No. 22-15741

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EZEKIAL FLATTEN, WILLIAM KNIGHT,
CHRIS GURR and ANN MARIE BORGES,

Plaintiffs - Appellants,

vs.

BRUCE SMITH and STEVE WHITE,

Defendants - Appellees.

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

On Appeal from the Decision of the United States District Court
for the Northern District of California, Case No. 3:21-cv-07031-SI
The Honorable Susan Illston

John Houston Scott
SCOTT LAW FIRM
1388 Sutter Street, Suite 715
San Francisco, CA 94109
Telephone: (415) 561-9601
Facsimile: (415) 561-9609

William A. Cohan
WILLIAM A. COHAN, P.C.
2888 Loker Ave., E, Suite 202
Carlsbad, CA 92010
Telephone: (442) 325-1111
Facsimile: (442) 325-1126

Attorneys for Plaintiffs– Appellants EZEKIAL FLATTEN,
WILLIAM KNIGHT, CHRIS GURR and ANN MARIE BORGES

TABLE OF CONTENTS

INTRODUCTION 1

JURISDICTIONAL STATEMENT 6

ISSUES PRESENTED..6

I. STATEMENT OF THE CASE 7

A. The Borges/Gurr Seizure of Marijuana on August 10, 2017 and the Knight Seizure on September 21, 2017....................................7

1. Introduction..7

2. Borges/Gurr Seizure...8

3. Knight Seizure...9

4. Material Facts That are Not in Dispute...................................12

5. The Four Streams of Revenue for the Criminal Conspiracy 14

II. SUMMARY OF THE ARGUMENT..17

III. STANDARD OF REVIEW...19

IV. ARGUMENT...19

A. The Order Dismissing the First Amended Complaint is Based on Misstatements of the Law While Drawing Inferences in Favor of the Non-Moving Parties...19

B. Plaintiffs Have Alleged an Association-in Fact Enterprise and a RICO Conspiracy that Includes Bruce Smith and Steve White..........23

C. The Law Regarding Conspiracy; The Pinkerton Rule 29

D. The Plaintiffs have Plausibly Alleged Connections Between the Seizures of Marijuana Grown Subject to Permits, the Zip-Tie Program and the Pay to Play Restitution Program 31

1. The Seizures of Marijuana by Defendants White and Smith ... 31

2. The Zip-Tie Program 34

3. The Pay to Play Restitution Program 40

E. The District Court Erred in Concluding There was an Alternative Legitimate Explanation for the Flatten Traffic Stop 44

F. The District Court Erred by Denying Leave to Amend 48

CONCLUSION 51

TABLE OF AUTHORITIES

Borges v. County of Mendocino, 503 F. Supp. 3d 989 (N.D. Cal. 2020)..................1

Bourjaily v. United States, 483 U.S. 171 (1987) 47

Bradley v. United States, 817 F.2d 1400 (9th Cir. 1987) 36

Continental Ore v. Union Carbide Corp, 370 U.S. 690 (1962) 30

Desert Palace v. Costa, 539 U.S. 90 (2003)...30

FDA v. Brown and Williamson Tobacco Corporation, 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)..36

Franks v. Delaware, 438 U.S. 154 (1978)...33

Gilbrook v. City of Westminster, 177 F.3d 839 (9th Cir. 1999) 29

Gonzalez v. Metropolitan Transportation Authority, 174 F.3d 1016 (9th Cir. 1998)..19

Johnson v. Terhune, 234 F.3d 1277 (9th Cir. 2000)...19

Lacey v. Maricopa County, 693 F.3d 913 (9th Cir. 2012).......................................29

Living Designs, Incorporated v. DuPont de Nemours and Company, 431 F.3d 353 (9th Cir. 2005) 23

Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) 50

Malley v. Briggs, 475 U.S. 335 (1986) 32, 33

Martinez v. County of Mendocino, 2017 WL 961744 41

People v. Brach, 95 Cal. App. 4th 571 (2002) 40

People v. Bright, 2020 WL 7654191 40

People v. Hochanandel, 176 Cal. App. 4th 997 (2009)....................35

People v. Landis, 156 Cal.App.4th Supp. 12 (2007)....................45

People v London, 228 Cal. App. 4th 544 (2014)....................1, 35

People v. Martinez, 36 Cal. 4th 384 (2005)....................41

People v. Mower, 28 Cal. 4th 457 (2002)....................35

People v. Wilen, 165 Cal. App. 4th 270 (2008)....................41

Pinkerton v. United States, 328 U.S. 640 (1946)....................30

Robinson v. Shell Oil Company, 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)....................36

United States v. Altomare, 625 F.2d 5 (4th Cir. 1980)....................24

United States v. Angelilli, 660 F.2d 23 (2nd Cir. 1981)....................24

United States v. Bacheler, 611 F.2d 443 (3rd Cir. 1979)....................24

United States v. Boyd, 991 F.3d 1077 (9th Cir. 2021)....................37

United States v. Clark, 646 F.2d 1259 (8th Cir. 1981)....................24

United States v. Freeman, 6 F.3d 586 (9th Cir. 1993)....................23, 24

United States v. Johnson, 297 F.3d 845 (9th Cir. 2002)....................29

United States v. Lee Stoller Enterprises, 652 F.2d 1313 (7th Cir. 1982)....................24

United States v. Montgomery, 384 F.3d 1050 (9th Cir. 2004)....................29

United States v. Ocasio, 578 U.S. 282 (2016)....................5, 43

United States v. Ron Pair Enters., Incorporated., 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)....................36

United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981) 24, 25, 26, 27

United States v. Thompson, 685 F.3d 993 (6th Cir. 1982) 23

United States v. Town of Colo. City, 935 F.3d 804 (9th Cir. 2019) 36

United Steel Workers of America v. Phelps Dodge Corporation, 865 F.2d 1539 (9th Cir. 1989)..29

Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) 36

STATUTES

18 U.S.C. § 1519 23

18 U.S.C. § 1951 19

18 U.S.C. § 1951(b)(2)..17, 20, 42

18 U.S.C. § 1961 6

18 U.S.C. § 1962(c) 23

18 U.S.C. § 1963 6

18 U.S.C. § 1964(c) 23

18 U.S.C. § 1965 6

18 U.S.C. § 1966 6

18 U.S.C. § 1967 6

18 U.S.C. § 1968 6

26 U.S.C. § 7201 23

28 U.S.C. § 1291 6

28 U.S.C. § 1331 6

Cal. Penal Code § 518 42

Cal. Penal Code § 830.1 45

Fed. R. Civ. P. 56(a)..36

Fed. R. Evidence 801(d)(2)..47

MISCELLANEOUS

Health & Safety Code § 11357 34

Health & Safety Code § 11358 34

Health & Safety Code § 11358(d)(3)(D) 38

Health & Safety Code § 11362.5 34

Health & Safety Code § 11362.7 35

Health & Safety Code § 11362.77 ....28, 37

Health & Safety Code § 11362.77(a)..36

Health & Safety Code § 11362.765 ....28, 35, 36

Health & Safety Code § 11470.1 28

Health & Safety Code § 11470.1(a)(1) 40

Health & Safety Code § 11470.1(d) 40

Health & Safety Code § 11470.2 ....passim

Health & Safety Code § 11470.2(a)(2) 40

Health & Safety Code § 11479 ....28, 33

INTRODUCTION

In 2016 California voters approved Proposition 64 making the cultivation and sale of recreational marijuana legal subject to compliance with state and local regulations and taxation. Prior to that time California law provided that marijuana could only be cultivated for medicinal purposes subject to a six plant per person limit. In addition, state law provided for collectives and cooperatives to cultivate and sell medical marijuana to patients or their caregivers on the condition that no person or entity could profit from the sales. *People v. London*, 228 Cal. App. 4th 544, 553-554 (2014).

Beginning in 2017 qualified persons could obtain a permit/license from state and local authorities to cultivate and sell marijuana for recreational use subject to regulations, labeling and taxation. However, marijuana continues to be illegal under federal law because it is irrebuttably presumed to be part of interstate commerce. Thus, persons who legally cultivate marijuana under California law, and engage in lawful intrastate commerce, are still considered criminals under federal law who do not have a property right protected under federal law. *Borges v. County of Mendocino*, 503 F. Supp. 3d 989 (N.D. Cal. 2020); Case No. 22-15673 on appeal to this Court challenging the irrebuttable presumption of interstate commerce relating to marijuana grown legally in California since Proposition 64 was implemented.

Mendocino County is part of the Emerald Triangle that also includes Trinity and Humboldt counties. Since the 1970's this region has become world famous for cultivating and distributing hundreds of tons of high quality marijuana. The local economy in Mendocino County is based primarily on marijuana production and sales. The County has scores of millionaires who have profited from cultivating marijuana. Yet none of that profit has been reported or taxed to help support the County coffers. In addition, many growers who flocked to Mendocino County in the 1970's and 1980's have created strong ties with the community including local officials. "The Boom and the Busts: Mendocino County's Agricultural Revolution", January 2019, University of Oxford, Global History of Capitalism Project, Case Study #8, by Charlie Harris.[1]

Both the district court and defendants refuse to recognize the undisputed facts alleged in First Amended Complaint (FAC) at paragraphs 13 and 14, which include the dependence of Mendocino County's economy (and its citizens' livelihood) on illegal cannabis production for the last 50 years, including per capita benefits between $12,000 and $60,000 annually. Consequently, the corruption and

[1] https://url.emailprotection.link/?b_N9xA9QM3IfnMZKDOyIZyiED74Hw-Vimq8DaG0e3syMro_50nGNxiDiPj1pNvZ04jgfUgdKT0JeJ396p1X4oyggUIPHxmnFi9OVMvFAzkOFlHSSv0hq-URqBbQlfxbAXBCxS0bjhnW7Xqx4zdbOn3zcK_WccRM6OPQPoD3AIFts~

RICO conspiracy alleged in the FAC are not merely "plausible"—they were inevitable.

