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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

PRIME HEALTHCARE SERVICES, INC., and PRIME HEALTHCARE FOUNDATION, INC.,

Plaintiffs,

v.

KAMALA D. HARRIS, in her personal capacity and in her official capacity as the Attorney General of the State of California,

Defendant.

5:15-cv-01934

DEFENDANT KAMALA D. HARRIS'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and 12(b)(6)

Date: February 29, 2016
Time: 9:30 a.m.
Courtroom: 650
Judge: Honorable George H. King
Trial Date: None Set
Action Filed: September 21, 2015

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INTRODUCTION

This action is brought by Prime Healthcare Services, Inc., and Prime Healthcare Foundation, Inc. ("Prime"), to challenge the California Attorney General's supervisory authority over charitable corporations operating in California. The law suit is designed more for headlines than judicial relief. Without including any facts that involve her, Prime accuses the Attorney General of *corruption*: that she accepted a bribe from the Service Employees International Union, United Healthcare Workers ("UHW") in exchange for a promise to render a negative decision on Prime's controversial attempt to acquire six nonprofit healthcare facilities from the Daughters of Charity Health System. This claim is outrageous, and the lawsuit is meritless and irresponsible.

The Attorney General's Office ("AGO") thoroughly investigated the proposed transaction. Consent to it was made subject to conditions designed to protect the public interest. Among them was a sound requirement that Prime keep emergency and essential medical services open for ten years at all but one medical facility to ensure continuity of services to the affected communities. The Attorney General imposed the ten-year conditions after six meetings for public comment, and after consideration of an independent consultant's opinion that the conditions were necessary to maintain the availability or accessibility of healthcare services in the affected service areas. The First Amended Complaint alleges that the ten-year conditions violated Prime's due process and equal protection rights secured by the Fourteenth Amendment to the United States Constitution and the National Labor Relations Act ("NLRA"). The complaint also challenges the constitutionality of the Attorney General's statutory authority over transfers of nonprofit healthcare facilities to for-profit Prime Healthcare Services, Inc., under the United States and California Constitutions.

Even accepting the complaint's allegations of corruption as true, as this motion must, the complaint's claims are subject to dismissal. First, the complaint's allegations of corruption lack adequate factual allegations, fail to meet the plausibility pleading standard, and the complaint's allegations of injury are insufficient to confer standing. Second, the claims of denial of due process, equal protection and NLRA rights are technically defective on seven grounds, and the Attorney General is qualifiedly immune from suit. Finally, the constitutional challenges to California Corporations Code sections 5914-5925 under the Fourteenth Amendment to the United States Constitution and the California Constitution are not viable as a matter of law. And if the Court determines that some claims are sufficiently pled to avoid dismissal at this early stage, the Attorney General alternatively urges the Court to abstain from adjudicating those claims to avoid unnecessary constitutional adjudication of a state sovereign matter.

The Court should dismiss the complaint without leave to amend.

STATEMENT OF FACTS

I. THE ATTORNEY GENERAL SUPERVISES CHARITIES

The Attorney General has general supervision over all charitable organizations and enforces the obligations of trustees, nonprofits, and fiduciaries that hold or control property in trust for charitable purposes.[1] In 1996, Corporations Code sections were enacted to impose more scrutiny over transfers of nonprofit charitable health facility assets. 1996 Cal. Stat., ch 1105, 1-5. The Legislature intended to preserve access to uncompensated healthcare for the poor, elderly, and disabled. *Id.* § 1(c)-(d) at 2. The statutes do this, in part, by requiring nonprofit corporations to

[1] Supervisory and enforcement authority is granted under the Supervision of Trustees and Fundraisers for Charitable Purposes Act (Cal. Gov't Code §§ 12580-12599.8), the Nonprofit Corporation Law (Cal. Corp. Code §§ 5000-6216), the Solicitations for Charitable Purposes Law (Cal. Bus. & Prof. Code §§ 17510-17510-17510.95), and provisions of the California Business and Professions Code that prohibit unlawful, unfair, or fraudulent business acts or practices within this State (*id.* §§17200-17210).

seek consent from the Attorney General before transferring a material amount of a nonprofit healthcare facility's assets. Cal. Corp. Code[2] §§ 5914-19 (to for-profit entity); §§ 5920-23 (to nonprofit entity).[3]

The Attorney General is required to review proposed nonprofit hospital facility transactions and to exercise her "discretion to consent to, give conditional consent to, or not to consent to any agreement or transaction" based on *any* factor the she deems relevant, including nine factors specified by statute. §§ 5917(a)-(i), 5923(a)-(i). These factors include whether the transaction would have "significant effect on the availability or accessibility of healthcare services to the affected community," § 5917(h), 5923(h); Cal. Code Regs. tit. 11, § 999.5(f)(8)-(9), and whether it is in the "public interest," §§ 5917(i), 5923(i); Cal. Code Regs. tit. 11, § 999.5(f)(12). When consent is granted, the Attorney General's policy is to require continuation of essential services for at least five years, including for emergency room services. Cal. Code Regs. tit 11, § 999.5(f)(8)(C). But the Attorney General retains "complete discretion to determine whether this policy shall be applied in any specific transaction under review." *Id.*

The AGO may request that an applicant (the nonprofit corporate seller) provide any information beyond the applicant's initial written submission that it deems reasonably necessary to review the proposed agreement or transaction. Cal. Code Regs. tit. 11, § 999.5(c)(2), (d). The AGO may consider relevant information from any person, and conducts public meetings to receive comments from interested parties. §§ 5916, 5922; Cal. Code Regs tit. 11, § 999.5(e)(7). The AGO typically contracts with a consultant to prepare an independent healthcare impact statement that assesses the transaction's possible impacts on the availability or

[2] Subsequent statutory references are to the California Corporations Code, unless specified otherwise.

