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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DUARTE NURSERY, INC., et al.,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; et al.,

Defendants.

UNITED STATES OF AMERICA,

Counterclaim-Plaintiff,

v.

DUARTE NURSERY, INC., et al.,

Counterclaim-Defendants.

No. 2:13-cv-2095-KJM-AC

PLAINTIFFS DUARTE NURSERY, INC., AND JOHN DUARTE'S OPPOSITION TO UNITED STATES MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' RETALIATION CLAIM

Hearing Date: November 20, 2015
Time: 10:00 a.m.
Court Room: 3-15th Floor
Judge: Kimberly J. Mueller

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INTRODUCTION

The United States and Army Corps of Engineers (Corps) motion for summary judgment on the First Amendment retaliation claim brought by Duarte Nursery, Inc. (Duarte Nursery) and John Duarte (collectively Duarte) must be denied. Sovereign immunity does not bar Duarte's claim, because the waiver of sovereign immunity in 5 U.S.C. § 702 encompasses all constitutional claims for other than money damages, under controlling Ninth Circuit precedent. The evidence, including an attorney for the government telling a witness "Well, you know Duarte Nursery sued us. Well, we are suing them back," establishes a prima facie case of First Amendment retaliation by the Corps and United States against Duarte, and, along with all reasonable inferences to be drawn from the evidence, establishes a genuine issue of disputed material fact regarding whether Duarte's complaint against the Corps was a substantial or motivating factor in the government's decision to file the Counterclaim against Duarte. The motion must be denied.

I

STATEMENT OF LAW

A. Summary Judgment

On a motion for summary judgment, the court does not resolve disputed questions of fact or credibility, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); rather, it must draw all inferences and view all evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). Where a genuine dispute of material fact exists, a motion for summary judgment must be denied. Fed. R. Civ. P. 56(a); *Smith v. Nixon*, 606 F.2d 1183, 1187 & n.17 (D.C. Cir. 1979) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970)). Determining whether a genuine issue of material fact exists involves (1) determining whether a fact is material, (2) determining whether there is a genuine issue for the trier of fact based on the evidence submitted. *Liberty Lobby*, 477 U.S. at 248.

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B. First Amendment Retaliation

A First Amendment retaliation claim requires that a plaintiff ultimately show "three elements: (1) that the plaintiff was engaged in a constitutionally protected activity, (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." March 23, 2014, Order on United States' Second Motion to Dismiss, ECF 63, at 7:26-8:3 (citing *Schneider v. Cnty of Sacramento*, 2014 WL 4187364, at *8 (E.D. Cal. Aug 21, 2014), internal citations omitted). *See also Corales v. Bennett*, 567 F.3d 554, 563 (9th Cir 2009) (citing *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 770 (9th Cir. 2006)). While frequently brought in the context of *Bivens* or Section 1983 claims, this Court has recognized First Amendment retaliation claims against government agencies as such, in the context of environmental enforcement litigation. *Lousiana-Pacific Corp. v. Beazer Materials & Services, Inc.*, 842 F. Supp. 1243, 1256 (E.D. Cal 1994) (citing *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977)) (responsible party stated viable opposition to CERCLA cost recovery claims based on EPA's alleged inflation of costs in retaliation for exercise of First Amendment rights).

Commenting on the conduct of public officials is a First Amendment protected activity within the ambit of the first element. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *McKinley v. City of Eloy*, 705 F.2d 1110, 1113 (9th Cir. 1983). So is exercising the right to sue government agencies and officials. *Saranno's Gasco*, 874 F.2d at 1314 (citing *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972).

The second element is directed to whether a person of ordinary firmness would be chilled in the exercise of First Amendment rights. *Schneider*, 2014 WL 4187364 at *8-9 (threatened financial impact exceeding value of property is sufficient injury to meet the second element). The United States is incorrect that plaintiffs must show subjective chilling of their exercise of First Amendment rights to meet the second element. United States Memo in Support of Motion for Summary Judgment on Retaliation Claims (U.S. Retaliation Memo), at 12. To the contrary,

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Mendocino Envtl. Ctr. v. Mendocino County, 192 F. 3d 1283, 1300 (9th Cir. 1999), holds that the test is objective, i.e., whether the retaliation would chill a person of ordinary firmness. *Resnick v. Hayes*, upholding dismissal of a federal prisoner's retaliation claim for failure to state a claim, merely stands for the proposition that the elements of the claim must be properly pleaded, and does not *actually* use the term "actually," as the United States asserts. 213 F.3d 443, 449 (9th Cir. 2000). *Resnick* is consistent with *Mendocino Envtl Cntr*. and *Schneider* in assessing whether the retaliation would chill a normally firm person's exercise of First Amendment rights. *Curley v. Village of Suffern*, 268 F. 3d 65, 73 (2d Cir. 2001), is not the law of the Ninth Circuit. The Second Circuit's "subjective" approach in *Curley* was explicitly rejected by the Eleventh Circuit in 2005, which noted that every other circuit to address the issue has used an "objective" or "person of ordinary firmness" approach. *Bennett v. Hendrix*, 423 F.3d 1247, 1250-51 (11th Cir. 2005) (collecting cases, including *Mendocino Envtl. Cntr.*).

The third element addresses the role that the plaintiff's protected activity played in the government's decision to act against the plaintiff. The Supreme Court of the United States requires the plaintiff to show, under this prong, that First Amendment conduct was a "substantial" or "motivating" factor in the government's decision. *Mt. Healthy City Board of Ed.*, 429 U.S. at 287. Once this prima facia showing is made, the burden shifts to the government to show that it would have taken the same action even without the plaintiff's First Amendment activity. *Id.* This inquiry requires the government to show that it would have acted as it did against the plaintiff, not merely that it could have done so. *Soranno's Gasco*, 874 F.2d at 1315. The question of motivation in First Amendment retaliation cases usually presents a question for the trier of fact. *Soranno's Gasco*, 874 F.2d at 1315 (citing *Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir. 1987), amended 828 F.2d 1445), *Lousiana-Pacific Corp., v. Beazer Materials & Services, Inc.*, 842 F. Supp. at 1256 (1994) (summary judgment denied to EPA, based on genuine issue of material fact whether EPA inflated investigation costs in retaliation against responsible party).

