Peter E. Martin
A Law Corporation
State Bar Number 121672
917 Third Street
Eureka, California 95501
Tel: (707) 268-0445
Fax: (707) 667-0318
Email: peter@petermartinlaw.com

Jeffrey Schwartz
State Bar Number 80643
791 Eighth Street, Suite H
Arcata, California 95521
Tel: (707) 822-2707
Fax: (707) 633-1900

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF HUMBOLDT

Barbara Sage, as an individual; Barbara Sage, as successor-in-interest to Charles Sage, deceased,

Plaintiffs,

vs.

City of Arcata, Brian Hoffman, Does 1 through 50,

Defendants.

CASE NO. DR120195

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Date: January 29, 2014
Time: 1:45 p.m.
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1. BRIAN HOFFMAN'S KNOWING OR RECKLESS OMISSION OF MATERIAL FACTS IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FOR THE SAGE RESIDENCE RENDERS THE WARRANT FATALLY DEFECTIVE.

For their claims of judicial deception and unlawful search to survive summary judgment, the Sages must show Officer Hoffman's deliberate falsehood or reckless disregard of the truth and establish that but for the officer's conduct, the search would not have occurred. *Chism v. Washington State* (9th Cir 2011) 661 F.3d 380, 386. Material omissions are treated the same way as false statements. *People v. Luttenberger* (1990) 50 Cal. 3d 1, 15, fn. 4. Officer Hoffman claimed he could smell marijuana coming from the Sage residence when he was there on May 11, 2011. However, his more experienced fellow officer on the scene, Kevin Stonebarger, believed it was impossible to tell where the smell of marijuana originated due to the position of the houses in the area and the wind direction. Officer Stonebarger shared his opinion with Officer Hoffman. Officer Stonebarger's opinion was omitted from the affidavit, making Hoffman's claim about the origin of the smell false or misleading. Hoffman's statement also conflicts with the statement of Barbara Sage, who states that no marijuana had been at the residence since May 5, 2011, six days before Hoffman did the first "drive-by" of the residence. Thus Hoffman could not have smelled a strong odor of marijuana coming from the Sage residence on May 11, 2011.

In *Robey v. Superior Court* (2013) 56 Cal.4th 1218, the court questioned the reliability of "smell" evidence:

> Like the smell of burned marijuana, the smell of unburned marijuana may be due to a transferred or residual odor. In People v. Gale (1973) 9 Cal.3d 788 (Gale), the "defendant's clothing smelled strongly of marijuana" (id. at p. 792), and "both officers testified they

> detected a strong odor of fresh marijuana apparently emanating from defendant's person." (Id. at p. 793, fn.4.) But "[a] search of defendant's person disclosed no marijuana or other contraband." (Id. at p. 792; see United States v. Quintana (M.D.Fla.2009) 594 F.Supp.2d 1291, 1295 [duffel bag "smelled strongly of raw marijuana" but police "found no marijuana inside the bag"]; State v. Davis (La.Ct.App.1991) 580 So.2d 1046, 1048 [police "detected a strong odor of raw marijuana during the vehicle search" but "found no marijuana"].) As these examples show, it is not difficult to conjure scenarios in which the smell of marijuana emanating from an otherwise nondescript package does not reveal its contents with a level of clarity akin to plain view.

The information in the affidavit relating to electrical usage omits significant material information, including, (i) the average household usage in Arcata; (ii) the size of the Sage residence; (iii) the fact that a secondary living unit trailer-residence was occupied upon the property; and (iv) the heat source in the Sage residence. Without this information, the magistrate had no frame of reference to determine whether the usage was suggestive of a grow. As a city employee, this information was readily available to Officer Hoffman from city records. The PG&E information in the affidavit also showed a 47% decrease in usage of electricity in the most recent data, which suggests if there was a grow prior, it had ceased. Hoffman's affidavit failed to address or explain this decrease.

Hoffman's affidavit omitted the fact that neither of the Sages had any criminal record, a significant exculpatory fact.

