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The Honorable 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-BJR

REPLY IN SUPPORT OF DEFENDANTS’
MOTION FOR PARTIAL SUMMARY
JUDGMENT

I. REPLY

Plaintiffs have failed to demonstrate any issues of material fact that preclude this Court from granting qualified immunity to all named Defendants. At the threshold of a § 1983 action in circumstances such as those presented here is the plaintiff’s burden of demonstrating the absence of probable cause. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (“To prevail on his § 1983 claim for false arrest and imprisonment, [plaintiff] would have to demonstrate that there was no probable cause to arrest him.”). The existence of probable cause is an absolute defense to any such claim. Since Plaintiffs have failed to demonstrate the absence of

1 probable cause – or any other constitutional violation – their claims against the named Defendants
2 should be dismissed.

3 In their Response, Plaintiffs make four of the same five arguments in opposition to
4 Defendants’ Motion for Summary Judgment they made the first time they responded to Defendants’
5 original Motion for Partial Summary Judgment filed over a year ago:

6 • “Defendants Willette And Hale Are Not Entitled To Immunity Based On
7 Their Conduct In Obtaining The Warrants.”, Plaintiffs’ Response in Opposition to
8 Defendants’ Motion for Partial Summary Judgment, Dkt. #47 at p. 21 and “Defendants
9 Willette And Hale Are Not Entitled To Qualified Immunity On Plaintiffs’ Probable Cause
10 Theory.”, Plaintiffs’ Response in Opposition to Defendants’ Renewed Motion for Partial
11 Summary Judgment, Dkt. #71 at p. 20;

12 • “Defendants Are Not Entitled To Summary Judgment Related To The
13 Unlawful Detention Of Plaintiffs Hazen Shopbell And Anthony Paul.” Dkt. #47 at p. 25
14 and Dkt. #71 at p. 25;

15 • “Plaintiffs’ § 1983 Claims Against Defendants Rothaus, Unsworth, And
16 Susewind Cannot Be Dismissed.”, Dkt. #47 at p. 28 and “Defendants Rothaus, Unsworth,
17 And Susewind Cannot Be Dismissed.” Dkt. #71 at p. 27; and

18 • “The Court Should Not Dismiss The John Doe Defendants.” Dkt. #47 at
19 p. 30 and Dkt. #71 at p. 30.

20 The Argument Plaintiffs have changed here is where they previously argued “Defendants
21 Are Not Entitled To Qualified Immunity Related To Their Execution Of The Superior and Tribal
22 Court Warrants.” (Dkt. # 47 at p. 24) they now argue “Defendants Are Not Entitled To Qualified
23 Immunity On Plaintiffs’ Deprivation Of Property Theory.” Dkt. #71 at p. 23. Apparently Plaintiffs
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1 have abandoned their opposition to Defendants receiving qualified immunity for the execution of
2 the lawfully obtained search warrants.

3 Nevertheless, none of Plaintiffs' arguments sufficiently address the arguments Defendants
4 submitted in support of their claim for qualified immunity and thus this Court should grant
5 Defendants' Motion for Partial Summary Judgment and find that all named Defendants are entitled
6 to dismissal of all Plaintiffs' claims against them. Defendants Reply to each of Plaintiffs' arguments
7 below.

8 II. ARGUMENT

9 A. Defendants Willette and Hale Are Entitled to Immunity Based on Their Conduct in 10 Obtaining the Warrants

11 The Fourth Amendment provides a guarantee against "unreasonable searches and seizures."
12 Search warrants must be based on probable cause. "The warrant clause of the Fourth Amendment
13 requires 'probable cause, supported by Oath or affirmation' to justify the issuance of a search
14 warrant." *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004). Specifically, a police officer
15 must establish "by sworn evidence presented to a magistrate that probable cause exists to believe
16 that an offense has been committed and that items related to that offense, such as fruits of the crime,
17 will be found on the premises sought to be searched at the time the warrant is issued."
18 *United States v. Rabe*, 848 F.2d 994, 997 (9th Cir. 1988). In determining whether a search warrant
19 is supported by probable cause, the crucial element is not whether the target of the search is
20 suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found
21 in the place to be searched. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n.6 (1978).