The enforcement of state law on growers of marijuana in Mendocino County has primarily been within the exclusive jurisdiction of the County Sheriff's Office and District Attorney's Office in coordination with state law enforcement agencies including the Department of Fish and Wildlife, the CHP and the California Attorney General's Office. Accordingly, the fox is guarding the hen house in relation to corrupt County law enforcement officials extorting marijuana from licensees under color of law by seizure, systematic failures to document chain of custody and failure to document destruction of extorted marijuana.

In a criminal prosecution for marijuana production or possession the issue of chain-of-custody is usually insignificant because the prosecution has evidence of the defendant's possession or control of the seized marijuana. Whether the seized marijuana was destroyed, stolen or misplaced after seizure is typically irrelevant to the prosecution. It is left to each law enforcement agency to create and enforce policies designed to prevent officers from taking advantage of the opportunity to abscond with the marijuana for personal gain and claim it was destroyed. A basic premise taught in criminal investigation course 101 regarding non-violent crimes is motive and opportunity. "The answer is money. What is the question?"

But here plaintiffs asseverate possession, control and property rights concerning the seized marijuana, alleging the seizures were extortion committed for the officers' personal gain. Under those circumstances the defendant officers' failure to produce any evidence of the actual destruction of marijuana legally grown becomes highly relevant. It also raises a reasonable inference that many tons of cannabis which they admittedly confiscated during some one thousand (1,000) seizures apiece—approximately two hundred (200) of which were done together—constitutes circumstantial evidence that tons of marijuana were not destroyed. The inference that some of the cannabis was not seized for law enforcement purposes but was instead extorted by the officers for personal gain thus becomes plausible.

This corruption is facilitated by the fact that federal law enforcement officials still consider persons who grow legally under California law as criminals. Accordingly, there are essentially no checks and balances on corrupt law enforcement officers who extort and divert marijuana for personal gain. Indeed, the California Attorney General's Office represents defendant Steve White in this action. Consequently, this United States Court of Appeals is the court of last resort.

The plaintiffs and other victims identified in this RICO lawsuit were legally cultivating or transporting marijuana in Mendocino County subject to the

regulations that went into effect in 2017 after Proposition 64 was passed. This case was removed from state court to federal court by Defendants Bruce Smith and Steve White. It should be governed by state law. Unfortunately, the dismissal Order implicitly ignores state created property rights arising from the district court's thinly veiled contempt for the Plaintiffs and their allegations – most of which are not in genuine dispute. In addition, the Order fails to cite or acknowledge applicable state law as it relates to (a) the zip-tie program; (b) the pay to play restitution program; and (c) the cover up related to the Flatten traffic stop. Despite the legal limit of six (6) plants per grower, Mendocino County's Sheriff issued permits for up to ninety-nine (99) plants by way of zip-ties for $50 a piece. Despite the legal limit on restitution imposed by actual costs of environmental remediation, the County's District Attorney accepted bribes in exchange for reducing felony charges to misdemeanors -- $100,000 in one case. The Order of dismissal purports to ratify bribery and extortion because several million dollars was used to subsidize law enforcement.

The zip-tie and restitution extortion schemes conducted by Sheriff Allman and District Attorney Eyster constitute soliciting bribes: "As all parties agree the type of extortion for which (Ocasio) was convicted … is the rough equivalent of what we would now describe as 'taking a bribe'." *United States v. Ocasio*, 578 U.S. 282, 285 (2016).

The district court found the Plaintiffs' allegations, based primarily on undisputed facts, implausible because it would be unreasonable to infer that local and state law enforcement officials would participate in a conspiracy to extort marijuana for personal gain. Instead, the Plaintiffs were viewed as criminals unworthy of belief, not entitled to the opportunity to obtain a remedy for the damages to their business or property resulting from extortion committed by County and State law enforcement officers.

JURISDICTIONAL STATEMENT

This action is brought under the civil RICO statute, 18 U.S.C. sections 1961 -1968. Jurisdiction of the district court was conferred by 28 U.S.C. section 1331. Judgment was entered on April 29, 2022 after the Defendants' motion to dismiss was granted. (1-ER-2 and 1-ER-3-24)

The Plaintiffs timely appealed from the judgment on May 13, 2022. (3-ER-386-412). This Court's jurisdiction arises pursuant to 28 U.S.C. section 1291.

ISSUES PRESENTED

1. Did the district court err by drawing inferences in favor of the non-moving parties and concluding it was not plausible law enforcement officers would conspire to extort marijuana for personal gain?

2. Did the district court err by ruling, as a matter of law, that Sheriff Allman's "zip-tie" program allowing growers to purchase up to 99 zip ties for recreational use and profit was lawful?

3. Did the district court err by ruling, as a matter of law, that the restitution program implemented by District Attorney Eyster complied with Health & Safety Code Section 11470.2?

4. Did the district court err by ruling, as a matter of law, that the co-conspirators Allman, Johnson or Eyster could have reasonably believed that Rohnert Park officers were legally performing law enforcement activities in Mendocino County on December 5 or 18, 2017?

5. Did the district court err by denying Plaintiffs' request to amend the complaint to add three new co-conspirators involved in the storage and transportation of marijuana extorted pursuant to the alleged RICO conspiracy?

I. STATEMENT OF THE CASE

A. The Borges/Gurr Seizure of Marijuana on August 10, 2017 and the Knight Seizure on September 21, 2017

1. Introduction

The Borges/Gurr seizure and the Knight seizure have four important things in common: (1) they both were in the permit process with Mendocino County and presumably not subject to accusations of cultivating marijuana illegally; (2) they both were raided based on warrants obtained by Defendant Steve White and his subordinates falsely alleging illegal water diversion; (3) they both had all of their marijuana seized by Defendants Smith and White with no proof of its destruction; and (4) both seizures yielded no evidence of the alleged water diversion. Defendant Smith asked the district court to take Judicial Notice of the related search warrants and return of warrants which confirm (1) the warrants were obtained based on allegations of water diversion and (2) that no evidence of water diversion was seized.

2. The Borges/Gurr Seizure

On May 4, 2017 plaintiffs met with Commissioner Diane Curry and Christina Pallman of her staff and submitted their application for a permit to cultivate marijuana and supporting documents. Plaintiffs were given an application receipt signed by Commissioner Curry dated May 4, 2017 that provides, in part: "The garden at this site is considered to be in compliance, or working toward compliance, until such time as a permit is issued or denied." The plaintiffs were told by Commissioner Curry they could immediately begin cultivation activities; and they did. (3-ER-208; FAC ¶¶ 102-103).

On August 10, 2017 at approximately 10:30 a.m. a convoy of California Division of Fish and Wildlife (F&W) vehicles, under the direction and supervision of defendant F&W Officer Steve White, arrived at Plaintiffs' property and agents, with guns pointed, immediately placed Plaintiffs Borges and Gurr in handcuffs. They were accompanied by defendant Mendocino County Officer Bruce Smith. Smith took the plaintiffs into temporary custody, searched their home, and prevented them from observing the seizure of marijuana plants and the destruction of equipment relating to their farming operation. Plaintiffs informed defendant White they had an application receipt/provisional permit from the County and were in full compliance with all County regulations. They also informed defendant

White that they were awaiting a report from Alpha Labs for tests of the creek water and the well water. (3-ER-210; FAC ¶ 108)

During the August 10, 2017 search F&W Warden Mason Hemphill, Warden Ryan Stephenson, Warden Wyatt Cole and other Wardens, under the direction and supervision of defendant White, searched the property. Hemphill executed a return on search warrant declaring that he took custody and possession of 163 living marijuana plants and 98 living marijuana plants and guns. Borges and Gurr were never prosecuted for any crime related to the seizure of their marijuana plants and it was soon confirmed that no water was being diverted from a local creek to the plaintiffs' well. (3-ER-210; FAC ¶ 109)

Mason Hemphill testified that he does not know if or how the seized marijuana was destroyed. Defendants Smith and White have admitted that following this seizure from Borges and Gurr the marijuana was placed in a dump truck at the COMMET office supervised by Defendant Smith, consistent with defendants' custom and practice. There is no chain of custody or record of what happened to that seized marijuana after it was placed in the dump truck. (3-ER-189; FAC ¶¶ 37-38) (3-ER-210; FAC ¶ 110).