[3] The transaction here is a transfer of nonprofit assets to a for-profit corporation.

accessibility of services to the affected community. *Id.* § 999.5(e)(6). This statement is public. *Id.*, § 999.5(e)(3)(D). The Attorney General must then notify the applicant of her decision. §§ 5915, 5921. The decision is reviewable in state court for an "abuse of discretion" in an administrative mandamus proceeding. Cal. Civ. Proc. Code § 1085.

II. THE ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

A. The Attorney General Conditionally Approved the Sale of Daughters of Charity Health System To Prime

In early 2014, the Daughters of Charity Health System ("DCHS") decided to transfer DCHS and its affiliated entities, including five nonprofit hospitals and one skilled nursing facility (collectively, "Hospitals"). *See* FAC ¶ 3.[4] On October 10, 2014, DCHS selected Prime's bid to purchase the Hospitals. *Id.* ¶¶ 4, 7, 78. The agreement required Prime to keep the Hospitals open, maintaining "all existing healthcare services, including emergency rooms and trauma centers, for *at least* five years." *Id.* ¶ 78.

Two weeks later, DCHS submitted the notice of the transaction to the AGO. *Id.* ¶¶ 8, 81. Two months after that, the AGO posted on its website all five healthcare impact reports assessing the effects of the transaction on the availability of healthcare services. Defendant's Request for Judicial Notice ("RJN") Exhs 1-5.[5] The healthcare consultant's impact statements recommended that four of the five hospitals and the skilled nursing facility be required to maintain emergency and some essential services for ten years to minimize the transaction's potential

[4] Four facilities were located in Northern California: Seton Medical Center in Daly City, Seton Coastside in Moss Beach, O'Conner Hospital in San Jose and St. Louise Regional Hospital in Gilroy. Two facilities were located in Southern California: St. Francis Medical Center in Lynwood and St. Vincent Medical Center in Los Angeles. FAC ¶ 3.

[5] The complaint's allegations are considered with judicially-noticeable facts. The impact statements document that each hospital, and the communities they serve, are unique. There is one report for each hospital. Seton Coastside, the skilled nursing facility, is considered in the Seton Medical Center report.

negative healthcare impacts. *Id.* Exh 1 at 94-104 (St. Francis Medical Center), Exh 3 at 90-98 (Seton Medical Center & Seton Medical Center Coastside), Exh 4 at 86-94 (O'Conner Hospital), Exh 5 at 81-88 (Saint Louise Regional Hospital). In January 2015, the AGO conducted six public meetings. FAC ¶ 84. On February 20, 2015, the Attorney General conditionally consented to the transaction. RJN Exh 6 at 1. The complaint characterizes the decision as a "77-page list of over 300 approval conditions."[6] FAC ¶¶ 14, 89.

With respect to continuity of services, a key issue in this case, the decision imposed the following conditions: (1) for St. Francis Medical Center, emergency services including a Level II Trauma Center with on-call trauma services and other essential medical services (ten years), RJN Exh 6 at 3-5, conditions IV-VI; (2) Seton Medical Center Coastside, skilled nursing services and stand-by emergency services (ten years), *id.* at 36, condition VI; (3) Seton Medical Center, O'Conner Hospital and Saint Louise Regional Hospital, emergency and other essential medical services (ten years) and other medical services (five years), *id.* at 35-36, conditions IV-V (Seton), 50-51, conditions IV-V (O'Connor), 65-66, conditions IV-V (Saint Louise); and (4) St. Vincent Medical Center, emergency and other essential medical services (five years), *id.* at 19-20, condition IV; *see* FAC ¶ 96.[7]

On March 10, 2015, Prime withdrew its bid, claiming that the ten-year conditions make the Hospitals financially unviable. FAC ¶¶ 18, 92, 94. The complaint acknowledges the Attorney General has previously required women's healthcare services be continued for ten years, but not for other services. *Id.* ¶ 96.

[6] As conditions were imposed on each hospital, the decision contained five separate sets of conditions with many of the same conditions being imposed at each of the hospitals. *See*, *e.g.*, RJN Exh 6 at 2, 18, 34, 49, 64, condition I. The decision imposed no more than 23 conditions on any one hospital. *Id.* at 13, 29, 44, 59, 74.

[7] The complaint's list of required ten-year services is exaggerated by Prime's splitting services into component parts, and listing other services that the decision required for only five years. FAC ¶ 96 at 43:19-45:19.

On July 31, 2015, DCHS noticed a second transaction, this time to transfer the Hospitals to Blue Mountain Capital Management, LLC. FAC ¶ 99. The complaint alleges the Attorney General would approve this transaction with five-year conditions. FAC ¶ 98. However, the healthcare consultant's impact statements posted on the AGO's website on October 2, 2015, make essentially the same recommendations to the Attorney General that were made on the Prime transaction: that emergency and some essential services remain in place for ten years. RJN Exhs 7 at 104-105, 9 at 101-102, 10 at 99-100, 11 at 90-91. The Attorney General's decision has not yet been issued.

B. Prime's Dispute With the United Healthcare Workers

Since 2009 Prime has apparently had a long-running and bitter dispute concerning UHW's efforts to organize Prime's labor force. FAC ¶¶ 10, 72 (alleging UHW was intent on killing the Prime deal because of their long standing feud). The complaint alleges the Attorney General derailed the Prime Hospitals' transaction in return for "up to $25 million" in campaign contributions from UHW. *Id.* ¶¶ 17, 41, 102, 93-94; *see* ¶ 85. However, there are no facts explaining the alleged bribe, the Attorney General's supposed acceptance of it, or how it came about.

