olson that no warrant existed for the safe; Defendants seized it anyway. Dkt. # 38 ¶19. Then, again without seeking advice from any WDFW AAG, Defendant Willette and Property Evidence Custodian Greg Dutton sawed open the $700 safe, destroying it. Dkt. ## 48-3 at 259; # 44 ¶11; 48-25 ¶3. WDFW later returned the illegally seized safe's contents, as required by law. *State v. VanNess*, 344 P.2d 713 (2015).

[16] Not long after Mr. Paul and Mr. Shopbell filed their respective replevin cases against WDFW, the agency began "shopping the prosecution" against Plaintiffs to prosecuting attorney offices. Dkt. # 48-49; Galanda Decl., Ex. 77 at 29; *id*., Exs. 75, 76 at 3 n.2.

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Defendants also seized from the Paul Home—and destroyed—two Apple Macbook Pro laptops, valued collectively at $3,000. Dkt. ## 48-21, 48-22. Defendants copied the hard-drives to those two laptops before returning them to Plaintiffs. *See id*. "Each of the screens are damaged" now and "it appears the operating system has been entirely removed" from one of those laptops. *Id*. Defendants Cenci, Hale, Olson, and other unidentified officers executed the search warrant on the Paul home, but without further discovery it remains unclear who handled the destroyed property. *See* Dkt. ## 31 ¶4; 34 ¶7; 38 ¶9-18.

From the Shopbell Home, Defendants seized but never returned their children's $300 black Galaxy Samsung tablet. Dkt. ## 48-22 ¶¶4-5; 48-26 ¶5; 48-27 ¶2. Defendants also seized—and destroyed—a $1,200 Dell laptop. Dkt. # 48-26 ¶5. After Defendants copied that laptop's hard-drive, it too is "no longer in working condition. It appears to be stuck in re-boot mode and displays only a black screen." *Id*. While Defendants Clementson, Jaros, Maurstad, Peters, Vincent, and other unidentified officers executed the search, without further discovery it remains unclear who handled the destroyed property. *See* Dkt. ## 32 ¶6; 35 ¶8; 36 ¶4; 39 ¶4; 43 ¶8.

Exclaiming Defendants' mishandling of Plaintiffs' belongings, on September 23, 2016, Defendant Willette stored Plaintiffs' computer evidence in a previously used evidence bag—which contained methamphetamine "crystals" and "powder" from a completely unrelated WDFW case. Dkt. # 48-55. According to Defendant Golden: "Wendy called me and said we had a 'big big problem' and then told me she was packaging up a PSSD hardrive copies and heard a grinding noise in the evidence bag. She opened the bag and found what appeared to be meth loose in the bottom of the bag. She tested with a NIK kit and showed positive." *Id.* Defendant Myers "admonished Wendy for testing the drugs at the customer service area. He had tried to get her to

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move to the back but she was not listening." *Id*. It appears "Wendy was exposed to the drug due to the language she used."[17] *Id.*

D. DEFENDANT WILLETTE THREATENS A TAX PREPARER WITH DEPORTATION

On November 22, 2016, Defendant Willette executed a search warrant on Rushmore Tax Services, Inc. Dkt. # 48-57 at 1. After she "rapped" her badge on front office window, Defendant Willette entered the premises, introduced herself, and served a search warrant on Anthony P. McAleer, Rushmore's CEO and Anthony and Nicole Paul's personal tax preparer. *Id.* While interrogating Mr. McAleer and, as with Mr. Park, refusing to believe his explanation that he "knew nothing about Puget Sound Seafood" and that he only "handle[s] his personal taxes," Defendant Willette confiscated the Pauls' 2014 and 2015 tax files. *Id.* at 1-2.

After Mr. Paul called him for tax purposes days later, Mr. McAleer could not avoid mentioning that he "no longer had a copy of his taxes in [his] office anymore." *Id*. at 4. Explaining he "could not answer" why, Mr. McAleer said he "was issued some paperwork that demanded it." *Id*. Not knowing what to do, Mr. McAleer faxed the warrant to Mr. Paul's lawyer, which caused Defendant Willette to return, along with "several officers in uniform," and serve a second search warrant on April 28, 2017. *Id*. She threatened him with obstruction of justice charges for faxing the warrant to Mr. Paul's lawyer—despite the warrant's unconstitutional "gag order"—which he feared meant he and his family could be deported to Australia. *Id.* at 1, 5.

