

**AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN  
CALIFORNIA**

JOHN THOMAS H. DO (SBN 285075)

jdo@aclunc.org

EMI YOUNG (SBN 311238)

eyoung@aclunc.org

GRAYCE ZELPHIN (SBN 279112)

gzelphin@aclunc.org

39 Drumm Street

San Francisco, CA 94111

Telephone: (415) 293-6333

Facsimile: (415) 255-8437

**ASIAN AMERICANS ADVANCING JUSTICE  
- ASIAN LAW CAUCUS**

GLENN KATON (SBN 281841)

glennk@advancingjustice-alc.org

MEGAN VEES (SBN 325184)

meganv@advancingjustice-alc.org

55 Columbus Avenue

San Francisco, CA 94111

Telephone: (415) 896-1701

Facsimile: (415) 896-1702

*Counsel for Plaintiffs*

**COVINGTON & BURLING LLP**

STANLEY YOUNG (SBN 121180)

syoung@cov.com

SAMANTHA FLATTERY (SBN 342420)

sflattery@cov.com

3000 El Camino Real 5 Palo Alto Square,

10th Floor Palo Alto, CA 94306-2112

Telephone: (650) 632-4704

Facsimile: (650) 632-4800

MICHAEL PLIMACK (SBN 133869)

mplimack@cov.com

ALISON WALL (SBN 319562)

awall@cov.com

JULIA BARRERO (SBN 352614)

jbarrero@cov.com

Salesforce Tower, 415 Mission St., Suite 5400

San Francisco, CA 94105-2533

Telephone: (415) 591-7022

Facsimile: (415) 591-6091

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**GER CHONG ZE CHANG, MAI NOU VANG,  
RUSSELL MATHIS, YING SUSANNA VA,**  
and all others similarly situated,

Plaintiffs,

v.

**COUNTY OF SISKIYOU and JEREMIAH  
LARUE,** in his official capacity as Sheriff,

Defendants.

Case No. 2:22-cv-01378-KJM-AC

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION TO STRIKE EXHIBITS D  
AND E TO DEFENDANTS' REQUEST  
FOR JUDICIAL NOTICE AND  
PORTIONS OF DEFENDANTS'  
MOTION TO DISMISS PLAINTIFFS'  
FIRST AMENDED COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: May 17, 2024

Time: 10:00 AM

Judge: Kimberly J. Mueller (KJM)

Courtroom: 3

Action Filed: August 3, 2022

Trial Date: Not assigned

**TO DEFENDANTS AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE THAT** on May 17, 2024 at 10:00 a.m., or as soon thereafter as the parties may be heard before the Honorable Kimberly Mueller in the District Court for the Eastern District of California in Courtroom 3, 15th Floor, 501 I Street, Sacramento, CA 95814, Plaintiffs Ger Chong Ze Chang, Mai Nou Vang, Russell Mathis, and Ying Susanna Va (“Plaintiffs”) will and hereby do move to strike from the record Exhibits D and E to Defendants’ Request for Judicial Notice (“RJN”) and the portions of Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint (“Motion to Dismiss” or “MTD”) identified in Attachment A to the Proposed Order accompanying this Motion.

This motion is based on the attached memorandum of points and authorities; Plaintiffs’ Opposition to Defendants’ Motion to Dismiss; all pleadings and papers filed in this action; and such oral argument as may be presented at the hearing on the motion.

Dated: March 26, 2024

**AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN  
CALIFORNIA**

By: /s/ John Thomas H. Do (authorized 3/26/2024)  
JOHN THOMAS H. DO  
EMI YOUNG  
GRAYCE ZELPHIN

**ASIAN AMERICANS ADVANCING  
JUSTICE-ASIAN LAW CAUCUS**

By: /s/ Megan Veas  
MEGAN VEES  
GLENN KATON

**COVINGTON & BURLING LLP**

By: /s/ Alison Wall  
ALISON WALL  
STANLEY YOUNG

*Counsel for Chang, et al. Plaintiffs*

## I. INTRODUCTION

Defendants use their Motion to Dismiss Plaintiffs' First Amended Complaint to put forth their own version of contested facts at issue in this lawsuit. But in a Rule 12(b)(6) motion to dismiss, *Plaintiffs'* allegations are generally assumed to be true and must be viewed in the light most favorable to the plaintiffs. Defendants' Motion to Dismiss is replete with assertions of fact that are either altogether unsupported or rely on evidence that cannot be considered on a motion to dismiss, including two exhibits (declarations asserting facts in a related case) that are not properly subject to judicial notice on this motion to dismiss. The Court should therefore strike Exhibits D and E to Defendants' Request for Judicial Notice ("RJN") and the improper statements of fact in the Motion to Dismiss.

