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10  
11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 ANN MARIE BORGES and CHRIS  
14 GURR, individually and doing business  
15 as GOOSE HEAD VALLEY FARMS,

16 Plaintiffs,

17 v.

18 COUNTY OF MENDOCINO, SUE  
19 ANZILOTTI, and DOES 1-25,

20 Defendants,  
21 \_\_\_\_\_ /

3:20-cv-04537 SI

NOTICE OF MOTION AND MOTION BY  
DEFENDANT SUE ANZILOTTI TO  
DISMISS PURSUANT TO F.R.C.P. 12(b)(6);  
MEMORANDUM OF POINTS AND  
AUTHORITIES

Date: September 25, 2020  
Time: 10:00 a.m.  
Ctrm: 1, 17<sup>th</sup> Floor, 450 Golden Gate Ave.,  
San Francisco

1 TO: Plaintiffs ANN MARIE BORGES and CHRIS GURR, and their attorney, JOHN  
2 HOUSTON SCOTT, Esq.:

3 PLEASE TAKE NOTICE that on September 25, 2020, at 10:00 a.m. in Courtroom 1,  
4 17<sup>th</sup> Floor, of the above-entitled court, located at 450 Golden Gate Avenue, San Francisco,  
5 California, before the Honorable Susan Illston, Senior District Judge, defendant Sue Anzilotti  
6 will and hereby does move for dismissal of plaintiff's second and fourth causes of action  
7 (constituting all of the causes of action asserted against her), pursuant to Federal Rules of  
8 Civil Procedure, Rule 12(b)(6), for failure to state a claim.

9 This motion is based upon this notice of motion and the accompanying memorandum  
10 of points and authorities, and all pleadings, papers, and records on file herein, and on such  
11 further and oral and/or documentary argument and evidence as may be presented at the  
12 hearing on this motion.

13  
14 Dated: August 17, 2020

/s/ Brian C. Carter  
CARTER RICH PC  
By: Brian C. Carter, Esq.

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16 Attorneys for Defendant SUE ANZILOTTI  
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**TABLE OF CONTENTS**

	<u>Page #</u>
1. INTRODUCTION .....	5
2. PLAINTIFF’S ALLEGATIONS IN THE COMPLAINT .....	7
3. SECTION 1983; F.R.C.P. 12(b)(6) .....	11
4. ARGUMENT.....	11
A. Plaintiffs Have Sued Anzilotti As A Private Party Conspiring With State Actors, But Have Failed To Adequately Allege Each Element Of A Completed Conspiracy In Which Anzilotti Was A Knowing, Willing Participant	11
B. Even If Plaintiffs Have Alleged All Of The Elements Of A Completed Conspiracy By Anzilotti, Plaintiffs Have Failed To Adequately Allege Actual Facts Supporting A Claim For A Completed Conspiracy That Included Anzilotti	16
5. CONCLUSION. ....	17

**TABLE OF AUTHORITIES**

**Cases**

<i>Adickes v. S.H. Kress &amp; Co.</i> , 398 U.S. 144 (1970) .....	12, 13, 16
<i>Applied Equip. Corp. v. Litton Saudia Arabia Ltd.</i> , 7 Cal. 4th 503 (1994) .....	12
<i>Bauldry v. County of Contra Costa</i> , N. C 12-03943 CRB, 2013 U.S. Dist.. LEXIS 58275 (N.D. Cal. April 23, 2013) .....	12, 13
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6, 16
<i>Brahmana v. Henard</i> , No. C 10-01790 JW, 2010 U.S. Dist. LEXIS 152377 . (N.D. Cal. Nov. 12, 2010) .....	11, 12
<i>Burns v. County of King</i> , 883 F.2d 819 (9th Cir. 1989) .....	12
<i>Citizens Against Corruption v. County of Kern</i> , No. 1:19-CV-0106 AWIGSA JLT, 2019 U.S. Dist. LEXIS 75225, at *8 (E.D. Cal. May 3, 2019) .....	5
<i>Dennis v. Sparks</i> , 449 U.S. 24 (1980). ....	12, 13, 16
<i>Fonda v. Gray</i> , 707 F.2d 435 (9th Cir. 1983) .....	12
<i>Franklin v. Fox</i> , 312 F.3d 423, 441 (9th Cir. 2002) .....	12
<i>Gilbrook v. City of Westminster</i> , 177 F.3d 839, 856-57 (9th Cir. 1999).....	12
<i>Imber v. Pachtman</i> , 424 U.S. 409, 417 (1976). ....	11

1 *Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571 (1995)..... 12

2 *Kimes v. Stone*, 84 F.3d 1121 (9<sup>th</sup> Cir. 1996)..... 17

3 *Marble v. Strecker*, No. CV 13-00186-M-DWM-JCL, 2014 U.S. Dist. .... 5  
 4 LEXIS 50770 (D. Mont. Feb 26, 2014)

5 *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998). .... 12

6 *National Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988). .... 12, 13

7 *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315 . .... 17

8 *Rehberg v. Paulk*, 566 U.S. 356 (2012)..... 11

9 *Sanders v. Lockyer*, 365 F.Supp.2d 1093 (N.D. Cal. March 28, 2005)..... 11

10 *Tower v. Glover*, 467 U.S. 914, 919-920 (1984) . .... 12

11 *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539 . .... 12  
 (9th Cir. 1989)