22 Probable cause for a search warrant "means a fair probability that contraband or evidence
23 of a crime will be found in a particular place, based on the totality of circumstances." *United States*
24 *v. SDI Future Health, Inc.*, 568 F.3d 684, 703 (9th Cir. 2009). And, according to the Supreme Court:

1 “[I]t is clear that ‘only the probability, and not a prima facie showing, of criminal activity is the
2 standard of probable cause.’” *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (quoting *Spinelli v. United*
3 *States*, 393 U.S. 410, 419 (1969)).

4 “The probable-cause standard is incapable of precise definition or quantification” and is “a
5 fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or
6 even usefully, reduced to a neat set of legal rules.” *Rodis v. City & County of San Francisco*,
7 558 F.3d 964, 969 (9th Cir. 2009). Furthermore, probable cause is certainly a much lower threshold
8 than the “beyond a reasonable doubt” degree of proof needed to support a conviction. The Ninth
9 Circuit has further said that probable cause does not require “certainty,” or a “preponderance of the
10 evidence,” or even a prima facie showing, but simply a “fair probability.” See *United States v.*
11 *Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (en banc), cert. denied, 549 U.S. 1032 (2006).

12 Law enforcement officers are allowed to rely on hearsay, such as statements of civilian
13 witnesses or other officers, in making the probable cause determination. “Police may rely on
14 hearsay and other evidence that would not be admissible in a court to determine probable cause[.]”
15 *Hart v. Parks*, 450 F.3d 1059, 1066 (9th Cir. 2006). Officers may additionally “draw on their own
16 experience and specialized training to make inferences from and deductions about the cumulative
17 information available to them that might well elude an untrained person.” *Id.* at 1067 (quoting
18 *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). “As a corollary . . . of the rule that the police
19 may rely on the totality of facts available to them in establishing probable cause, they also may not
20 disregard facts tending to dissipate probable cause.” *Ramirez v. City of Buena Park*, 560 F.3d 1012,
21 1023-1024 (9th Cir. 2009). Nevertheless, the “fact that other inferences are possible does not mean
22 that there is a triable issue of fact as to whether there was probable cause.” *Hart*, 450 F.3d at 1067.

1 “[L]aw enforcement officers do not have to rule out the possibility of innocent behavior.”
2 *Ramirez*, 560 F.3d at 1024.

3 Of course, judicial deception may not be employed by an officer to obtain a search warrant.
4 *Franks v. Delaware*, 438 U.S. 154, 155-156, 170-171 (1978). That said, the burden is high for a
5 plaintiff to establish judicial deception. “To support a § 1983 claim of judicial deception, a plaintiff
6 must show that the defendant deliberately or recklessly made false statements or omissions that
7 were material to the finding of probable cause.” *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004).
8 The plaintiff’s showing of a deliberate falsehood or reckless disregard for the truth must be
9 substantial. *Ewing v. City of Stockton*, 588 F.3d 1218, 1224 (9th Cir. 2009). “Omissions or
10 misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit
11 which on its face establishes probable cause.” *Id.* “The court determines the materiality of alleged
12 false statements or omissions.” *KRL*, 384 F.3d at 1117. If false statements are submitted to the
13 magistrate, the district court “purges those statements and determines whether what is left justifies
14 issuance of the warrant.” *Ewing*, 588 F.3d at 1224. “If the officer omitted facts required to prevent
15 technically true statements in the affidavit from being misleading, the court determines whether the
16 affidavit, once corrected and supplemented, establishes probable cause.” *Id.*

17 In reviewing a magistrate’s decision to issue a search warrant, the district court’s role is
18 somewhat circumscribed. It is not to second-guess the magistrate but rather to ensure the issuing
19 magistrate made a reasonable judgment call. “The task of the issuing magistrate is simply to make
20 a practical, common-sense decision whether, given all the circumstances set forth in the affidavit
21 before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay
22 information, there is a fair probability that contraband or evidence of a crime will be found in a
23 particular place.” *Gates*, 462 U.S. at 238. The district court’s role, in turn, is to ensure the magistrate
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1 issuing the search warrant had a “substantial basis” to conclude probable cause existed.
2 *Id.* at 238-39.