The complaint's main focus is on Dave Regan, and UHW. It alleges that UHW created a website to oppose Prime's bid, and to support an alternative bidder. FAC ¶ 68. UHW also passed a resolution calling on the Attorney General to stop the sale to Prime until investigations of Prime for Medicare fraud were resolved. *Id.* ¶ 73. Later, UHW issued a press release announcing that 27 state legislators had signed a letter to the Attorney General demanding that she stop the sale to Prime. *Id.* ¶ 74. UHW also announced that 38 state legislators, two U.S. Representatives, and other elected officials had signed the letter to the Attorney General opposing the sale. *Id.* UHW aired television ads and mounted a calling campaign urging the Attorney General to deny consent to the sale. *Id.* ¶ 79. Following the Attorney

General's decision on February 20, 2015, UHW took credit for the Attorney General's decision. *Id.* ¶ 91.

Prime also alleges that during labor negotiations that preceded the Attorney General's decision, Regan repeatedly informed Prime, and DCHS, that the Attorney General would scuttle the transaction if no labor deal was reached. FAC ¶¶ 9-10, 11, 42-43, 44, 64, 71-72, 85.[8] Regan boasted that "he has the influence with Harris to either make or break Prime with respect to the Prime-DCHS sale," the Attorney General "would do what she was told and nothing more," and he "controls Harris and the political process in California." *Id.* ¶¶ 42, 71, 85.

C. The Attorney General Denied an Earlier Sale of Victor Valley Community Hospital to Prime

The complaint includes allegations concerning the Attorney General's 2011 denial of consent to Prime's nonprofit foundation purchase of Victor Valley Community Hospital ("VVCH"), a nonprofit hospital corporation located in San Bernardino County. FAC ¶¶ 45, 52. The Attorney General denied consent to this sale on public interest grounds, and due to its likely significant effect on the availability or accessibility of healthcare services to the community. RJN Exh 14.[9] The complaint seeks *no* relief related to the VVCH transaction, but alleges that UHW influenced the Attorney General's denial, and that the denial was a "mistake" caused by the Attorney General's inexperience. FAC ¶¶ 45, 48, 53-54. The complaint alleges that a UHW attorney told a bankruptcy judge that the Attorney General would not approve the VVCH transaction, that UHW planned to oppose the sale at a public meeting, and the AGO arranged for a larger meeting venue. *Id.*

[8] Conway Collis, a DCHS representative, attempted to mediate the labor negotiations. He is alleged to be a lobbyist and friend of the Attorney General. Former Attorney General Bill Lockyer, was brought in to help mediate. He is alleged to be a confidant of the Attorney General. Both are alleged to have urged Prime to enter an agreement with UHW. FAC ¶¶ 12-13, 44.

[9] Former Attorney General Edmund G. Brown Jr. had previously denied consent to the sale of Anaheim Memorial Medical Center to Prime. RJN Exh 15.

¶¶ 47, 50. After the Attorney General made her decision, UHW took credit. *Id.* ¶ 45. Prime alleges that the Attorney General received campaign contributions from UHW in support of her 2010 and 2014 campaigns for Attorney General. *Id.* ¶ 40.

III. LEGAL CLAIMS ALLEGED IN THE FIRST AMENDED COMPLAINT

The complaint consists of five "counts," all flowing from the decision to impose the ten-year conditions on the Hospitals transaction. The first and second counts allege violation of Prime's Due Process and Equal Protection rights under the Fourteenth Amendment. FAC ¶¶ 106-115. The third count alleges violation of Prime's right to bargain collectively under the NLRA. *Id.* ¶¶ 116-121. All of these first three counts seek compensatory damages under 42 U.S.C. § 1983. The fourth count, for declaratory relief, challenges the constitutionality of California Corporations Code section 5914-5925 under the Fourteenth Amendment and the California Constitution. *Id.* ¶¶ 122-131. This count alleges vagueness, violations of Due Process and Equal Protection rights, infringement on Prime's right to acquire property, and an unlawful delegation of legislative power in violation of article I, section 1, and article III, section 3, of the California Constitution. *Id.* ¶¶ 127-129. The fifth count seeks injunctive relief.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure seeks dismissal for lack of subject matter jurisdiction.[10] Fed. R. Civ. P. 12(b)(1). The party seeking to invoke the jurisdiction of the federal court bears the burden of proving all jurisdictional prerequisites have been met. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The court is not limited to the complaint's allegations but may consider other extrinsic evidence. *Hornsby v. Lufthansa German Airlines*, 593 F. Supp. 2d 1132, 1135 (C.D. Cal. 2009). A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a complaint. *N.*

[10] Subsequent references to federal rules are to Federal Rules of Civil Procedure unless otherwise stated.

Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). When reviewing a complaint under Rule 12(b)(6), the court must accept all allegations of material fact as true and construe those facts in the light most favorable to the plaintiff, *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir 1994), but may consider facts outside the complaint that are subject to judicial notice, *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

ARGUMENT

I. THE FIRST AMENDED COMPLAINT'S FACTUAL ALLEGATIONS ARE INSUFFICIENT

The complaint is peppered with accusations against the Attorney General, most made "on information and belief," of *quid pro quo* corruption, ranging from bribery, and extortion, to mail fraud and wire fraud. FAC ¶¶ 28-31, 41, 64, 70, 83, 102, 108, 119, 129. The complaint alleges a corrupt agreement between the Attorney General and UHW for an approval of the Hospitals transaction with conditions so onerous they amount to a *de facto* denial of the transaction in exchange for campaign contributions. *Id*. The alleged misconduct lies at the heart of the Section 1983 claims (*id.* ¶¶ 102, 108, 119), and is incorporated by reference into the remaining state law claims (*id.* ¶¶ 122, 128). None of these allegations is set forth in sufficient detail to survive a motion to dismiss under Rule 12(b)(6).