3. The Knight Seizure

Beginning in 2015, as a means of supplementing his income, Plaintiff Knight began growing marijuana as part of Mendocino County's 9.31 (zip-tie)

program. In order to qualify Knight's property was inspected by Undersheriff Randy Johnson – a neighbor who also resided in Potter Valley along Highway 20. Plaintiff Knight was required to fence the grow area and comply with other requirements which included paying a $50/plant zip tie fee for each plant. (3-ER-211; FAC ¶ 115)

Mr. Knight applied for and was issued a provisional permit in May 2017 to legally grow marijuana, subject to certain conditions. Because of his participation in the program he stopped paying zip-tie fees to the Sheriff's Office. (3-ER-211-212; FAC ¶ 116)

Plaintiff Knight fully cooperated with the County Department of Agriculture and related agencies including the California Department of Fish and Wildlife and the Mendocino County Sheriff's Office. At the request of Undersheriff Randy Johnson, Mr. Knight moved his garden in 2017 so that it was clearly visible from Highway 20. Prior to the September 21, 2017 raid by defendants Bruce Smith and Steve White, Mr. Knight had not been informed by Randy Johnson or any government agency that he was out of compliance with any conditions related to his marijuana operation. (3-ER-212; FAC ¶ 117)

On September 15, 2017 Warden Ryan Stephenson of F&W, under the supervision and direction of defendant Steve White, obtained a search warrant for William Knight's property under the pretext that Knight was illegally diverting

water. The County Department of Agriculture and Undersheriff Randy Johnson were aware that spring water on the property had been used to irrigate the garden since 2015. Plaintiff Knight was in the process of having it inspected and approved by the appropriate agencies. (3-ER-212; FAC ¶ 118)

On September 21, 2017 at 8:00 am defendant Steve White, his subordinate Ryan Stephenson and other members of F&W, together with defendant Bruce Smith and members of County of Mendocino Marijuana Enforcement Team aka COMMET, arrived at William Knight's property located at 7800 Highway 20 in Ukiah. Defendants Smith and White, and others under their supervision, proceeded to "eradicate" 405 mature and ready for harvest marijuana plants. In addition, Ryan Stephenson reported taking into evidence 80 one pound bags of processed marijuana, a cardboard container of processed marijuana, 36 pounds of shake, two fifty gallon drums of processed marijuana, a paper bag of processed marijuana, a shotgun, a revolver, a cell phone, a Samsung cellular device and two electronic scales. (3-ER-212-213; FAC ¶ 119-120)

The return of search warrant was filed on September 28, 2017. The return identified the seized property referred to above as all property taken by Ryan Stephenson. A Declaration of Destruction of Marijuana pursuant to Health and Safety Code 11479, signed by Ryan Stephenson, stated that the gross weight of the

controlled substance (marijuana) seized was 1,321 pounds. (3-ER-213; FAC ¶ 122)

Plaintiff William Knight has information and believes that the 1,321 pounds of the marijuana referred to above was not destroyed and that no reliable evidence exists to prove that it was. Rather, in furtherance of the conspiracy alleged herein, the marijuana was sold by Defendants Smith and/or White. (3-ER-213; FAC ¶ 124)

4. Material Facts That are Not in Dispute

Most of the material facts alleged in the FAC are not in genuine dispute.

1. Plaintiffs Borges and Gurr obtained a provisional permit to legally cultivate cannabis in Mendocino County on May 4, 2017. (3-ER-208; FAC ¶¶ 102-103)

2. Borges and Gurr hired a hydrologist on July 26, 2017 to determine whether the well on their property contained creek water from a nearby creek in response to an inspection by two F&W employees. (3-ER 209; FAC ¶ 107)

3. On August 10, 2017 defendant Steve White, accompanied by a number of F&W agents under his supervision and co-defendant Sgt. Bruce Smith, executed a search warrant at the Borges/Gurr property based on alleged water diversion from a nearby creek. (3-ER-210; FAC ¶¶ 108-109)

4. The F&W agents seized over 260 marijuana plants. No evidence was seized regarding suspected water diversion. (¶ 41) Borges and Gurr were never prosecuted for any crime, and it was soon determined that water was not being diverted from the creek. (3-ER-210; FAC ¶ 109)

5. According to Steve White he and defendant Smith put the plants taken from the Borges/Gurr farm into a dump truck at Smith's COMMET office. According to Smith the plants were later taken on an unknown date by an unknown person to be buried. There are no documents reflecting the chain

of custody of the marijuana plants seized, nor does any evidence exist to confirm the plants were buried. (3-ER-210; FAC ¶ 110)

6. Plaintiff William Knight obtained a provisional permit to cultivate cannabis in Mendocino County in May 2017. (3-ER-212; FAC ¶ 117)

7. On September 21, 2017 defendant Steve White, accompanied by a number of F&W agents under his supervision and co-defendant Bruce Smith, executed a search warrant obtained under the pretext that Knight was illegally diverting water. (3- ER-212; FAC ¶¶ 118-119)

8. The F&W agents seized 405 marijuana plants plus additional processed marijuana totaling 1,321 pounds of marijuana. (3-ER-212-213; FAC ¶¶ 120-124) No evidence was seized regarding water diversion. (3-ER-190-191; FAC ¶ 43)

9. According to defendants Steve White and Bruce Smith prior to 2017 they each participated in over one thousand seizures of marijuana in Mendocino County. At least two hundred of those seizures were done together, some with a warrant and some without. (3-ER-188; FAC ¶ 35)

10. Marijuana that was not ready to harvest was left at the site of the eradication. Marijuana that was ready to harvest was taken off site and placed in a dump truck at Bruce Smith's COMMET office. The seized marijuana was supposedly destroyed, however, it was never documented when, how or by whom the marijuana was destroyed. (3-ER-188-189; FAC ¶¶ 35-36)

11. Section 11479 requires that photographs be taken which reasonably demonstrate the total amount of the suspected controlled substance to be destroyed and a declaration that includes the date and time of the destruction.

12. Defendants Smith and White have admitted that no photographs were taken of the seized marijuana nor were records made documenting the date and time of the destruction of many tons of marijuana seized by them during hundreds of seizures. (3-ER-188-189; FAC ¶¶ 36-38)

5. The Four Streams of Revenue for the Criminal Conspiracy

The Plaintiffs have alleged a criminal conspiracy that had four streams of revenue between 2011 and 2017: (1) Sheriff Allman's "zip-tie" program, (2) District Attorney Eyster's "restitution" program, (3) traffic stops in Mendocino County as a pretext to extort and sell marijuana, and (4) "eradication" efforts in Mendocino County as a pretext to extort and sell marijuana. (3-ER-183-190; FAC ¶¶ 17-43). The zip-tie program and the restitution program demonstrate two ways in which Sheriff Allman and District Attorney Eyster manufactured opportunities to extort cash from persons growing marijuana illegally through the association-in-fact enterprise identified herein as the Mendocino County Sheriff's Office and the Mendocino County District Attorney's Office.

The zip-tie program allowed growers in Mendocino County to purchase up to 99 zip-ties at $50/plant from the Sheriff's Office to buy protection from seizure and prosecution. It evolved between 2008 and May 2017 when it was replaced by the Proposition 64 permit program allowing for the cultivation and sale of recreational marijuana subject to strict regulations and taxation. As implemented by co-conspirator Sheriff Allman, growers could pay money to the Sheriff and/or the Sheriff's Office in exchange for protection. Cash payments to the Sheriff's Office were not recorded into a computer system on receipt, as compared to payments by credit card. Rather, Sheriff Allman's assistant, Sue Anzilotti, would

place cash and a copy of a handwritten receipt into a box and deliver it to the fiscal department at the Sheriff's Office at the end of her shift. It is unknown how it was reported or deposited thereafter. Notably, Ms. Anzilotti previously worked with Sheriff Allman's wife, Laura Allman, at a local bank where she received training in money laundering. (3-ER-184-185; FAC ¶¶ 19-22)

The restitution program, aka the "pay to play" program, was created in 2011 by co-conspirator David Eyster soon after he was elected District Attorney. His office was short staffed and unable to prosecute a huge backlog of marijuana cases. Whereas Health & Safety Code Section 11470.2 limits restitution to actual enforcement costs, as implemented by Mr. Eyster the restitution program gave him the authority to demand fines, to be determined exclusively by him, sometimes based on the number of pounds and/or plants seized from growers and supposedly destroyed. Some local judges referred to it as an extortion scheme. Criminal defendants were allowed to pay substantial amounts of money, usually cash, that was unrelated to actual enforcement costs. Rather, persons could pay to avoid prison in exchange for misdemeanor pleas and probation. (3-ER-185-186; FAC ¶¶ 24-27)

The zip-tie and restitution programs had one major fact in common: persons purchasing zip-ties or paying restitution appeared at the Sheriff's Office, almost always paid cash, and received a handwritten receipt. The payment was not

recorded in a computer system unless it was by credit card. On a daily basis the payments received (almost all of which were in cash) were put into a box with copies of the handwritten receipts and taken to the "fiscal" office. (3-ER-184-185; FAC ¶¶ 20-22 and 3-ER-186-187; FAC ¶¶ 27-29). The opportunities for skimming cash are obvious and there were no checks and balances in place.

This case arises out of traffic stops and seizures to extort marijuana from Plaintiffs, who lawfully possessed the marijuana. The traffic stop of Plaintiff Flatten by co-conspirator Huffaker is alleged in great detail and summarized below, together with the cover-up that followed. (3-ER-196-202; FAC ¶¶ 62-84). To further demonstrate a pattern of racketeering activity the Plaintiffs have alleged other traffic stops. (3-ER-187-188; FAC ¶¶ 30-34 and 3-ER-204-207; FAC ¶¶ 89-96).

In addition, the seizures of marijuana from Plaintiffs Borges, Gurr and Knight are also alleged in great detail and summarized below. (3-ER-188-191; FAC ¶¶ 35-43 and 3-ER-207-214; FAC ¶¶ 97-127). The more recent seizures from Andres Rondon and licensed transporters of large quantities are also alleged. (3-ER-214-216; FAC ¶¶ 128-132). The common thread is the admission by Defendants Smith and White that they performed hundreds of seizures of marijuana in which they failed to document the chain of custody and destruction of marijuana seized by them.

