UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

JAMES MICHAEL BENNO; JESSICA ELAINE BENNO; JACOB DANIEL BENNO; LOGAN WAYNE BENNO; MARCIA JONES; DENNIS PERON; BRIAN MONTERROZO; RICHARD YOUNG; CHARLES B. McINTOSH; JESSICA CONCHA SOLANO; NICHOLAS NEAL BOLTON; WALTER CARNEY; JERILYN CARNEY; and JOSH HANCOCK,

Plaintiffs, v. SHASTA COUNTY, CALIFORNIA; DEPARTMENT; THOMAS BOSENKO, in his capacity as Sheriff of Shasta County; DALE FLETCHER; TOM BARNER; SHASTA COUNTY CODE ENFORCEMENT; SHASTA COUNTY BOARD OF SUPERVISORS; LESTER BAUGH; and DOES 1 to 10,

Defendant.

No. 2:16-cv-01110-TLN-DMC

ORDER

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This matter is before the Court on Defendants County of Shasta , Shasta County Board of Supervisors , Shasta County Code Enforcement Office (Code Enforcement , and Shasta (collectively, Defendants . 1

(ECF No. 22.) Plaintiffs James Benno, Jessica Benno, Jacob Benno, Logan Benno, Marcia Jones, Dennis Peron, Brian Monterrozo, Richard Young, Charles McIntosh, Jessica Solano Solano , Nicholas Bolton Bolton , Walter Carney, Jerilyn Carney, 2

and Josh Hancock . (ECF No. 23.) Defendants replied. (ECF No. 24.) For the reasons discussed herein, the Court GRANTS Motion to Dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND This action is proceeding on Plai asserts Defendants violated Plaintiffs constitutional rights when they enacted a county ordinance banning the outdoor cultivation of marijuana and enforced the ordinance by conducting raids on Plaintiffs property. (See ECF Nos. 1, 9.)

James Benno, Solano, Bolton, Walter Carney, and Jerilyn Carney began cultivating medical marijuana on their respective real properties in Shasta County at various times between 1997 and 2009. (Id. at 4 5.) Plaintiffs do not indicate whether they cultivated the marijuana indoors or outdoors on their properties but contend they cultivated medical marijuana ealth & Safety Code §§ 11362.5 et seq.) and Cal ealth & Safety Code §§ 11362.7 et seq.). (Id. at 4 5, 7.) The Complaint additionally indicates James Benno cultivated the marijuana for himself and a group of patients. (Id. at 4.)

1 Plaintiffs additionally bring this action against Defendants Thomas Bosenko, Dale Fletcher, Tom Barner, and Lester Baugh. (See ECF No. 1 at 1, 3.) However, these individual Defendants are not represented in the instant motion to dismiss because they have not been served with process and have not appeared in this action. 2 The Complaint occasionally refers to a Jerylyn Jerilyn Carney, but it appears that these references all apply to the same Plaintiff.

On December 13, 2011, the County enacted an ordinance which permitted the indoor and outdoor cultivation of marijuana, subject to certain restrictions O . (ECF No. 9 at 4 14.) On January 28, 2014, the County enacted a subsequent ordinance banning the outdoor cultivation of marijuana O . 3

(Id. at 16 28.) Meanwhile, Plaintiffs identify four discrete raids which they contend were performed without valid warrants:

1) In or around September 2013, unidentified employees of the Dept.

and Code Enforcement purportedly raided property owned by Solano and Bolton. At that time, 68 medical marijuana plants were removed. (ECF No. 1 at 5.) 2) In or around September 2013, unidentified employees of the Dept.

and Code Enforcement purportedly raided property owned by Walter and Jerilyn Carney. During this raid, 96 medical marijuana plants, as well as unspecified miscellaneous personal property, were destroyed and Walter and Jerilyn Carney were arrested. Walter and Jerilyn Carney were both held in jail for three days after their arrest. (Id.) 3) On May 20, 2014, unidentified employees of the Dept. and Code

Enforcement purportedly raided property owned by James Benno. (Id.) During the raid, 99 medical marijuana plants were destroyed, dirt was removed, and unspecified personal property was damaged and destroyed. (Id.) 3 The Court may take judicial notice of facts that are capable of accurate determination by sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b)(2). Accordingly, the Court judicially notices Shasta County Ordinance No. SCC 2011-05 (2011) and Shasta County Ordinance No. SCC 2014-02 . (ECF No. 9 at 4 14, 16 28); Chew v. City & Cnty. of San Francisco, No. 13-CV-05286-MEJ, 2016 WL 631924, at *1 (N.D. Cal. Feb. 17, 2016), , 714 F. App x 687 (9th Cir. 2017) (taking judicial notice of official municipal enactments, ordinances, and statutes); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006).