## II. LEGAL STANDARD

"As a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion."<sup>1</sup> *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (internal quotation marks and citations omitted); *see also* Fed. R. Civ. P. 12(d). The two exceptions to this general rule are 1) documents attached to the complaint or incorporated by reference and 2) judicially noticeable matters. *Lee*, 250 F.3d at 688–89; *Gerritsen v. Warner Bros. Entertainment Inc.*, 112 F. Supp. 3d 1011, 1020 (C.D. Cal. 2015). Documents not attached to the complaint but on which the complaint "necessarily relies" are considered to be incorporated by reference if "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011). A matter is subject to judicial notice if it is "not subject to reasonable dispute" because it either 1) "is generally known within the trial court's territorial jurisdiction" or 2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

---

<sup>1</sup> As Plaintiffs point out in the opposition to Defendants' Motion to Dismiss, Defendants' mootness arguments are properly raised under Rule 12(b)(1). Opp'n to MTD at 15. The evidence Plaintiffs move to strike does not bear on Defendants' mootness arguments, but on their arguments attacking the adequacy of the Complaint under 12(b)(6). Additionally, Defendants' bare assertions of fact (for which no evidence is cited) should be stricken regardless of whether they pertain to arguments considered under the 12(b)(1) or 12(b)(6) standard. *See infra* § III(C).

Courts routinely strike exhibits, declarations, and assertions of fact that may not be considered when ruling on a 12(b)(6) motion. *See, e.g., In re Applied Micro Circ. Corp. Sec. Litig.*, No. 01-CV-0649 K AJB, 2002 WL 34716875, at \*2–3 (S.D. Cal. Oct. 4, 2002) (granting motion to strike declarations submitted in support of 12(b)(6) motion because they were extrinsic to the complaint); *Kamaole Pointe Dev. LP v. Cnty. of Maui*, No. CV 07-00447 DAE-LEK, 2007 WL 9710919, at \*1–2 (D. Haw. Oct. 26, 2007) (granting motion to strike motion to dismiss because exhibits and declarations attached to the motion to dismiss “[went] beyond those types of documents considered to be acceptable to attach to a motion to dismiss.”); *In re Energy Recovery Inc. Sec. Litig.*, No. 15-CV-00265-EMC, 2016 WL 324150, at \*3 (N.D. Cal. Jan. 27, 2016) (granting motion to strike factual assertions and arguments derived from exhibits to 12(b)(6) motion containing facts not subject to judicial notice).

### III. ARGUMENT

#### A. The Court Should Strike Exhibits D and E to the RJN and the Portions of the Motion to Dismiss that Rely Upon Them.

Exhibits D and E to Defendants’ Request for Judicial Notice are a declaration and an affidavit, respectively, filed by Defendants in the related case *Lo et al v. County of Siskiyou et al.*, No 2:21-cv-00999-KJM-AC action. *See* RJN at 2; Dkt. 9. Both were made by Rick Dean, Community Development Director of Defendant Siskiyou County. *See* RJN, Exhs. D, E. Defendants cite the declaration and affidavit in support of factual assertions in their Motion to Dismiss. *See* MTD at 5, 8.

Facts asserted in declarations and affidavits are generally not judicially noticeable. *See Turnacliiff v. Westly*, 546 F.3d 1113, 1120 n. 5 (9th Cir. 2008) (denying request for judicial notice of declaration filed in another action because the facts described were not “generally known” and the declarant was not a source “whose accuracy cannot reasonably be questioned”); *Cramer v. Target Corp.*, No. 1:08-CV-01693-OWWSKO, 2010 WL 2465338, at \*2 (E.D. Cal., June 9, 2010) (declining to take judicial notice of truth of facts asserted in declarations because they were “neither capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned, nor generally known within the jurisdiction of the Court”); *Coalition for a Sustainable Delta v. F.E.M.A.*, 711 F.Supp.2d 1152, 1172 n. 6 (E.D. Cal. 2010) (denying request for judicial notice of declaration submitted in related lawsuit because requesting party sought to rely on declaration for truth of its contents).