II. SUMMARY OF THE ARGUMENT

The essence of a RICO conspiracy is two or more persons conspiring to conduct the affairs of an enterprise through a pattern of perpetrating RICO predicate crimes. This is racketeering activity. In this case the association-in-fact enterprise is the Mendocino County Sheriff's Office and District Attorney's Office. Those entities are not parties, nor are they co-conspirators. The pattern is established by Defendants Smith and White's admissions of committing hundreds of marijuana seizures with no proof that the seized marijuana was destroyed. The First Amended Complaint (FAC) alleges in detail the seizures of marijuana from the Plaintiffs, and others, by the Defendants and/or their co-conspirators constituting extortion as the RICO predicate crimes.

The Plaintiffs' RICO claims are not based on legitimate law enforcement activities. Rather, the RICO claims are based on the allegation that Defendants Smith and White participated as co-conspirators by committing acts of extortion, in violation of Section 1951(b)(2), by seizing -- sometimes using a search warrant -- and selling tons of marijuana while claiming it was destroyed. The Plaintiffs' RICO claims are grounded on the allegation that the marijuana confiscated by the Defendants was neither seized for purposes of law enforcement, nor destroyed. Rather, it was extorted and sold. See 3-ER-178-180; FAC ¶¶ 3, 5, 8, 3-ER-183; FAC ¶ 17, 3-ER-188-189; FAC ¶¶ 36-37, 3-ER-197-198; FAC ¶¶ 69-70, 3-ER-

199; FAC ¶ 75, 3-ER-205; FAC ¶ 90, 3-ER-210; FAC ¶ 110 and 3-ER-213; FAC ¶ 124.

The most damning evidence against Defendants Smith and White came from their own mouths, i.e., they both testified their policy and practice from 2007 to 2017 was not to document the chain of custody of seized marijuana, nor the times, places or witnesses to hundreds of alleged destructions. This practice was authorized and condoned by Sheriff Allman and District Attorney Eyster in furtherance of the conspiracy. There is no documented evidence that the bulk of the marijuana seized by Defendants Smith and White was ever destroyed. This explanation applies not only to the marijuana seized from the Plaintiffs herein, but also to the hundreds of seizures Smith and White conducted in Mendocino County. The defense can be summarized as follows, i.e., trust me and "take my word for it." In other words, it must be lawful because the Defendants had badges and warrants even though they cannot account for what happened to the countless tons of marijuana they seized. Because power tends to corrupt the Plaintiffs should have the opportunity to "trust but verify."

The connection between (1) the extortion and seizure of marijuana from growers in Mendocino County and (2) traffic stops used as a pretext to extort marijuana from drivers in Mendocino County is revealed through the cover-up orchestrated by co-conspirators Sheriff Allman, Undersheriff Johnson and District

Attorney Eyster, including a phony press release, fraudulent statements to the press claiming crimes were not reported, false claims that the seizures were legitimate and the victims lied about the quantity seized – and refusals by the Sheriff and District Attorney to investigate. (3-ER-200-202; FAC ¶¶ 76-84)

III. STANDARD OF REVIEW

On appeal from a motion to dismiss the court must accept the plausible facts alleged as true and review the lower court's decision *de novo*. *Gonzalez v. Metropolitan* Transportation *Authority,* 174 F.3d 1016 (9th Cir. 1998); *Johnson v. Terhune*, 234 F.3d 1277 (9th Cir. 2000). The law applicable to a motion to dismiss is set forth in more detail in the Plaintiffs' opposition to the County of Mendocino's motion to dismiss. (2-ER-106)

IV. ARGUMENT

A. The Order Dismissing the First Amended Complaint is Based on Misstatements of the Law While Drawing Inferences in Favor of the Non-Moving Parties

The Order dismissing Plaintiffs' First Amended Complaint ("FAC") with prejudice rationalizes its decision by clearly erroneous misstatements of law compounded by inferences contrary to common sense:

> The Court concludes that the FAC fails to state a claim under RICO . . . the FAC is larded with conclusory and speculative allegations that 'are not entitled to the presumption of truth.' *Iqbal*, 556 U.S. at 679. For example, plaintiffs allege 'on information and belief' that defendants and their alleged co-conspirators have 'conducted financial transactions with the proceeds of extortion,' FAC ¶141, but the only

> actual extortion that is alleged in the FAC consists of the Tatum and Huffaker pretextual stop and extortion scheme. (emphasis supplied) (1-ER-19-20; Order, Document 76, 17:24-18:1)

To the contrary, "actual extortion" is alleged as the means by which defendants White and Smith personally seized over $2 million worth of cannabis from plaintiffs using pretextual warrants to perpetrate extortion, defined in 18 U.S.C. § 1951(b)(2):

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

FAC paragraph 105 states in pertinent part:

> In furtherance of the conspiracy alleged herein Defendant White decided to use a false allegation of water diversion as a pretext to obtain a warrant and seize the plaintiffs' (Gurr's and Borges') property.

The FAC continues in pertinent part:

> "On August 10, 2017, at approximately 10:30 a.m. a convoy of . . . vehicles under the direction of defendant Steve White arrived at [Gurr's and Borges'] property and agents, with guns pointed, immediately placed [Borges and Gurr] in handcuffs. They were accompanied by defendant Bruce Smith. Smith took the plaintiffs into temporary custody. . ." (3-ER-210; FAC ¶108)

> During the August 10, 2017 search [agent] Mason Hemphill [and other agents] . . . under the direction and supervision of defendant White, searched the property. Hemphill executed a return on search warrant declaring that he took custody of 163 living marijuana plants and 98 living marijuana plants and guns. (3-ER-210; FAC ¶109)

> Over 260 plants were seized and placed in a dump truck . . . yet no evidence was seized regarding suspected water diversion. (3-ER-190; FAC ¶40)
>
> * * *
>
> On September 21, 2017, at 8:00 a.m. defendant Steve White [and other agents] together with defendant Bruce Smith arrived at [Plaintiff] Knight's property. . . (3-ER-212-213; FAC ¶120)
>
> The return of the search warrant [which] was filed with the court on September 28, 2017 . . . stated that the gross weight of . . . (marijuana) seized was 1,321 pounds. (3-ER-213; FAC ¶122)
>
> No evidence was seized related to water diversion. (3-ER-190; FAC ¶42)

Notwithstanding the Order's proffered "example" of the "conclusory and speculative allegations" with which the FAC is "larded" -- that "are not entitled to the presumption of truth," each and every allegation quoted above from the FAC is an undisputed fact. The Order equates undisputed facts with "lard" and "conclusory and speculative allegations." Because defendants obtained search warrants to seize evidence limited to "illegal water diversion," but seized no such evidence -- instead seizing only plaintiffs' $2 million worth of marijuana, which marijuana disappeared with no evidence of its destruction by any means -- it is reasonable to infer the warrant was pretext to seize plaintiffs' marijuana for reasons unrelated to legitimate law enforcement. The inference that defendants seized plaintiffs' marijuana to sell it for their personal profit is strengthened exponentially by defendants' admissions that each of them had participated in

approximately one thousand (1,000) cannabis seizures -- some two hundred (200) together -- with no documented evidence of the chain of custody or the alleged destruction of the marijuana seized.

The Order rejects common sense by noting:

> However, the FAC does not contain any factual allegations in support of such a claim, such as alleging specific illicit sales by Smith or White, any investigations of Smith or White for illegal activity,[2] or statements from witnesses that the seized cannabis was not actually destroyed. (1-ER-20; Order, 18:2-6)

The Order's substitute for analysis is reducible to plaintiffs' failure to elicit and allege a confession from a co-conspirator. Imposing such a pleading standard on plaintiffs is tantamount to granting blanket immunity to corrupt law enforcement officers. Indeed, the Order continues ". . . aside from the pretextual traffic stop/extortion scheme allegedly perpetrated by Tatum and Huffaker . . . the remainder of the conduct alleged in the FAC consists of facially legitimate law enforcement activities. . ." (1-ER-20; Order, 18:17-19) (emphasis supplied).

The Order's willful blindness to undisputed facts is further demonstrated by its refusal to recognize that co-conspirator Tatum pled guilty to "the pretextual traffic stop/extortion scheme" on December 1, 2021, which fact is reflected in the indictment against co-conspirators Tatum and Huffaker and the Court's acceptance

[2] See 3-ER-200-201; FAC ¶¶ 78-82 describing the Sheriff's and District Attorney's refusals to investigate and false statements in justification.

of Tatum's guilty pleas – both of which are attached to and incorporated in the FAC. See Exhibit "C" attached to the FAC at pp. 69-87, including the indictment in Case No. 21-cr-00374-MMC and Court minutes reflecting the Court's acceptance of Tatum's "guilty pleas to Counts One, Four, and Five of the Indictment," i.e. Conspiracy to Commit Extortion Under Color of Official Right, 18 U.S.C. §1951; Falsifying Records in a Federal Investigation, 18 U.S.C. §1519; and Tax Evasion, 26 U.S.C. §7201, respectively. (1-ER-3-24)

B. Plaintiffs Have Alleged an Association-in Fact Enterprise and a RICO Conspiracy that Includes Bruce Smith and Steve White

As explained in *Living Designs, Inc. v. DuPont de Nemours & Co.,* 431 F.3d 353, 361 (9th Cir. 2005):

> The elements of a civil RICO claim are as follows: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to plaintiff's "business or property."' (18 U.S.C. §§ 1964(c), 1962(c). * * * And there is no question that Du Pont and the law firms together can constitute an 'associated in fact' RICO enterprise (citation omitted) . . a group or union consisting solely of corporations or other legal entities can constitute an "association in fact" enterprise.' *Id.* at 361.