A. Federal Pleadings Require Plausible Factual Allegations

A complaint must allege facts sufficient to establish the allegations are plausible, not merely possible. "Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires not only 'fair notice of the nature of the claim, but also grounds on which the claim rests.'" *Li v. Kerry*, 710 F.3d 995, 998 (9th Cir. 2013) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556 n.3 (2007). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" does not satisfy Rule 8's pleading requirements. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

While a high level of factual detail is not required, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly,* 550 U.S. at 570) (holding that a pleading's "[f]actual allegations must be enough to raise a right to relief above the speculative level"). "Plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility'" to show their entitlement to relief. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at 557). Finally, allegations made "upon information and belief" are inadequate, except "where the facts are peculiarly within the possession and control of the defendant [citation omitted], or where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010).

For example, the *Twombly* complaint alleged that an agreement between regional telephone systems was a restraint of trade and violated the Sherman Act. First, the Supreme Court held that the allegation that defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not compete with one another" was a mere legal conclusion not entitled to an assumption of truth. *Twombly*, 550 U.S. at 551, 555. Next, the Court held that allegations that the companies consciously engaged in parallel conduct, while consistent with the possibility of an illegal agreement, did not satisfy the plausibility requirement. *Id.* 550 U.S. at 556. "Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556-57. The Court concluded that the complaint allowed "an obvious alternate explanation" that did not depend on an unlawful agreement or conspiracy. *Id.* at 566-69.

After *Iqbal,* it is clear the plausibility standard applies to all civil actions. The Supreme Court will reject pleadings that do not show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 668. Iqbal was a Muslim, arrested and detained in the aftermath of the 2001 terrorist attacks. He filed a *Bivens* complaint against federal officials and corrections officers alleging deprivation of many constitutional protections while in custody. The complaint alleged that former Attorney General John Ashcroft, and former FBI Director Robert Mueller subjected Iqbal to harsh conditions of confinement based on his race, religion, or national origin. *Id.* at 666-69.

The Court declined to give a presumption of truth to the complaint's "bare assertions" that Ashcroft was the "principal architect" of this policy and Mueller was "instrumental" in adopting and executing it. *Iqbal*, at 680-81. "These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim . . . ." *Id.* at 681. The Court considered the complaint's factual allegations that thousands of Arab Muslim men were arrested and detained under Mueller's direction, and held in restrictive conditions of confinement until "cleared" by the FBI pursuant to a policy approved by Ashcroft and Mueller. "Taken as true," the Court held, "these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose." *Id.* The Court noted that the September 11 attackers were Arab Muslims, members of al Qaeda, a group composed mostly of Arab Muslims and led by Osama bin Laden, an Arab Muslim. *Id.* at 682. A legitimate policy of arrests and detentions "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. . . . As between that 'obvious alternative explanation for the arrests, *Twombly, supra*, at

567 [], and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." *Id.*

B. The First Amended Complaint Does Not Contain Plausible Allegations of Fact

Prime's complaint fails the plausibility requirement established by the *Twombly* and *Iqbal* decisions. It contains no specific, non-conclusory factual allegations that suggest more than the theoretical possibility of *quid pro quo* misconduct. Most of the illegal corruption allegations are made "on information and belief;" yet nothing suggests that underlying facts are "peculiarly within the possession and control of the defendant," *Boykin,* at 215, and therefore nothing allows Prime to rely upon "information and belief" to allege the corrupt conduct that is asserted to be at the bottom of all the claims. When the complaint's conclusory and "information and belief" allegations are disregarded, there remains no plausible inference of the Attorney General's culpability.

Count I claims a violation of due process rights "based on Plaintiffs' rejection of UHW's unionization demands and in *quid pro quo* exchange for the continuing political and financial support of UHW and Regan." FAC ¶ 108. This conclusory allegation underlies all the other counts. It is, in turn, based on an allegation that "Prime is informed and believes that UHW promised Harris up to $25 million dollars [sic] by way of political contributions through SEIU COPE, the national Political Action Committee for SEIU and UHW, if she denied or imposed conditions on the Prime-DCHS sale which would constitute a *de facto* denial." *Id.* ¶ 41. The campaign money allegation simply does not withstand scrutiny.

First, the allegation is made on information and belief, although there is no reason to believe that the facts are peculiarly within the Attorney General's possession and control. Moreover, the very specific promise of "up to $25 million" in campaign contributions cannot be squared with the notion that Prime does not know the information's source.

Second, *no* "factual enhancement to cross the line between possibility and probability" is provided. There is no information providing the date, time, or place of the alleged promise, or by which UHW representative it was made.

Third, only a promise by UHW is alleged – but UHW is not a defendant. As for the Attorney General, there is no allegation that she received or agreed to accept future political contributions, much less that she did so as part of a *quid pro quo* exchange.

Fourth, each of the remaining allegations that might support a claim of culpable conduct falls short of providing the specific "factual enhancement" and grounding in personal knowledge necessary to state a plausible claim to relief. Again, most allegations are made on information and belief. FAC ¶¶ 64, 70, 83, 85.

The complaint's failure to cross "the line between possibility and plausibility" is particularly clear in light of the obvious alternative explanation for the Attorney General's decision – that the conditional consent with ten-year conditions met the requirements of section 5917, and the Attorney General in the exercise of sound discretion concluded that the conditions were required to minimize potential healthcare impacts that might result from the transaction in affected communities.