Injunctive relief is an available remedy for a First Amendment retaliation claim. *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995) (injunction against immigration legalization hearings that use undisclosed classified information to retaliate

against exercise of right of association) vacated on other grounds by 525 U.S. 471 (1999); *Denney v. DEA*, 508 F. Supp. 2d 815 (E.D. Cal. 2007) (physician had standing to seek injunctive relief against federal investigation retaliating against his speech in favor of medical marijuana). If Duarte prevails in making the required initial showing at trial that suing the Corps and other First Amendment protected actions were "substantial" or "motivating" factors in referring the case to the Justice Department, and filing the Counterclaim, then the Court can and should enjoin the prosecution of the Counterclaim until the government proves, by a preponderance of the evidence, that it would have brought the Counterclaim absent Duarte's suit against the Corps.

II

ARGUMENT

A. Sovereign Immunity Does Not Bar Duarte's Retaliatory Prosecution Claim

Duarte's Sixth Claim for Relief contends that the Corps and the United States unconstitutionally retaliated against Duarte. Specifically, Duarte argues that the Corps' decision to file a Clean Water Act civil enforcement action against it was the direct result of Duarte's own decision to file an action challenging the Corps' cease and desist order, as well as to speak publicly about the Corps' actions against Duarte. See Second Am. Compl. ¶¶ 114-120. The Corps contends that sovereign immunity bars any relief. But as explained below, sovereign immunity presents no obstacle to this Court's adjudication of Duarte's constitutional claim, for three reasons. First, the APA's waiver of sovereign immunity extends to constitutional challenges to federal agency action, regardless of whether the governmental activity falls within the APA's definition of "agency action." Second, the Corps' filing of an enforcement action against Duarte constitutes "agency action" under the APA. And third, general principles of prosecutorial discretion do not bar Duarte's constitutional challenge to the Corps' retaliatory enforcement action.

1. The APA's Waiver of Sovereign Immunity Is Not Limited to "Agency Action"

The Corps contends that the APA's waiver of sovereign immunity, 5 U.S.C. § 702, does not apply to Duarte's retaliation claim. That provision provides, in relevant part:

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> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Citing decisions from the Seventh Circuit and the D.C. District Court, the Corps argues that Duarte's claim is barred, (i) because it does not attack "agency action" as defined by the APA, and (ii) because Section 702's waiver is limited to challenges to such "agency action." See P&As at 6-7. Yet inexplicably, the Corps does not cite, much less attempt to distinguish, Ninth Circuit case law holding that the APA's waiver is not limited to APA-style "agency action."

In *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), the plaintiff sued the Immigration and Naturalization Service, contending that the Service and its agents had violated its First and Fourth Amendment rights by conducting an undercover investigation of the church's alleged practice of providing sanctuary to illegal immigrants. *See id.* at 520-21. The district court ruled against the church, holding that sovereign immunity barred all its claims against the United States because the church did not challenge any "agency action" as defined by the APA. On appeal, the Service made the same argument. *See id.* at 524 ("The INS' argument is that § 702's waiver of sovereign immunity applies only to 'agency action' as defined by the APA, and that the challenged investigative activity does not constitute 'agency action' within the APA definition.").

The Ninth Circuit, however, flatly rejected the government's narrow reading of Section 702. *See id.* at 525 ("We cannot agree with the INS that § 702's waiver of sovereign immunity is limited to instances of 'agency action' as technically defined in [the APA]."). The Court noted that the original version of Section 702, which contained just one sentence referring to "any agency action," might plausibly have been interpreted as limiting the waiver to lawsuits challenging such action. *See id.* But such an interpretation was no longer tenable following Congress's 1976 amendments to Section 702, which added a second sentence purporting to waive immunity for all validly pled claims "seeking relief other than money damages." *See id.* at 524. Therefore, in the Ninth Circuit's estimation, the government's position "offend[ed] the plain meaning of the

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amendment." *Id*. at 525. Moreover, the government's position ran counter to the relevant legislative history. The Court quoted approvingly from the House Committee Report accompanying the 1976 legislation, which described the amendment's purpose as to "eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency." *Id*. at 524 (quoting H. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U. S. Code Cong. & Admin. News 6121, 6123). The Court rejected the government's position that it would be inappropriate to extend the APA's waiver to challenges to mere "investigative activity." Although acknowledging that "the APA is largely concerned with regulatory commands and processes," the Court nevertheless underscored that the APA also is intended to limit agency behavior "to protect the privacy and autonomy of groups and individuals affected by the regulatory process." *Id*. Therefore, it would be "anomalous" and "inexplicable" to deny Section 702's application to "claims for equitable relief against government investigations alleged to violate First and Fourth Amendment rights." *Id*.

A subsequent Ninth Circuit panel has suggested that Presbyterian Church conflicts with the panel decision in *Gallo Cattle Co. v. United States Department of Agriculture*, 159 F.3d 1194 (9th Cir. 1998). *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 808-09 (9th Cir. 2006). But that suggestion is without foundation. In *Gallo Cattle*, the plaintiff sought judicial review of an agency's preliminary ruling on the plaintiff's administrative petition. *See Gallo Cattle*, 159 F.3d at 1195-96. The plaintiff argued that its claim was properly pled under 5 U.S.C. § 704, the provision of the APA that provides a cause of action to challenge "final agency action." *See Gallo Cattle*, 159 F.3d at 1198. The Ninth Circuit, however, concluded that the plaintiff could not avail itself of judicial review through Section 704 because the agency action it challenged was not "final." *See id.* at 1199. Unsurprisingly, *Gallo Cattle* did not cite *Presbyterian Church*, given that *Gallo Cattle* concerned Section 704, whereas *Presbyterian Church* concerned Section 702. In fact, *Presbyterian Church* distinguishes much of the case law that the government had relied on based on the important distinction between those Sections. *See Presbyterian Church*, 870 F.2d at 526 (observing that "many of [the government's cited cases] have nothing to do with § 702's waiver

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of sovereign immunity, but rather are concerned with the definition of 'final agency action' reviewable under § 704 of the APA"). It was likely the failure to perceive that distinction which led the *Gros Ventre* court to conclude erroneously that a conflict exists between *Presbyterian Church* and *Gallo Cattle*. The root cause of that failure well may be that the first sentence of Section 702 both waives sovereign immunity and creates a particular cause of action,[1] whereas the second sentence of Section 702—upon which *Presbyterian Church's* analysis hinges—simply waives sovereign immunity for suits (of whatever stripe) seeking equitable relief.