3 In reviewing the sufficiency of the affidavit supporting the warrant, “after-the-fact scrutiny
4 by courts . . . should not take the form of *de novo* review. A magistrate’s determination of probable
5 cause should be paid great deference by reviewing courts. . . . A grudging or negative attitude by
6 reviewing courts toward warrants . . . is inconsistent with the Fourth Amendment’s strong
7 preference for searches conducted pursuant to a warrant” *Id.* at 236 (citations and internal
8 quotes omitted); *see also Dawson v. City of Seattle*, 435 F.3d 1054, 1062 (9th Cir. 2006) (decision
9 to issue warrant is reviewed for “clear error”).

10 In challenging the warrants here, Plaintiffs argue that three factors preclude this Court from
11 finding probable cause existed for their issuance and thus also preclude a finding that Defendants
12 Willette and Hale are entitled to dismissal of Plaintiffs’ claims against them. Dkt. #47 at pp. 22-23;
13 Dkt. #71 at p. 21. Those three points are summarized as follows:

- 14 • Defendant Willette falsely claimed that the Washington Department of Fish
15 and Wildlife (WDFW) possessed jurisdiction to enforce Washington statutes and conduct
16 searches on Tulalip reservation trust land;
- 17 • Probable cause to issue the Superior Court and Tribal Court Warrants
18 depended on the illegality of the 444-pound sale of Dungeness crab; and
- 19 • Defendant Willette’s affidavits also contained false information from an
20 anonymous source and she failed to disclose that he was a Puget Sound Seafood Distributors
21 (PSSD) competitor, his information was uncorroborated, and that he was a first time
22 confidential informant.

1 *Id.* Even if Plaintiffs’ argued points were correct, which they are not, collectively or separately,
 2 none is sufficient to defeat probable cause or preclude summary judgment to Defendants Willette
 3 and Hale. In other words, even if Plaintiffs’ assertions are valid, there remained adequate probable
 4 cause to issue the warrants. *Ewing*, 588 F.3d at 1224. “If the officer omitted facts required to prevent
 5 technically true statements in the affidavit from being misleading, the court determines whether the
 6 affidavit, once corrected and supplemented, establishes probable cause.” *Id.*

7 First, Defendant Willette did not falsely claim that WDFW possessed jurisdiction to enforce
 8 Washington statutes and conduct searches on Tulalip reservation trust land. In fact, WDFW has
 9 jurisdiction to search property on trust land when allegations of violations of Washington Statutes
 10 occur outside the reservation boundaries, especially when Defendants both involved the Tulalip
 11 Tribal Police and received a warrant from a Tulalip Tribal Court as occurred here. *Nevada v. Hicks*,
 12 533 U.S. 353, 365-66 (2001); *State v. Clark*, 178 Wash. 2d 19, 308 P.3d 590 (2013);
 13 *See Dkt. #48-71* (“I believe that: In Pierce, Snohomish, and Thurston County, Washington, during
 14 the period between March 27, 2015, and January 8, 2016, the following crimes did occur:);
 15 *see also* Dkt. #44-1, Dkt. #44-2, Dkt. #44-3; Dkt. #56 at pp. 1-4, ¶¶ 2, 7-8¹. Moreover, the warrants
 16 alleged violations of the Tulalip Tribal Code as well as violations of Washington statutes.
 17 Dkt. #48-71 at p. 3. Also, Defendant Willette makes clear in her Affidavit for Search Warrant, that
 18 one of the subject properties “is owned by the Tulalip Tribe.” *Id.* at p. 4. Finally, the warrant was
 19 issued by the Tulalip Tribal Court (*id.* at p. 3), and Plaintiffs make no legal showing that Tulalip
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22 ¹ Dkt. #56 is the Second Declaration of Wendy Willette, submitted by Defendants in their first Reply
 23 of Detective Willette’s references in that declaration are to Plaintiffs’ incorrect factual assertions in their Response
 24 (Dkt. #47) and are specified in reference to that document. Her comments are nevertheless appropriate for
 consideration here because Plaintiffs assert the same “facts,” with which Defendants and, specifically,
 Detective Willette take direct issue. *See* Dkt. #56.

1 Tribal Court lacked jurisdiction as they allege. With or without this information, the warrant was
2 supported by ample probable cause and was properly requested and legally issued.