Here, Defendants cite the declaration and affidavit not for the fact that they were filed in the *Lo* matter, but for the truth of the facts asserted in them. See MTD at 5:10-20, 8:9-10. For example, Defendants cite Exhibit D in support of factual assertions regarding the types of structures occupied by “illegal cannabis growers” in the Mount Shasta Vista subdivision and the type of water trucks used to deliver water to them. See MTD at 5. Defendants cite Exhibit E for the proposition that the adverse effect of illegal cannabis cultivation “is commonly known throughout the State of California and even acknowledged by both Governor Newsome [*sic*] and Attorney General Bonta.”<sup>2</sup> See MTD at 8. These factual assertions are not “generally known” within the court’s jurisdiction, and Mr. Dean is not a “source[] whose accuracy cannot reasonably be questioned.” See Fed. R. Evid. 201(b); *Turnacliiff*, 546 F.3d at 1120 n. 5. As such, the factual matters for which Defendants cite the declaration and affidavit are not judicially noticeable. The Court should therefore strike Exhibits D and E to Defendants’ Request for Judicial Notice and the portions of the Motion to Dismiss that rely upon them: page 5, lines 10 through 16 and 18 through 20, and the parenthetical on page 8, lines 9 and 10.<sup>3</sup>

**B. The Court Should Strike Factual Assertions Supported by Improper Citation to the *Lo* Order.**

Defendants cite docket number 47 in the *Lo* matter, the September 3, 2021, order granting in part the *Lo* plaintiffs’ motion for preliminary injunction (“*Lo* Order”), for statements of fact contained in it. See MTD at 3–5. Yet Defendants have not requested judicial notice of the *Lo* Order or attempted to explain how the Court may otherwise rely on the facts it contains. Nor could they, as the statements of fact from the *Lo* Order may *not* be considered on a 12(b)(6) motion.

---

<sup>2</sup> Exhibit E does not provide any support for this proposition. Neither the affidavit nor its exhibits mention statements by Governor Newsom or Attorney General Bonta regarding the effects of illegal cannabis cultivation. See RJN, Exh. E. The Court should therefore strike lines 9 and 10 of page 8 for the additional reason that they are unsupported by any evidence. See *infra* § III(C).

<sup>3</sup> Attachment A to the Proposed Order accompanying this Motion is a strikethrough of the Motion to Dismiss identifying precisely the language Plaintiffs move to strike.

1 First, the court may not take judicial notice of the factual content of the *Lo* Order. Defendants do  
 2 not cite the *Lo* Order for the fact that it was issued or its legal effect,<sup>4</sup> but instead rely on the *Lo* Order for  
 3 the truth of the statements contained in it. See MTD at 3–5. These statements are not subject to judicial  
 4 notice. See *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003) (“[T]aking judicial notice of findings  
 5 of fact from another case exceeds the limits of Rule 201.”), *overruled on other grounds by Albino v. Baca*,  
 6 747 F.3d 1162 (9th Cir. 2014); *M/V Am. Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1491  
 7 (9th Cir. 1983) (“As a general rule, a court may not take judicial notice of proceedings or records in  
 8 another cause so as to supply, without formal introduction of evidence, facts essential to support a  
 9 contention in a cause then before it.”); *Zargarian v. BMW of N. Am., LLC*, No. CV184857RSWLPLAX,  
 10 2019 WL 6111732, at \*1 n. 1 (C.D. Cal. Sept. 23, 2019) (“The Court may ... take judicial notice of matters  
 11 of public record, such as prior court proceedings, and its own records. ... The Court will not, however,  
 12 take judicial notice of any findings of fact in the court documents, only of the existence of each document  
 13 and the orders of the courts.”) (citations omitted).

14 Second, the *Lo* Order is not incorporated by reference into the First Amended Complaint. Though  
 15 the order is referenced in the First Amended Complaint, see Dkt. 47 ¶ 138, it does not meet the second  
 16 requirement for incorporation by reference: it is not “central to” Plaintiffs’ claims. See *Corinthian*  
 17 *Colleges*, 655 F.3d at 999. Rather, a single paragraph of Plaintiffs’ 287-paragraph First Amended  
 18 Complaint mentions the *Lo* Order to provide background on the status of the challenged water ordinances.  
 19 See Dkt. 47 ¶ 138. The *Lo* Order is thus not incorporated by reference into the First Amended Complaint.