II. THE COMPLAINT'S ALLEGATIONS ARE INSUFFICIENT TO CONFER STANDING ON ANY COUNT

A. Hypothetical Injuries are Insufficient to Confer Standing

The standing doctrine identifies disputes that are "appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). To establish standing, Prime must show that: (1) it suffered an injury in fact – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560-61 (citations and quotations marks omitted). Where

an allegation of injury is conjectural or hypothetical and not clean-cut and concrete, concepts of standing and ripeness overlap and provide additional ground for dismissing a complaint. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010).

B. Prime's Alleged Injuries Are Insufficient to Confer Standing

Prime alleges as injury, that it is: (1) prevented from lawfully acquiring and operating the Hospitals pursuant to the agreement, (2) potentially subject to an action by DCHS for breach of the agreement, and (3) unlawfully prevented by the Attorney General from acquiring other California nonprofit hospitals because of Prime's "continuing rejection of UHW's unreasonable unionization demands." FAC ¶ 134. These allegations are insufficient to confer standing, even at this early stage, for three reasons.

First, allegations that Prime will potentially be subject to an action for breach of the agreement, or will potentially be prevented from acquiring other hospitals in the future, are insufficient to confer standing because these purported injuries did not exist at the time the complaint was filed. And the facts as they existed at the time the complaint was filed are the only relevant facts. *Lujan,* 504 U.S. at 569, n 4; *D'Lil v. Best W. Encina Lodge & Suites,* 538 F.3d 1031, 1036 (9th Cir. 2008). Further, these allegations of injury are speculative and hypothetical, providing no possibility that they could be redressed by a court.

Second, even if an action by DCHS against Prime for breach of the contract were not speculative, allegations that Prime will be sued by DCHS for breach of the agreement do not confer standing because there would be no "causal connection" between an action by DCHS against Prime for breach of the agreement and the ten-year conditions. *Lujan*, 504 U.S. at 560-61 (requiring "causal connection between the injury and the conduct complained of"). The complaint alleges that Prime "abandoned" or "withdrew" from the agreement because the ten-year conditions would not have allowed Prime to acquire the failing Hospitals on acceptable terms. FAC ¶¶ 18, 92, 94. Prime and DCHS knew that conditions would be imposed on

the transaction should the Attorney General consent, and they negotiated a contract term defining "Acceptable AG Conditions." RJN Exh 12 at 2. Under the agreement, Prime could terminate if the Attorney General imposed a condition that was not among "Acceptable AG Conditions." *Id*. at 46 (article 10.1(e)). Thus, whether Prime's withdrawal was a breach of contract will be determined by the contract's definition of acceptable conditions, not by the conditions themselves. Stated otherwise, any causal connection between the ten-year conditions and an action by DCHS against Prime is severed by the contract definition of acceptable conditions. If Prime's withdrawal was a breach, the injury is self-inflicted.

Third, the fact of injury based on the complaint's allegation that the ten-year conditions prevented Prime from "acquiring and operating the DCHS Hospitals" is insufficient to confer standing. FAC ¶ 134. The complaint alleges that the ten-year conditions would not have allowed Prime to acquire the "failing" Hospitals and make them "profitable." *Id.* ¶¶ 18, 92, 94, see 65 (alleging Hospitals "financially failing in epic proportions"). But a lost opportunity to acquire hospitals that were "financially failing in epic proportions," and to make them profitable, is not a concrete injury that a court could ever redress. *Lujan*, 504 U.S. at 560-61.

III. THE COMPLAINT'S COUNTS I, II, III AND IV FOR VIOLATION OF CIVIL RIGHTS FAIL BECAUSE THEY ARE SUBSTANTIVELY INADEQUATE AND BECAUSE QUALIFIED IMMUNITY PROTECTS THE ATTORNEY GENERAL FROM SUIT

Counts I, II, III and IV for violation of due process, equal protection, the NLRA, and state constitutional provisions, brought under 42 U.S.C. § 1983, fail to state claims for relief. In addition, the Attorney General is qualifiedly immune from the claims. FAC ¶¶ 106-131. Prime brings Counts I, II and III against the Attorney General in her personal capacity for compensatory damages. *Id.* Count IV is brought against the Attorney General in her official capacity. Each of these count's failings is addressed, in turn, below.

A. Count I: A Due Process Claim Requires a Protected Liberty or Property Interest

Count I fails to plead any deprivation of liberty or property to support a violation of due process rights. A threshold requirement of a due process claim is the showing of a liberty or property interest protected by the Fourteenth Amendment of the United States Constitution. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972); *Wedges/Ledges, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994). Prime does not possess either interest.

1. Prime Has Not Alleged a Protected Liberty Interest.

Prime has no protected "liberty interest in freedom from arbitrary government action." FAC ¶ 107. Liberty interests protected by due process "include most of the rights enumerated in the Bill of Rights . . . [and] extend to certain *personal choices central to individual dignity and autonomy*, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, __ U.S. __, 135 S.Ct. 2584, 2598 (2015) (emphasis added). "Only those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause." *Mullins v. State of Or.*, 57 F.3d 789, 793 (9th Cir. 1995). Acquiring the Hospitals on terms Prime finds acceptable is not a personal choice central to human dignity and autonomy. It is a business calculation.