A broad spectrum of government entities have been categorized by federal appeals courts as RICO enterprises. In *United States v. Freeman*, 6 F.3d 586 (9th Cir. 1993),

> Appellant Freeman and Netters were indicted as a result of an FBI sting operation aimed at identifying corruption in the California state legislature. Netters was convicted of one count of violating RICO, three counts of extortion in violation of the Hobbs Act, four counts of

> money laundering, and one count of subscribing to a false tax return . . . Freeman was convicted of conspiring to and aiding and abetting extortion … We affirm. *Id.* at 588.

The cases referred to by the *Freeman* court and the government agency RICO enterprise are listed below (citations to denials of all petitions for certiorari are omitted): *United States v. Thompson*, 685 F.3d 993, (6th Cir. 1982) (en banc) – the Governor's office; *United States v. Angelilli*, 660 F.2d 23 (2nd Cir. 1981) – Office of the Court; *United States v. Lee Stoller Enterprises*, 652 F.2d 1313 (7th Cir. 1982) (en banc) – County Sheriff's Office; *United States v. Clark*, 646 F.2d 1259, (8th Cir. 1981) – Judge; *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980) – District Attorney's Office; *United States v. Bacheler*, 611 F.2d 443 (3rd Cir. 1979) – Office of the Court; and *United States v. Stratton*, 649 F.2d 1066 (5th Cir. 1981) – Florida's Third Judicial Circuit Court.

It is undeniable that starting in the early 1980's, government corruption cases led federal appeals courts around the country to identify a variety of government entities used to commit RICO predicate crimes. Sheriff's Offices, District Attorney's Offices and courts were found to be RICO enterprises. The *Stratton* case affirmed the determination that multiple courts within Florida's Third Judicial Circuit constituted a single RICO enterprise the affairs of which were conducted as part of a single conspiracy as is alleged instanter:

> . . . the indictment alleges that the offenses were all part of a single scheme to use the Third Judicial Circuit for illicit profit-making activities and to cover up these illegal activities. . .
>
> Appellants next contend that by broadly defining the enterprise as Florida's Third Judicial Circuit, the government has improperly charged multiple conspiracies under the guise of a single conspiracy. Appellants argue that each agreement to bribe a judge or court official, or to use a public office for illegal profit-making activity, constituted a separate conspiracy. Since some co-conspirators had no knowledge of all the illicit agreements, appellants suggest that the government cannot charge a single conspiracy in a single count. Appellants' argument misconstrues the nature of a RICO conspiracy. The gravamen of a RICO conspiracy charge is that 'each (defendant or co-conspirator) agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes.' **Under RICO it is irrelevant whether 'each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs.'** . . . As noted above, in the case at bar, the indictment charged and the evidence indicated that the defendants participated in a single scheme of racketeering activity involving Florida's Third Judicial Circuit. . . . . . 'if this were not a RICO case,' the appellants might well have a valid argument. However, under RICO 'diverse parties and crimes' are tied together through the concept of the illegal enterprise. (citations omitted) *Id.* at 1073-74 (emphasis added)

In *Stratton,* the indictment charged nine defendants with participating in a pattern of racketeering activity involving the court and law enforcement system of the Third Judicial District of the State of Florida. "In examples too numerous to recount, the indictment cites instances in which various defendants were involved in such offenses as bribery, manipulation of grand juries, protection of illegal activities, and threats against

prospective witnesses. In short, the indictment alleges that instead of doing justice, one arm of the Florida court system was undoing it." *U.S. v Stratton,* 649 F.2d 1066, 1070 (5th Cir. 1981).

The district court's myopic view of the allegations in this case as not plausible is exposed by the fact that nearly all of the allegations are not in genuine dispute. The only fact in genuine dispute relates to the allegation that the marijuana extorted from the Plaintiffs, and others, was sold. The Plaintiffs were denied a request made during the hearing on defendants' motion to dismiss to amend the FAC to add new allegations identifying the names of co-conspirators involved in the storage and transportation of marijuana extorted by the defendants and their co-conspirators.

Like the indictment in *United States v. Stratton*, 649 F.2d 1066 (5th Cir. 1981) the Complaint ". . . alleges that the (RICO) offenses were all part of a single scheme to use [the Sheriff's and District Attorney's Offices] for illicit profit-making activities and to cover up these illegal activities. . ." *Id.* at 1073. Like the defendants in *Stratton*, these defendants insist that the many extortions committed by Tatum and Huffaker cannot be part of the same conspiracy alleged against Smith and White based on their extortionate seizures pursuant to pretextual search warrants against Plaintiffs Borges, Gurr and Knight at their properties, nor can the

Sheriff's and District Attorney's obstructions of justice committed against Flatten and Knight be predicate crimes in furtherance of a single conspiracy. As the *Stratton* court explained:

> [Defendants'] argument misconstrues the nature of a RICO conspiracy. The gravamen of a RICO conspiracy charge is that 'each (defendant or co-conspirator) agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes.' Under RICO it is irrelevant whether 'each defendant participated in the enterprise's affairs through different, even unrelated crimes, as long as we may reasonably infer that each crime was intended to further the enterprise's affairs. *Id.* at 1074

The Order acknowledges (1-ER-22-23; at 20:23-21:3) that the FAC alleges: (1) an association-in-fact RICO enterprise that included the Mendocino County Sheriff's Department and District Attorney's Office, and (2) that Sheriff Allman, Undersheriff Johnson and District Attorney Eyster were the hub and co-conspirators Tatum, Huffaker, Defendants Smith and White were the spokes of the RICO conspiracy. The Order further acknowledges that the FAC alleged the common purpose of the conspiracy -- mistakenly labelled the RICO enterprise[3] -- was "to continue to cover up, aid, abet and encourage the officers in the field to extort cannabis and cash . . . from growers and transporters of cannabis in Mendocino County, regardless of whether the [victims] are licensed. . ." (1-ER-3-

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[3] It is unclear whether the Order's material mischaracterization of the diametrically opposed purposes of the enterprise and the conspirators who conducted its affairs through a pattern of racketeering was inadvertent.

24) Unfortunately, the Order then adumbrates defendants' false narrative by asserting ". . . aside from Huffaker and Tatum's highway extortion scheme, the other alleged 'extortion' in the FAC consists of facially legitimate law enforcement activities." (emphasis supplied) (1-ER-23; Order 21:4-5)

As will be discussed more fully below, it is undisputed that the seizure of lawfully permitted marijuana from Plaintiffs Borges, Gurr and Knight by Defendants Smith and White, under the pretext of investigating water diversion, resulted in approximately one ton of marijuana disappearing without a trace and without compliance with Health and Safety Code Section 11479 requiring photographs of the marijuana destroyed and a declaration stating the date and time of the destruction. Regardless, the Defendants could pretend to comply with Section 11479 by falsely declaring the seized marijuana was destroyed without ever having to prove it.

As to the "zip-tie" program it cannot be genuinely disputed that it was in clear violation of Health and Safety Code Section 11362.77 (the 6 plants rule) and Section 11362.765 (patients and primary caregivers may not profit from cultivating marijuana).

Finally, the pay to play "restitution" program was also in clear violation of Health and Safety Code Sections 11470.1 and 11470.2.

C. The Law Regarding Conspiracy; The Pinkerton Rule

To be liable for participation in a conspiracy, each participant need not know the exact details of the plan but must at least share the common objective of the conspiracy. *United Steel Workers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989) (en banc); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). Evidence of agreement may be circumstantial rather than direct. *Gilbrook*, 177 F.3d at 856-57.

The conspiratorial agreement(s) need not be explicit; it is sufficient if the conspirators knew or had reason to know the scope of the conspiracy and that their own benefits depended on the success of the venture. *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004). *Lacey v. Maricopa County*, 693 F.3d 913 (9th Cir. 2012) (en banc) reaffirmed *Gilbrook v. City of Westminster*, 177 F.3d 839, 857-58 (9th Cir. 1999): To be liable each participant in the conspiracy need not know the exact details of the plan, but must at least share the common objective of the conspiracy. A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions. *Lacey v. Maricopa County* at 935.

After a conspiracy is established, proof of the defendant's connection to the conspiracy must be shown . . . but the connection can be slight. *United States v. Johnson*, 297 F.3d 845, 868 (9th Cir. 2002). The character and effect of a

conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *Continental Ore v. Union Carbide Corp*, 370 U.S. 690, 699, 962 (1962).

For 75 years an unbroken line of cases has repeatedly reaffirmed the *Pinkerton* principle as first set forth below:

> A conspiracy is a partnership in crime . . . We have here a continuous conspiracy. There is no evidence of the affirmative action . . . which is necessary to establish . . . withdrawal from it . . . It is settled that 'an overt act of one partner may be the act of all without any new agreement specifically directed to that act.' The criminal intent to do the act is established by the formation of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 644-647 (1946).

Admissions and confessions are rare among co-conspirators in both criminal and civil RICO cases. Prosecutors typically rely upon circumstantial evidence to prove RICO claims beyond a reasonable doubt. Circumstantial evidence can be as persuasive as direct evidence to prove any fact.

> "The reason for treating circumstantial evidence and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.' (Citation omitted) The adequacy of circumstantial evidence also extends beyond civil cases: we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."