Further, to the extent Plaintiffs allege the 2014 Ordinance was enacted in November 2014 (ECF No. 1 at 5) and not the January 28, 2014 date appearing on the face of the ordinance document (ECF No. 9 at . See Daniels-Hall , 629 F.3d 992, 998 (9th Cir. 2010) (the court need not accept as true allegations that contradict matters properly subject to judicial notice).

At that time, James Benno, Logan Benno, and Jacob Benno were arrested. (Id.) James and Logan Benno were held in jail for approximately 60 days following their arrest; Jacob Benno was held in jail for approximately 45 days. (Id.) 4) On or around May 1, 2016, unidentified Dept. deputies entered

Id. at 6.) The Complaint does not indicate that any items were confiscated or that any other actions were taken. During the aforementioned raids, Plaintiffs allege officers in military-style uniforms physically attacked and pointed their weapons at Plaintiffs. (Id. at 15.) Plaintiffs further allege they were danger to [the] officers, attempt[] to escape or evade [the] officers. (Id.) Rather,

Plaintiffs allege they (Id.) As a result of these encounters, Plaintiffs allege they sustained physical well as mental injuries including Post Traumatic Stress Disorder, anxiety and other mental

disorders. (Id.) The Complaint does not identify any of the individual officers who participated in the aforementioned raids, attribute specific conduct to any individual officer, or specify which Plaintiffs were injured during the raids or what particular injuries they each sustained. (See id.) Plaintiffs additionally contend that, if warrants were obtained [for any of the raids], they were deficient. 4

(Id. at 13.) On May 20, 2016, Plaintiffs initiated this action, asserting five causes of action pursuant to 42 U.S.C. § 1983 for: (1) warrantless search and seizure in violation of the Fourth Amendment, against the County Dept.; (2) improper taking in violation of the Fifth and

4 The Complaint does not assert any factual allegations relating to the six remaining Plaintiffs: Jessica Benno, Marcia Jones, Dennis Peron, Brian Monterrozo, Richard Young, or Charles McIntosh. (See generally ECF No. 1.) to grow marijuana under state law and that Shasta County terminated that right without providing an amortization period (ECF No. 1 at 6), however, may support an inference that these particular Plaintiffs had an interest in the properties/alleged marijuana Second, Fourth, and Fifth Causes of Action.

Fourteenth Amendments, against the County Dept.; (3) excessive force in violation of the Fourth Amendment, against the County Dept.; (4) inverse condemnation in violation of Article I, § 19(a) of the California Constitution, against all substantive due process rights under the Fourteenth Amendment, against all Defendants. 5

(Id. at 12 18.) Plaintiffs seek monetary damages, fees and costs, and injunctive relief. (Id. at 18 20.)

On November 28, 2017, Defendants filed the instant Motion to Dismiss pursuant to filed an

Opposition, and Defendants replied. (ECF Nos. 23 24.)

II. STANDARD OF LAW A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Rule 8(a)

See Ashcroft v. Iqbal (Iqbal), 556 U.S. 662, 678 79 (2009). Under notice the defendant fair notice of what the claim . . . Bell Atlantic v. Twombly (Twombly), 550 U.S. 544, 555 (2007) discovery rules and summary judgment motions to define disputed facts and issues and to dispose Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). A court is bound to give the plaintiff the benefit of every -p Retail (Retail Clerks), 373 U.S. 746, 753 n.6 (1963). A plaintiff

showing entitlement to Twombly 5

Fifth Cause of Action as their Sixth Cause of Action Court will hereina Fifth Cause of Action

the plaintiff pleads factual content that allows the court to draw the reasonable inference that the Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556).

United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir.

1986). While Rule 8(a) does not requir unadorned, the defendant-unlawfully-harmed- Iqbal, 556 U.S. at 678. A

elements o Twombly, 550 U.S. at 555; see also Iqbal, 556 U.S. at 678

facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

Ultimately, a c Iqbal, 556 U.S. at 697 (quoting Twombly her] claims . . . Id. at 680. While the plausibility requirement is not akin to a probability requirement, it demands more than Id. at 678. This plausibility inquiry is -specific task that requires the reviewing court to draw on its judicial experience and Id. at 679.

urt should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (quoting Doe v. United States, 58 F.3d 484, 497 (9th Cir. 1995)); see also Gardner v. Marino, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in denying leave to amend when amendment would be

futile). Although a district court should

freely give

Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 520 (9th Cir. 2013) (quoting Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir. 2004)).