The affidavit did not demonstrate that Hoffman understood, appreciated or followed the Compassionate Use Act (Prop. 215, codified at Health and Safety Code section 11362.5, hereafter "CUA") or the Medical Marijuana Program Act (SB 420, codified at H&S 11362.7 et seq., hereafter "MMPA.") The affidavit omitted the fact that 10% of the marijuana grows in Arcata are legal under the CUA and MMPA. Hoffman's affidavit

failed to disclose any effort on his part to determine whether the Sages were legally cultivating marijuana, and there was no showing that the Sages had failed to comply with the CUA or the MMPA. Upon entry, it was discovered that the Sages had been lawfully growing at one time, but the grow was fallow at the time of the entry.

The informant's tip to the police here is not enough to save this warrant. The tip was that a state park employee informed a DTF agent, who later informed Hoffman, that the informant "commonly smells growing marijuana coming from the residence of 1992 Zehndner Ave. during his morning runs." The informant's observations suffer from the same problem that Hoffman's observations did: in a close residential neighborhood like the Arcata Bottoms, you cannot tell where the smell originates. The DTF agent is not named; neither is the informant. The double hearsay makes the information inherently less reliable. Neither the dates the informant made his observations, nor the date they were conveyed to the DTF agent, nor the date the DTF agent spoke with Hoffman are known. An allegation of probable cause set forth in a search warrant affidavit must show that probable cause existed at the time the warrant was issued. See, *Sgro v. United States*, 287 U.S. 206, 211 (1932): "[I]t is manifest that the proof [contained in a search warrant affidavit] must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *See also* 3 Wright, *Federal Practice & Procedure*, § 662, p. 23. ("Probable cause must exist at the time it is sought to make the search. It is not enough that at some time in the past there existed circumstances that would have justified the search in the absence of reason to believe that those circumstances still exist.").

Hoffman failed to include his statement of expertise in the affidavit. This is the nail in the coffin for this affidavit. The affiant's expertise must be given to the magistrate. The opinion of the affiant, when supported by his record of training and experience, will be considered by the issuing magistrate. *People v. Tuadles* (1992) 7 Cal.App.4th 1777. The affiant must set forth his training and experience in the affidavit for his opinion to be considered by the magistrate. See, *People v. Johnson* (1971) 21 Cal.App.3d 235, 243. The City argues that his opinions can be considered because Hoffman prefaced the opinions with a statement that they were based upon his training and experience. Without knowing what that training and experience was, however, the magistrate could not, as a matter of law, rely upon Hoffman's opinions.

Hoffman's omissions amount to reckless disregard of the truth. *Wilson v. Russo* (3rd Cir 2000) 212 F.2d 781 ["omissions are made with reckless disregard if an officer withholds a fact in his ken that any reasonable person would have known was the kind of thing the judge would wish to know"]; *Rivera v. United States* (2nd Cir 1991) 928 F.2d 592 ["recklessness may be inferred where the omitted information was clearly critical to the probable cause determination"]; *United States v. Jacobs* (8th Cir 1993) 986 F.2d 1231 ["because of the highly relevant nature of the omitted information, we hold the omission occurred at least with reckless disregard of its effect upon the affidavit," as "any reasonable person would have known that this was the kind of thing the judge would wish to know"]. Hoffman's omission of fellow-officer Stonebarger's opinion from the affidavit that the smell of marijuana could not be traced with any degree of confidence to the Sage residence is an omission of information highly critical to the probable cause

determination, and under the above-cited authority, permits the trier of fact to infer that Hoffman recklessly disregarded the truth. Likewise, Hoffman's omission of the Sages' clean rap sheets, information the court would surely want, permits a similar inference of Hoffman's "reckless disregard." Hoffman's omission of his statement of expertise, when viewed in the light of his other omissions, permits a similar inference. Finally, Hoffman's omission from his affidavit of the entire issue of the legality of cultivation of cannabis under the CUA and the MMPA not only was in reckless disregard of the truth that a significant percentage of grows in Arcata are legal, but was in reckless disregard of the rights of medical cannabis patients to be secure in their homes, in violation of the Fourth Amendment.