In any event, *Presbyterian Church* and *Gallo Cattle* are readily harmonized, as Judge O'Neill of this District demonstrated a mere fortnight ago. In *California Sportfishing Protection Alliance v. United States Bureau of Reclamation*, 2015 WL 6167521 (E.D. Cal. Oct. 20, 2015), a coalition of environmentalists challenged the Bureau's alleged failure to comply with various water quality standards imposed by federal and state law in its operation of the Central Valley Project. *See id.* at *1. The Bureau moved to dismiss, in part on the ground that the plaintiffs did not challenge "final agency action" and thus were not entitled to Section 702's waiver. In resolving the motion, Judge O'Neill discussed *Presbyterian Church* and the alleged intra-circuit split regarding the scope of Section 702. He concluded that no such conflict exists, relying on *San Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005). *See* 2015 WL 6167521, at *9.

In *San Carlos*, the plaintiff sought to bring a cause of action directly under the National Historic Preservation Act rather than the APA (presumably because the federal activity it challenged—the failure to maintain certain water levels in an Arizona reservoir—would not have qualified as a "final agency action" under Section 704). *Cf. San Carlos*, 417 F.3d at 1092-93. In determining whether the federal courts had jurisdiction over the plaintiff's action, the Ninth Circuit quoted favorably from *Presbyterian Church* for the proposition that, in enacting the APA,

[1] For example, in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the Supreme Court observed, immediately after having quoted Section 702's first sentence, that the first sentence creates a cause of action for judicial review of "agency action" according "to specific authorization in the substantive statute" as well as "final agency action" under Section 704 of the APA. *See id.* at 882.

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"Congress was quite explicit about its goals of eliminating sovereign immunity as an obstacle in securing judicial review of the federal official conduct." *San Carlos*, 417 F.3d at 1096 (quoting *Presbyterian Church*, 870 F.2d at 524). The Court then observed that allowing causes of action to proceed directly under other federal statutes "is not without consequence," because a plaintiff can thereby avoid the APA's requirement of "final agency action" and administrative exhaustion. *See San Carlos*, 417 F.3d at 1096-97. With that caution in mind, the Court concluded that the Preservation Act did not establish its own cause of action and, thus, the plaintiff's remedy resided solely (if at all) in the APA. *See id.* at 1098-99.

Having reviewed *San Carlos*, Judge O'Neill then noted how its implied rule—no Section 702 waiver without a non-APA cause of action—would explain the Ninth Circuit's decision in *Gros Ventre*, which purported to find a conflict between *Presbyterian Church* and *Gallo Cattle*. *See Cal. Sportfishing Protection Alliance*, 2015 WL 6167521, at *9. In *Gros Ventre*, the problem with the plaintiff's tribal trust resources claim, according to Judge O'Neill, was that the plaintiff could not identify any cause of action (other than the APA) that might provide a procedural vehicle for raising its claim. *See id. See also Gros Ventre*, 469 F.3d at 809.

Judge O'Neill then concluded that *Presbyterian Church* can be reconciled with the *Gros Ventre* line of cases in the following manner. The APA's definition of "agency action" does not limit Section 702's waiver so long as the claim in question may be brought through a cause of action other than that provided by the APA. *See Cal. Sportfishing Protection Alliance*, 2015 WL 6167521, at *9. Applying this rule, Judge O'Neill concluded that he must dismiss the case before him, because none of the claims advanced by the plaintiffs "provide[d] an independent private right of action apart from that provided by the APA." *Id*. He added, however, that (i) "Presbyterian Church can be explained in this construct by virtue of the fact that it raised claims that a federal agency violated the U.S. Constitution," and (ii) "Constitutional provisions can give rise to direct rights of action for declaratory and injunctive relief." *Id*. at *9 n.7. *See Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1027-28 (E.D. Cal. 2012) (reading *Presbyterian Church* for the proposition that "the waiver of sovereign immunity in Section 702 encompasses constitutional challenges, and is not limited to claims challenging conduct that constitutes 'agency action' ") (citing *Presbyterian*

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Church, 870 F.2d at 525); *Navajo Nation v. U.S. Dep't of Interior*, 34 F. Supp. 3d 1019, 1030 (D. Ariz. 2014) (reading *Presbyterian Church* for the proposition that "this § 704 limitation does not limit the § 702 waiver for some constitutional claims") (citing *Presbyterian Church*, 870 F.2d at 526).

Judge O'Neill's analysis provides a sound basis of decision for this Court.[2] Duarte brings *its First Amendment claims directly under the Constitution, just as the plaintiff in Presbyterian Church. See Trudeau v. Fed. Trade Comm'n*, 456 F. 3d 178, 190 (D.C. Cir. 2006) (affirming the existence of a "direct cause of action under the First Amendment [for] unconstitutional retaliation"); *Hubbard v. U.S. E.P.A.*, 809 F.2d 1, 11 n.15 (D. C. Cir. 1986) ("The court's power to enjoin unconstitutional acts by the government . . . is inherent in the Constitution itself . . . ."). It seeks only equitable relief, just as the plaintiff in *Presbyterian Church*. It contends that a federal agency has violated the Constitution, just as the plaintiff in *Presbyterian Church*. Therefore, Section 702 waives sovereign immunity for Duarte's retaliation claim.

2. The Precise Scope of Section 702 Is Irrelevant Because Duarte Challenges "Agency Action"

The APA defines "agency action" to include, among other things, a "sanction," *see* 5 U.S.C. § 551(13), which in turn the APA defines as, among other things, a "prohibition, requirement, limitation, or other condition affecting the freedom of a person," as well as "taking other compulsory or restrictive action." *Id*. § 551(10)(A), (G). Here, Duarte contends that the Corps' filing of a civil action against him violates his constitutional right to be free from retaliatory government action. The filing of such a civil action qualifies as a condition affecting Duarte's freedom, or more generally a compulsory or restrictive action. Once the Corps filed and served its action, Duarte was required to respond to that action on pain of a default judgment. *See* Fed. R. Civ. P. 55(a). Moreover, the commencement of that action has allowed the Corps to conduct

[2] Notably, none of the Corps' pertinent authority concerns *constitutional* actions. *See Aleck v. United States*, 2005 WL 1586939 (D. Or. June 21, 2005) (trespass and quiet title); *Aleck v. United States*, 2005 WL 2709502 (D. Or. Oct. 21, 2005) (violation of transmission easement agreement); *Doe v. Attorney General of United States*, 941 F.2d 780, 793 (9th Cir. 1991) ("government tort liability"); *Hearst Radio v. FCC*, 167 F.2d 225 (D.C. Cir. 1948) (same); *City of Oakland v. Holder*, 901 F. Supp. 2d 1188 (N.D. Cal. 2013) (civil forfeiture).