III. ANALYSIS Defendants move to dismiss the Complaint in its entirety. The Court will address

A. Shasta County Entities and Second and Fourth Causes of Action s with respect to the Shasta Second and Fourth Causes of Action (improper takings and inverse condemnation, respectively).

Defendants argue that the Dept. are not proper parties because they are not separate entities from the County. (ECF No. 22 at 16.) Defendants s not ripe where Plaintiffs have not exhausted their administrative remedies pursuant to state law inverse condemnation proceedings. (Id. at 23 24.) Moreover, Defendants argue the takings claim is inapplicable where, as here, property is seized for a cri Id. at 24.) Defendants additionally seek

limitations and because that was infringed upon. (Id. at 18 21.)

In their Opposition, Plaintiffs concede that the Dept. are not separate entities from the County and should therefore be dismissed from this

action. (ECF No. 23 at 8.) Plaintiffs further state the Complaint should be amended to remove their causes of action for takings (Second Cause of Action) and inverse condemnation (Fourth Cause of Action), thus conceding such claims should be dismissed. (Id.)

Accord Motion to Dismiss as to Plaintiffs Second and Fourth Causes of action is GRANTED without leave to amend. T Dept. are hereby DISMISSED from this action.

B. Section 1983 Claims for Violations of the Fourth Amendment (First and

Third Causes of Action) Plaintiffs assert Fourth Amendment violations (unlawful searches/seizures and excessive force, respectively) pursuant to 42 U.S.C. § 1983 . (ECF No. 1 at 12 15.) Defendants move to dismiss both claims because Plaintiffs fail to

establish Monell liability against the County where they do not allege any facts relating to customs, policies, or practices promulgated by the County. (ECF No. 22 at 21 23.) The Court agrees with Defendants.

Section 1983 allows persons to sue individuals or municipalities acting under the color of state law

for violations of rights guaranteed under the Constitution or federal law. See 42 U.S.C. § 1983; Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691 92 (1978). In a claim against an individual defendant in his personal capacity, a plaintiff must allege facts showing deprivation of his federally-secured rights resulted from conduct directly attributable to each specific defendant. See Baker v. McCollan, 443 U.S. 137, 142 (1979); Iqbal, 556 U.S. at 676 (plaintiff must show - individual actions, ha[d] violated the Constituti ; see also Bd. of the Cty. Comm rs v. Brown (Brown), 520 U.S. 397, 403 (1997) (a municipality may not be held vicariously liable for the acts of its employees). In a (i.e., Monell) claim against the municipality, by contrast, the municipality itself causes the constitutional violation through a policy or custom. Monell, 436 U.S. at 690 n.55, 691. In this narrow instance, the governmental entity or rivation, and the entity remains liable for the actions of its agents. Kentucky v. Graham, 473 U.S. 159, 165 67 (1985). If a complaint does not explicitly mention the capacity in which officials are sued but asserts specific factual allegations against t See Romano v. Bible, 169 F.3d 1182, 1186 (9th Cir. 1999).

To bring a Monell claim against the municipality, a p Whitaker v. Garcetti, 486 F.3d 572, 581 (9th Cir. 2007)

(citing Monell, 436 U.S. at 694); Kentucky, 473 U.S. at 166; see also Brown, 520 U.S. at 403, 405 Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.). Further, absent identification of a formal governmental policy, a plaintiff must

the loc Trevino v. Gates, 99 F.3d 911, 918 (9th

Cir. 1996) (citing Monell, 436 U.S. at 691) (internal quotations omitted).

Here, a plain reading of the Complaint reveals that Plaintiffs are asserting a Monell claim. Romano, 169 F.3d at 1186. Simply put, the only factual allegations asserted in the Complaint describe individual raid incidents during which unidentified employees of the Dept. and/or Code Enforcement purportedly seized and/or threatened Plaintiffs with weapons, and caused physical and emotional injuries to certain Plaintiffs. (See ECF No. 1 at 5 6, 13.) Because a municipality cannot be held vicariously liable solely for the actions of its employees in a § 1983 claim, the County must fail. 6

See Monell, 436 U.S. at 694. Plaintiffs arguments in Opposition are unavailing. First, Plaintiffs argue a singular es their Monell claim:

Plaintiffs are informed and believe and based upon such information and belief allege that all of the actions alleged in this Complaint were taken pursuant to customs, policies, and practiced [sic] have been, are presently, and will be acting under the color and authority of the laws of the United States and the state of California.