2. BRIAN HOFFMAN IS NOT ENTITLED TO QUALIFIED IMMUNITY.

An officer is not entitled to qualified immunity on a claim of judicial deception:

> Our analysis of this prong is brief because we have already held that governmental employees are not entitled to qualified immunity on judicial deception claims. In *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir.1991) (overruled on other grounds by *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir.2002)), we explained that
>
> if an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, ... he cannot be said to have acted in a reasonable manner, and the shield of qualified immunity is lost.
>
> *Id.* at 1387 (quoting *Olson v. Tyler*, 771 F.2d 277, 281(7th Cir.1985)) (internal quotation marks omitted). We have consistently applied the rule that summary judgment on the ground of qualified immunity is not appropriate once a plaintiff has made out a judicial deception claim.

Chism v. Washington State (9th Cir 2011) 661 F.3d 380, 393. Defendants make passing references to qualified immunity in their Opening Brief, but have made no legal argument nor cited any authority showing that Brian Hoffman should be granted qualified immunity on summary judgment. For the reasons set forth in the following section of this

Memorandum, defendants have waived any grant of qualified immunity on summary judgment by not sufficiently raising it in their Opening Brief.

3. DEFENDANTS HAVE WAIVED SUMMARY ADJUDICATION ON PLAINTIFF'S SECOND AND SIXTH CAUSES OF ACTION BY FAILING TO MAKE A LEGAL ARGUMENT OR TO CITE AUTHORITY IN THEIR OPENING BRIEF.

Plaintiff's Second Cause of Action is for Judicial Deception, and her Sixth Cause of Action is for Knock-Notice Violation. Defendants' Opening Brief mentions judicial deception in passing but fails to make any legal argument or to cite any authority for summary adjudication on this Second Cause of Action. As to the Sixth Cause of Action, no legal argument or citation of authority is presented on the knock-notice issue in defendants' Opening Brief. Defendants may not raise arguments on these causes of action for the first time in their reply brief:

> It is a mistake to leave key arguments for the reply brief on the theory it will give you the "last word" with the court. The court may *refuse to consider arguments first raised in reply papers*, or it may grant the other side time for further briefing. [See *Balboa Ins. Co. v. Aguirre* (1983) 149 CA3d 1002, 1010, 197 CR 250, 254—"The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before"; compare *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 CA4th 1292, 1307–1308, 72 CR3d 259, 272—court has *discretion* to accept new evidence in reply papers as long as opposing party given opportunity to respond; *see also* ¶ *7:122.9*]

Weil and Brown, Civil Procedure Before Trial, Vol. 2, Ch. 9(I)-C, Paragraph 9:106.1 (Rutter Group, 2014).

4. THE CITY OF ARCATA IS LIABLE TO PLAINTIFF BASED UPON THE ACTIONS OF ITS POLICY-MAKING CHIEF OF POLICE, THOMAS CHAPMAN, ITS FAILURE TO TRAIN ITS POLICE OFFICERS, AND ITS DELIBERATE INDIFFERENCE TO THE

CONSTITUTIONAL VIOLATIONS THAT PROXIMATELY FOLLOWED CHIEF CHAPMAN'S ACTIONS AND INACTIONS.

In or about October, 2009, a TV documentary aired nationally about Arcata entitled "Pot City, USA." In response to the controversy that arose in Arcata afterwards, Thomas Chapman, then acting Chief of Police, began a marijuana eradication program within the Arcata Police Department. Members of the eradication team included Dokweiler, Hoffman and Stonebarger. Prior to October, 2009, complaints about indoor grows in Arcata had been referred to the Drug Task Force, an interagency team with specialized training. Although Stonebarger had some training in writing search warrants from his previous assignment at DTF, neither Dokweiler nor Hoffman had had any documented search warrant training since the basic police academy, many years prior. Neither Dokweiler nor Hoffman had had any documented training about the CUA or the MMPA. In 2010, the team focused on indoor grows that consumed at least 5,000 kwh per month. In 2011, the team was running out of large grows to eradicate, and lowered their threshold to households using at least 3,000 kwh per month. In late 2010, Dokweiler instituted, with Chapman's knowledge, a quota system for cash seized, plants seized, guns seized and processed bud seized. A large 4' x 6' white board in Dokweiler's office documented the progress made toward the goals. At a dinner in late 2010, Dokweiler offered to buy dinner and drinks as a reward for the team if they met quota in 2011. Hoffman was particularly motivated by the quotas and the reward because he viewed Dokweiler as thrify or cheap, and was going to take great pleasure in Dokweiler buying the team dinner. Chapman was a "hands-on" chief, and was a big fan of statistics. He and Dokweiler were friends outside the office, and he was constantly in and out of Dokweiler's office. Chapman had