Desert Palace v. Costa, 539 U.S. 90, 100 (2003)

D. The Plaintiffs have Plausibly Alleged Connections Between the Seizures of Marijuana Grown Subject to Permits, the Zip-Tie Program and the Pay to Play Restitution Program

1. The Seizures of Marijuana by Defendants White and Smith

The Plaintiffs have alleged a pattern of RICO activity that involves Defendants Smith and White based on admissions made by them under oath. They testified that they performed at least two hundred (200) seizures of marijuana together and their custom and practice was not to document the chain of custody or the destruction of the seized marijuana. (3-ER-188-189; FAC ¶¶ 35-38)

According to the Order, when Smith and White seized plaintiffs' marijuana for their own personal benefit, such extortionate seizures were ". . . facially legitimate law enforcement activities. . ." To support the "facial legitimacy" imputed to defendants' extortion, the Order notes, ". . . the FAC also acknowledges [the searches and seizures] were conducted pursuant to search warrants signed by state court judges." (emphasis added) (1-ER-21; Order, 19:21-22) The Order ignores the pertinent portions of the FAC quoted above, which include the undisputed facts that the warrants purportedly providing "facial legitimacy" to defendants' extortion committed in uniform with guns drawn, carrying pretextual warrants, were based on fraudulent claims of "illegal water diversion" authorizing only seizures of evidence, fruits and instrumentalities of "illegal water diversion" -

- not plaintiffs' marijuana cultivated pursuant to licenses granted by the State of California and Mendocino County Department of Agriculture.

Furthermore, no evidence of "illegal water diversion" was seized during the defendants' alleged "law enforcement activities" at the plaintiffs' properties. The facts that (1) the warrants only authorized seizures of evidence pertaining to "illegal water diversion," (2) no such evidence was seized and, (3) instead, defendants seized a ton of plaintiffs' marijuana, are undisputed. But the Order ignores those facts and draws inferences in favor of the non-moving parties.

The Order's talismanic invocation of the claim that ". . . the FAC also acknowledges [the searches and seizures] were conducted pursuant to search warrants signed by state court judges" (emphasis supplied) is false. Those warrants were procured by fraudulent claims of "illegal water diversion" in the affidavits submitted and no such evidence was sought or seized by defendants. In *Malley v. Briggs*, 475 U.S. 335, 345 (1986), the Court addressed issues arising from police officers' civil liability for seeking warrants without an objectively reasonable basis for doing so. Although the *Malley* court was not dealing with the pretextual warrants and extortion alleged in the FAC, the principles enunciated therein invalidate the Order's "facial validity" *a fortiori*:

> In *Leon* [468 U.S. at 922, n. 23] we stated that 'our good-faith inquiry is confined to the objectively reasonable question whether a reasonably well-trained officer would have known the search was illegal despite the [court's] authorization.'

Franks v. Delaware, 438 U.S. 154, 169 (1978), which preceded *Malley v. Briggs*, *supra*, likewise addressed false and misleading affidavits to obtain warrants, which arose in the context of a motion to suppress evidence in a criminal case. The *Franks* opinion quotes Justice Douglas' concurrence in *Mapp v. Ohio* (citation omitted), using language particularly appropriate to the Order's eisegesis in dismembering the FAC:

> Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause the District Attorney or his associates have ordered.

The seizures of approximately one ton of marijuana from Borges, Gurr and Knight did not comply with Health and Safety Code Section 11479 which requires that when marijuana is destroyed that there be photographs of the amount of marijuana destroyed and a declaration stating the date and time of the destruction. Given the defendants' custom and practice of not documenting the chain of custody or the time and place of the presumed destruction, the failures to comply with Section 11479 by declaration were standard practice. Defendants Smith and White, and their co-conspirators, could have complied with Section 11479 and nevertheless repeatedly stolen the seized cannabis because their practice was to eschew documenting the chain of custody of marijuana from the time it was seized to the time of its alleged destruction. It is undisputed that in relation to over a

thousand raids performed by Defendants Smith and White between 2007 and 2017 there is no record of when, where and how hundreds of tons of marijuana were destroyed.

The Order continues its caricature of the FAC to support its result-oriented conclusions:

> Although the FAC is lengthy, when stripped of all of the conclusory and speculative allegations, it is lacking any factual specificity that would allow the Court to plausibly infer that the Mendocino County 'zip-tie' program, the District Attorney's restitution program, and the searches and seizures of cannabis by various law enforcement agencies were part of a criminal RICO scheme. The 'zip-tie' program was authorized by a Mendocino County ordinance in 2008 and operated until 2017 when it was replaced by a permit program. The restitution program is authorized by state law, and the Court takes judicial notice of the fact that a Mendocino County Grand Jury investigated the program and recommended its continued use . . . Thus, although the FAC alleges that the zip-tie program involved 'bribe[s]' by marijuana growers and that growers paid 'extortion money' under the restitution program, the FAC does not allege anything more than government employees doing their jobs. (Order, 18:25-19:13)

As will be discussed below, the zip-tie program and the restitution program were both in clear violation of state law.

2. The Zip-Tie Program

In 1996 California voters passed Proposition 15, known as the Compassionate Use Act (CUA), thus adding Section 11362.5 to the Health and Safety Code. It provided that: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not

apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

The CUA provided limited immunity from state criminal prosecution for unlawful marijuana possession and cultivation solely to qualified patients and their primary caregivers who possess or cultivate marijuana for the patient's personal use. *People v. Mower*, 28 Cal. 4th 457, 474-475 (2002).

In 2003, the Legislature enacted the Medical Marijuana Program Act (MMPA) at Health and Safety Code Section 11362.7 to encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana. The MMPA did not amend the CUA; rather, it is a separate legislative scheme that implements the CUA. *People v. Hochanandel*, 176 Cal. App. 4th 997, 1012-1013 (2009).

The MMPA seeks to enhance the access of patients and caregivers through collective, cooperative cultivation projects. However, the MMPA does not allow patients, identification cardholders, or their primary caregivers to earn a profit from the cultivation or distribution of medical marijuana, whether through a cooperative, collective, or otherwise. Section 11362.765; *People v. London*, 228 Cal. App. 4th 544, 553-554 (2014).

The MMPA limits the amount of marijuana a patient or primary caregiver may possess. Section 11362.77(a) provides that: "A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient." This is commonly referred to as the 6 plants limit.

This statutory scheme (MMPA) was in effect in 2008 when Sheriff Allman implemented a "zip-tie" program that the County of Mendocino Board of Supervisors adopted in 2008 establishing the "zip-tie" program.

> "We review de novo both the "district court's grant of summary judgment," *Bradley v. United States,* 817 F.2d 1400, 1402 (9th Cir. 1987), and its interpretation of the statute, *see United States v. Town of Colo. City,* 935 F.3d 804, 807 (9th Cir. 2019). Summary judgment here is appropriate if there is "no genuine dispute as to any material fact and the [government] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When we interpret a statute, our "first step . . . is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). If so, the "inquiry must cease," provided "the statutory scheme is coherent and consistent." *Id.* (quoting *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)). We determine "[t]he plainness or ambiguity of [the] statutory language . . . by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id. at 341*; *see also Util. Air Regul. Grp. v. EPA,* 573 U.S. 302, 320, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) (noting that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000))). Thus, in addition to looking at the statutory text, we analyze the statutory and regulatory framework as a

> whole and examine the meaning of the statutory provisions "with a view to their place" in that framework. *Util. Air Regul. Grp.,* 573 U.S. at 320."

United States v. Boyd, 991 F.3d 1077, 1080 (9th Cir. 2021).

The FAC alleges as follows:

By 2008 Sheriff Allman implemented a "zip-tie" program that became local "law" when the Mendocino County Board of Supervisors passed Ordinance 9.31 in 2008. The program changed over time until it was replaced by the permit program in May 2017. On occasion, it allowed for growers to purchase from the Sheriff's Office up to 99 zip-ties at $50/plant so as to become protected from seizure and prosecution by local law enforcement. (3-ER-184; FAC, ¶ 19)

There were reports that some growers purchased zip-ties directly from the Sheriff with cash prior to 2015. From 2015 to mid-2017 growers could purchase zip-ties from an assistant to Sheriff Allman, Sue Anzilotti. (3-ER-184; FAC, ¶ 20)

The County "zip-tie" Ordinance allowed for anyone, with or without a medical need, to purchase up to 99 zip-ties and cultivate up to 99 plants, and make a profit, in clear violation of State law, i.e., Section 11362.77 (6 plants per person) and Section 11362.765 (qualified persons may not profit from cultivating marijuana). How much of the zip-tie cash received at the Sheriff's Office was actually deposited into a public fund, as opposed to diversion elsewhere for private gain, is unknown and undocumented. Only rare non-cash payments were recorded into the Sheriff's Office computer system on receipt. (3-ER-184-185; FAC ¶¶ 21

and 22) Other County officials did not have access to the Sheriff's Office computer system or records of cash received.

The district court characterized the zip-tie program as "legitimate regulatory activity" that Plaintiffs had improperly alleged as bribery or extortion. The Order itself notes:

> The state court criminal complaint against Knight alleges that Knight and another individual committed the crime of unlawful cultivation of marijuana with environmental violation in violation of Cal. Health & Safety Code §11358(d)(3)(D) by cultivating six or more marijuana plants and unlawfully diverting or obstructing the natural flow of water. (Order, 5:10-14) (emphasis added)

At no point does the Order address the applicable state law legal limit of growing six (6) marijuana plants -- without diverting water illegally -- while finding Mendocino County's Ordinance "legal" despite its purportedly authorizing growth of ninety-nine (99) marijuana plants at $50 per plant. The Order's purported ratification of a 1650% increase in the number of marijuana plants "legally" grown in Mendocino County is never explained.

Similarly, the Order acknowledges the allegations of co-conspirator District Attorney Eyster's extorting bribes to reduce felony charges leading to extended incarceration -- to misdemeanor charges -- leading to probation. The Order quotes FAC ¶¶ 24-29, including Eyster's receipt of bribes from criminal defendants Stornetta and Anderson of $42,600 and $100,000, respectively, and Eyster's admissions that he ". . . personally calculates the restitution . . . in order to

eliminate corruption. . ." (1-ER-11-12; Order, 9:2-10:5) The Order never considers Eyster's admissions that he intentionally violates the statute he claims to implement, inflating "restitution" to his "personal calculations."