2. Prime Has Not Alleged a Protected Property Interest

Prime also has no protected property right to consummate the transaction on conditions it finds acceptable, because the Corporations Code grants the Attorney General broad discretion over hospital transactions. To have a property interest entitling a person to due process, a person must have a legitimate claim of entitlement to a particular government benefit. *Gerhart v. Lake County*, 637 F.3d 1013, 1019 (9th Cir. 2011) (citing *Roth*, 408 U.S. at 577). Such property rights are not created by the federal Constitution, but must arise from an independent source,

such as state law, or understandings that secure certain benefits. *Id.*; *Roth*, 408 U.S. at 577. A legitimate claim of entitlement is determined when the language of the statute couches an entitlement in mandatory terms. *Johnson v. Rancho Santiago Cmty Coll. Dist.*, 623 F.3d 1011,1030 (9th Cir. 2010). State law creates a legitimate claim of entitlement only "when it 'imposes significant limitations on the discretion of the decision maker.'" *Gerhart*, 637 F.3d at 1019 (quoting *Braswell v. Shoreline Fire Dep't*, 622 F.3d 1099, 1102 (9th Cir. 2010)). There is no property interest where, as here, the decision maker is given broad discretion. *Id.*

Section 5917 gives the Attorney General discretion to consent to a transaction conditionally. § 5917(a)-(i). If consent is granted, she has "complete discretion" to determine the period of time the buyer should continue existing levels of healthcare services. Cal. Code Regs. tit 11, § 999.5(f)(8)(C). Therefore, the complaint fails to allege an entitlement to a benefit that could be recognized by the federal Constitution. Nor can an entitlement be assumed based on the Attorney General's approvals of other transactions alleged in the complaint. A past practice of granting a benefit is not sufficient to establish a legal future entitlement. *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) ("A constitutional entitlement cannot be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past"); *Gerhart v. Lake County*, 637 F.3d at 1020-21.

B. Count II: Prime Has No Viable Equal Protection Claim

Count II fails to plead a viable equal protection claim under Section 1983. The complaint alleges that Prime was treated differently from other similarly-situated buyers of nonprofit hospitals because unprecedented conditions were imposed due to the rejection of unionization demands. FAC ¶¶ 112-113. This is a "class of one" equal protection claim. Prime does not allege that it is a member of a class; it alleges that it was intentionally treated differently than others similarly situated, and no rational basis exists for the different treatment. *SeaRiver Maritime*

Fin. Holdings, Inc. v. Mineta 309 F.3d 662, 679 (9th Cir. 2002). The doctrine cannot be applied here because it does not apply to discretionary decisions, because the complaint does not plead facts showing that others were similarly situated, and because there are plausible reasons for the conditions.

1. The "Class of One" Doctrine Does Not Apply to Discretionary Decisions

The "class of one" doctrine has no application to state actions that "by their very nature involve discretionary decisionmaking based on . . . individualized assessments." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 603 (2008) (holding that the doctrine did not apply to employment decisions); *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) (holding doctrine does not apply to Arizona's execution protocol). Where discretion is exercised, "the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted." *Engquist*, 553 U.S. at 603. Section 5917 affords the Attorney General broad discretion to impose conditions based on many individualized considerations including different community needs. § 5917; Cal. Code Regs. tit. 11 § 999.5. The consultant's reports attest to the many individualized factors the Attorney General considers. RJN Exhs 1-5.

2. Prime Has Not Satisfied the "Similarly Situated" Requirement for "Class of One" Claims

The complaint also fails to allege facts showing that the ten-year conditions were different from conditions imposed on similarly-situated buyers of nonprofit hospitals. Prime must show a *high* degree of similarity between it and those claimed to have received better treatment. *United States v. Moore*, 543 F.3d 891, 896 (7th *Cir.* 2008); *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006); *Garden City, Inc. v. San Jose*, 2013 WL 4766748, at *4 (N.D. Cal. 2013). To be

similarly situated, "the class-of-one challenger and his comparators must be '*prima facie* identical in all relevant respects or directly comparable . . . in all material respects.'" *Moore*, at 896. Prime has utterly failed to allege facts – not bare conclusions, but *facts* – that other buyers were similarly situated. Prime fails to allege facts concerning these other purchasers' own circumstances, including but not limited to whether each of these other entities were for-profit buyers, like Prime, as the Attorney General may well approach hospital acquisitions by a for-profit buyer differently than for a nonprofit buyer, or whether these other sellers were smaller, community hospital facilities providing fewer essential medical services. FAC ¶¶ 96-97, *see* 88 (acknowledging the Attorney Genera's decision to impose a ten-year requirement on transfers to for-profit entities). More importantly, Prime ignores the unique circumstances the Hospitals and communities they serve, such as size, location, availability of alternative medical services, and other factors that are documented in the healthcare consultant's impact statements. RJN Exhs 1-5.

3. Plausible Reasons Support the Ten-Year Conditions

The equal protection claim also fails because there are plausible reasons for the ten-year conditions. When a "case involves 'social and economic policy' and neither targets a suspect class nor impinges upon a fundamental right," a court "must determine whether there is 'any reasonably conceivable state of facts that could provide a basis for the classification.'" *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004) (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). "[J]udicial review is 'at an end' once the court identifies a plausible basis on which the legislature may have relied." *Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 108-09 (2003); *RUI One Corp.*, 371 F.3d at 1155. Here, plausible reasons exist for the ten-year conditions.

The statute's legislative findings stress the important role nonprofit health facilities have in providing care to the needy, poor and disabled and acknowledge that transfers to for-profit corporations could affect the availability of community

healthcare services. 1996 Stats., ch. 1105. Section 5917 guides the Attorney General's decision, requiring her to consider whether the proposed transaction may create a significant effect on the availability or accessibility of healthcare services to the affected community, and is in the public interest. This oversight authority is intended to prevent the loss of community assets and benefits provided by the hospital historically. *See California Attorney General Antitrust Enforcement in Health Care*, § 8.13 Cal. Anti. & Unfair Comp. L. (Updated Dec. 2014); Phill Kline et al., *Protecting Charitable Assets in Hospital Conversions: An Important Role for the Attorney General*, 13–SPG Kan. J.L. & Pub. Pol'y 351, 372-73 (Spring, 2014) [hereinafter "Kline"].