12 *Walker v. County of Santa Clara*, No. C-04-02211 RMW, 2006 U.S. .... 12  
 13 Dist. LEXIS 10105 (N.D. Cal. Feb. 24, 2006)

14 *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773 (1979). .... 13

15 **Federal Statutes**

16 42 U.S.C. § 1983. .... 5, 10, 11, 12, 13, 17

17 § 1 of the Civil Rights Act of 1871, 17 Stat. 13..... 12

18 § 1 of the Sherman Act (15 U.S.C. § 1)..... 17

19 Federal Rules of Civil Procedure, Rule 12(b)(6) .... 5, 6, 11, 15, 16

20 **California Statutes**

21 Cal. Code of Civil Procedure, § 335.1..... 17

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3 **MEMORANDUM OF POINTS AND AUTHORITIES**4 **1. INTRODUCTION.**

5 Plaintiffs Ann Marie Borges and Chris Gurr and defendant Sue Anzilotti (Anzilotti)  
6 are neighbors; they own adjoining parcels of real property (Plaintiffs' complaint [Complaint],  
7 Dkt. No. 1; ¶ 5, 1:22) south of Ukiah, Mendocino County, California. Anzilotti, her husband  
8 and her two children have to drive past the plaintiffs' property to get to and from their  
9 residence. Anzilotti and her husband, like everyone else in the neighborhood except for  
10 plaintiffs, opposed the prospect of a commercial marijuana cultivation operation in their  
11 residential neighborhood. Anzilotti and others let their elected representatives know about  
12 their opposition.

13 Plaintiffs' complaint herein names Anzilotti as a defendant in two causes of action  
14 under 42 U.S.C. § 1983 (Section 1983), for deprivation of their constitutional rights to equal  
15 protection (2<sup>nd</sup> cause of action) and due process (4<sup>th</sup> cause of action). Plaintiffs expressly  
16 name Anzilotti as a defendant "in her individual capacity as a private actor . . ." (Complaint,  
17 ¶ 5, 1:21), and therefore, to satisfy Section 1983's requirement that a defendant acted under  
18 color of state law, they must establish that Anzilotti 'conspired' with state actors.

19 Plaintiffs' claims against Anzilotti fail for several reasons. Before one gets to the state  
20 actor hurdle, plaintiffs have to show that they have been deprived of a constitutional right(s).  
21 As Mendocino County (County) explains in its August 13, 2020, motion to dismiss pursuant  
22 to Federal Rules of Civil Procedure, Rule 12(b)(6) (Rule 12(b)(6))(County Motion; Dkt. Nos.  
23 11, 11-1), plaintiffs can have no constitutional or other federal rights to cultivate marijuana  
24 (aka 'cannabis') because it is a controlled substance under federal law. See County Ps&As  
25 (Dkt. No. 11; hereafter, County Ps&As), 16:11 - 17:28; *Citizens Against Corruption v. County*  
26 *of Kern*, No. 1:19-CV-0106 AWI GSA JLT, 2019 U.S. Dist. LEXIS 75225, at \*8 (E.D. Cal.  
27 May 3, 2019) ("federal law does not recognize any protectible liberty or property interest in . .  
28 . marijuana"); *Marble v. Strecker*, No. CV 13-00186-M-DWM-JCL, 2014 U.S. Dist. LEXIS  
50770, at \*22 (D. Mont. Feb 26, 2014) ("contraband per se under federal law"). And even if

1 plaintiffs could assert a constitutional ‘right’ to cultivate marijuana, the County Motion shows  
2 that plaintiffs’ application was properly denied (County Ps&As at 13:12-14: “denial of the  
3 permit was proper, because Plaintiffs were attempting to create a new cultivation site at a time  
4 at which the permitting process was only open to existing growers in the inland zone”).  
5 Plaintiffs were not improperly deprived of any constitutional/federal rights, and their claims  
6 therefore all fail as a matter of law. See County Ps&As 13:12 - 16:10.

7 Anzilotti files concurrently with this motion a joinder, seeking to join in and benefit  
8 from the granting of the County Motion. Absent plaintiffs having been deprived of a  
9 constitutional right, there is no underlying, completed tort of which plaintiffs can complain,  
10 and thus no possible “conspiracy” claim against Anzilotti.

11 Second, even if plaintiffs’ Complaint survives the County Motion, the Complaint fails  
12 to allege facts, as opposed to conclusions, that competently describe a conspiracy by Anzilotti.  
13 Plaintiffs’ allegations about what Anzilotti did with the government officials (John McCowen  
14 [McCowen] and Carre Brown, two of the five elected members of the Mendocino County  
15 Board of Supervisors) do not satisfy the requirements for a conspiracy claim under federal (or  
16 California) law.

17 Third, even if plaintiffs have sufficiently alleged every element/requirement of a  
18 conspiracy claim, their conclusory allegations do not include enough factual material to cross  
19 the ‘plausibility threshold’ articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)  
20 (*Twombly*). Plaintiffs’ claims against Anzilotti are thus subject to dismissal under Rule  
21 12(b)(6).