Twombly. See Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011). Without more such as allegations 6 The Court declines at this time to address the merits of Plaintiffs might be applied against individual defendant officers sued in their personal capacity, as the instant Motion to Dismiss was brought by the County extent that they are asserted against the County.

discussing or identifying an actual custom, policy, or practice of the County, or asserting the purported constitutional deprivation was the result of such policies insufficient to state a Monell claim. See id. at 900 01.

Second, Plaintiffs appear to argue it can be inferred that the County employees acted pursuant to customs, policies, and practices based on the four raids identified in the Complaint. (ECF No. 23 at 8.) The Court disagrees. The Ninth Circuit has held iability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy Trevino, 99 F.3d at 918; see also Meehan v. Los Angeles County, 856 F.2d 102 (9th Cir. 1988) (two incidents not sufficient to establish custom). Here, the four demonstrate neither frequency nor consistency with purported behavior sufficient to establish any longstanding custom, practice, or policy. To the contrary, during two of the raids, officers allegedly destroyed marijuana plants and property and arrested certain Plaintiffs; during a different raid, officers only removed marijuana plants and made no arrests; and during the fourth raid, officers apparently did not remove or destroy property or arrest any individuals. (See ECF No. 1 at 5.)

Finally, Plaintiffs argue they do not yet have access to internal documents, emails, notes and other evidence proving the County ECF No. 23 at 8.) Through this purported justification for their pleading deficiencies, Plaintiffs implicitly concede any Monell claim asserted in the Complaint is deficient. Moreover, to survive a Rule 12(b)(6) motion to dismiss, the Complaint does not need evidence or detailed factual allegations of a custom, policy or practice, but it must allege enough facts to raise a reasonable expectation that discovery will reveal evidence of one. See Asahi Glass Co. v. Pentech Pharmaceuticals, Inc., 289 F. Supp. 2d 986, 995 (N.D. [S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and Plaintiffs do not allege any facts about a custom, policy, or practice. Therefore, they have their] claims . . . across the line from conceivable to plausible. Iqbal, 556 U.S. at 680.

Accordingly, Defendants First and Third Causes of Action is GRANTED. Nevertheless, the Court finds Plaintiffs may cure the identified deficiencies through amendment. Lopez, 203 F.3d at 1130. Therefore, the dismissal is with leave to amend.

C. Section 1983 Claim for Violation of Substantive Due Process Rights Under

the Fourteenth Amendment (Fifth Cause of Action) Under the Fourteenth Amendment, n]o state shall . . . deprive any person of life, liberty, or property, without due process of laws. U.S. Const.

amend. XIV. For purposes of substantive due process interest protected by the due process clause. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

A legitimate interest protected by the Fourteenth Amendment is one that is contractually or statutorily granted. Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005). With regard to substantive due process challenges to land use ordinances, a plaintiff must establish the ordinance is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, Teresi Invs. III v. City of Mt. View (Teresi), 609 F. App x 928, 930 (9th Cir. 2015) (quoting Euclid v. Ambler Co., 272 U.S. 365, 395 (1926)). Furthermore, if it is at least fairly debatable that the [ordinance] was rationally related to legitimate government interests Id. (citing , 995 F.2d 161, 165 (9th Cir. 1993).

Plaintiffs assert a § 1983 claim against Defendants for violations of their substantive due process rights under the Fourteenth Amendment. (ECF No. 1 at 16 18.) Plaintiffs further contend the 2014 Ordinance is invalid and unenforceable because it is not sufficiently tailored to address a compelling government interest. Id. at 17 18.) Defendants move to dismiss Plaintiffs due process claim on the basis that Plaintiffs have not identified any fundamental right or interest that was violated. Specifically, Defendants argue there is no constitutionally-protected property interest in growing marijuana, under either state or federal law. (ECF No. 22 at 17 20). In their Opposition,

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fundamental vested rights and due process claims have nothing to do with state marijuana laws. (ECF No. 23 at 4.) The Court finds Defendants have the better argument.