3 Second, probable cause to issue the Superior Court and Tribal Court Warrants did not
4 depend on the illegality of the 444 pound sale of Dungeness crab. The illegal sale of 444 pounds of
5 Dungeness crab was not the only crime (or possible crime), upon which the warrants were based.
6 The Affidavits for Search Warrants themselves demonstrated scores of other possible violations
7 that Defendant Willette uncovered during her investigation. Dkt. #44-1 at pp. 6-7; Dkt. #44-2 at
8 pp. 5-6; Dkt. #44-3 at pp. 5-6. All those other crimes or possible crimes again provided ample
9 probable cause to support requesting and issuing the search warrants the neutral magistrates
10 ultimately did issue, even without the inclusion of the illegal sale of 444 pounds of Dungeness crab.²

11 Last, Defendant Willette's affidavits did not contain any false information from an
12 anonymous source and the other factors argued by Plaintiff (*i.e.*, that the anonymous source was "a
13 PSSD competitor, his information was uncorroborated, and that he was a first time confidential
14 informant") could not change the existence of ample probable cause. As Defendant Willette asserts
15 she "made a careful examination of financial records obtained through search warrants" and
16 separately "determined there were underpayments, outside of and prior to any statement made
17 by WDFW's anonymous information source." Dkt. #56 at p. 2, ¶ 4. Defendant Willette only used
18 the information she gained through that source as a potential reason for the retroactive payments
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20 _____
21 ² Plaintiffs are misinformed regarding their assertion that the Memorandum of Understanding (MOU)
22 restricts the State from referring charges on a Tulalip Tribal member in Pierce County. This is outlined within the
23 MOU. *See* Dkt. #56, Ex. 4 at 5. In addition to the MOU not applying (see below), a conviction in tribal court does
24 not preclude the State from filing charges in State court. It is not double jeopardy (*State v. Moses*, 145 Wash. 2d
370, 37 P.3d 1216 (2002)). Furthermore, the MOU referenced in the "Dismissal Memo" was not entered into until
two years *after* the violation at issue in that case and the MOU was not intended to be retroactive: "This MOU shall
be effective for two years after the date of the last signature and can be renewed by mutual agreement." *See also*
Dkt. #56 at p. 2, ¶ 3-4. The MOU between the WDFW and the Tulalip Tribe was signed on May 31, 2017. Last, if
the participants really believed the sale of 444 pounds of Dungeness crab was legal, they would have no need to
have back-dated their fish ticket or the check covering that sale. *See* Dkt. #38, Dkt. #44.

1 she uncovered through her own investigation. *Id.* Clearly the search warrants were supported
2 without this additional information.

3 The Ninth Circuit has repeatedly emphasized that the Fourth Amendment does not require
4 inclusion of all exculpatory evidence, and has upheld a warrant in the face of omitted evidence that
5 contradicted statements in the warrant application. *See Beltran v. Santa Clara County*,
6 389 Fed.Appx. 679, 681 (9th Cir. 2010); *Ewing*, 588 F.3d at 1226-27 (concluding that, given the
7 strength of the identification by one witness, omission of a non-identification by another witness
8 “does not cast doubt on probable cause.”); *see also United States v. Colkley*, 899 F.2d 297, 303
9 (4th Cir. 1990) (noting that “non-lawyers who normally secure warrants in the heat of a criminal
10 investigation should not be burdened with the same duty to assess and disclose information as a
11 prosecutor who possesses a mature knowledge of the entire case.”).

12 Again, if the reviewing court finds an affidavit included false statements, the proper
13 procedure is for the court to purge those statements and determine whether the remaining statements
14 justify issuance of the warrant. *See Ewing*, 588 F.3d. at 1224. If a court finds that an affidavit
15 excludes material facts, “the court determines whether the affidavit, once corrected and
16 supplemented, establishes probable cause.” *Id.* “If probable cause remains after amendment, then
17 no constitutional error has occurred.” *Id.* The warrants here were supported by ample probable cause
18 even if the deficiencies argued by Plaintiffs existed in reality, which they do not. Consequently, no
19 constitutional violations occurred and Defendants Willette and Hale are entitled to qualified
20 immunity because any reasonable officer under the circumstances would believe their requests for
21 the warrants, supported by this probable cause, were proper.