22 In fact, Anzilotti is being sued for having engaged in petitioning activity protected by  
23 the 1<sup>st</sup> Amendment of the U.S. Constitution as well as by the California Constitution. That  
24 one or two members of the Mendocino County Board of Supervisors, along with the Deputy  
25 County Counsel in charge of the County’s cannabis program conspired with Anzilotti to  
26 deprive plaintiffs of known, constitutional rights, is sheer fantasy. If plaintiffs had actual facts  
27 to support their claims, they would have alleged them. They did not. This court should  
28 dismiss plaintiffs’ claims against Anzilotti, without leave to amend if based upon the granting

1 of the County Motion, and with leave if granted for the absence of factual allegations.

2  
3 **2. PLAINTIFF’S ALLEGATIONS IN THE COMPLAINT.**

4 In August 2016, plaintiffs Ann Marie Borges and Chris Gurr purchased the subject real  
5 property south of Ukiah, Mendocino County, commonly known as 1181 Boonville Road  
6 (Plaintiffs’ Property). (Complaint, ¶ 3, 1:11-15; all future references in this Section 2 are to  
7 the paragraphs and lines in the Complaint.)

8 County’s cannabis program “went into effect in the spring of 2017”. (¶ 4, 1:16-18.)

9 Anzilotti is and at all relevant times “was a neighbor of the Plaintiffs”; Anzilotti  
10 resides (with her husband and son, and daughter when home from college) “at 1551 Boonville  
11 Road”. (¶ 5, 1:22-23.)

12 Anzilotti “is sued in her individual capacity as a private actor who conspired with state  
13 actors.” Anzilotti “cooperated and conspired with County officials and County employees,  
14 acting under color of state law, to deprive the Plaintiffs of certain constitutional rights.” (¶ 5,  
15 1:21-22, 23-25.)

16 Plaintiffs claim (Complaint, ¶ 10, 2:22-23) to have been guided to their purchase of the  
17 Plaintiffs’ Property in August 2016 by County’s “existing Cannabis Program” (¶ 10, 2:20-21),  
18 but they also allege/acknowledge that County’s “cannabis program . . . went into effect in the  
19 spring of 2017”, i.e., several months after their purchase. (¶ 4, 1:16-18.)

20 Plaintiffs “completed their application [to County] to cultivate medical marijuana” on  
21 May 1, 2017. (¶ 12, 3:4.) At a May 4, 2017, meeting with County’s cannabis program  
22 Commissioner Diane Curry (Curry) and staff, plaintiffs “learned their application was  
23 approved”. (¶ 12, 3:6-7.)

24 In June 2017, Anzilotti “contacted Steve White of the California Department of Fish  
25 and Wildlife (CDFW) on behalf of ‘concerned homeowners’ who lived adjacent to Plaintiffs’  
26 property. She made false allegations that the water source for Plaintiffs’ approved cultivation  
27 site was not approved for use in commercial cultivation operations.” (¶ 14, 3:15-19.)

28 County Supervisor John McCowen (misidentified at 3:25 as “McCune”) led an effort

1 at a Board of Supervisors (BOS) meeting on June 28, 2017, to amend the County ordinance to  
2 prohibit use of coastal grow sites as a qualifying predecessor site. (¶ 15, 3:20-26.)

3 In July 2017, CDFW employees advised Curry that they suspected that plaintiffs’  
4 water supply for their cultivation operation was being illegally diverted from Robinson Creek,  
5 i.e., underflow. (¶ 16, 4:19.)

6 Plaintiffs hired a hydrologist to perform a hydrology study. (¶ 17, 4:10-13.)

7 On August 10, 2017, before the hydrologist had prepared his report/analysis, CDFW  
8 raided Plaintiffs’ Property and eradicated 272 growing marijuana plants. (¶ 18, 4:14-22.)  
9 Plaintiffs received their (allegedly exculpatory) water test results three days later. (¶ 19, 4:23 -  
10 5:2.)

11 Plaintiffs sought to respond to a change to the County ordinance (see ¶ 15), which  
12 change disqualified coastal sites as predecessor sites, by showing prior cultivation in Willits,  
13 and plaintiffs were expecting that their final permit would be issued/delivered to them. (¶¶ 20-  
14 22, 5:1-16.)

15 On November 22, 2017, plaintiff Chris Gurr “made a formal complaint against . . .  
16 Anzilotti to the Enforcement Division of the California Fair Political Practices Commission  
17 (FPPC). A copy of Gurr’s complaint to the FPPC is attached to the Complaint as Exhibit E.  
18 Gurr therein complained about Anzilotti’s alleged use and allegedly wrongful use of “her  
19 position as an unsworn administrator with the Sheriff’s Office” to perform various wrongful  
20 acts to her personal benefit. (¶ 23, 5:17-22.) Notably, plaintiffs do not here actually allege that  
21 Anzilotti committed the acts alleged in Gurr’s complaint to the FPPC; the paragraph instead  
22 refers to what Gurr’s “allegations were centered on”. (5:19.)<sup>1</sup>