E. DEFENDANT WILLETTE INITIATED SECOND CRIMINAL CHARGES AGAINST PLAINTIFFS.

On August 15, 2016, Defendant Willette went to the Marine View Cold Storage facility in Burlington and "placed a 'hold' on 4 totes" of PSSD's fishing bait. Galanda Decl., Exs. 75, 76

[17] The likelihood that Defendant Willette became affected by the methamphetamine by dermal contact is highly, highly unlikely. Charles B. Salocks, *et. al*, *Dermal Exposure to Methamphetamine Hydrochloride Contaminated Residential Surfaces*, 50 FOOD & CHEM. TOXICOLOGY 4436 (2012). It is more likely that Defendant Willette voluntarily ingested the methamphetamine. This would explain other irrational conduct that Defendant Willette has engaged in more recently, as well. *See, e.g., Wickersham v. State*, No. 77651-7-I, 2019 WL 5110551 (Wash. Ct. App. Oct. 14, 2019) ("Willette said, you need to take care of your dog. Your dog is going to die. . . . Willette also said she 'wasn't standing outside in over 90-degree heat' [and] admits that she used the words 'shit' and 'fuck'. . . .").

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¶2; *see also* Dkt. ## 48-29; 48-30; 48-32 ¶15; 48-33. PSSD purchased the clam bait from Tulalip and Swinomish Tribal members who had harvested the clams within usual and accustomed ("U&A") fishing areas for resale to other Tulalip members for fishing use within Treaty-reserved U&A." 12 Stat. 927 (Jan. 22, 1855); Dkt. # 48-3 at 122-125. Defendant Willette understood that the bait was harvested, bought and sold, and intended for resale, by and between Tribal members engaged in Treaty-protected commercial fishing activities within the U&A; and as such, was not subject to state fishing regulation. Dkt. # 48-3 at 122-125; *see also id*., at 125 ("Q. Do you have a belief that Washington State Fishing Law applies to those transactions between, for example, Swinomish, Tulalip, and then other Tulalip tribal members? A. From treaty Indian to treaty Indian? Q. Correct. A. Within U&A? Q. Correct. A. I don't think so.").[18]

On August 22, 2016, Defendant Willette and other WDFW officers returned to Marine View Cold Storage and conducted another warrantless seizure, this time of PSSD's stored bait. Galanda Decl., Exs. 75, 76 ¶¶2, 6; *see also* Dkt. ## 48-29; 48-30; 48-33.

> WDFW officers used a sledge hammer, hammer and shovel to dislodge the frozen contents of the totes, potentially damaging these items, then removed the contents of the totes and resorted them into two totes containing bait clams.
>
> The WDFW officers removed the 2 totes containing bait clams owned by PSSD from Marine View to drive them to the Skagit County dump where the totes were emptied into the waste disposal area.

Galanda Decl., Exs. 75, 76 ¶¶3-4. Defendant Willette and her colleagues destroyed 1,180 pounds of bait valued at $2,665, and preserved only "samples from the 4 totes in 4 baggies that contained approximately 15 clams." *Id.* ¶¶2; Dkt. # 48-3 at 135-136; Dkt. ## 48-29; 48-30; 48-32 ¶15; 48-33. Det. Willette "did not have a search warrant, subpoena or other form of compulsory process authorizing the seizure of the bait clams on August 22, 2016, nor did WDFW have a court order

[18] In dismissing the Skagit County criminal charges, Judge Stiles did "not reach, but recognize[d the] asserted defense that the harvest of bait clams by Tulalip Indians occurred solely within usual and accustomed areas and the subsequent sale to a PSSD representative occurred on the Tulalip reservation trust land and [thus] State Court prosecution would violate the Point Elliott Treaty . . . ." Galanda Decl., Exs. 75, 76 at 3 n.1 (citations omitted).

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allowing the bait clams' destruction." Galanda Decl., Exs. 75, 76 ¶6.

On June 15, 2018, the Skagit County Prosecutor—at Defendant Willette's referral—filed a second Information against Mr. Paul, and also named Mr. Shopbell, alleging five felony counts of shellfish buying and trafficking in relation to the destroyed clam bait.[19] Dkt. # 48-3 at 250; 48-34; 48-35; 48-36. Underscoring the retaliatory nature of the Skagit County charges after Pierce County had dismissed the first Information against Mr. Paul, Defendant Willette elicited a "commitment to enforcing WDFW laws" from the Skagit County Prosecutor, which she felt was "quite heartening to hear . . . after the disappointing outcome in Pierce County." Dkt. # 48-37.