1 **B. The Existence of Probable Cause Entitles Defendants to Qualified Immunity Related**
 2 **to Their Execution of the Superior and Tribal Court Warrants and the Seizure of**
 3 **Personal Property**

4 As Defendants previously pointed out and Plaintiffs have failed to rebut, each and every
 5 Defendant who was involved in the search of Plaintiffs' respective residences or business or was
 6 involved in the detention of either Plaintiffs Hazen Shopbell and Anthony Paul, or both,
 7 examined the warrant relative to their involvement and each and every Defendant determined on
 8 his or her own that the warrants were supported by probable cause. Dkt. #31 at pp. 1-2, ¶ 3;
 9 Dkt. #32 at p. 2, ¶ 3; Dkt. #33 at p. 2, ¶ 3; Dkt. #34 at p. 2, ¶ 3; Dkt. #35 at p. 2, ¶ 4; Dkt. #36
 10 at pp. 1-2, ¶ 3; Dkt. #37 at pp. 1-2, ¶ 2; Dkt. #38 at pp. 1-2, ¶ 3; Dkt. #39 at pp. 1-2, ¶ 3; Dkt. #43
 11 at p. 2, ¶ 4; Dkt. #44 at pp. 2-5, 7, ¶¶ 4, 7-8, 9.b.-9.c., 18. All of those Defendants had significant
 12 training in search warrants and establishing probable cause. Dkt. #31 at pp. 1-2, ¶ 3; Dkt. #32
 13 at pp. 1-2, ¶¶ 2-3; Dkt. #33 at pp. 1-2, ¶¶ 2-3; Dkt. #34 at 1-2, ¶¶ 2-3; Dkt. #35 at pp. 1-2, ¶¶ 2-3;
 14 Dkt. #36 at pp. 1-2, ¶¶ 2-3; Dkt. #37 at pp. 1-2, ¶¶ 2-3; Dkt. #38 at pp. 1-2, ¶¶ 2-3; Dkt. #39
 15 at pp. 1-2, ¶¶ 2-3; Dkt. #43 at pp. 1-2, ¶¶ 2-4; Dkt. #44 at pp. 1-2, ¶ 2.

16 Even if the other named Defendants had not made their own separate examination and
 17 determination of probable cause, in the Ninth Circuit, "line officers" who assist in executing a
 18 search warrant are allowed to rely upon the officer who is in charge of obtaining the warrant and
 19 executing the search, and are entitled to qualified immunity. *Ramirez v. Butte-Silver Bow County*,
 20 298 F.3d 1022, 1027-28 (9th Cir. 2002). In other words, officers who take a subordinate role in
 21 executing a search warrant are not liable even where a warrant may turn out to be invalid. *Id.*

22 Line officers, on the other hand, are required to do much less. They do not have
 23 to actually read or even see the warrant; they may accept the word of their
 24 superiors that they have a warrant and that it is valid. *Guerra [v. Sutton]*, 783 F.2d
 [1371] at 1375 [(9th Cir. 1986)]; *Marks*, 102 F.3d at 1029-30. So long as they
 "ma[k]e inquiry as to the nature and scope of [the] warrant," *Guerra*, 783 F.2d at

1 1375, their reliance on leaders’ representations about it is reasonable. *Id.*;
2 *Marks*, 102 F.3d at 1029–30.

3 *Id.* at 1028. As outlined in detail above, there is no evidence the warrants were invalid – in fact
4 the evidence shows otherwise – but even if this Court were to determine any of them to be
5 invalid, all the other named Defendants are entitled to qualified immunity.

6 We have held that officers are immune from suit “when they reasonably believe
7 that probable cause existed, even though it is subsequently concluded that it did
8 not, because they ‘cannot be expected to predict what federal judges frequently
9 have considerable difficulty in deciding and about which they frequently differ
10 among themselves.’ ”

11 *Crowe v. County of San Diego*, 608 F.3d 406, 433 (9th Cir. 2010). Again, police officers are
12 entitled to qualified immunity from suit for damages arising out of a Fourth Amendment
13 violation if a reasonable officer with the same facts as the defendant officer could have
14 reasonably believed the arrest was supported by probable cause even if a court later determines
15 it was not. *Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1984). Notably, too, as Plaintiffs
16 point out, Defendants had “thirty or more warrants” issued by “multiple local courts.” Dkt. #47
17 at p. 8. That means in at least 30 separate instances local neutral magistrates found sufficient
18 probable cause to issue the requested warrants.