to have known about the quotas. However, Chapman denied knowledge of the quotas in his deposition. Chapman claimed in his deposition that the quotas would have violated APD policy. Yet Chapman never investigated or disciplined Dokweiler for the quotas or the reward, thereby giving them his tacit approval. Meanwhile, Hoffman ran into trouble writing search warrants. He wrote an application for a search warrant for a house on Panorama Drive that contained a false statement about his ability to see the electric meter from the street. He also made a significant error in an application for a search warrant for a house on Wyatt Lane. He then re-wrote the affidavit, and re-submitted it to Asst. D.A. Kelly Neel, who refused to approve it because she felt that his prior error had compromised the prosecution. There was a third incident where Kelly Neel rejected a weak search warrant application submitted by Hoffman. After these incidents, Stonebarger spoke with Kelly Neel, who told him, based on these three incidents, that she had concerns about Hoffman's credibility, and was going to review his warrant applications with heightened scrutiny. Kelly Neel denied these facts at her deposition. Stonebarger's recollections of Neel's statements are admissible as prior inconsistent statements. (Evidence Code sec. 1235.) After his conversation with Neel, Stonebarger reported the whole matter to Dokweiler, Hoffman's supervisor. No investigation or discipline of Hoffman was done based on these incidents.

Municipal Liability based upon Chapman's actions as a "final policy maker." In *Pembaur v. City of Cincinnati,* 475 U.S. 469, 470 (1986) the Court held that a decision by a policy making official could subject the City to liability. In *Pembaur*, the Court found that a decision by the county prosecutor authorizing an unlawful entry into plaintiff's business was sufficient to impose liability upon the City. When municipal liability is based upon the

conduct of a final policy maker, the question of who is a final policy maker is answered by looking to state law. *City of Saint Louis v. Praprotnik,* 485 U.S. 112, 123 (1988). "The identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury." *Jett v. Dallas Indep. Sch. District*, 491 U.S. 701, 737 (1989). Police chiefs are frequently held to be final policy makers. See, *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir 1989), *cert. denied*, 110 S. Ct. 75 (1989); *Arendale v. City of Memphis* 519 F.3d 587 (6th Cir 2008). Here, state law shows that Chapman is the final policy maker for policies governing the conduct and training of Arcata's police officers. See, Government Code section 38630(a) ["The police department of a city is under the control of the chief of police."] Chapman either wrote or selected policies from Lexipol (the policy writing company for police departments) for the APD. Chapman undertook a campaign to eradicate indoor grows in Arcata. In this program he placed officers with no training in search and seizure, search warrant writing, or the CUA or the MMPA. He tacitly approved of quotas and a reward scheme to motivate the officers to target as many grows as possible. It follows that placing untrained officers into a highly technical assignment under a quota/reward scheme, would very probably lead to a trampling of the rights of medical cannabis patients. Chapman's conduct as a final policy maker proximately caused the harm to the Sages. Hence the City is liable to the Sages.