On August 8, 2018, Chairwoman Zackuse wrote Skagit County, objecting to the latest charges against Mr. Shopbell and Mr. Paul. Dkt. # 48-41 at 1. Again, citing WDFW's violation of the MOU and the Boldt Decision, Chairwoman Zackuse explained:

> These cases involve shellfish harvested from Tulalip treaty usual and accustomed places and sold to Tulalip buyers for bait. Given that the facts of these cases revolve around tribal fisherman and treaty fishing activity, we believe these matters are within the purview of the Tulalip justice system . . . . [W]e also don't believe a bait clam violation rises to the level of a felony or that WDFW should be attempting to exercise State jurisdiction in this matter.

Id. Chairwoman Zackuse concluded: "These cases are just the latest in a string of WDFW-referred criminal cases filed in State court against Tulalip fishers. These continued actions against Tulalip fishers and fish buyers have increased our community's perception that WDFW is disproportionately targeting tribal members for enforcement action." *Id.*[20] Defendants Golden and Willette handled WDFW's "response" to Tulalip's objection, which was to ignore it as

[19] Since 2017, WDFW, including Defendants Willette and Olson, has "shopped" various manufactured criminal charges against Mr. Paul and Mr. Shopbell to at least five state prosecuting attorney's offices: King, Snohomish, Pierce, and Skagit Counties, and the Washington State Attorney General ("AG"). Dkt. ## 48-3 at 46-49, 250-251; 48-6 at 1; 48-70 at 1; 48-35; 48-47; 48-48; 48-49; 48-58. Pierce County presented a WDFW lawyer with "the option of being designated a special deputy prosecutor on the case since they claimed it was important," but WDFW "declined that option first saying he would have to check with the elected AG [and] then sa[ying] that he did not think his unit had time to do it." Dkt. #48-6 at 1. Snohomish County also "believe[d] the case is best-serve at the AG's office." Dkt. #48-72. It is telling that the AG will not bring charges for WDFW.

[20] The Tribes' perception is consistent with a letter written to WDFW that former WDFW agent Todd Vandivert has published online, alleging that Defendant Mike Cenci has directed WDFW "investigators to find crimes committed by tribal members to embarrass the tribes publicly." Dkt. # 48-59 at 7.

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political "tactic," and successfully cause Skagit County to do the same. Dkt. ## 48-40, 48-68.

In March of 2019, Mr. Paul and Mr. Shopbell filed dispositive motions with the Skagit County Superior Court. Dkt. ## 48-43; 48-44; 48-45; 48-46. During a June 18, 2019, hearing, Judge Stiles found it "troublesome" that the five felony charges brought against them had been "shopped" to "King, Pierce, and Snohomish Counties, all of which declined to bring those charges . . . ." Galanda Decl., Ex. 77 at 29; *id.*, Exs. 75, 76 at 3 n.2. Judge Stiles granted the motions on July 17, 2019 and "terminated" both cases, ruling in pertinent part: "The WDFW's destruction of the bait clams violated the Defendant's constitutional right to access useful and exculpatory evidence." *Id*., Exs. 75, 76 at ¶F. The State appealed on July 22, 2019. *Id.*, Ex. 78.

Given Plaintiffs' malicious prosecution allegations in this action, Defendants WDFW, Golden, and Willette and the AG's Office—including defense counsel of record here—took an "earnest" role in sustaining the retaliatory criminal charges filed against Mr. Paul and Mr. Shopbell in Skagit County. Dkt. ## 48-38, 48-39; 48-40; 48-42. Defendants WDFW, Golden, and Willette likewise assumed an active role in the Skagit County Prosecutor's decision to appeal Judge Stiles' July 17, 2019, rulings. *See* Galanda Decl., Ex. 79.

F. DEFENDANT WILLETTE INITIATED THIRD SET OF CRIMINAL CHARGES.

On December 31, 2018, the Pierce County Prosecutor—also at Defendant Willette's urging—filed a third Information against Mr. Paul, arising from the warrantless seizure of the Pauls' safe on June 13, 2016. Dkt. ## 48-3 at 47-48; 48-50; 48-51. Mr. Paul sought suppression given that the Superior Court Warrant did not authorize the seizure of the safe, but his motion was denied. Dkt. ## 48-7. 48-73, 48-74. After a jury trial in which the State alleged that Mr. Paul constructively possessed hydrocodone because it was found in the safe—*i.e.*, strict liability—he was found guilty of one unlawful possession count, on March 13, 2020. Galanda Decl., Ex. 80 at 2; Dkt. # 69-1. While Mr. Paul will appeal, particularly the search/seizure error, it is notable that

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out of this entire debacle—involving thousands of dollars of destroyed property and thousands upon thousands more in attorneys' fees and WDFW resources—this has been the only charge sustained—and it does not even concern Mr. Paul and Mr. Shopbell's fish distribution.