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extensive and burdensome discovery on Duarte, activities that obviously affect Duarte's freedom and that effectively compel him to take his own defensive actions. *See* Fed. R. Civ. P. 26-37.

The Ninth Circuit has held that the filing of an administrative complaint constitutes "agency action." *See Standard Oil Co. of Cal. v. F.T.C.*, 596 F.2d 1381, 1385 (9th Cir. 1979), *rev'd on other grounds*, *F.T.C. v. Standard Oil of Cal.*, 449 U.S. 232 (1980) (holding that the filing of an administrative complaint does not constitute final "agency action"). *Cf. Paradyne Corp. v. U.S. Dep't of Justice*, 647 F. Supp. 1228, 1232 (D.D.C. 1986) ("[C]ourts have held that almost any act made by an agency can be 'agency action.' "). Given the substantially greater burdens and costs involved, it follows a fortiori that the filing of an action in federal court qualifies as an "agency action." And by similar logic, given that "an agency intent on penalizing a party through adverse publicity, especially false or unauthorized publicity, might well merit a review of its action" as a "sanction," *Indus. Safety Equipment Ass'n, Inc v. E.P.A.*, 837 F.3d 1115, 1119 (D.C. Cir. 1988), it follows that the same penal intent, manifested by a federal civil enforcement action, presents an even stronger case for review.

The Corps argues to the contrary, citing *City of Oakland v. Holder*, 901 F. Supp. 2d 1188, 1195 (N.D. Cal. 2013). There, the court concluded that the filing of a civil action "does not fit within the APA's definition of agency action," but the court's conclusion was followed by no citation to authority. *See id.* Moreover, in a latter portion of the opinion, the court appeared to collapse the two distinct analytical questions of "agency action" and finality, with its reasoning essentially tracking the Supreme Court's rationale in Standard Oil for why a complaint's filing does not constitute final agency action. *Compare id*. at 1195-96 *with Standard Oil*, 449 U.S. at 242-43. And on appeal, the Ninth Circuit did not address this point, merely concluding, consistent with the Supreme Court's *Standard Oil* decision, that the filing of a complaint is not final agency action. *See City of Oakland v. Lynch*, 798 F.3d 1159, 1166 (9th Cir. 2015).

Accordingly, in light of the Ninth Circuit's decision in *Standard Oil*, as well as the sanctioning effects of the Corps' complaint, the filing of that document constitutes agency action under the APA.

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3. The Decision Whether to Retaliate Against Duarte for Engaging in Constitutionally Protected Conduct Is Not Committed to the Corps' Unreviewable Discretion

The Corps argues that the APA waiver cannot apply to Duarte's retaliation claim because the agency's decision-making preceding the filing of its enforcement action is not subject to judicial review. *See* P&As at 7-8 (citing *inter alia Heckler v. Cheney*, 470 U.S. 821 (1985)). The Corps' argument is without merit, for two principal reasons.

First, the APA provides that it "applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As explained in Part A.1, one of the "provisions" of the APA—Section 702—waives sovereign immunity for at least some claims attacking non-"agency action." Because Duarte does not challenge "agency action" as defined in the APA, the bar of Section 701(a)(2) does not arise.

Second, assuming that Duarte does challenge "agency action" within the meaning of Section 701(a)(2), such action is not committed solely to the Corps' discretion. To so hold would give the Corps license to retaliate against citizens for the exercise of their constitutional rights, while leaving these citizens with no judicial recourse. *Cf. Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). The Corps seeks support for this extravagant claim in *Heckler*. But that case is of no avail to the agency, for there the Court merely held that "an agency refusal to institute proceedings is a decision 'committed to agency discretion by law.'" *Heckler*, 470 U.S. at 835 (emphasis added). Here, however, Duarte challenges precisely the opposite—the Corps' decision to institute proceedings. If such a decision were committed solely to agency discretion, then no citizen could ever challenge, for example, federal enforcement actions on pretextual grounds. Not surprisingly, the case law fails to support the Corps' radical proposition. *See, e.g., Wayte v. United States*, 470 U.S. 598, 608 (1985) ("[A]lthough prosecutorial discretion is broad, it is not unfettered. . . . In particular, the decision to prosecute may not be

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deliberately based upon an unjustifiable standard such as . . . the exercise of protected statutory and constitutional rights.") (quotation marks and citations omitted).

Accordingly, Section 701(a)(2) of the APA does not bar Duarte's retaliation claim.

B. The Facts Establish a Prima Facia Showing of First Amendment Retaliation Against the Corps and the United States

1. Duarte's Complaint Against the Corps Is Protected Under the First Amendment

Duarte sued the Corps on October 10, 2013. ECF 1. The Complaint states claims against the Corps for denial of Duarte's due process rights by ordering the cessation of all work in waters of the United States on the Property while failing to afford either a pre-deprivation or prompt post-deprivation hearing. ECF 1, ECF 90 (Second Amended Complaint). The complaint is without doubt activity protected by the First Amendment. *Soranno's Gasco*, 874 F.2d at 1314.

2. The Corps' Referral of Duarte's Matter to the Justice Department, and Subsequent Counterclaim, Are Sufficient Injuries to Chill the Exercise of First Amendment Rights by a Person of Ordinary Firmness

As a direct result of the filing of Duarte's suit, the Corps suspended its already-prepared referral of Duarte's enforcement matter to the EPA (where it was bound under official Corps policy), and instead referred the matter to the Justice Department. Robb Dep., 122:25 – 123:2, 138:5-9, 142:10-21, 150:6-17, 154:20 - 155:1. The Justice Department filed the Counterclaim on May 7, 2014, ECF 28. The Counterclaim seeks statutory penalties for alleged violations of the Clean Water Act. ECF 28 at 28. These penalties run at the rate of $37,500 per day.[3] 33 U.S.C. § 1319(c). The alleged violations occurred in November and December of 2012, yielding a maximum potential civil penalty in excess of $40,000,000, a figure well in excess of the value of the Property.

Both of these actions, the referral to the Justice Department, and the filing of the Counterclaim, are sufficient to chill a person of ordinary firmness in the exercise of free speech rights. *See Schneider*, 2014 WL 4187364 at *8-9 (increase in cost of financial assurances

[3] As adjusted for inflation, see 78 Fed. Reg. 66643 (Nov. 6, 2013).