Municipal liability based on failure to train, supervise or discipline. Where a non-policy making employee commits a constitutional violation, the city may be liable if it was "deliberately indifferent" to the likelihood that the violation would occur. *City of Canton v.*

Harris, 489 U.S, 378, 389-391 (1989). A court will find "deliberate indifference" where there is an obvious need for training, and the failure to provide the training resulted in the violation. *Id.* at 489 U.S. 390. See, e.g., *Gregory v. City of Louisville*, 444 F.3d 725, 754 (6th Cir 2006) [liability found for failure to train about the handling of exculpatory materials]; *Miranda v. Clark County*, 319 F.3d 465, 471 (9th Cir 2003) [liability for failing to train lawyers to handle capital cases]; *Davis v. Mason County*, 927 F.2d 1473, 1483 (9th Cir 1981) [liability for failure to train on use of force]; *Doe v. Estes*, 926 F. Supp. 979, 988 (D. Nev. 1996) ["Certain situations present a potential for constitutional violations that is so obvious and so clearly likely to occur, that a local government entity's failure to take prophylactic measures may well rise to the level of deliberate indifference even before any particular violation has been brought to the attention of the entity's policymakers..."] Dokweiler and Hoffman had no training in search warrant writing, search and seizure or the CUA or MMPA. The law of search and seizure is complex. The complexity was magnified by the enactment of the CUA and the MMPA, which legalized medical cannabis and permitted cooperative dispensaries and allowed caregivers to grow for a third party. It is obvious that officers engaged in this specialized work needed training in order to succeed, and in order to secure the rights of medical cannabis patients. Hoffman and Dokweiler erred through a failure of leadership on Chapman's part. When they made mistakes, the response was not investigation, supervision or discipline, but a classic cover-up. Had they been properly trained, supervised and disciplined, they would not have caused the harm to the Sages.

Municipal liability based upon customs and practices. Hoffman's missteps in writing

the Panorama Drive and Wyatt Lane search warrants after the Sage warrant are evidence tending to show the City had a custom of turning a blind eye to mistakes that put citizens' civil liberties at risk. See, *Beck v. City of Pittsburgh*, 89 F.3d 966, 973 (3d Cir. 1996) (recognizing that post-event incident "may have evidentiary value for a jury's consideration when the City and policymakers had a pattern of tacitly approving the use of excessive force."); *Foley v. City of Lowell*, 948 F.2d 10, 13-15 (1st Cir. 1991); *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987).

5. THE SEARCH WARRANT LACKED PROBABLE CAUSE TO SEARCH THE SAGE'S HOME BECAUSE NO FACTS WERE ATTESTED TO THAT SUGGESTED THE SUSPECTED MARIJUANA WAS FOR UNLAWFUL PURPOSES.

It is axiomatic that state agents do not have probable cause or reasonable suspicion of an offense when the unlawful activity they suspect, which is the basis of the warrant, is equally consistent with innocent activity. (*Irwin v. Superior Court* (1969) 1 Cal.3d 423, 427; *People v. One 1960 Cadillac Coupe* (1964) 62 Cal.2d 92, 96; see *Illinois v. Gates* (1983) 462 U.S. 213; 103 S. Ct. 2317; 76 L. Ed. 2d 527; see *Sibron v. New York* (1968) 392 U.S. 40; 88 S. Ct. 1889; 20 L. Ed. 2d 917.)

Here, the Hoffman affidavit at best suggested that sometime in March or April of 2011, the house contained marijuana.[1] Hoffman had no knowledge whether the marijuana, if any, was being lawfully possessed for medical purposes or unlawfully possessed. Hoffman had

[1] Hoffman and the Arcata Police and support from the Drug Task Force entered the house on May 11, 2011, well after the electricity usage waned.

no knowledge of how much marijuana was in the house. Other than the fact that he had a suspicion that marijuana was growing at the Sages' home he presented no other factors to the magistrate to support the warrant.[2]

Hoffman stated that whether or not it was a medical grow was not his concern and he did nothing at all to find out if the marijuana he believed was growing at the Sages' house was a lawful medical grow. (July 17, 2012, proceedings p. 31.)

At his deposition Hoffman responded to the question:

BY MR. MARTIN:

Q. Now, between the time you started your investigation of this case and the time you submitted your affidavit for the search warrant for the PG&E records to Judge Cissna, had you done anything to attempt to determine that – whether the marijuana you suspected was growing in the Sage residence was being grown lawfully?