III. LAW AND ARGUMENT

A. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

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 U.S. 223, 231 (2009). "[W]hen properly applied, it protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

"[S]ummary judgment in favor of moving defendants is inappropriate where a genuine issue of material fact prevents a determination of qualified immunity until after trial on the merits." *Liston v. Cty. of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997). On summary judgment, courts "must assume the nonmoving party's version of the facts to be correct." *Id.* at 977. A defendant is not entitled to qualified immunity if "the facts that a plaintiff has alleged or shown make out a violation of a constitutional right," and that right was "clearly established at the time of the defendant's alleged misconduct." *Pearson*, 555 U.S. at 232.

1. Defendants Willette And Hale Are Not Entitled To Qualified Immunity On Plaintiffs' Probable Cause Theory.

"[I]t is clearly established that the Fourth Amendment requires a warrant application to contain a truthful factual showing of probable cause." *Hunter v. Namanny*, 219 F.3d 825, 381 (8th Cir. 2000); *see also Odom v. Kaizer*, 884 F. Supp. 2d 923, 932 (D.N.D. 2012) (The Fourth Amendment right "to a determination of probable cause based upon a truthful factual showing was clearly established"). "A warrant based upon an affidavit containing 'deliberate falsehood' or 'reckless disregard for the truth' violates the Fourth Amendment." *Bagby v. Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996) (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978)).

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The standard for qualified immunity in a civil rights action of this type is governed by *Franks*, 438 U.S. 154. *Rickert v. City of Poulsbo*, No. 07-5477, 2008 WL 2397539, at *5 (W.D. Wash. Jun.10, 2008) (citing *Liston v. County of Riverside*, 120 F.3d 965, 972 (9th Cir.1997)). To survive a defendant officer's motion for summary judgment on the ground of qualified immunity, plaintiff must: "1) make a substantial showing of deliberate falsehood or reckless disregard for the truth, and 2) establish that, but for the dishonesty, the challenged action would not have occurred." *Liston,* 120 F.3d at 973 (internal citations omitted). In other words, "a police officer who recklessly or knowingly includes false material information in, or omits material information from, a search warrant affidavit cannot be said to have acted in an objectively reasonable manner, and the shield of qualified immunity is lost." *McNelis v. Craig*, No. 12-007, 2014 WL 6686624, at *11 (D. Idaho Nov. 26, 2014) (quotation omitted). If a plaintiff satisfies these requirements, "the matter should go to trial." *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995)

Thus, here, as a threshold issue, a Court must determine whether the alleged omissions in the affidavit were material to a finding of probable cause. *Liston*, 120 F.3d at 973. And accepting the facts alleged by plaintiffs as true, as the Court must, multiple martial false submissions were made by Defendants, which caused the at-issue warrants to issue. *Id.* First, probable cause to issue the Superior Court and Tribal Court Warrants depended on the illegality of the 444-pound sale of Dungeness crab, which the Tulalip Tribes deemed entirely lawful—information that Defendant Willette and Hale knew before obtaining the warrants. Dkt. # 48-1; # 34 ¶¶4-6. Second, Defendant Willette falsely claimed that WDFW possessed jurisdiction to enforce Washington statutes and conduct searches on Tulalip reservation trust land. Dkt. ## 48-7 at 1-2; 48-71 at 1; *Boyd*, 109 Wn.App. at 247 n.2. Third, Defendant Willette's affidavits also contained false information from Mr. Richardson; she failed to disclose that he was a PSSD competitor, his information was uncorroborated, and that he was a first-time confidential informant. Dkt. ## 48-7

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at 10-11; Dkt. # 48-71 at 10-11; *U.S. v. Wall*, 277 Fed.Appx. 704, 706 (9th Cir. 2008). A reasonable magistrate presented with this information would simply not have issued a warrant based on facts regarding the *legality* of the crab sale, on the lack of jurisdiction, and circumstances surrounding Mr. Richardson's misinformation. *Liston*, 120 F.3d at 974.

The Court also must determine whether Plaintiffs have made a "substantial showing" that Defendant Willette intentionally or recklessly omitted the information. *Id.* "[O]missions are made with reckless disregard if an officer withholds a fact in his ken that any reasonable person would have known . . . was the kind of thing the judge would wish to know" and that assertions are in reckless disregard of the truth if they are made "with a high degree of awareness of the statements' probable falsity." *Wilson v. Russo*, 212 F.3d 781, 787-88 (3d Cir. 2000); *see also Arnheiter v. Random House, Inc.*, 578 F.2d 804, 806 (9th Cir. 1978) ("Reckless disregard has been held to mean those false statements made with the high degree of awareness of their probable falsity.") (quotation omitted). The question of intent or recklessness is "for the trier of fact." *Hervey*, 65 F.3d at 791. "[C]lear proof of deliberate or reckless omission is not required." *Stanert*, 762 F.2d at 781.