The ten-year conditions serve the statute's purposes by assuring that the Hospitals will continue to provide services to their communities. The complaint tacitly acknowledges this reason for the ten-year conditions. FAC § 88 (during February 2015 meeting, AGO told Prime that Attorney General would be requiring ten-year conditions "for any future sale of a non-profit to a *for profit operator* in California" to prevent loss of community assets and benefits). A party attacking a legislative or quasi-legislative decision has "the burden to negative every conceivable basis which might support it." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. at 315. The complaint fails to suggest a factual basis for meeting this burden.

The complaint's claim that the ten-year conditions were motivated by a promise of political support does not overcome these failures. In *RUI One Corp.*, a closely analogous Ninth Circuit case, plaintiff challenged on equal protection grounds a living wage ordinance imposed by the City of Berkeley on employers who received certain benefits from the City. Plaintiff argued that the reasons the City proffered for the amendment were untrue, and the City's true motive for the amended ordinance was to aid a unionization campaign at one of the hotels affected by the ordinance. *RUI One Corp*, 371 F.3d at 1155. The court held that, if this was

the City's motive, it was irrelevant. *Id.* Judicial review ends when the court finds that a plausible basis for the decision exists. *Id.*

C. Count III: The NLRA Claim Is Not Viable

Count III fails to plead a viable NLRA claim under Section 1983. The complaint alleges that the ten-year conditions were imposed in response to Prime's refusal to accede to UHW's unionization demands, interfering with labor negotiations between Prime and UHW (*see, e.g.,* FAC ¶¶ 117-120), a subject covered in section 8(d) of the NLRA. 29 U.S.C. § 158(d). Section 8(d) imposes on employers and employee representatives certain duties with respect to collective bargaining, but does not compel either to enter into a collective bargaining agreement. By its terms, section 8(d) applies only to employers, employees and employee representatives, so State action affecting collective bargaining usually would not constitute a violation of the NLRA. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 n.2 (1989) ("*Golden State II*").

The Supreme Court, however, has held that certain state action may be preempted by the NLRA, and therefore violate the Act. *Id.* at 110-13; *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 617-19 (1985) ("*Golden State I*"). There are two types of NLRA preemption. The first, established in *San Diego Building Trades Council v. Garmon*, known as *Garmon* preemption, prohibits a state from regulating conduct that is arguably protected or prohibited by the NLRA, because that falls within the primary jurisdiction of the National Labor Relations Board. 359 U.S. 236, 244-245 (1959). The second type of NLRA preemption, known as *Machinist*s preemption, bars state regulation of areas that have been "left to be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976). In its complaint, in purported reliance on *Golden State II*, Prime alleges that the Attorney General's decision violates the NLRA because

Machinists preemption bars the Attorney General from interfering in the collective bargaining process. FAC ¶¶ 117-119.

Here, the ten-year conditions do not regulate collective bargaining at all, and therefore there is no NLRA preemption. But even if the conditions are deemed to implicate the collective bargaining process, there is no preemption because the Attorney General is acting on behalf of the members of the public who would be affected by the sale of health care facilities to Prime.

1. The Ten-Year Conditions Do Not Regulate Conduct Within the NLRA

The ten-year conditions do not regulate conduct governed by the NLRA. The complaint does not allege that the ten-year conditions interfere with collective bargaining or require Prime to accommodate UHW. FAC ¶¶ 96-97. The conditions themselves do not include any requirement that Prime engage in collective bargaining. Therefore, the ten-year conditions do not regulate conduct within the ambit of the NLRA, and the complaint's recitation of *Golden State II*, *see* FAC ¶¶ 117, 119, as support for the claim is inapposite. See *Golden State I*, 475 U.S. at 611 (emphasizing that city's sole basis for refusing to extend taxi franchise was the company's failure to settle labor dispute).

The allegation that the conditions constituted punishment for failing to resolve labor disputes also does not implicate NLRA preemption – even if it were true. FAC ¶¶ 117, 119. Courts do not delve into the motives or improper intent in determining whether state action is preempted by the NLRA, even when the improper intent is to influence labor negotiations. *Johnson v. Rancho Santiago Cmty Coll. Dist.,* 623 F.3d at 1026 (9th Cir. 2010) (in determining federal preemption, courts will not delve into alleged improper motives); *N. Ill. Chapter of Assoc'd Builders & Contractors, Inc. v. Lavin,* 431 F.3d 1004, 1007 (7th Cir. 2005) (whether state officials were motivated to assist organized labor irrelevant to federal

preemption determination). *Accord RUI One Corp. v. City of Berkeley*, 371 F.3d at 1155 (motive to assist unionization efforts irrelevant to equal protection analysis).

2. There Is No NLRA Preemption Where the Attorney General Acts in Parens Patriae

There is also no NLRA preemption where the Attorney General acts in *parens patriae* for the state residents who have a beneficial interest in having healthcare services, and where her supervisory authority touches interests deeply rooted in local feeling and responsibility.