19 Contrary to Plaintiffs’ assertions, Defendants affirmatively deny Plaintiffs’ property was
20 destroyed other than their safe. Nevertheless, as common sense dictates, and as federal courts
21 have routinely recognized, searches conducted by law enforcement personnel are, by their very
22 nature, disruptive and may well leave a residence “disheveled” or otherwise disturbed. As the
23 Supreme Court noted, “officers executing search warrants on occasion must damage property in
24 order to perform their duty.” *Dalia v. United States*, 441 U.S. 238, 258 (1979); *see also*
United States v. Becker, 929 F.2d 442, 446 (9th Cir. 1991) (use of jackhammer on concrete not
unreasonable destruction of property during execution of search warrant). And “only

1 unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively,
2 violates the Fourth Amendment.” *Liston v. County of Riverside*, 120 F.3d 965, 979
3 (9th Cir. 1997); *see also United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991).

4 Plaintiffs deceptively argue that several of their electronic devices were “illegally seized
5 and destroyed,” when, in fact, all but one of those devices were returned to Plaintiffs.
6 *See* Dkt. #48-25, Dkt. #48-26. According to the Plaintiffs in their declarations, even though they
7 were returned, not a single one of those devices were still operable. *Id.* Importantly, Plaintiffs
8 created those declarations in support of Plaintiffs seeking replevin and return of the very property
9 they claim was damaged here. *See* Dkt. #48-25, Dkt. #48-26, Dkt. #48-65. Plaintiffs then settled
10 those property claims with the State of Washington and WDFW. Dkt. #48-66.

11 Again, search warrants typically do not specify the manner in which they are to be
12 executed by officers; rather, “it is generally left to the discretion of the executing officers to
13 determine the details of how best to proceed with the performance of a search authorized by
14 warrant[.]” *Dalia*, 441 U.S. at 257. As the Supreme Court has recognized, officers executing a
15 search warrant occasionally “must damage property in order to perform their duty.” *Id.* at 258;
16 *see also Hill v. McIntyre*, 884 F.2d 271, 278 (6th Cir. 1989) (“[O]fficers executing search
17 warrants must [often] damage property in order to perform their duty.”) (internal quotations
18 omitted). As with other areas of Fourth Amendment law, the standard for whether officers have
19 violated the Fourth Amendment by damaging property during the execution of a search warrant
20 is reasonableness. *United States v. Ramirez*, 523 U.S. 65, 71 (1998). Officers act unreasonably
21 if the damage to the defendant’s property was excessive or unnecessary to accomplish the
22 purposes of the search. *Id.*

1 Here, the search warrants allowed for the seizure of any computer equipment.
2 Dkt. #48-7 at p. 4; Dkt. #48-13 at p. 4; Dkt. #48-71 at p. 21. That some of the computer
3 equipment is alleged by Plaintiffs to have become inoperable upon return to Plaintiffs does not
4 constitute an *unreasonable* destruction of property as contemplated by the Supreme Court or the
5 Ninth Circuit in prior Fourth Amendment cases. Even if this Court believed the inoperability of
6 that equipment were unreasonable, Plaintiffs have not demonstrated which of the named
7 Defendants made the electronic equipment that way. Perhaps most importantly, Plaintiffs have
8 not demonstrated that the law was clearly established at the time of these actions that if an
9 electronic device becomes inoperable after the time of seizure pursuant to a valid warrant, every
10 officer involved in the execution of that warrant has violated a subject's Fourth Amendment
11 rights and is constitutionally liable. The named defendants are entitled to qualified immunity.