The Order's distortions of California law are perfectly quantifiable in the example of its conclusion that the state law limit of six (6) marijuana plants per person can be multiplied to accommodate ninety-nine (99) plants for the Mendocino County zip-ties program aka Allman's bribes and extortion. The Order's logic in pretending that 6 equals 99 yields a ratio of 1:16.5. The Order's equating 1 with 16.5 can be applied to its "finding" that Eyster's bribes and extortion are "restitution;" specifically, bribes of $42,600 and $100,000 -- characterized in the Order as legal "restitution" -- when divided by 16.5 yield dollar amounts of $2,582 and $6,061, respectively. These dollar amounts are at least arguably within the range of legal restitution amounts based on evidence of actual restitution in reported decisions.

We can convert the ratio to a percentage, but it defies application when we attempt to transfer this digitization to its analog in the Order's refusal to recognize Allman, Johnson and Tatum as part of the cover-up detailed in the FAC. Eyster's refusal to investigate these lies and the crimes committed and cover up in Mendocino County -- where Eyster is the chief law enforcement officer -- is most

plausibly understood as an essential part of the cover-up and constitutes misprision of felonies.

3. The Pay to Play Restitution Program

California Health and Safety Code Section 11470.1(a)(1) provides that *the expenses of seizing, eradicating, destroying or taking remedial action* with respect to any controlled substance or its precursor shall be recoverable from any person who manufactures or cultivates a controlled substance or its precursor. Section 11470.1(d) provides that all **expenses** recovered **shall be remitted to the law enforcement agency which incurred them.**

Section 11470.2(a)(2) provides, in part, that recovery can be made from any person who aids or abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance. "The trier of fact shall make an award of expenses, **if proven**, which shall be enforceable as any civil judgment." (emphasis added)

There are decisions regarding the expense of eradicating marijuana by law enforcement officers that provide some guidance in this area. *People v. Brach*, 95 Cal. App. 4th 571, 575-576 (2002) (cost of $1,195 for the eradication of 540 plants); *People v. Bright*, 2020 WL 7654191 (cost of $9,196 for the eradication of 495 plants). Most of the reported decisions regarding restitution under Section 11470.2 relate to the actual expenses incurred in relation to cleaning up meth labs.

See, for example, *People v. Martinez,* 36 Cal. 4th 384 (2005) and *People v. Wilen,* 165 Cal. App. 4th 270 (2008).

In *Martinez v. County of Mendocino*, 2017 WL 961744, plaintiff Martinez filed a petition for a writ of mandate challenging District Attorney Eyster's program in which criminal defendants charged with marijuana-related felonies are offered the opportunity to reduce their charges in exchange for a set payment to be determined by the amount of marijuana seized.

According to the petition Eyster required criminal defendants who have been arrested on felony charges of marijuana cultivation, transportation and possession for sale to pay $500 per pound of marijuana and $50 per marijuana plant seized to the investigating law enforcement agency. It was further alleged that Eyster would agree to forgo felony charges and instead charge a misdemeanor in exchange for the payment of restitution not related to the actual expenses incurred in seizing, eradicating and/or destroying marijuana. "Thus, the criminal defendants who can afford to do so can make large payments to avoid felony charges carrying potentially lengthy prison terms … in favor of reduced misdemeanor or wobbler charges with probation and little to no jail time."

It was further alleged that the program violates Section 11470.2 because the payment scheduled based on the amount of marijuana seized bears no relationship to the costs of marijuana seizure, eradication, and destruction and the money

recovered has not been used to cover such costs but to pay for other agency expenses. Martinez sued for a preliminary injunction to prevent enforcement of the program.

The appellate court affirmed the Mendocino Superior Court ruling denying the petition on the basis that Martinez lacked standing to seek relief in other defendants' cases, failed to establish a likelihood of success on the merits and failed to demonstrate the trial court abused its discretion. The court noted that the program generated about $5.2 million as of fall 2014 and "suspending a program that generates significant revenues for small local agencies could impose immediate and meaningful fiscal problems." Thus, the court did not squarely address the issue of whether the restitution program complied with Section 11470.2.

The FAC (3-ER-185-187; ¶¶ 24-28) details District Attorney ("D.A.") Eyster's bribery and extortion "pay to play" scheme, purportedly legalized by Health & Safety Code §11470.2, which limits "restitution" ". . . to actual enforcement costs constituting a small fraction of the sums extracted. . ." (FAC ¶ 25). FAC ¶¶ 26 and 28 detail bribes of $100,000 and $42,000, paid, respectively, by criminal defendants Matthew Ryan Anderson and Kyle Stornetta. D.A. Eyster has publicly admitted that he personally determined the amounts in violation of §11470.2 (necessarily violating 18 U.S.C. §1951(b)(2) and Cal. Penal Code §518).

FAC ¶ 27 notes: During a 2013 restitution hearing, Mendocino County Superior Court Judge Clay Brennan condemned the practice as "extortion of defendants. . ." (3-ER-186) *United States v. Ocasio,* 578 U.S. 282, 285 (2016).

The Order admits ". . . the Court takes Judicial notice of the fact that a Mendocino County Grand Jury investigated the program and recommended its continued use. . ." (1-ER-21; Order, 19:3-5) The Court also could have taken judicial notice that the District Attorney conducted the Grand Jury's investigation and, as noted in FAC ¶ 27, the Mendocino County taxpayers benefited from some $8 million collected during 2011-2014 by the Sheriff and District Attorney, which subsidized the County's law enforcement activities.

These undisputed facts are easily understood in the context that: (1) admitted extortionist Tatum was named "Officer of the Year" in 2016 by the Rohnert Park Police Department, largely due to his financial contributions to its law enforcement budget from his extortionate activities; and (2) the Grand Jury "investigation" approving the program was led by the District Attorney and comprised of Mendocino County taxpayers who directly benefited from lower taxes. The Kabuki theatre by which the alleged RICO conspirators' bribery and extortion scheme has been consecrated by the district court's Order makes a mockery of honest "government employees doing their jobs."

Prior to the implementation of Proposition 64 in 2017 the victims of bribery and extortion were treated as criminals. This case illustrates how the corrupt law enforcement cabal continued its campaign of extortion in Mendocino County after Proposition 64 was implemented. Only because persons could now lawfully cultivate, process and sell marijuana pursuant to state law did it become possible for victims of extortion to identify themselves and provide testimony and evidence of ongoing racketeering activities in Mendocino County without risking self-incrimination.

E. The District Court Erred in Concluding There was an Alternative Legitimate Explanation for the Flatten Traffic Stop

The FAC at ¶¶ 76 through 84 (3-ER-200-202) alleges that co-conspirators Allman, Johnson and Eyster made and caused to be made several false and fraudulent statements in furtherance of the RICO conspiracy which cannot be subsumed under the rubric “facially legitimate law enforcement activities” -- except within the parallel universe created in Mendocino County. The Order mischaracterizes and omits most of the FAC’s allegations in ¶¶ 76 through 84 in the following language:

> The FAC alleges that Sheriff Allman, Undersheriff Johnson, and District Attorney Eyster engaged in a ‘cover up’ of the Flatten traffic stop because Allman directed Tatum to issue a press release exonerating Mendocino County law enforcement, Eyster told Flatten that his office would not investigate, and Johnson stated ‘no crime was committed’ and that his office would not be investigating. These allegations are both conclusory and consistent with an ‘obvious

> alternative explanation for defendant's behavior' -- that Allman, Eyster and Johnson were unaware of Tatum and Huffaker's scheme and believed that the stop was legitimately conducted by Rohnert Park police officers. (emphasis added) (1-ER-23; Order, 21:10-17)

First, the emphasized statement that Allman, Eyster or Johnson could have believed the stop was legitimately conducted by Rohnert Park officers is indisputably false as a matter of fact and law because Rohnert Park is not located in or near Mendocino County,[4] a fact of which Allman, Eyster, Johnson and the district court were well aware and of which this court can take judicial notice. Cal. Penal Code §830.1 clearly defined the territorial jurisdiction of Rohnert Park officers -- and all other California city and county officers -- thus excluding the possibility that Rohnert Park officers could have been legitimately conducting law enforcement activities in Mendocino County. *People v. Landis*, 156 Cal.App.4th Supp. 12 (2007).

Second, the Order itself continues the "cover-up" by omitting the FAC's allegations that Undersheriff Johnson did not merely state that "no crime was committed" and "his office would not investigate." Instead, Johnson also repeatedly lied to the press about the Rohnert Park officers' illegal seizures in Mendocino County -- not only the Flatten stop December

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[4] The municipal and jurisdictional boundaries of police officers of Rohnert Park are approximately thirty (30) miles from the nearest portion of Mendocino County and there is no suggestion that Tatum, Huffaker or any other Rohnert Park officer was in hot pursuit of any offenders from Rohnert Park.

5, but also the B.L. stop on December 18, 2017. Johnson's lies about Tatum's and Huffaker's extortion scheme could not have appeared to be "facially legitimate law enforcement activities" because Johnson, Allman and Eyster are aware of the territorial limitations on officers' "legitimate law enforcement activities." Contrary to the Order's elliptical and misleading references to it, the FAC alleged:

> (1) Co-conspirator Randy Johnson continued to publish his false narrative in furtherance of the RICO conspiracy and cover up by stating to [the journalist who had published Flatten's allegations] that the Mendocino County Sheriff's Department <u>would no longer be looking into Flatten's incident because</u> '<u>our investigation showed</u> [<u>the stop</u>] <u>was done by a legitimate agency</u>.' (emphasis supplied (3-ER-201; FAC ¶ 80).