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exceeding value of gravel mine sufficient injury under First Amendment retaliation claim).

/ / /

3. Duarte's Lawsuit Against the Corps Was a Substantial or Motivating Factor in the Corps' Referral to the Justice Department, and the Filing of the Counterclaim.

As the United States generally lays out, up until the time that Duarte filed the Complaint, the Corps was going to refer this matter to EPA, in accordance with Corps policy as expressed in its Field Level Agreement with EPA. Kelley Dep., 16-19. The Corps staff involved in this case have a low expectation, based on their experience, that any particular case referral will lead to EPA enforcement. Haley Dep., 50:6-18, Jewell Dep. 50:9-18. The Corps staff had no expectation, at this phase of its work, that the Corps would be involved in litigation against Duarte. Kelley Dep., 267:12-18.

This changed when the Complaint was filed on October 10, 2013. The Corps abandoned its prior decision to refer the case to EPA, and never made the referral. Robb Dep., 122:25 - 123:2, 138:5-9, 142:10-21, 150:6-17, 154:20 - 155:1. Then, staff at the Corps decided to refer the matter directly to the Department of Justice. Robb Dep., 156-57. This new course of conduct was the direct result of Duarte's Complaint. Robb Dep., 142:10-21; 150:6-13. In other words, the reason the Corps did not go through with its planned and prepared referral of the case to EPA (where the likelihood of EPA enforcement action was known to be low), and instead referred the case to Justice, was solely because Duarte sued the Corps. Duarte's Complaint was thus without doubt a "substantial" or "motivating" factor in the Corps decision to refer the matter to the Justice Department.

After the United States filed the Counterclaim, one of the Justice Department attorneys in this case, John Thomas Do, held a conversation with Caleb Unruh, whose deposition the United States was then trying to schedule. During this conversation, Mr. Unruh asked Mr. Do straight out, "what is this, what is this about." Mr. Do's answer was: "Well, you know Duarte Nursery sued us. Well, we are suing them back." Mr. Unruh immediately interpreted this answer as expressing a retaliatory motive against Duarte, and was concerned that it also expressed a similar animus against him. Unruh Dep., 204:13-205:10. This is clear evidence that not only was Duarte's

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Complaint a substantial or motivating factor in the Corps' decision to refer the matter to the Justice Department, but in the Department's decision to prosecute the case.

Additional facts warrant an inference in favor of Duarte, as the non-moving party, that the Complaint was a substantial or motivating factor in the decision to refer to Justice, and the decision to file the Counterclaim. First, the Corps staff who were involved in this case had few experiences with Clean Water Act lawsuits for alleged unauthorized activities brought "by the Corps" as opposed to those which had been referred to EPA. This case is one of the few of its kind that several of them have ever been aware of. Kelley Dep., 267:16-18; Haley Dep., 50:22-51:19, Jewell, 87:4-7.

Second, Matt Kelley observed an almost identical wheat planting just north of the Property about a year before Duarte's alleged Clean Water Act violations. Kelley ignored this larger planting, even though he considered it a violation upon seeing it. Kelley Dep., 54:12-55:9.

Third, Kelley's declaration that he never harbored retaliatory animus against Duarte, Kelley Dec., ¶ 14, ECF 125, must be put in the context of his derisive dismissal of Ronda Lucas' letter to him, requesting information on which the Corps had based its determination that Duarte violated the Clean Water Act, and on available administrative remedies. Exhibit 37, ECF 116-5 ("No substance, just a ranting fishing expedition."). This was a response to a request that the Corps had an obligation to grant under FOIA and the Due Process Clause, and within the ambit of a person's First Amendment right to petition government. Yet Mr. Kelley's hostility to Ms. Lucas' request on Duarte's behalf is impossible to mistake. Further, Mr. Kelley's superior was not particularly concerned about his statements. (Haley Dep., 45:11-16). It was following this that Kelley also "purged" the file of "tons of stuff" before sending it along to Mr. Robb for further action. Kelley Dep., 244:14-245:16.

Fourth, the court should liberally infer the facts in Duarte's favor as to the reasons for the Corps referral and Justice Department decision to file the Counterclaim, because in depositions the United States refused to allow its witnesses to answer questions on these reasons under claims of attorney-client and attorney work product privilege. Robb Dep., 156:15-18; Jewell Dep., 82:3-83:25. Having refused to allow the Corps staff to testify as to their reasons for the referral, the

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other available testimony and documents regarding the relationship of Duarte's Complaint to the referral and Counterclaim should strongly support any necessary inference that the Complaint was a substantial or motivating factor in both the decision to refer to Justice, and the decision to file the Counterclaim.

Nor can the United States now assert, U.S. Retaliation Memo at 10:8-11, that the sole reason for the filing of the Counterclaim was that it may have been compulsory under Rule 13. First, there is not evidence offered for this assertion. Second, it is offered as an inference, to which the United States is not entitled as the moving party. Third, the United States refused to answer all questions directed at the reasons for the referral to the Justice Department on the grounds of privilege. Having made a tactical decision to conceal their reasons behind what may be otherwise legitimate claims of privilege, the defendants may not now ask the Court to presume that the only reason the Counterclaim was filed was a concern that it was compulsory. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587-88.

These facts create a genuine question of material fact which forecloses a grant of summary judgment in favor of the government on Duarte's First Amendment retaliation claim. *See Soranno's Gasco*, 874 F.2d at 1315 (questions of motivation generally require fact finding); *Lousiana-Pacific Corp.*, 842 F. Supp. at 1256 (summary judgment denied to EPA based on genuine dispute of material fact as to alleged EPA retaliation).

CONCLUSION

Sovereign immunity does not bar Duarte's First Amendment retaliation claim, under controlling Ninth Circuit law. Duarte makes a prima facie case, from the words of the government's counsel, that the Complaint against the Corps was a substantial or motivating factor in the Corps decision to refer this matter to the Justice Department, and the United States decision to sue Duarte for potentially tens of millions of dollars in civil penalties. This prima facie showing raises a genuine dispute of material fact as to why the government filed the counterclaim, and

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precludes a grant of summary judgment to the government on that claim. For the foregoing reasons, the motion must be denied.

DATED: November 6, 2015.

Respectfully submitted,

M. REED HOPPER
ANTHONY L. FRANÇOIS
DAVID M. IVESTER

By /s/ Anthony L. François
ANTHONY L. FRANÇOIS

Attorneys for Plaintiffs and Counterclaim-Defendants Duarte Nursery, Inc., et al.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing OPPOSITION TO MOTION FOR SUMMARY JUDGMENT have been served through the Court's CM/ECF system on all registered counsel this 6th of November, 2015.