23 Plaintiffs received a “Temporary Cannabis Cultivation License” from the State of  
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25 <sup>1</sup> Gurr’s FPPC complaint against Anzilotti was filed two years and nine months ago. Plaintiffs do not allege  
26 anything about the results thereof. Anzilotti categorically denies Gurr’s allegations, except that she did on a small  
27 number of occasions use her Sheriff’s Dept. email during her break time for personal business, including to contact  
28 persons regarding the plaintiffs’ marijuana cultivation operation,. This use of her work email was and is allowed under  
Sheriff Dept. policy. Anzilotti’s actions alleged in paragraph 23 and in the referenced exhibit do not include any  
allegation of Anzilotti having communicated with McCowen or Kiedrowski about the results or ‘fruits’ of her allegedly  
wrongful actions; these allegations therefore do not support plaintiffs’ conspiracy theory.



1 California in January 2018. (¶ 24, 5:23 - 6:1.)

2 Curry left her position as Commissioner of County’s cannabis program in March 2018.  
3 (¶ 25, 6:2-3.)

4 On July 9, 2018, County sent plaintiffs a letter advising them that their application for  
5 a permit to cultivate marijuana “had been denied because they did not provide evidence of  
6 prior and current cultivation on the same parcel as required by paragraph (B)(1) of the local  
7 Ordinance/10A.17.080. . . . This denial was based on a false and fraudulent premise.” (¶ 26,  
8 6:4-8; see also ¶ 27.) Plaintiffs “are the only AG40 applicants for a permit to cultivate  
9 medical cannabis in the County of Mendocino who complied with all (B)(3) requirements but  
10 were denied a permit by the County of Mendocino.” (¶ 28, 6:17-19.)

11 Anzilotti “was politically connected to at least two members of the Mendocino County  
12 Board of Supervisors”, namely, McCowen and Carre Brown, and when Anzilotti “began to  
13 complain publicly against the Plaintiffs to various state and local agencies she also  
14 complained privately”. (¶ 29, 6:21-24.)

15 McCowen was a leader on the BOS, and he “formed a special relationship with  
16 Deputy County Counsel Matthew Kiedrowski [Kiedrowski], another co-conspirator . . . [who]  
17 was assigned by County Counsel . . . to oversee the Cannabis Program” after Curry’s  
18 retirement. (¶ 30, 6:25 - 7:4.)

19 “Sometime after . . . May 2017 . . . Curry was informed by . . . Kiedrowski that . . .  
20 McCowen would never allow the Plaintiffs’ project to be approved”, including because  
21 Plaintiffs’ prior cultivation site was in the coastal zone. (¶ 31, 7:5-9.)

22 After plaintiffs switched their prior cultivation site to Willits, Kiedrowski “intervened  
23 and prevented the temporary permit from being delivered.” (¶ 32, 7:10-13.)

24 Plaintiffs hired counsel and offered to execute an agreement regarding the alleged  
25 prior cultivation site in Willits, but plaintiffs’ “approved temporary permit was . . . being held  
26 hostage, under color of state law, by . . . Kiedrowski in furtherance of the conspiracy between  
27 . . . Anzilotti, . . . McCowen and . . . Kiedrowski”. (¶ 33, 7:16-18.)

28 On July 9, 2018, Curry’s successor as Commissioner for County’s Cannabis Program

1 sent to plaintiffs a letter (“prepared by . . . Kiedrowski”) “notifying the Plaintiffs their  
2 application was denied and the reason for the denial. See Exhibit G attached. The  
3 manufactured reason for the denial is both false and pretextual.” (¶ 35, 7:23 - 8:2.)

4 Plaintiffs claim to be entitled to recover economic damages, including for “past and  
5 future lost earnings,” damages for emotional distress, and against Anzilotti punitive damages.  
6 (¶¶ 36-39, 8:3-16.) Specifically, Anzilotti’s acts and omissions “were willful, wanton,  
7 reckless, malicious, oppressive and/or done with a conscious or reckless disregard for the  
8 rights of Plaintiffs”, such that plaintiffs are entitled to punitive damages against Anzilotti. (¶  
9 38, 8:11-13.)

10 On July 8, 2020, one day short of two years after County sent its July 9, 2018, permit  
11 denial letter to plaintiffs, plaintiffs filed their Complaint herein. Plaintiffs therein assert  
12 claims:

13 1- against County only, under 42 U.S.C. § 1983 (Section 1983), for “Class of  
14 One/Equal Protection” (¶¶ 40-42, 8:17 - 9:3),

15 2- against County and Anzilotti, under Section 1983, for “Class of One/Equal  
16 Protection,” based on a “Conspiracy” between Anzilotti and County (¶¶ 43-46, 9:5-20),

17 3- against County only, under Section 1983, for denial of “Substantive Due Process,”  
18 (¶¶ 47-51, 9:22 - 10:10), and

19 4- against County and Anzilotti, under Section 1983, for “Substantive Due Process,”  
20 based on a “Conspiracy” between Anzilotti and County (¶¶ 52-55, 10:12 - 11:3).

21 In their prayer for relief, plaintiffs seek compensatory<sup>2</sup> and punitive damages, plus  
22 attorney fees and other court costs (11:5-10), and request a jury trial (11:12-13).