A. How so?

Q. How might it have been lawful?

A. No how, any way in particular am I to know that. I was to seek that out.

[July 17, 2012, proceedings p. 31.]

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[2] Hoffman stated in the warrant affidavit that an unidentified person ran by the corner where the Sages lived and smelled the marijuana emanating from the house. Besides this information being cumulative to Hoffman's own alleged statement of smelling marijuana, the jogger's observations are wholly irrelevant. An uncorroborated unknown tipster cannot provide probable cause for an arrest or search warrant. (*Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 952 [any rookie officer knows that uncorroborated unknown tipsters cannot provide probable cause for an arrest or search warrant].)

Later in the deposition Officer Hoffman said in response to questions:Q. All Right. So when you did seek the warrant from Judge Reinholtsen is it fair to say you had no information whether the grow complied with the Compassionate Use Act?

A. [BRIAN HOFFMAN:] I did not know at the time whether it complied with the Compassionate Use Act.

Q. And so it was only after you entered the residence and found the recommendation under Prop. 215 that you were able to determine that the grow—the Sage residence was lawful?

A. The location of Proposition 215 paperwork does not make any grow legitimate. It was the totality of the circumstances, it was the size of the grow at the time we were there.

[July 17, 2012, proceedings, p. 61.]

Officer Hoffman did not bother to investigate prior to the submission of the PG&E warrant or the residence warrant whether the marijuana suspected of being grown was lawful under the Compassionate Use Act. His view and attitude was if there is probable cause that there is marijuana suspected of being in a home it is irrelevant to him whether that marijuana is lawful or unlawful. His deposition statement that how was he to know if the grow was lawful or not beforehand indicates it was of no concern for him to bust into the Sages' house first and then determine the legality, or not, of the suspected marijuana being grown in the Sages' home. [*Id.* at pp. 31, 61.]

California case law is unsettled on the issue of whether there is probable cause to enter a home when an officer suspects marijuana is being grown therein but has no idea whether the grow is lawful.[3] The waning trend it is argued that under the Compassionate Use Act, a person is given that right to possess, grow and use marijuana for medical purposes if they have a Proposition 215 medical recommendation, in essence a prescription. The Compassionate Use Act states that it is an affirmative defense to a charge of marijuana possession, use and cultivation that a person has a medical recommendation. Therefore, it is argued, that it is presumed unlawful to possess, grow or use marijuana, and if found in possession of the a person by law enforcement, one can tell it to the judge later in court. This logic and reasoning completely turns both the United States and California constitutions on their heads.

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[3] *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1058-1060, a tenuous car stop case, is the only case that addresses the peripheral issues set forth herein. In *Strasburg*, the court permits the detention and search of a person even with the knowledge that the suspect has a medical marijuana recommendation. It is distinguished from the facts herein. In *Strasburg* the defendant was stopped in an automobile where the expectation of privacy is far diminished from a search of a home, which is given a greater degree of Fourth Amendment protection, respect and expectation of privacy than does a warrantless automobile search. Automobile searches have been considered less protected under the Fourth Amendment than a person's home.

Strasburg, to the extent it has any constitutional validity, is limited to automobile searches and not extended to home searches. There is a far greater expectation of privacy with a home than an automobile. In fact the automobile has far less protection under the Fourth Amendment than just about any other area to be searched. (*California v. Acevedo* (1991) 500 U.S. 565; 111 S. Ct. 1982; 114 L. Ed. 2d 619.) Moreover, *Strasburg* came well before *Arizona v. Gant* (2009) 566 U.S. ___ [129 S.Ct. 1710, 1719], which changed the whole paradigm of car searches when it prohibited carte blanche car searches under the *Belton* rule of the so-called "automobile exception."

A clear example of the illogic of the reasoning is set forth in many cases related to the "prescription defense" as set forth in CALCRIM No. 2304, which reads, "The defendant is not guilty of possessing [a controlled substance] if (he/she) had a valid, written prescription for that substance from a physician . . . licensed to practice in California." (CALCRIM No. 2304.) It is well established that a person found in possession of certain controlled substances has an *affirmative defense* that he or she has a prescription for that controlled substance. (*People v. Carboni* (2014) 2014 DJ DAR 103 [C066518 (Cal. Ct. App. Third Dist.]; Health and Safety Code sec. 11350, 11377.)