/s/ Anthony L. François
ANTHONY L. FRANÇOIS

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Attorneys for Plaintiffs and Counterclaim-Defendants

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DUARTE NURSERY, INC., a California Corporation; and JOHN DUARTE, an individual,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

UNITED STATES OF AMERICA,

Counterclaim- Plaintiff,

v.

No. 2:13−CV−02095−KJM−AC

PLAINTIFF'S SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION REGARDING PLAINTIFF'S "RETALIATION" CLAIM

DUARTE NURSERY, INC., a California Corporation; and JOHN DUARTE, an individual,

Counterclaim- Defendants.

Date: **November 20, 2015**
Time: **10:00 a.m.**
Courtroom: **3**
Judge: **Hon. Kimberly J. Mueller**

[Fed. R. Civ. P. 12(b)(1) & 56]

Plaintiff Duarte Nursery, Inc., hereby provides this separate statement of undisputed material facts in support of motion for summary adjudication regarding Plaintiff's "retaliation" claim**.**

	Fact	Evidence	Plaintiffs' Response
1.	Duarte Nursery, Inc., owns real property on Paskenta Road in Tehama County, California ("Subject Property"), and has owned that property at all times relevant to this action.	**Stipulated**.[1] Second Amended Complaint ("SAC"), ECF 90 at ¶ 2.	**UNDISPUTED**
2.	On November 28, 2012, United States Army Corps of Engineers employee Matthew Kelley drove by the Subject Property on his way to or from a meeting unrelated to the Subject Property.	**Stipulated** Deposition of Matthew Kelley ("Kelley Dep."), ECF 115, at 49:13-15, 57:20-58:5, 58:14-18, & Exh. 8, ECF 117-1.	**UNDISPUTED**
3.	On November 28, 2012, Mr. Kelley observed equipment on the Subject Property, and he believed that the Subject Property had been "ripped."	**Stipulated**. Kelley Dep., ECF 115, at 64:8-17	**UNDISPUTED**
4.	On November 28, 2012, Mr. Kelley did not know who owned the Subject Property.	**Stipulated**. Kelley Dep. at 69:6-12, ECF 115, & Exh. 8, ECF 117-1; *see also* Kelley Dep., ECF 115, at 70:10-19, ECF 115.	**UNDISPUTED**
5.	On November 28, 2012, Mr. Kelley was aware of a 1994 "delineation" and, based on it, believed that there were vernal pools and other features that required a Clean Water Act permit prior to dredging or filling activities.	**Stipulated**. Kelley Dep. at 65:12-66:14, ECF 115.	**UNDISPUTED**
6.	Upon observing the activities and equipment on the Subject Property, Mr. Kelley believed that there was unauthorized work in "waters of the United States."	**Stipulated**. Kelley Dep. at 69:1-12, ECF 115.	**UNDISPUTED**
7.	Upon observing the activities and equipment on the Subject Property,	**Stipulated**.	**UNDISPUTED**

[1] In compliance with the Court's scheduling order, the parties met and conferred to discuss the substance of each motion and narrow any factual disputes. The parties also exchanged draft statements of proposed undisputed facts and, in most cases, revised versions. This process resulted in all facts for this motion being agreed, *except* for facts 20 and 24-26. Each fact marked "Stipulated" is agreed to by the parties for purposes of the summary judgment motions only. Each party reserves the right to contest any of these facts (or their bases) at trial or in other proceedings. In addition, each party reserves the right to object to the materiality or relevance of each fact on this motion.

	Mr. Kelley believed that the activities comprised a "big violation" of the Clean Water Act.	Kelley Dep. at 69:13-21, ECF 115, & Exh. 8, ECF 117-1.	
8.	The day after observing the potential violation, Mr. Kelley notified his supervisor and her supervisor in an e-mail because he believed it to be "a big issue potentially."	**Stipulated**. Kelley Dep. at 71:21-25, ECF 115, & Exh. 8, ECF 117-1.	**UNDISPUTED**
9.	After observing the activities and equipment on the Subject Property, Mr. Kelley began investigating the potential violation.	**Stipulated**. Kelley Dep. at 70:10-71:6, ECF 115.	**UNDISPUTED**
10.	On December 3, 2012, Mr. Kelley communicated with state regulators regarding the potential violation as part of his investigation.	**Stipulated**. Kelley Dep. at 76:3-17, ECF 115 & Exh. 8, ECF 117-1.	**UNDISPUTED**
11.	On December 6, 2012, Mr. Kelley visited the Subject Property and observed work on the property.	**Stipulated**. Kelley Dep. at 102:1-19, ECF 115, & Exh. 11, ECF 117-2.	**UNDISPUTED**
12.	On December 6, 2012, Mr. Kelley believed that he observed "ripping" on the property.	**Stipulated**. Kelley Dep. at 102:1-19, ECF 115, & Exh. 11, ECF 117-2; *see also id.*, ECF 115, at 103:5-24 & 104:19-105:5.	**UNDISPUTED**
13.	On December 6, 2012, Mr. Kelley believed that the entire site of the Subject Property was being "actively ripped," and that most or all of the aquatic resources on the Subject Property were being destroyed.	**Stipulated**. Kelley Dep. at 105:11-106:3, ECF 115, & Exh. 11, ECF 117-2.	**UNDISPUTED**
14.	On December 6, 2012, Mr. Kelley believed that he observed a violation of the Clean Water Act.	**Stipulated**. Kelley Dep. at 117:10-118:2, ECF 115, & Exh. 11, ECF 117-2.	**UNDISPUTED**
15.	On December 6, 2012, Mr. Kelley still did not know who owned the Subject Property.	**Stipulated**. Exhibit 11, ECF 117-2.	**UNDISPUTED**