23 On August 13, 2020, County filed the County Motion.  
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26  
27 <sup>2</sup> Plaintiffs make no mention of the fact that shortly after the events related in the Complaint, the members of  
28 Anzilotti’s and plaintiffs’ neighborhood voted overwhelmingly to ‘opt out’ of the marijuana cultivation ordinance, such  
that marijuana cultivation was and is no longer permissible in the neighborhood. Plaintiffs’ claims for future lost  
earnings and the like (Complaint, ¶¶ 36-39, 8:3-16) totally ignore the fact that this election/decision renders such claims  
essentially illusory as a matter of law, as Anzilotti will prove herein if this case survives to the point of such proof.

1 **3. SECTION 1983; F.R.C.P. 12(b)(6).**

2 Section 1983, “which derives from § 1 of the Civil Rights Act of 1871, 17 Stat. 13,  
3 creates a private right of action to vindicate violations of ‘rights, privileges, or immunities  
4 secured by the Constitution and laws’ of the United States. Under the terms of the statute,  
5 ‘[e]very person’ who acts under color of state law to deprive another of a constitution right  
6 [is] answerable to that person in a suit for damages.” *Rehberg v. Paulk*, 566 U.S. 356, 361  
7 (2012)(quoting from *Imber v. Pachtman*, 424 U.S. 409, 417 (1976).

8 Pursuant to Rule 12(b)(6),

9 “a complaint may be dismissed against a defendant for failure to state a  
10 claim upon which relief may be granted against the defendant. Dismissal may  
11 be based on either the lack of cognizable legal theory or the absence of  
12 sufficient facts alleged under a cognizable legal theory. . . . For purposes of  
13 evaluating a motion to dismiss, the court must presume all factual allegations  
14 of the complaint to be true and draw all reasonable inferences in favor of the  
15 nonmoving party. . . . Any existing ambiguities must be resolved in favor of  
16 the pleading. . . . [¶] However, mere conclusions couched in factual allegations  
17 are not sufficient to state a cause of action. . . . The complaint must plead  
18 ‘enough facts to state a claim for relief that is plausible on its face.’ . . . A  
19 claim is plausible on its face ‘when the plaintiff pleads factual content that  
20 allows the court to draw the reasonable inference that the defendant is liable for  
21 the misconduct alleged.’ . . . Thus, ‘for a complaint to survive a motion to  
22 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from  
23 that content, must be plausibly suggestive of a claim entitling the plaintiff to  
24 relief.’ . . . Courts may dismiss a case without leave to amend if the plaintiff is  
25 unable to cure the defect by amendment.”

18 *Brahmana v. Henard*, No. C 10-01790 JW, 2010 U.S. Dist. LEXIS 152377, at \*4 (N.D. Cal.  
19 Nov. 12, 2010)(*Brahmana*)(citations, quotations omitted). See also *Sanders v. Lockyer*, 365  
20 F.Supp.2d 1093, 1098 (N.D. Cal. March 28, 2005).

22 **4. ARGUMENT**

23 **A. Plaintiffs Have Sued Anzilotti As A Private Party Conspiring With State**  
24 **Actors, But Have Failed To Adequately Allege Each Element Of A Completed**  
25 **Conspiracy In Which Anzilotti Was A Knowing, Willing Participant.**

26 Plaintiffs allege that Anzilotti, “a private actor, conspired with John McCowen, a state  
27 actor, to achieve a common goal, i.e., prevent the Plaintiffs from becoming licensed”.  
28 (Complaint, ¶ 44, 9:7-8, and ¶ 53, 10:15-16). This allegation is an obvious effort to bring

1 plaintiffs' claims against Anzilotti within the scope of the cases holding that a private actor  
2 conspiring with (often immune) state actors to deprive plaintiffs of their constitutional rights  
3 can be liable to the plaintiff under Section 1983. See, e.g., *Dennis v. Sparks*, 449 U.S. 24  
4 (1980); *Tower v. Glover*, 467 U.S. 914, 919-920 (1984) (*Dennis*); *Adickes v. S.H. Kress &*  
5 *Co.*, 398 U.S. 144, 152 (1970); *Bauldry v. County of Contra Costa*, N. C 12-03943 CRB,  
6 2013 U.S. Dist. LEXIS 58275 (N.D. Cal. April 23, 2013) (*Bauldry*); *Brahmana*, 2010 U.S.  
7 Dist. LEXIS 152377; *Walker v. County of Santa Clara*, No. C-04-02211 RMW, 2006 U.S.  
8 Dist. LEXIS 10105, at \*8-9 (N.D. Cal. Feb. 24, 2006). Compare *National Collegiate Athletic*  
9 *Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (*Tarkanian*).

10 "It is enough that [the conspiring private actor] is a willful participant in joint action  
11 with the State or its agents. Private persons, jointly engaged with state officials in the  
12 challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Dennis*, 449  
13 U.S. at 27-28 ("corrupt conspiracy involving bribery of [a] judge").