Here, again, Defendants Willette and Hale both had information that the crab sale was legal and that jurisdiction was lacking, and Willette was aware of the unethical circumstances surrounding Mr. Richardson. Dkt. ## 48-1 at 1, 2 ¶4; 34 ¶¶4-6. Any officer exercising his or her professional judgment in Defendant Willette and Hale's position would have known that her affidavit failed to establish probable cause and that she should not have applied for the warrant given these issues without more evidence of wrong doing. *Malley*, 475 U.S. 335, 345 (1986).

Plaintiffs have made the required substantial showing that Willette intentionally or recklessly omitted these facts. A reasonable jury could find that Defendant Willette's affidavit,

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upon which both the Superior and Tribal Court Warrants relied, included "deliberate falsehood or reckless disregard for the truth." *Snell*, 920 F.2d at 698. Defendants are not entitled to immunity.

2. Defendants Are Not Entitled To Qualified Immunity On Plaintiffs' Deprivation Of Property Theory.

Unnecessary destruction of property is unconstitutional. *Liston*, 120 F.3d at 979. "[T]he destruction of property by state officials poses as much of a threat, if not more, to people's right to be 'secure in . . . their effects' as does the physical taking of them." *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994), *overruled on other grounds*, *Robinson v. Solano Cty.*, 278 F.3d 1007, 1013 (9th Cir. 2002) (citation omitted). "Reasonableness is the touchstone of any seizure under the Fourth Amendment."[21] *Hells Angels Motorcycle Club v. San Jose*, 402 F.3d 962, 975 (9th Cir. 2005). Courts look to the totality of the circumstances to determine whether the destruction of property was reasonably necessary to effectuate the performance of the law enforcement officer's duties. *See Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001). "A seizure becomes unlawful when it is 'more intrusive than necessary.'" *Ganwich*, 319 F.3d at 1122 (quoting *Florida v. Royer*, 460 U.S. 491 (1983)). To determine whether Defendants' destruction of Plaintiffs' property was reasonable, the Court must balance "the nature and quality of the instruction on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Even "[i]n the ordinary case"—this one if far from ordinary—"the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *U.S. v. Place*, 462 U.S. 696, 701 (1983).

[21] The Ninth Circuit has alternatively considered allegations of destruction of property during the execution of a search warrant as an unreasonable search rather than a seizure. *Liston*, 120 F.3d at 979; *see also United States v. Ankeny*, 502 F.3d 829, 837-38 (9th Cir. 2007). Regardless of the nomenclature, the standard is the same.

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In this case the intrusion was severe. Defendants illegally seized and destroyed the Paul Plaintiffs' safe and two laptops. Dkt. ## 48-3 at 259; 44 ¶11; 48-25 ¶3; Dkt. 48-21, 48-22. Defendants also seized and never returned Plaintiff Anderson and Shopbell's Galaxy Samsung Tablet, as well as seized and destroyed their Dell laptop. Dkt. ## 48-22 ¶¶4-5; 48-26 ¶5; 48-27 ¶2. Defendants further illegally seized and destroyed—without a warrant or court order—PSSD's clam bait. Dkt. ## 48-29; 48-30; 48-32 ¶ 15, 3 at 122-25, 136-37 Galanda Decl., Exs. 75, 76 at ¶F. In contrast, the government issue of safety was minimal given the regulatory nature of the alleged crimes and given the evidence, there can be no doubt the totality of Defendants' actions were disproportionate to the perceived or actual threat to officer safety, and therefore amounted to an unreasonable search. *Torre v. City of Renton*, 164 F.Supp.3d 1275, 1284 (W.D. Wash. 2016). Viewing the facts in the light most favorable to the Plaintiffs, the seizures and destruction of Plaintiffs' properties were unreasonable, and violated the Fourth Amendment. *See, e.g., Hessel v. O'Hearn*, 977 F.2d 299, 305 (7th Cir. 1992) (destruction of "a can of soda pop" actionable).