12 Plaintiffs also claim irregularities with the destruction of clam bait from the Marine View
13 Cold Storage in Burlington, WA. Dkt. #47 at p. 25. However, because Plaintiffs did not possess
14 valid licenses, their clams were subject to seizure under Wash. Rev. Code Title 77 (2016).
15 See Dkt. #48-34. Pursuant to Wash. Rev. Code § 77.15.085 (2016), such shellfish are subject to
16 seizure without warrant: "Fish and wildlife officers and ex officio fish and wildlife officers may
17 seize without a warrant wildlife, fish, shellfish, and covered animal species parts and products they
18 have probable cause to believe have been taken, transported, or possessed in violation of this title
19 or rule of the commission or director." That shellfish is then forfeited to the State. Wash. Rev. Code
20 § 77.15.100 (2016). There was no constitutional violation for this seizure and thus it lends nothing
21 to Plaintiffs' claims against the Defendants.

22 Importantly here, the Skagit County trial court in one of the corresponding criminal cases
23 below did not suppress the clam bait evidence because it was seized without probable cause, but
24

1 only because, in that court’s opinion, it was exculpatory evidence and had been destroyed.
2 *See* Dkt. #72-3 at p. 29. In fact, that precise ruling is apparently still on appeal (*see* Dkt. #72-4) and
3 the issue there is whether the destroyed clam bait was properly excluded because it was “useful and
4 potentially exculpatory,” not whether probable cause was present or even necessary at the time it
5 was seized. *See State v. Shopbell*, Nos. 80215-1-I, 80216-0-I, 2020 WL 435532 (Wash. Jan. 13,
6 2020). Moreover, even though Plaintiffs have referenced comments from that same trial court about
7 “shopping” the case for prosecution, Plaintiffs have yet to cite to any court that found probable
8 cause was lacking, nor have Plaintiffs provided evidence of its absence. Because Defendants had
9 probable cause, all Defendants are, at a minimum, entitled to qualified immunity and Plaintiffs’
10 claims against them should be dismissed.

11 **C. Defendants Are Entitled to Summary Judgment Related to the Lawful Detention of**
12 **Plaintiffs Hazen Shopbell and Anthony Paul**

13 Plaintiffs have alleged no new facts relating to their detention in response to Defendants’
14 Motion for Partial Summary Judgment. Similarly, Plaintiffs have offered no facts that establish
15 Defendants did not have probable cause to arrest them or reasonable suspicion to detain them.
16 Consequently, the named Defendants who participated in those interactions with Plaintiffs are
17 entitled to qualified immunity.

18 “Probable cause does not require the same type of specific evidence of each element of the
19 offense as would be needed to support a conviction.” *Adams v. Williams*, 407 U.S. 143, 149 (1972).
20 Therefore, the evidentiary standard for probable cause is significantly lower than the standard that
21 is required for conviction. *See Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) (“We have made
22 clear that the kinds and degree of proof and the procedural requirements necessary for a conviction
23 are not prerequisites to a valid arrest.”) (citations omitted). Probable cause exists if “at the moment
24 the arrest was made . . . the facts and circumstances within [the officers’] knowledge and of which

1 they had reasonably trustworthy information were sufficient to warrant a prudent man in believing
2 that [the suspect] had committed or was committing an offense.” *Beck v. Ohio*, 379 U.S. 89, 91
3 (1964) (citations omitted).

4 As Defendants demonstrated in their opening memorandum in support of their motion for
5 partial summary judgment – and Plaintiffs have failed to rebut – even if Plaintiffs *were* arrested as
6 they allege, those arrests were supported by probable cause. Dkt. #30 at pp. 17-22. As the Supreme
7 Court has observed, “it should first be determined whether the actions [the plaintiff] allege[s] [the
8 actions defendant took] are actions that a reasonable officer could have believed lawful. If they are,
9 [the defendant] is entitled to dismissal prior to discovery.” *Anderson v. Creighton*, 483 U.S. 635,
10 646 n.6 (1987); *accord Saucier v. Katz*, 533 U.S. 194, 207 (2001). Plaintiffs were properly detained
11 or arrested and Defendants are entitled to qualified immunity.