14 In *Bauldry*, plaintiff sued participants in a "Dirty DUI" scheme, including a private  
15 investigator that conspired with a Sheriff's Deputy to effect DUI arrests of persons involved in  
16 marital dissolution actions, to benefit the arrestee's opposing spouse. The court there  
17 described the requirements of a valid conspiracy allegation under Section 1983:

18 "To plead a civil conspiracy under § 1983, Plaintiff must show "an  
19 agreement or 'meeting of the minds' to violate constitutional rights." *Franklin*  
20 *v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002) (quoting *United Steelworkers of Am.*  
21 *v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41(9th Cir. 1989)). A complaint  
22 must be pled with sufficient particularity to show a meeting of the minds.  
23 *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998); *Burns v. County of King*,  
24 883 F.2d 819, 821 (9th Cir. 1989). Each participant does not need to know  
25 each detail of the conspiracy but all must share a common objective. *United*  
26 *Steelworkers*, 865 F.2d at 1541; *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir.  
27 1983) (no common objective shown when bank turned over individual's bank  
28 records to FBI without knowing that FBI's goal was to end individual's political  
speech). Circumstantial evidence may show participation in a conspiracy.  
*Gilbrook v. City of Westminster*, 177 F.3d 839, 856-57 (9th Cir. 1999).

25 "California law is similar. See *Applied Equip. Corp. v. Litton Saudia*  
26 *Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994) (a conspiracy "imposes liability on  
27 persons who, although not actually committing a tort themselves, share with  
28 the immediate tortfeasors a common plan or design in its perpetration"). A  
plaintiff must prove three things: "(1) the formation and operation of the  
conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3)  
damages arising from the wrongful conduct." *Kidron v. Movie Acquisition*

1           *Corp.*, 40 Cal. App. 4th 1571, 1581 (1995). "Tacit consent as well as express  
2           approval will suffice to hold a person liable as a coconspirator." *Wyatt v. Union*  
3           *Mortg. Co.*, 24 Cal. 3d 773, 785 (1979)."

3           *Bauldry*, 2013 U.S. Dist LEXIS 58275, at \*9-10.

4           Further requirements for a valid conspiracy are articulated in *Tarkanian*, if perhaps  
5           indirectly. There, the NCAA conducted an investigation of recruiting practices by University  
6           of Nevada Las Vegas (UNLV) basketball coach Jerry Tarkanian. UNLV had apparently  
7           cooperated in the investigation. NCAA demanded that UNLV fire Tarkanian or face major  
8           sanctions from NCAA. UNLV fired Tarkanian. Tarkanian sued UNLV and NCAA under  
9           Section 1983, alleging that UNLV's cooperation with NCAA's investigation, and then firing  
10          of Tarkanian, rendered NCAA a state actor for purposes of Section 1983, the same effect  
11          accomplished by a valid conspiracy allegation. The Nevada courts, including the state's  
12          Supreme Court, accepted this argument and found NCAA liable to Tarkanian under Section  
13          1983.

14          The U.S. Supreme Court reversed, finding that UNLV and NCAA were not jointly  
15          cooperating together in targeting Mr. Tarkanian, and that NCAA therefore was not a state  
16          actor and was not liable to Tarkanian under Section 1983. Citing to and distinguishing *Dennis*  
17          and *Adickes*, in which valid private/state conspiracy claims were made and upheld, the court  
18          pointed to the "corrupt conspiracy involving bribery of the judge" in *Dennis*, and the  
19          department store's having "conspired with [a] police officer" in *Adickes* to arrest a white  
20          teacher seeking to be served lunch, along with her black students, in the 'colored' section of a  
21          segregated restaurant. Rejecting any similarity between *Dennis* and *Adickes*, on the one hand,  
22          and the *Tarkanian* case on the other, the Supreme Court pointed out that UNLV's and  
23          NCAA's interests were divergent rather than shared/identical, and stated: "In this case there is  
24          **no suggestion of any impropriety** respecting the agreement between the NCAA and UNLV."  
25          488 U.S. at 464, fn. 17 (bolding supplied). Impropriety of the alleged joint action is thus a  
26          requirement of any allegation of a conspiracy between County and Anzilotti in this case.

27          Here, as noted in the County Motion, County sought at the relevant (early) time to  
28          move existing cultivation sites to more desirable inland sites without increasing the number of

1 such sites, whereas plaintiffs did not have a current inland site and sought to transfer from a  
2 disqualified coastal site, the result of which would have been to increase the number of inland  
3 cultivation sites. Anzilotti, in contrast, sought only to avoid a new, creek-water-depleting  
4 industrial marijuana cultivation site in the middle of her riparian, historically residential  
5 neighborhood. County's and Anzilotti's interests in denying plaintiffs' permit coincided, but  
6 came from totally different sources and motivations. Their concurrent efforts to deny the  
7 permit were not a conspiracy, much less a conspiracy to deny plaintiffs 'constitutional' rights.

8 The Complaint's allegations about Anzilotti's actual, persona acts and omissions  
9 consist of the following:

10 - Anzilotti "is sued in her individual capacity as a private actor who conspired with  
11 state actors." Anzilotti "cooperated and conspired with County officials and County  
12 employees, acting under color of state law, to deprive the Plaintiffs of certain  
13 constitutional rights." (¶ 5, 1:21-22, 23-25.)