Would there be any question of the impropriety of a search of a home based on an officer's statement that he had a suspicion that there was Vicodin in a home in an amount unknown and with no knowledge by the officer if a person in that home was in lawful possession, or not, of that controlled substance? There is not a magistrate in this state who would even consider the issuance of a warrant based on those facts. An officer attempting to get a warrant based on this scenario would be turned away.

While the prescription defense to more traditional medicines is an affirmative defense if one is found in possession of the prescription drug, there has never been a situation where the privacy rights of a person possessing a prescription drug was eviscerated for his or her right to possess that controlled substance. Why then should marijuana, listed as a controlled substance, be treated any differently under California law? A state cannot afford a right to a person and then eviscerate the constitutional protections of that right. (See *People v. Smith* (1983) 34 Cal.3d 251.)

"[A] [person's] house is his castle." (*Miller v. United States* (1958) 357 U.S. 301, 307 [2 L. Ed. 2d 1332, 78 S. Ct. 1190].) This phrase expresses the view that one's home is a place of personal privacy and its inhabitants are entitled to freedom from governmental intrusion absent a very good reason. "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." (*People v. Camacho* (2000) 23 Cal.4th 824, 831; *United States v. Karo* (1984) 468 U.S. 705, 714 [82 L. Ed. 2d 530, 104 S. Ct. 3296.) "We have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's home is his castle [to the point that [t]he poorest man may in his cottage bid defiance to all the forces of the Crown.' " (*Georgia v. Randolph* (2006) 547 U.S. 103, 115 [164 L. Ed. 2d 208, 126 S. Ct. 1515, 1524].)

Moreover, California courts and law enforcement officers cannot ignore their obligations to follow federal law on Fourth Amendment Constitutional issues.[4] Under federal law, state agents are prohibited from entering a residence or detaining a person unless there is probable cause to believe a crime is being committed. Knowledge that there is marijuana being grown or possessed in a house without any facts to determine if that grow is a

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[4] Under Cal. Const., art. I, § 28, subd. (d) ([old] Prop. 8), applicable to crimes occurring after its effective date, evidence may be excluded only to the extent exclusion is also required by the federal exclusionary rule which applies to evidence seized in violation of U.S. Const., 4th Amend.

lawful medical grow is insufficient probable cause to believe a crime is being committed. (See *People v. Smith,* supra, 34 Cal.3d 251.)

California courts are to look to federal constitutional standards to determine the admissibility of evidence. (*People v. Luevano* (1985) 167 Cal.App.3d 1123, 1128; *In re Lance W.* (1985) 37 Cal.3d 873; *People v. Lopez* (1985) 173 Cal.App.3d 125.)

Proposition 215 legalized the use, possession and cultivation of medical marijuana. Whether it be an affirmative defense or not, it does not change the fact that law enforcement officers, and in particular Officer Hoffman here, still should be prohibited from entering homes without any facts to support whether the marijuana in the house is for lawful or unlawful purposes. (See *Illinois v. Gates* (1983) 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed.2d 527.)

6. THE POLICE ACTED WITH EXCESSIVE FORCE DURING THE SEARCH.

Handcuffing the Sages constituted excessive force. Claims of excessive force are determined under a standard of objective reasonableness viewed from the perspective of a reasonable officer on the scene. *Graham v. Connor,* 490 U.S. 386, 395-396 (1989). The Fourth Amendment prohibits unduly tight handcuffing during a seizure. *Morrison v. Board of Trustees of Green Twnshp.*, 583 F.3d 394, 400 (6th Cir 2009). *Graham v. Connor, supra,* set forth three factors to evaluate a claim of excessive force: (1) the severity of the crime; (2) whether the suspect posed an immediate threat to officer safety;