As an initial matter, the Court notes Plaintiffs fail to articulate any clear characterization see ECF No. 1 at 17) to which they refer. Instead, the Complaint contains scattershot references to due process under the Fifth Amendment, Fourteenth Amendment, and California Constitution, as well as procedural due process, substantive due process (see id. at 6 7, 9 10, 16, 18), all used interchangeably while devoid of context or factual predicate. For example, at times, Plaintiffs appear to of medical marijuana from the provisions of the 2011 Ordinance. (See id. at 5 6.) From these allegations, it appears Plaintiffs contend Defendants violated their due process rights by enacting an ordinance that deprived Plaintiffs of vested land use rights created under the 2011 Ordinance . 7

(Id. at 6.) Yet Plaintiffs also allege they began cultivating marijuana on their properties prior to the 2011 Ordinance in compliance with the CUA and MMPA, from which it may be inferred Plaintiffs are claiming they obtained certain vested marijuana cultivation rights pursuant to those California Health and Safety Code sections. (See id. at 4 5.) In addition, the Complaint includes much discussion of the medical and health benefits of medical marijuana for patients, such that Plaintiffs appear to assert that the right of patients to access medical marijuana though distinct from cultivating it is a fundamental right. (See id. at 7 9, 16 17.) On this basis alone, the Court finds Plaintiffs have ///

7 in Opposition generate further confusion. In particular, Plaintiffs Goat Hill Tavern v. City of Costa Mesa, 6 Cal. App. 4th 1519, 1526 (1992). (ECF No. 23 at 4 5.) This appears to contradict any contention that the 2014 Ordinance divested Plaintiffs of their land use rights. Moreover, Plaintiffs argue their claim is more akin to that in Collective Health Coop. v. City of Santa Barbara, 911 F. Supp. 2d 884 (2002). (Id.) But Santa Barbara See 911 F. Supp. 2d at 892 93 (discussion of plainti enactment of ordinance restricting use).

failed to Twombly, 550 U.S. 555.

Furthermore, Defendants correctly note that Plaintiffs have failed to identify any fundamental right that was violated. First, there is no fundamental right to collectively cultivate marijuana, and Plaintiffs have not identified any legal authority in support of such a contention. Indeed, there is no property right in medical marijuana that is recognized by the Fourteenth Amendment. Little v. Gore, 148 F. Supp. 3d 936, istrict courts have found there is no protected property interest [in medical (citations omitted); The Kind and Compassionate v. City of Long Beach, 2 Cal. App. 5th 116, 120 (2016) prohib ; see also Kirby v. Cty. of

Fresno, 242 Cal. App. 4th 940, 964 [state] constitutional right to cultivate . marijuana clearly arbitrary and unreasonable, having no substantial relation to Teresi, 609 F. App x at 930.

Second, to the extent Plaintiffs assert a right to outdoor cultivation of medical marijuana that vested under the 2011 Ordinance, Plaintiffs also fail to allege sufficient facts to state a claim. T Bowers v. Whitman, 671 F.3d 905, 916 (9th Cir. 2012) (quoting Lakeview Dev. Corp. v. City of S. Lake Tahoe not constitute a protected property interest, unless the interest has vested in equity based on

Id.; see also v. City of Santa Barbara, 911 F. Supp. 2d 884 (2002) (o operate its dispensary was it had obtained a land use permit to build the dispensary and had expended significant resources in reliance on the permit enactment of an ordinance that . But Plaintiffs have not alleged any facts showing a right that has vested. ///

Finally, Plaintiffs fail to establish any vested right to cultivate medical marijuana pursuant to the CUA or MMP. Indeed, California courts have rejected arguments that the CUA or MMP grants a statutory right to use and/or collectively cultivate medical marijuana. See Safe Life Caregivers v. City of L.A., 243 Cal. App. 4th 1029, 1048 (2016); Kirby, 242 Cal. App. 4th at 964

see also Kind and Compassionate, 2 Cal. App. 5th at 120 21 (citing City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 56 Cal. 4th 729, 757 (2013) (, and a public .

For these reasons is GRANTED. However, it is possible Plaintiffs may cure the identified deficiencies through amendment, therefore the dismissal is with leave to amend. Lopez, 203 F.3d at 1130.

IV. CONCLUSION Based on the foregoing, the Court hereby GRANTS Defendants Motion to Dismiss (ECF No. 22) as follows:

as to Second and Fourth Causes of Action without leave to amend;

2. Defendants Shasta County Board of Supervisors, Shasta County Code Enforcement Department are hereby DISMISSED from this action; and

3. is GRANTED as to First, Third, and Fifth (referred to in the Complaint as Pla of) Causes of Action with leave to amend.

Plaintiffs may file an amended complaint not later than 30 days from the date of electronic filing of this Order. Defendants responsive pleading is due 21 days after Plaintiffs file an amended complaint. /// ///

IT IS SO ORDERED. DATED: November 2, 2020