16.	Mr. Kelley subsequently learned that Duarte Nursery, Inc., owned the Subject Property, and called John Duarte on December 11, 2012, to discuss the potential violation at the Subject Property.	**Stipulated**. Kelley Dep. at 134:21-135:7, ECF 115, & Exh. 17, ECF 116-1; *see also id*., ECF 115, at 136:15-24.	**UNDISPUTED**
17.	At the time of the December 11, 2012, conversation, Mr. Kelley believed that the activities on the Subject Property were potential violations of the Clean Water Act.	**Stipulated**. Kelley Dep., ECF 115, at 138:19-139:12.	**UNDISPUTED**
18.	During the December 11, 2012, conversation, Mr. Duarte acknowledged that they were conducting work on the Subject Property, but asserted that they knew where the wetlands were and were avoiding them.	**Stipulated**. Kelley Dep., ECF 115, at 140:7-12.	**UNDISPUTED**
19.	During the December 11, 2012, conversation, Mr. Kelley informed Mr. Duarte that wetlands drainages were not being avoided.	**Stipulated**. Kelley Dep., ECF 115, at 140:13-141:9.	**UNDISPUTED**
20.	During the December 11, 2012, conversation, Mr. Kelley advised Mr. Duarte that the Corps would be sending a formal letter notifying Duarte of the Corps' belief that there were violations of the Clean Water Act, and that Duarte should cease and desist any unauthorized activity in waters of the United States.	Kelley Dep., ECF 115, at 140:13-141:25; see also Exh. 17, ECF 116-1.	**DISPUTED** Exhibit 17 states that Kelley advised John Duarte to cease and desist "additional impacts to," not "any unauthorized activity in" waters of the United States.
21.	After the December 11, 2012, conversation with Mr. Duarte, Mr. Kelley began working on a cease and desist letter.	**Stipulated**. Kelley Dep. at 142:1-24, ECF 115.	**UNDISPUTED**
22.	On or about February 19, 2013, Mr. Kelley completed an initial investigation memo for Duarte Nursery's actions on the Property.	**Stipulated**. Kelley Dep., ECF 115, at 168:2-18 & Exhibit 30, ECF 116-2.	**UNDISPUTED**
23.	The Corps sent a cease and desist letter to Duarte on February 25, 2013.	**Stipulated**. Kelley Dep., ECF 115, at 223:17-25 & Exhibit 34, ECF 116-3.	**UNDISPUTED**

24.	The matter was then transferred from Mr. Kelley to James Robb, a staff member in the Corps' enforcement division	**Stipulated**. Kelley Dep., ECF 115, at 228:4-11 & 229:23-230:1.	**UNDISPUTED**
25.	Mr. Robb believed the activities on the Subject Property constituted a flagrant violation of the Clean Water Act	**Stipulated**. Deposition of James Robb ("Robb Dep."), ECF 113, at 122:4-123:24.	**UNDISPUTED**
26.	Mr. Robb, in consultation with his supervisors decided to make a formal referral to EPA for enforcement before October 9, 2013.	**Stipulated**. Robb Dep., ECF 113, at 122:25-123:2.	**UNDISPUTED**
27.	On October 9, 2013, the referral package was completed and "sent for printing," meaning that the formal package was complete and being prepared for official signature.	**Stipulated**. Robb Dep., ECF 113, at 141:9-142:11.	**UNDISPUTED**
28.	At the time the decision was made to refer the matter to EPA, nobody at the Corps of Engineers was aware of any lawsuit by Duarte Nursery, Inc., or John Duarte, nor were they expecting a lawsuit.	**Stipulated**. Robb Dep., ECF 113, at 158:25-159:10	**UNDISPUTED**
29.	This lawsuit was filed by Duarte on October 10, 2013.	**Stipulated**. Complaint, ECF 1.	**UNDISPUTED**
30.	Before the formal referral packet was sent to EPA, Corps staff learned of Duarte's lawsuit.	**Stipulated**. Robb Dep., ECF 113, at 143:21-144:24 & Exh. 119.	**UNDISPUTED**
31.	After the Corps and EPA became aware of the lawsuit and held further discussions, EPA indicated that it would decline the referral because the lawsuit was a "complicating factor."	**Stipulated**. Robb Dep., ECF 113, at 154:20-155:20.	**UNDISPUTED**
32.	During his deposition, Michael Jewell testified to the following regarding the referral to the Department of Justice for enforcement:	**Stipulated**. Deposition of Michael Jewell, ECF 111, at 87:11-23	**UNDISPUTED**

	Q If you had been in the office, if this had been presented to you for approval for forwarding on to the DOJ, would you have approved it? A Yes. Q Why? A It's a flagrant case. EPA did not take the referral. In my mind, in my opinion, it wouldn't have been appropriate just to walk away from it; would not have been appropriate to pursue some sort of an after-the-fact permit. It was knowing. It was willful. It was an important enough case in my mind and in my opinion that I had no problems being told after the fact that it got referred.		
33.	After the matter was referred to the Department of Justice, Department attorneys sought, and on March 25, 2014, received, permission from the Assistant Attorney General for the Environment and Natural Resources Division to assert this enforcement action as a counterclaim in this proceeding.	**Stipulated**. US_01820, ECF 117-7.	**UNDISPUTED**
34.	There is no evidence that any Corps held retaliatory animus towards Duarte Nursery Inc. or John Duarte.	*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (movant need not negate element on which non-movant has burden of proof.); *see also* Declaration of Matthew P. Kelley, ECF 125, at ¶ 14.	**DISPUTED** as to the facts, and as to the materiality of the existence of "retaliatory animus" to whether the filing of the Complaint was a substantial or motivating factor in the decision to file the Counterclaim. Up until the time that Duarte filed the Complaint, the Corps was going to refer this matter to EPA, in accordance with Corps policy as expressed in its Field Level Agreement with EPA. Kelley Dep., 16-19. The Corps staff involved in this case have a low expectation, based on their experience that any particular case referral will lead to EPA enforcement. Haley Dep., 50:6-18, Jewell

			Dep. 50:9-18. The Corps staff had no expectation, at this phase of its work, that the Corps would be involved in litigation against Duarte. Kelley Dep., 267:12-18. This changed when the Complaint was filed on October 10, 2013. The Corps abandoned its prior decision to refer the case to EPA, and never made the referral. Robb Dep., 122:25 – 123:2, 138:5-9, 142:10-21, 150:6-17, 154:20 – 155:1. Then, staff at the Corps decided to refer the matter directly to the Department of Justice. Robb Dep., 156-57. This new course of conduct was the direct result of Duarte's Complaint. Robb Dep., 142:10-21; 150:6-13. After the United States filed the Counterclaim, one of the Justice Department attorneys in this case, John Thomas Do, held a conversation with Caleb Unruh, whose deposition the United States was then trying to schedule. During this conversation, Mr. Unruh asked Mr. Do, "what is this, what is this about." Mr. Do's answer was: "Well, you know Duarte Nursery sued us. Well, we are suing them back." Mr. Unruh immediately interpreted this answer as expressing a retaliatory motive against Duarte, and was concerned that it also expressed a similar animus against him. Unruh Dep., 204:13 - 205:10. Corps staff who were involved in this case had few experiences with Clean Water Act lawsuits for