and (3) whether the suspect resisted arrest or fled. *Graham* at p. 396. Applying these factors here shows the Sages committed no crime at all; they posed no threat to the officers and were cooperative throughout the encounter. They ought not to have been handcuffed at all. A reasonable officer would not have done so. Mr. Sage's handcuffs were too tight and left bruises. Mr. Sage was ill and had his breathing assisted by an oxygen tube. *Morrison, supra*, held that bruising and pain during handcuffing created a genuine issue of fact regarding the existence of excessive force. Defendants' position, that without medical records handcuffing does not rise to the level of excessive force, is a minority view, and one that has been discredited. In *Wilkins v. Gaddy*, 559 U.S. 34 (2010) the Court rejected the notion that "the absence of some arbitrary quantum of injury requires automatic dismissal of an excessive force claim." While *Wilkins* was an Eighth Amendment case, the same principle applies here. This case is more akin to *Kopec v. Tate*, 361 F.3d 772 (3d Cir 2004), where the court reversed summary judgment in favor of the officer for handcuffing a suspect "under benign circumstances." The arrest was for failing to supply the officer with the suspect's name and address. The court noted that the officer was "not, after all, in the midst of a dangerous situation involving a serious crime or armed criminals." Here, the officers knew before entry that the Sages were a law-abiding couple in their 60s. Their conduct was excessive.

Deploying a SWAT team to execute the Sage warrant was excessive force. *Alexander v. City & Cnty. of San Francisco,* 29 F.3d 1355, 1367 (9th Cir.1994) (a jury might conclude that deployment of a SWAT team for the purpose of inspecting property was excessive); *Estate of Smith v. Marasco*, 430 F.3d 140, 149 (3d Cir.2005) ("[A]

decision to employ a SWAT-type team can constitute excessive force if it is not objectively reasonable to do so in light of the totality of the circumstances." (internal quotation marks omitted)); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1190 (10th Cir.2001) ("[T]he decision to deploy a SWAT team to execute a warrant must be 'reasonable' because it largely determines how the seizure is carried out, thereby determining the extent of the intrusion on the individual's Fourth Amendment interests."); *Rush v. Mansfield*, 771 F.Supp.2d 827, 858–59 (N .D.Ohio 2011); *Solis v. City of Columbus*, 319 F.Supp.2d 797, 808–09 (S.D.Ohio 2004).

To bring fifteen officers with helmets, with at least six AR-15's, in a commando-style raid on two old people with no record is excessive on its face. A reasonable jury could so conclude.

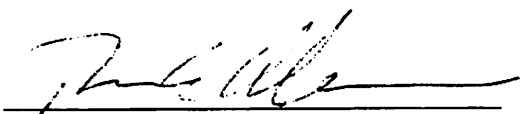
5. CONCLUSION

"Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir.2005) (en banc) (alteration in original) (internal quotation marks omitted); see also *Espinosa v. City and County of San Francisco*, 598 F.3d 528 at 537 ("[T]his court has often held that in police misconduct cases, summary judgment should only be granted 'sparingly' because such cases often turn on credibility determinations by a jury.").

If summary judgment is denied on the federal causes of action, it should also be denied on the Elder Abuse claim. If the police used unreasonable force, then a question of fact exists as to whether they are liable for elder abuse. For the reasons set forth herein, the motion for summary judgment/adjudication should be denied.

Dated: January 15, 2014

Respectfully Submitted,



Peter E. Martin
Attorney for Plaintiff
Barbara Sage

PROOF OF SERVICE

I, Teresa Cote', declare that I am employed by Peter E. Martin, A Law Corporation, whose address is 917 Third Street, Eureka, California 95501. I am over the age of eighteen (18) years and am not a party to this action.

On January 15, 2014, I served the following document:

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

[X] **BY HAND DELIVERY:** By Personally delivering a true copy thereof to the party(ies) and at the address(es) as set forth below:

Nancy K. Delaney
MITCHELL, BRISSO, DELANEY & VRIEZE
Attorneys at Law
814 Seventh Street
Eureka, California 95502

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Eureka, California on January 15, 2014.

Teresa Cote'