12 **D. Plaintiffs’ § 1983 Claims Against Defendants Rothaus, Unsworth, and Susewind Must**
13 **Be Dismissed**

14 Plaintiffs did not demonstrate any personal participation by Defendants Rothaus, Unsworth,
15 and Susewind, in their Response and therefore Plaintiffs’ claims against these three named
16 Defendants must be dismissed. None of Plaintiffs’ citations to any of their exhibits demonstrates
17 that “DFW eventually recanted all of the facts fabricated by Defendant Rothaus” Dkt. #47
18 at p. 29. In fact, as Defendants have previously pointed out, and have clarified again, Defendant
19 Rothaus had no participation in the alleged constitutional deprivations of Plaintiffs. Dkt. #55.
20 Defendant Rothaus had no participatory role in the investigation, the requests for warrants,
21 execution of the warrants, or the detention of any Plaintiffs. *Id.* Defendant Rothaus is not a friend
22 of the anonymous source and made no attempt to verify the source’s information since he is not an
23 enforcement officer. *Id.* The inquiry into causation must be individualized and focus on the duties
24 and responsibilities of each individual defendant whose acts or omissions are alleged to have

1 caused a constitutional deprivation. *Rizzo v. Goode*, 423 U.S. 362, 370-71 and 375-77 (1976).

2 Without any participation at all, Defendant Rothaus should be dismissed.

3 Similarly, Defendants Susewind and Unsworth should also be dismissed because Plaintiffs
4 have failed to specifically tie either of those Defendants to their alleged constitutional deprivations.

5 The absence of specifics is significant because, to establish individual liability under
6 42 U.S.C. § 1983, “a plaintiff must plead that each Government-official defendant,
7 through the official’s own individual actions, has violated the Constitution.”
8 *Iqbal*, 129 S.Ct. at 1948. Even under a “deliberate indifference” theory of individual
9 liability, the Plaintiffs must still allege sufficient facts to plausibly establish the
10 defendant’s “knowledge of” and “acquiescence in” the unconstitutional conduct of
11 his subordinates. *Starr*, 652 F.3d at 1206–07. In short, Plaintiffs’ “bald” and
12 “conclusory” allegations are insufficient to establish individual liability under
13 42 U.S.C. § 1983. See *Iqbal*, 129 S.Ct. at 1950–53; cf. *Starr*, 652 F.3d at 1216–17.

10 *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012). Plaintiffs here have also failed to allege any
11 specific tie that either of these named Defendants has to anything related to Plaintiffs. Bald and
12 conclusory allegations of “failure to train” or adequately supervise are insufficient. *Id.* Defendants
13 Susewind and Unsworth must be dismissed.

14 **E. The Court Should Dismiss the Doe Defendants**

15 Plaintiffs allege “[d]iscovery will lead to the identification of the John Doe
16 Defendants. . . .” Dkt. #71 at p. 30. The investigations into Plaintiffs’ conduct has continued for
17 nearly five or more years, yet, even after all that time, Plaintiffs here cannot allege any specific
18 acts that denied them of any specific constitutional rights for which they have not yet identified
19 the actor. That is, Plaintiffs have not provided this Court with specific allegations that some yet-
20 to-be-identified individual, arrested them without probable cause on a certain date.

21 And though discovery may have been stayed *in this case* pending the prosecution of the
22 underlying criminal cases against Plaintiffs, it is highly likely much, if not all, the investigatory
23 material was shared with Plaintiffs in those criminal cases. Yet Plaintiffs have still not posited
24

1 any theories on which actors' names may be missing or even what those phantom participants'
2 roles may have been in denying Plaintiffs any of their constitutional rights.

3 Clearly from the volumes of information Plaintiffs supplied this Court in their thinly-
4 veiled attempt to create a question of material fact, Plaintiffs have the information they would
5 need to identify a specific constitutional deprivation committed by a person whose name they
6 are yet to determine despite their efforts. The Doe Defendants should be dismissed.

7 **III. CONCLUSION**

8 For the foregoing reasons all Defendants respectfully request that this Court dismiss all
9 Plaintiffs' constitutional claims against them with prejudice.

10 DATED this 11th day of May 2020.

11 ROBERT W. FERGUSON
12 Attorney General

13 /s/ Eric A. Mentzer
14 ERIC A. MENTZER, WSBA #21243
15 Senior Counsel
16 Attorneys for Defendants
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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will send notification of such filing to the following:

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DATED this 11th day of May 2020, at Tumwater, Washington.

/s/ Eric A. Mentzer
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