The finding that a Fourth Amendment claim may exist is not the end of the inquiry. Clearly established Ninth Circuit law provides that "relatively minor destruction of property in executing a search warrant" is not unreasonable for purpose of the Fourth Amendment. *Pacific Marine Center, Inc. v. Silva*, 553 Fed.Appx. 671, 674 (9th Cir. 2014) (citation omitted). However, "where items that were clearly not the subject of the search or even related to the search have been destroyed . . . , courts in this circuit have refused qualified immunity." *Neal v. California City*, No. 14-269, 2015 WL 4227466, at *11 (E.D. Cal. July 10, 2015); *see also Hells Angels*, 402. F .3d at 974 (denying qualified immunity where officers cut a mailbox off its post, jack-hammered a sidewalk, and broke a refrigerator, all for the purpose of collecting Hells Angels indicia); *Simmons v. City of Orlando*, No. 16-1909, 2017 WL 10399211, at *2 (M.D. Fla. Sept. 15, 2017) (no qualified immunity where officers "[d]estroyed a laptop computer"). Here, there is

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sufficient evidence to suggest that Defendants destroyed property unrelated to the purpose of the search—discovering evidence of illegal fish sales. "A reasonable officer in that situation would know that his conduct was violative of Plaintiffs' rights." Neal, 2015 WL 4227466, at *12.

B. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT RELATED TO THE UNLAWFUL DETENTION OF PLAINTIFFS HAZEN SHOPBELL AND ANTHONY PAUL.

Issues of material fact preclude summary judgment on the issue of whether Defendants' conducted a lawful investigatory stop or unconstitutional detention and arrest of Plaintiffs.

There is no "bright line rule for determining when an investigatory stop crosses the line and becomes an arrest." *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995). A court determining whether a seizure is a temporary detention or an arrest must consider the totality of the circumstances. *Id.* Each case must be decided on its own facts. *U.S. v. Parr*, 843 F.3d 1228, 1231 (9th Cir. 1988). For instance, when a plaintiff is fully cooperative, no evidence suggests that he was dangerous or that safety considerations required intrusive methods of restraint, a detention may constitute an arrest. *U.S. v. Del Vizo*, 918 F.2d 821; *U.S. v. Ricardo D.*, 912 F.2d 337, 340 (9th Cir. 1990). "[I]n evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria." *U.S. v. Sharpe*, 470 U.S. 675, 685 (1985). There has been an arrest if, under the circumstances, a reasonable person would conclude that he was not free to leave after brief questioning. *U.S. v. Pinion*, 800 F.2d 976, 978-79 (9th Cir. 1986).

Whether a detention constitutes an arrest depends on a variety of factors, including the length of Plaintiffs' detention, whether they were handcuffed, placed in a patrol vehicle or subsequently transported in that vehicle, whether the officers believed probable cause to arrest existed, and whether the plaintiff was free to leave. *See, e.g., Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996); *Meredith v. Erath*, 342 F.3d 1057, 1061-62 (9th Cir. 2003); *Benite-Mendez v. INS*, 760 F.2d 907, 909 (9th Cir. 1983); *Dubner v. City of San Francisco*, 266 F.3d 959

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(9th Cir. 2001); *Bradford v. City of Seattle*, 557 F.Supp.2d 1189, 1199-1200 (W.D. Wash. 2008) (citing cases); *Del Vizo*, 918 F.2d 821. There are genuine issues of material fact regarding all of these factors present in this case. *See* Dkt. ##31, 32, 33, 35, 37, 43.

Although Plaintiffs are unable to provide a sworn account of what transpired during their unlawful detention on June 13, 2016, given the Fifth Amendment issues in this case,[22] the numerous material fact issues raised by Defendants' own account of those events preclude summary judgment. Crucially for the purposes of determining whether a detention constituted an arrest and whether the detention or arrest was lawful, Defendants offer differing accounts as to whether: (1) Plaintiffs were handcuffed, Dkt. ## 35 ¶6, 32 ¶5, 37 ¶5, 43 ¶5; (2) Plaintiffs were free to leave, Dkt. ## 33 ¶5, 35 ¶5, 32 ¶4; (3) probable cause to arrest did not exist, Dkt. ## 31 ¶5, 35 ¶6; (4) where the interviews occurred, Dkt. ## 35 ¶7, 2 ¶5; (5) the nature of the instructions given before and during the incident; and (6) if those instructions were given, when and which Defendants gave them, Dkt. ## 31, 32, 33, 35, 37, 43.

Further, "the reasonableness of the detentions does not turn on the total amount of time involved but on when a reasonable officer would have known that a serious error had occurred and that the search should be terminated." *Liston*, 120 F.3d at 978. The facts are clear that Defendants all realized that a serious error had occurred during their unlawful detention of Plaintiffs. *See* Dkt. ## 31, 32, 33, 35, 37, 43. "At the moment that the degree of certainty reached such a level that a reasonable officer would have realized these facts," continued detention of Plaintiffs became unlawful and a reasonable officer could not reasonably have believed that further detention was proper. *Liston*, 120 F.3d at 978. Further, Defendants Cenci, Clementson, Golden, Jaros, Myers, and Vincent acknowledge this conclusion. Dkt. ## 31, 32, 33, 35, 37, 43. In sum, these Defendants continued to detain Plaintiffs although a reasonable officer would have

[22] Although Defendants are correct that "Plaintiffs 'don't intend to request any further continuance notwithstanding those other matters'" still pending in Skagit and Pierce Counties, Fifth Amendment concerns persist. Dkt. #69 at 2.