14 - In June 2017, Anzilotti "contacted Steve White of the California Department of Fish  
15 and Wildlife (CDFW) on behalf of 'concerned homeowners' who lived adjacent to  
16 Plaintiffs' property. She made false allegations that the water source for Plaintiffs'  
17 approved cultivation site was not approved for use in commercial cultivation  
18 operations." (¶ 14, 3:15-19.)

19 - On November 22, 2017, plaintiff Chris Gurr "made a formal complaint against . . .  
20 Anzilotti to the Enforcement Division of the California Fair Political Practices  
21 Commission (FPPC). A copy of Gurr's complaint to the FPPC is attached to the  
22 Complaint as Exhibit E. Gurr therein complained about Anzilotti's alleged use and  
23 allegedly wrongful use of "her position as an unsworn administrator with the Sheriff's  
24 Office" to perform various wrongful acts to her personal benefit. (¶ 23, 5:17-22.)

25 - Anzilotti "was politically connected to at least two members of the Mendocino  
26 County Board of Supervisors", namely, McCowen and Carre Brown, and when  
27 Anzilotti "began to complain publicly against the Plaintiffs to various state and local  
28 agencies she also complained privately". (¶ 29, 6:21-24.)<sup>3</sup>

- Anzilotti's acts and omissions "were willful, wanton, reckless, malicious, oppressive  
and/or done with a conscious or reckless disregard for the rights of Plaintiffs", such  
that plaintiffs are entitled to punitive damages against Anzilotti. (¶ 38, 8:11-13.)

Plaintiffs have not alleged that Anzilotti and McCowen actually communicated and  
agreed on anything; nor do they allege that Anzilotti ever communicated at all with

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<sup>3</sup> In paragraph 33 of the Complaint, at 7:16-18, plaintiffs allege that their "approved temporary permit was . . . being held hostage, under color of state law, by Matthew Kiedrowski in furtherance of the conspiracy between Sue Anzilotti, John McCowen and Matthew Kiedrowski", but this does not amount to an alleged act by Anzilotti.

1 Kiedrowski (or Supervisor Brown). The only allegation about Supervisor Brown is that  
2 Anzilotti was “politically connected to” her, whatever that means. Plaintiffs do not allege that  
3 Anzilotti ever knew that plaintiffs were entitled to their permit but agreed that plaintiffs  
4 should nevertheless be deprived of it, or that theirs was a constitutional right (which it clearly  
5 was not). All Anzilotti wanted was plaintiffs’ permit to be denied. Anzilotti complained (to  
6 CDFW, not to County, McCowen or Kiedrowski) about plaintiffs taking presumably large  
7 quantities of water from a very shallow well that is within a stone’s throw of a salmon/  
8 steelhead spawning stream that dwindles/recedes into only a few shallow pools in the  
9 summer; these complaints seem pretty reasonable, if not downright responsible. Plaintiffs  
10 claim that Anzilotti’s statements to CDFW about plaintiffs’ water source were “false”, but  
11 they don’t allege what those statements were (how would they know?) or how they were false.  
12 Anzilotti is alleged to have done what amounts to petitioning to elected County government  
13 officials to deny plaintiffs’ application for a permit for a new, commercial marijuana  
14 cultivation operation in the midst of a riparian, historically residential neighborhood. This 1<sup>st</sup>  
15 Amendment petitioning activity pure and simple. Anzilotti cannot be held to have violated  
16 plaintiffs’ constitutional rights merely by exercising hers, at least not on the allegations in the  
17 Complaint.

18 While plaintiffs use the word “conspiracy” repeatedly when referring to Anzilotti’s  
19 actions, this is nothing but a conclusion and should be ignored on a Rule 12(b)(6) motion.  
20 Plaintiffs are required to allege formation of the conspiracy, i.e., a meeting of the minds (i.e., a  
21 mutual, complete plan), operation/conduct of the conspiracy, wrongful conduct in furtherance  
22 of the conspiracy, completion of the conspiracy, and damages resulting from the completed  
23 conspiracy. Here the Complaint does not come close to containing allegations that satisfy all  
24 of these requirements. The court should therefore dismiss plaintiffs’ 2<sup>nd</sup> and 4<sup>th</sup> causes of  
25 action against Anzilotti.

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1           **B. Even If Plaintiffs Have Alleged All Of The Elements Of A Completed**  
2           **Conspiracy By Anzilotti, Plaintiffs Have Failed To Adequately Allege Actual**  
3           **Facts Supporting A Claim For A Completed Conspiracy That Included Anzilotti.**

4           In *Twombly*, the Supreme Court held that a plaintiff seeking to avoid a dismissal under  
5           Rule 12(b)(6) of a claim under § 1 of the Sherman Act (15 U.S.C. § 1), which statute requires  
6           a “contract, combination or conspiracy” in restraint of trade, must file “a complaint with  
7           enough factual matter (taken as true) to suggest that an agreement was made.” 550 U.S. at  
8           556. “Asking for plausible grounds to infer an agreement does not impose a probability  
9           requirement at the pleading stage.” (*Ibid.*) The complaint, in other words, must pass a  
10          “threshold of plausibility” to survive dismissal. (*Ibid.*)

11          Here, plaintiffs’ contention is that Anzilotti conspired with one, or perhaps two,  
12          elected members of the Mendocino County Board of Supervisors, and/or with the Deputy  
13          County Counsel who had been assigned by County Counsel to oversee County’s Cannabis  
14          Program, to deny plaintiff’s permit application, in knowing and intentional denial of  
15          plaintiffs’ constitutional rights to equal protection and due process. This, despite what County  
16          now describes as plaintiffs improperly “attempting to create a new cultivation site at a time at  
17          which the permitting process was only open to existing growers in the inland zone” (County  
18          Ps&As, 13:12-14.)