Neither Johnson nor any of the defendants or co-conspirators has claimed or proffered any evidence of any agreement permitting Rohnert Park Officers to perform any "law enforcement activities" in Mendocino County.

> (2) When [the same journalist] interviewed Co-conspirator Johnson after Tatum's fraudulent press release, Johnson falsely claimed that neither plaintiff Flatten nor B.L. had reported their highway robberies in Mendocino County (on December 5 and 18, 2017, respectively) to the Mendocino County Sheriff's Office. But both extortionate seizures had been reported. (3-ER-201; FAC ¶ 82).

> (3) Sheriff Allman's and Undersheriff Johnson's false and fraudulent statements were made in furtherance of the RICO conspiracy alleged herein, including agreements between co-conspirators Eyster, Allman and Johnson at the hub of the conspiracy and officers Tatum, Huffaker, Smith, White and DOES 1 through 50 as the spokes of the hub and spokes conspiracy . . . officers in the field were permitted to steal cash . . . and cannabis from those

growing and/or transporting cannabis in Mendocino County, while the Sheriff and the District Attorney would refuse any requests to investigate the perpetrators. (3-ER-201; FAC ¶ 83)

(4) Finally, the FAC alleges at ¶ 84:

> On and before February 19, 2018 [the journalist mentioned above] interviewed Johnson concerning Flatten's accusations . . . Johnson claimed Flatten was lying, Flatten had more marijuana than he claimed, they had video of the entire incident, and he was retiring -- so do not contact him about this incident again . . . Sheriff Allman's directions to Tatum that, 'in order to clear up the confusion,' Tatum issued a press release excluding Mendocino County law enforcement from any involvement in the December 2017 cannabis seizures during traffic stops in Mendocino County; and . . . Johnson's false and fraudulent statements . . . are subsumed under the rubric in Rule 801(d)(2) based on the holding in *Bourjaily v. United States*, 483 U.S. 171 (1987).[5]

As noted in the FAC's footnote to *Bourjaily*, the content of an out-of-court statement may be considered in determining the alleged conspiracy has been established by a preponderance of the evidence, that defendant joined the conspiracy, and that the statement was made during the course of and in furtherance of the conspiracy.

Instead of doing their duty by asking a few simple questions, the Mendocino County Undersheriff and Sheriff (1) falsely accused Flatten of lying, (2) falsely claimed to have videotape of the entire incident and (3) directed Tatum to issue a false and fraudulent press release. The District Attorney refused to investigate.

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[5]Johnson's lie that "they had video of the entire incident" has been exposed by the failure to produce any such video.

It's difficult to reconcile these undisputed facts with the Order's description of this conduct as ". . . government employees doing their jobs. . ."

F. The District Court Erred by Denying Leave to Amend

After the Plaintiffs filed their Opposition to Defendants Motions to Dismiss the First Amended Complaint on February 22, 2022 and before the oral argument on April 29, 2022, they obtained new information they sought to add by way of amendment to the FAC. This new information was provided to the district court during the April 29th hearing. (Transcript of April 29, 2022 Hearing; 2-ER-30-32)

> Furthermore, we would -- we have gathered some more evidence now of the warehouse where -- I should say a warehouse where quantities of the extorted cannabis have been stored, a trucking company that has been transporting cannabis around the United States, and Lieutenant Jason Cadillo of the Mendocino County Sheriff's Department, who lives on the premises where this warehouse is located in Ukiah. And so we'd be naming Lieutenant Cadillo and Gabriel Rensen, who operates the company that he is President of, the company called Penofin, that owns this warehouse, and the trucking company executive, whom we would name as Gilbert Durant. So –
>
> **THE COURT:** And what is it you would say about these folks?
>
> **MR. COHAN:** Well, they're involved in the storage and transportation of the extorted cannabis, Your Honor. Again, you can't expect us to produce someone who says, oh, yeah, I bought a ton of marijuana from one of these corrupt cops. I mean, not unless we can offer the person immunity and we would otherwise prosecute them. We have no such power, Your Honor, because we're just civil plaintiff lawyers here. So –

> **THE COURT:** So tell me what exactly these folks did that you would like to name?
>
> **MR. COHAN:** Well, first of all, Mr. Cadillo should say Lieutenant Jason Cadillo of the Mendocino County Sheriff's Department lives within a fenced area that contains the warehouse, and he lives there. And we've got photos of his official vehicle, Mendocino County Sheriff's Department vehicle right there, along with the most amazing security for this warehouse where supposedly legal products involving wood finishes are stored. But there are numerous security cameras, razor wire, and Lieutenant Caudillo living on the premises to provide security for what we believe are large quantities of the cannabis that's stored there and for –
>
> **THE COURT:** Why do you believe that? I mean, what evidence do you have of that?
>
> **MR. COHAN:** Well, the evidence is that we have a trucking company that is operating without a reasonable explanation for all the trucks they have, other than their trucking cannabis around the country. We have the storage facility whence it's stored before it's trucked to the destination or destinations for which it's destined. A lieutenant is living there, providing security with a bunch of security cameras, which are way over the top for any kind of legal quantities there. We have a witness who has told us that large black duffel bags are being removed from the warehouse.
>
> Again, it's all circumstantial evidence at this point, Your Honor. We can't get search warrants.

This request to amend the FAC was implicitly denied because it was not mentioned in the April 29, 2022 Order granting the Defendants' motions to dismiss without leave to amend. In their opposition memorandum the Plaintiffs cited the following authority: The Ninth Circuit has "repeatedly held that a district court

should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith,* 203 F.3d 1122, 1130 (9th Cir. 2000).

Here, the district court found the allegations of a RICO conspiracy were "not entitled to the presumption of truth" because the alleged extortion included conclusory allegations that the co-conspirators have "conducted financial transactions with the proceeds of the extortion." (Order, 17:24-28; 1-ER-19) The court further noted that the FAC assumes that Smith and White must have sold seized marijuana on the black market because defendants did not document when, where and by whom the marijuana was destroyed and there was no policy that required a chain of custody to be maintained from the seizure of the marijuana to its alleged destruction. (Order, 18:1-10; 1-ER-20) For clarity purposes, the Plaintiffs did not allege that the Defendants "must have sold seized marijuana." Rather, the Plaintiffs allege that it is reasonable to infer that some of the marijuana seized was sold on the black market.

This presumption that the lack of any checks and balances would not tempt the Defendants to sell the marijuana they seized is based on an assumption that all law enforcement officers are able to resist the temptation. Plaintiffs submit this is a rebuttable assumption. There are well known instances of such corruption too numerous to count. People who have the opportunity to unjustly enrich themselves

by breaking the law often do so – especially when there is a lack of checks and balances.

CONCLUSION

For the foregoing reasons, the order granting the motions to dismiss should be reversed and the matter should be remanded to district court for further proceedings.

Dated: September 20, 2022

SCOTT LAW FIRM

/s/ John Houston Scott
John Houston Scott
Attorney for Appellants

Dated: September 20, 2022

WILLIAM A. COHAN, P.C.

/s/ William A. Cohan
William A. Cohan
Attorney for Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants hereby request oral argument.

Respectfully submitted,

SCOTT LAW FIRM

Dated: September 20, 2022

By: /s/ John Houston Scott
John Houston Scott
Attorneys for
Plaintiffs-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Opening Brief of Plaintiffs-Appellants and attached current Service List with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 20, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Sherry Alhawwash
Sherry Alhawwash

SERVICE LIST

Attorneys for Plaintiffs-Appellants, EZEKIAL FLATTEN, WILLIAM KNIGHT, CHRIS GURR and ANN MARIE BORGES:

John Houston Scott
SCOTT LAW FIRM
1388 Sutter Street, Suite 715
San Francisco, CA 94109
Telephone: (415) 561-9601
Facsimile: (415) 561-9609
Emails: john@scottlawfirm.net

William A. Cohan
WILLIAM A. COHAN, P.C.
2888 Loker Avenue E, Suite 202
Carlsbad, CA 92010
Telephone: (442) 325-1111
Facsimile: (442) 325-1126
E-mail: bill@williamacohan.com

Attorneys for Defendant-Appellee, BRUCE SMITH:

Christian M. Curtis
County Counsel County of Mendocino
501 Low Gap Road
Ukiah, CA 95482
Telephone: (707) 234-6885
Facsimile: (707) 463-4592
E-mail: curtisc@mendocinocounty.org

Michael G. Colantuono
Pamela K. Graham
Abigail A. Mendez
Merete Rietveld
COLANTUONO, HIGHSMITH & WHATLEY, PC
420 Sierra College Drive, Suite 140
Grass Valley, CA 95945
Telephone: (530) 432-7357
Facsimile: (530) 432-7356

E-mail: PGraham@chwlaw.us; AMendez@chwlaw.us; MColantuono@chwlaw.us; MRietveld@chwlaw.us

John Abachi
COLANTUONO, HIGHSMITH & WHATLEY, PC
790 E. Colorado Blvd., Suite 850
Pasadena, CA 91101-2109
Telephone: (213) 542-5700
Facsimile: (213) 542-5710
E-mail: jabaci@chwlaw.us

Attorney for Defendant-Appellee, STEVE WHITE:

Kymberly E. Speer, Deputy Attorney General
ATTORNEY GENERAL'S OFFICE
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-0985
Facsimile: (510) 622-2270
E-mail: Kymberly.Speer@doj.ca.gov