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known their detention was unlawful. Plaintiffs have presented evidence sufficient to support the conclusion that an unreasonable detention occurred. *Liston*, 120 F.3d at 979. Plaintiffs have demonstrated facts upon which a reasonable jury could properly conclude that a reasonable officer would have known those Defendants' actions were unlawful. *Id.*

While Defendants are correct that Officers may use intrusive means of effecting a stop, such as handcuffing or vehicle detention, this is only the case: (1) where the suspect is uncooperative or takes action that raises a reasonable possibility of danger or flight; (2) where the police have information that the suspect is currently armed; (3) where the stop closely follows a violent crime; or (4) where the police have information that a crime that may involve violence is imminent. *Washington*, 98 F.3d at 1189. Here, none of these factors were present. Plaintiffs were not uncooperative and did not attempt to flee. Dkt. ## 31, 32, 33, 35, 37, 43. Defendants had no information that Plaintiffs were armed. *Id.* Defendants' stop did not follow a violent crime and they did not have information that Plaintiffs were about to commit a violent crime. *Id.*

When reviewing this case in the light most favorable to Plaintiffs, a rational jury could find that this incident exceeded the limits of an investigative detention under *Terry* and constituted an unlawful detention or arrest, and that Defendants' tactics were extremely intrusive, yet none of the *Washington* factors justifying such tactics were present. Thus, summary judgment cannot be granted to Defendants as a matter of law.

C. DEFENDANTS ROTHAUS, UNSWORTH, AND SUSEWIND CANNOT BE DISMISSED.

1. Defendant Rothaus Is Not Entitled to Qualified Immunity.

Defendant Rothaus argues that he should be dismissed because he did not personally participate in the events that give rights to Plaintiffs' civil rights claims.[23] This claim is disingenuous as best. The evidence indicates that Defendant Rothaus conspired with his personal friend and WDFW confidential informant, Mr. Richardson, to fabricate and repeat lies about

[23] Dkt. # 30 at 9.

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Plaintiffs—lies that served as the basis for WDFW's unlawful warrants, the unreasonable searches of Plaintiffs and their homes, the illegal detention of Plaintiffs, and the subsequent destruction of their property. *See* Dkt. ## 48-11 at 3; 48-7 at 10-1;, 48-8 ¶3; 48-3 at 112, 62, 64, 65, 66, 67, 63. WDFW eventually recanted all of the facts fabricated by Defendant Rothaus and his confidential-informant friend, admitting the information provided had no factual basis once challenged in court and causing them both to lament to each other "the situation" they caused together. *See e.g.*, Dkt. ## 48-10 ¶5; 48-18 at 3; 48-12 ¶7; 48-3 at 108, 114-15, 62. The now debunked information invented by Defendant Rothaus and Mr. Richardson, which served as the basis for Defendants' unconstitutional conduct, was either known to be false or known to be false if the truth had not been recklessly disregarded, and thus violative of the Fourth Amendment. *Myers v. Morries*, 810 F.2d 1437, 1457 (8th Cir. 1987). Unlike the circumstances present in *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980), Plaintiffs here have alleged facts that, when taken as true, show that Defendant Rothaus precipitated the deprivation of Plaintiffs' constitutional rights. He therefore cannot be dismissed from this litigation.

2. Defendants Unsworth And Susewind Are Not Entitled to Qualified Immunity.

Former WDFW Director Defendant Unsworth and current Director Defendant Susewind argue they should be dismissed from this litigation because they did not have any personal participation and cannot be held liable under Section 1983 based on a theory of respondent superior. Dkt. # 68 at 11 Plaintiffs allege that these Defendants failed to adequately train and supervise the Defendant WDFW officers, and ratified their unlawful actions. Dkt. # 28 at 23-24.

Section 1983 is a vehicle for holding officials personally liable. In *Sumahit v. Parker*, the defendants argued—as here—"that plaintiff has not stated a claim against defendant in his individual capacity because plaintiff has alleged that defendant acted only as a policymaker." No. 03-2605, 2008 WL 449713, at *4 (E.D. Cal. Feb. 15, 2008). The court rejected this argument:

Personal-capacity suits seek to impose personal liability upon a government

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> official for actions he takes under color of state law. . . . On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a moving force behind the deprivation; thus, in an official-capacity suit the entity's policy or custom must have played apart in the violation of federal law. **While an official-capacity lawsuit requires a policy or custom, this does not mean that an individual-capacity lawsuit may not be based on policy or custom. . . . [An] individual capacity lawsuit [is] appropriate against defendant in his role as policy maker for the institution**.