			alleged unauthorized activities brought "by the Corps" as opposed to those which had been referred to EPA. This case is one of the few of its kind that several of them have ever been aware of. Kelley Dep., 267:16-18; Haley Dep., 50:22 - 51:19, Jewell, 87:4-7. Matt Kelley observed an almost identical wheat planting just north of the Property about a year before Duarte's alleged Clean Water Act violations. Kelley ignored this larger planting, even though he considered it a violation upon seeing it. Kelley Dep., 54:12 - 55:9. Matt Kelley dismissed Ronda Lucas' request for information on the basis for the Order and available administrative remedies as "a ranting fishing expedition" and his supervisor was not concerned about this statement. Exhibit 37, ECF 116-5; Haley Dep., 45:11-16. Matt Kelley "purged" the file of "tons of stuff" before sending it along to Mr. Robb for further action. Kelley Dep., 244:14 - 245:16.
35.	There is no evidence that this enforcement action was motivated by retaliatory animus	*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (movant need not negate element on which non-movant has burden of proof.); *see also* Declaration of Matthew P. Kelley, ECF 125, at ¶ 14.	**DISPUTED** as to the facts, and as to the materiality of the existence of "retaliatory animus" to whether the filing of the Complaint was a substantial or motivating factor in the decision to file the Counterclaim. Up until the time that Duarte filed the Complaint, the Corps was going to refer this matter to EPA, in

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36.	There is no evidence that this enforcement action would not have been brought but for retaliatory animus.	*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (movant need not negate element on which non-movant has burden of proof); *see also* Declaration of Matthew P. Kelley, ECF 125, at ¶ 14.	**DISPUTED** as to the facts, and as to the materiality of the existence of "retaliatory animus," or whether the Counterclaim would have been brought "but for" retaliatory animus, to whether the filing of the Complaint was a substantial or motivating factor in the decision to file the Counterclaim. Up until the time that Duarte filed the Complaint, the Corps was going to refer this matter to EPA, in accordance with Corps policy as expressed in its Field Level Agreement with EPA. Kelley Dep., 16-19. The Corps staff involved in this case have a low expectation, based on their experience that any particular case referral will lead to EPA enforcement. Haley Dep., 50:6-18, Jewell Dep. 50:9-18. The Corps staff had no expectation, at this phase of its work, that the Corps would be involved in litigation against Duarte. Kelley Dep., 267:12-18. This changed when the Complaint was filed on October 10, 2013. The Corps abandoned its prior decision to refer the case to EPA, and never made the referral. Robb Dep., 122:25 – 123:2, 138:5-9, 142:10-21, 150:6-17, 154:20 – 155:1. Then, staff at the Corps decided to refer the matter directly to the Department of Justice. Robb Dep., 156-57. This new course of conduct was the direct result of Duarte's Complaint. Robb Dep., 142:10-21; 150:6-13.

			After the United States filed the Counterclaim, one of the Justice Department attorneys in this case, John Thomas Do, held a conversation with Caleb Unruh, whose deposition the United States was then trying to schedule. During this conversation, Mr. Unruh asked Mr. Do, "what is this, what is this about." Mr. Do's answer was: "Well, you know Duarte Nursery sued us. Well, we are suing them back." Mr. Unruh immediately interpreted this answer as expressing a retaliatory motive against Duarte, and was concerned that it also expressed a similar animus against him. Unruh Dep., 204:13 - 205:10. Corps staff who were involved in this case had few experiences with Clean Water Act lawsuits for alleged unauthorized activities brought "by the Corps" as opposed to those which had been referred to EPA. This case is one of the few of its kind that several of them have ever been aware of. Kelley Dep., 267:16-18; Haley Dep., 50:22 - 51:19, Jewell, 87:4-7. Matt Kelley observed an almost identical wheat planting just north of the Property about a year before Duarte's alleged Clean Water Act violations. Kelley ignored this larger planting, even though he considered it a violation upon seeing it. Kelley Dep., 54:12 - 55:9. Matt Kelley dismissed Ronda Lucas' request for information on the basis for the Order and available

			administrative remedies as "a ranting fishing expedition" and his supervisor was not concerned about this statement. Exhibit 37, ECF 116-5; Haley Dep., 45:11-16. Matt Kelley "purged" the file of "tons of stuff" before sending it along to Mr. Robb for further action. Kelley Dep., 244:14 - 245:16.
37.	John Duarte testified as follows during his deposition: Q. Do you feel that you wanted to say something about the Corps of Engineers to the press but something prevented you from doing that? A. Only retaliatory lawsuits. Q. And how so? A. Well ... Q. How did that stop you? A. It didn't.	**Stipulated**. Deposition of John Duarte, ECF 109, at 163:11-165:5	**UNDISPUTED** as to the facts. Duarte DISPUTES the materiality of this testimony to whether the government's filing suit against Duarte is sufficient to chill a person of ordinary firmness in the exercise of First Amendment rights.

Dated: November 6, 2015.

Respectfully submitted,

M. REED HOPPER
ANTHONY L. FRANCOIS
DAVID M. IVESTER
PETER PROWS
GERALD E. BRUNN
Assistant Attorney General

By /s/ Anthony L. Francois
ANTHONY L. FRANÇOIS

Attorneys for Plaintiffs and Counterclaim-Defendants Duarte Nursery, Inc., et al.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PLAINTIFF'S SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION REGARDING PLAINTIFF'S "RETALIATION" CLAIM** have been served through the Court's CM/ECF system on all registered counsel this 6th of November, 2015.

/s/ Anthony L. François
ANTHONY L. FRANÇOIS

Kiren Mathews

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Case Name: (TEMP) Duarte Nursery Inc. et al v. United States Army Corps of Engineers et al
Case Number: 2:13-cv-02095-KJM-AC
Filer: John Duarte
Duarte Nursury, Inc.
Document Number: 154

Docket Text:
OPPOSITION by John Duarte, Duarte Nursury, Inc. to [134] Motion to Dismiss or, in the alternative, for Summary Adjudication. (Attachments: # (1) Statement Sep statement in opposition to MSJ for Retaliation Claim)(Francois, Anthony)

2:13-cv-02095-KJM-AC Notice has been electronically mailed to:

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