19          Plaintiffs’ claims, based upon the facts they have actually alleged in the Complaint, do  
20          not pass the *Twombly* plausibility threshold. In contrast to *Dennis*, where there was strong  
21          evidence of bribery of the judge that issued an improbable and improper injunction, and in  
22          contrast to *Adickes*, where there was an obvious, generations-old custom of segregation and  
23          cooperation between a department store and police officers to enforce it, here there is no  
24          allegation of anything of this nature. Mendocino County is and has always been one of the  
25          more pro-marijuana counties in this State. The County sought to enable its historical  
26          cultivators (i.e., mom and pop) to move their sites to more desirable sites before the flood  
27          gates opened to new, well-capitalized competitors. Plaintiffs sought to improperly increase  
28          the number of sites in the inland zone despite failing to prove their then-active cultivation in



1 Willits, and their prior coastal cultivation did not quality. That their permit application was  
 2 properly denied is a great deal more likely than that it was the result of a conspiracy between  
 3 McCowen, Kierkowski and Anzilotti to deny it despite knowing/believing that they were  
 4 entitled to it. Indeed, to state the claim is to reveal the meritless nature thereof.

5 Plaintiffs provide hollow, self-serving conclusions in place of actual facts. If they had  
 6 facts, they would have alleged them. This court should dismiss plaintiffs 2<sup>nd</sup> and 4<sup>th</sup> causes of  
 7 action against Anzilotti.

## 9 5. CONCLUSION.

10 Anzilotti should not be dragged through federal court,<sup>4</sup> much less subjected to a money  
 11 judgment and an award of attorney fees to plaintiffs under Section 1983, for having merely let  
 12 her elected County officials know how adamantly she and her neighbors opposed the initiation  
 13 of a large, commercial, water-gulping marijuana cultivation operation in her riparian,  
 14 historically-residential neighborhood. Plaintiffs seek by their Complaint against Anzilotti,  
 15 including its strange paragraph 23 that refers to but does not purport to adopt or rely upon  
 16 Chris Gurr's meritless complaint to the FPPC,<sup>5</sup> to find a second pocket from which to seek  
 17 recovery on their meritless claims. If plaintiffs had any evidence of an actual conspiracy by  
 18 Anzilotti, they would have alleged them. Instead, they offer only conclusions, generalities and  
 19 suppositions. Disposal of all of these meritless claims at the pleading stage would be  
 20 appropriate and just.

21 If this court finds that the County Motion (in which Anzilotti joins) has merit, and that  
 22 plaintiffs have no prospect of amending around the fatal defects/obstacles identified therein,

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24 <sup>4</sup> See *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317 (“The point of the anti-SLAPP statute  
 25 is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights.”; italics  
 26 in original).

27 <sup>5</sup> It is not clear that a malicious prosecution lawsuit may be based upon an unsuccessful, knowingly false  
 28 complaint to the FPPC. Mr. Gurr was therefore probably more willing to make his false allegations in that forum than  
 he is to make such claims in this action. It may also be that plaintiffs recognize that the two-year statute of limitations  
 on Section 1983 claims for events occurring prior to July 8, 2018, has run. See Cal. Code of Civil Procedure, § 335.1;  
*Kimes v. Stone*, 84 F.3d 1121, 1129 (9<sup>th</sup> Cir. 1996)

1 this court should dismiss all of plaintiffs' claims without leave to amend. If the court grants  
2 only this motion, however, given that plaintiffs should normally be given a chance to add facts  
3 to cure defects, leave to amend might appropriately be granted.

4  
5 Dated: August 17, 2020

/s/ Brian C. Carter

CARTER RICH PC

By: Brian C. Carter, Esq.

Counsel for Defendant SUE ANZILOTTI

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**PROOF OF SERVICE BY ELECTRONIC DELIVERY**

(Borges v. County of Mendocino, Case No.: 3:10-cv-04537 SI)

I am employed in the County of Mendocino, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 305 N. Main Street, Ukiah, California, 95482.

On August 17, 2020, I served the attached document, entitled NOTICE OF MOTION AND MOTION BY DEFENDANT SUE ANZILOTTI TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES, on the interested parties BY ELECTRONIC MAIL at the addressee(s) listed below, as follows:

John Houston Scott  
[john@scottlawfirm.net](mailto:john@scottlawfirm.net)

Christian M. Curtis, County Counsel  
[cocosupport@mendocinocounty.org](mailto:cocosupport@mendocinocounty.org)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 17, 2020, at Ukiah, California.

\_\_\_\_\_  
*/s/ Brian C. Carter*  
Brian C. Carter