Id. at *4-*5 (quotation omitted; emphasis added). In so holding, the court relied upon *Ritchie*.

In *Ritchie*, the plaintiff named as a defendant the warden of the state prison, alleging that he was responsible—in his individual capacity—for the objectionable state policies. 938 F.2d 689. The defendants argued—as Defendants also do here—defendants in a Section1983 action cannot be held liable based on a theory of *respondeat superior* or vicarious liability. *Id.* at 692. While this is true, there is a distinction for supervisors and policymakers:

> [T]he suit against [the warden] is an "individual capacity" suit, **notwithstanding that no "hands on" misconduct is claimed**. [The warden] is sued as the policy maker for the institution. A judgment against [the warden] would not be a judgment against the State, and the State would not be compelled to reimburse [the warden] or pay the judgment. If the State should voluntarily pay the judgment or commit itself to pay as a result of a negotiated collective bargaining agreement, this would *not* change the analysis.

Id. (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)) (some emphasis in original).

Defendants thus fail to comprehend the breadth of Plaintiffs' claim, which has nothing to do with *respondeat superior* and everything to do with their own culpability action and inaction in the training, supervision, control of the involved officers, as well as their acquiescence to and ratification of the officers' unconstitutional acts and omissions.[24] *See Thornhill v. Aylor*, No. 15-0024, 2016 WL 8737358, at *9 (W.D. Va. Feb. 19, 2016) (plaintiff need not show that a supervisor "had actual or constructive knowledge of the circumstances" but "simply the risk of

[24] In addition to the discovery subjects set forth in Dkt. # 50 at 1-2, Plaintiffs require document and deposition discovery into Defendant WDFW's training and supervision policies and customs in order to properly defend against summary judgment. Fed. R. Civ. Proc. 56(d); Galanda Decl., ¶10; *but see* Dkt. # 59 at 2.

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harm to [persons] like" the complainant); *Nicholas v. Ada Cty.*, No. 17-0289, 2017 WL 4517966, at *4 (D. Idaho Sept. 20, 2017) ("facts showing the supervisor failed to act or improperly acted to train, supervise, or control his or her subordinates" will result in personal § 1983 liability); *Gabriel v. Cty. of Herkimer*, 889 F. Supp. 2d 374, 402 (N.D.N.Y. 2012) (finding personal "liability based on a supervisor's creation of a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom" where the policymaker "allowed unconstitutional policies and customs to occur and continue").[25]

On these facts, it is doubtful that much of any training, supervision, or control of the involved officers—particularly Defendant Willette—occurred on either Defendants Unsworth or Susewind's watch. Defendant WDFW appears to be a law enforcement agency devoid of internal control, constitutional check and balance, or ethical norm.[26]

D. THE COURT SHOULD NOT DISMISS THE JOHN DOE DEFENDANTS.

Discovery will lead to the identification of the John Doe Defendants who, among at least 30 officers, were involved in the execution of the Superior Court and Tribal Court Warrants. Dkt. # 44 ¶4. Courts find that plaintiffs should be given that opportunity unless it is clear that discovery would not uncover the identities. *Gillespire v. Civiletti*, 629 F.2d 637, 643 (9th Cir. 1980). In a Section 1983 case, it is inappropriate for a District Court to dismiss unidentified defendants prior to the start of discovery. *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999). The Court should therefore not dismiss the John Doe Defendants.

IV. CONCLUSION

As a result of each of their incompetence and defiance of the law, Defendants are not entitled to wear the cloak of qualified immunity. Defendants' motion should be denied.

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[25] The fact that "Defendant Susewind was not even Director of WDFW until after the alleged deprivations occurred" is inapposite since, in the Ninth Circuit, "ratification of subordinate decisions may occur after the allegedly unconstitutional action has already occurred." *Au Hoon v. City & Cty. of Honolulu*, 922 F.2d 844 (9th Cir. 1991).

[26] WDFW Directors are not accountable to the Washington State Governor or electorate, like many other state agency heads. *See* RCW §§ 77.04.013, 77.04.020.

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DATED this 27th day of April 2020.

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CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today I served the foregoing document, via CM/ECF and email on the following parties:

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The foregoing Statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, April 27, 2020.

s/Wendy Foster
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