---

21 <sup>4</sup> Plaintiffs request that the Court take judicial notice of the *Lo* Order for the fact that the Court issued a  
 22 preliminary injunction in *Lo*. See Plaintiffs’ Request for Judicial Notice; Opp’n to MTD at 5. Unlike  
 23 Defendants, Plaintiffs rely on the order not for the truth of facts contained in it, but for its legal effect,  
 24 which is properly subject to judicial notice. See *Neilson v. Union Bank of California, N.A.*, 290 F. Supp.  
 25 2d 1101, 1113 (C.D. Cal. 2003) (taking judicial notice of “the existence and legal effect” of court orders  
 26 in a related case because “[n]otice [of court orders] can be taken . . . only for the limited purpose of  
 27 recognizing the ‘judicial act’ that the order represents on the subject matter of the litigation.”) (internal  
 28 quotations and citations omitted). Indeed, this Court has recognized that court orders and filings are  
 subject to judicial notice for the fact that “a court undertook a particular judicial act,” but generally not to  
 show “the truth of allegations, statements, or arguments” within them. *United States v. Biotronik, Inc.*,  
 No. 214CV02407KJMEFB, 2016 WL 1587215, at \*1 (E.D. Cal. Apr. 20, 2016), *aff’d sub nom. United*  
*States ex rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011 (9th Cir. 2017).

1 *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (“[T]he mere mention of the  
2 existence of a document [in a complaint] is insufficient to incorporate the contents of a document.”).

3 Because the *Lo* Order is not incorporated by reference into the First Amended Complaint and the  
4 statements therein are not subject to judicial notice, those statements may not be considered on a motion  
5 to dismiss. The Court should therefore strike the portions of the Motion to Dismiss that rely upon them:  
6 page 3, lines 13 through 26; page 4, lines 2 through 7 and 9 through 28; page 5, lines 3 through 5 and 7  
7 through 9.

### 8 **C. The Court Should Strike Wholly Unsupported Factual Assertions**

9 Finally, Defendants fail to support many of the factual assertions in the Motion to Dismiss with  
10 citation to *any* evidence. Most of these unsupported facts are raised in relation to Defendants’ 12(b)(6)  
11 arguments attacking the adequacy of Plaintiffs’ claims. For example, Defendants put forth their own  
12 version of one of the traffic stops of Plaintiff Chang, providing, without evidence, “facts” that Plaintiffs  
13 purportedly “[left] out from their allegations[.]” MTD at 15. Even properly substantiated (which they are  
14 not), such factual assertions are not properly raised on a 12(b)(6) motion.<sup>5</sup> *See Lee*, 250 F.3d at 688. The  
15 Court should therefore strike page 3, line 27 through page 4, line 2; page 4, line 8; page 5, lines 5 through  
16 7; page 11, lines 14 through 16; page 15, line 23 through page 16, line 3; and page 16, lines 15 and 16.

17 Defendants also fail to provide evidence of facts related to their arguments bearing on this Court’s  
18 subject matter jurisdiction, which would be properly raised under Rule 12(b)(1). *See* Opp’n to MTD at  
19 15. Specifically, Defendants argue that Plaintiffs’ tenth and eleventh claims are moot based on  
20 Defendants’ unsubstantiated claim that the challenged liens have been expunged. *See* MTD at 1, 6, 17–  
21 18. Because there is no evidence in the record to support this claim, the Court should strike page 1, line  
22 13; page 6, lines 7 through 11; and page 17, line 28 through page 18, line 2.

---

23  
24  
25  
26 <sup>5</sup> The Motion to Dismiss also includes a number of unsupported assertions regarding Defendants’ intent  
27 in implementing the challenged ordinances and practices. *See* MTD at 2, 5–6, 8–9. The Court should  
28 disregard these statements because it must make all reasonable inferences – including those related to  
Defendants’ intent – in Plaintiffs’ favor. *See* Opp’n to MTD at 3 (citing *Koala v. Khosla*, 931 F.3d 887,  
894 (9th Cir. 2019)).

**IV. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the instant Motion to Strike and strike from the record Exhibits D and E to Defendants' Request for Judicial Notice and the portions of Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint identified above and in Attachment A to the Proposed Order accompanying this Motion.