The Attorney General's supervisory authority over California's charitable trusts is in *parens patriae* for the State's residents. *Patton v. Sherwood*, 152 Cal. App. 4th 339, 342 (2007); Kline, *supra* at 369. When a state acts in *parens patriae*, it furthers its quasi-sovereign interests. Quasi-sovereign interests are "a set of interests the State has in the well-being of its populace," in which the State acts in *parens patriae*, as distinct from its *sovereign* interests, which includes the power to regulate – to create and enforce laws. *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 602 (1982). A state acts in *parens patriae* to protect the state's interest in "the health and well-being – both physical and economic – of its residents." *Id*. at 607. Here, the ten-year conditions prevent closure of essential services for the poor, elderly and disabled that a for-profit entity might more quickly eliminate for profit-based reasons. They ensure that essential services remain available to serve communities that may prevent an expectant mother from having to travel over 30 miles to reach a hospital with obstetrical services (as is the case for the ten-year services requirement for delivery services at St. Louise Regional Hospital in Gilroy), RJN Exh 5 at 92, or enable a trauma victim to get to a hospital that provides trauma services in time to prevent death (as is the case for the ten-year requirement for Level II trauma services at St. Francis Medical Center in Lynwood), *id.* Exh 1 at 95-96, or medically fragile patients needing sub-acute, ventilated dialysis services to continue to have these services available (as is the

case for the ten-year requirement for sub-acute care services at Seton Medical Center in Daly City that is the *only* provider of ventilated dialysis services in San Mateo County), *id.* Exh 3 at 91-92.

There is also no NLRA preemption where the State's authority touches interests deeply rooted in local feeling and responsibility. In *Garmon*, the Supreme Court stated that the NLRA does not withdraw from the states the "power to regulate . . . where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243-44. In *Retail Property Trust v. United Broth. of Carpenters & Joiners of America*, the Ninth Circuit held that state law claims for trespass and nuisance that could constitute secondary boycott activity under the NLRA were not preempted because those claims "touch[] interests deeply rooted in local feeling and responsibility." 768 F.3d 938, 942 (2014). The Ninth Court reasoned: "The NLRA did not displace those areas where the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Id*. at 951 (quoting *Metro. Life Ins. Co. v. Mass*, 471 U.S. 724, 756 (1985). The ten-year conditions would ensure that a buyer of a nonprofit hospital would be answerable to the public, and not merely to investors, and that essential medical services would continue to be provided. These are matters inherently deeply rooted in local feeling and responsibility.

D. Count IV: Because No Violation of a Federally-Protected Right Is Alleged, There Is No Viable Claim Under 42 U.S.C. § 1983

Count IV, entitled: "Declaratory Relief (28 U.S.C. § 2201 and 42 U.S.C. § 1983)," appears to allege that sections 5914-5925 are unconstitutional under three distinct approaches. Each is faulty. First, if Count IV is premised on alleged violations of state constitutional rights, it is outside the scope of Section 1983's protection, and should be dismissed. Second, if Count IV alleges that violations of

state constitutional rights constitute a denial of due process under the Fourteenth Amendment, this approach also fails to state a claim under Section 1983 because neither of the state constitutional provisions at issue can trigger Fourteenth Amendment protections. Third, Count IV alleges that the nonprofit hospital transfer provisions are vague, depriving them of due process. This claim fails because the Attorney General's decision does not implicate First Amendment rights or criminal sanctions.

1. Section 1983 Applies Only to Violations of Federal Rights, Not Violations of the State Constitution

Claims based on alleged violations of state law are not cognizable under Section 1983. *See California v. LaRue*, 409 U.S. 109, 110 n.1 (1972) (claim that, as a matter of state law, regulations exceed authority conferred upon state agency is not cognizable under Section 1983). *Capogrosso v. The Supreme Court of New Jersey*, 588 F.3d 180, 185-86 (3d Cir. 2009) (claim that state court rule violates state constitution properly dismissed for failure to state a claim cognizable under § 1983). Therefore, Prime cannot "pursue a violation of the California Constitution under the guise of a federal civil rights claim," but instead such a claim "must be treated as a supplemental state law claim."[11] *Easter v. CDC*, 694 F.Supp.2d 1177, 1184 (S.D. Cal. 2010) (citing *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)).

Count IV of the complaint contends that an actual controversy exists "over whether the Non-Profit Hospital Transfer Statute violates Section 1 of the Fourteenth Amendment to the U.S. Constitution, and/or Article I, Section 1 and Article III, Section 3 of the California Constitution." FAC ¶ 130. To the extent plaintiffs seek to rely directly on an alleged state constitutional violation, their

[11] Section V of the Argument, post, explains why the state constitutional claims in Count IV fail to state a claim to relief, even when viewed as supplemental state law claims.

claims fail because Section 1983 does not apply to non-federal claims. Instead, these claims must be treated as supplemental state law claims.

2. No Fourteenth Amendment Rights are Conferred by the State Constitutional Provisions on Which Prime Relies

a. The Fourteenth Amendment Does Not Guarantee Adherence to the State Separations of Power

Count IV also contains an as-applied challenge to the Corporations Code brought under the Fourteenth Amendment and California Constitution, article III, section 3. Plaintiffs contend that the Act is an impermissible delegation of legislative power, violating state separation of powers principles and depriving them of due process under the Fourteenth Amendment. FAC ¶¶ 124, 129.

This separation of powers theory fails to state a claim under Section 1983. "The principle of separation of powers is not enforceable against the states as a matter of federal constitutional law." *May v. Supreme Court of State of Colo.*, 508 F.2d 136, 139 (10th Cir. 1974) (Fourteenth Amendment's guarantees of due process and equal protection do not apply to alleged violation of state constitution's separation of powers provisions); *see Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 255 (1957) ("[T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.").

b. Prime Lacks Standing Under California Constitution Article I, Section 1, Which Is Not a Source of Fourteenth Amendment Rights

Prime claims that the Nonprofit Hospital Transfer Statute is facially invalid and unconstitutionally vague under the Fourteenth Amendment, and under California Constitution, article I, section 1. FAC ¶¶ 124, 127, 129. It contends the law gives the Attorney General "unfettered discretion to deny, or impose unlimited conditions on approving," a buyer's acquisition of a non-profit hospital, thereby placing "an arbitrary, irrational and unreasonable restriction on the buyer's constitutional right to acquire property." FAC ¶ 127. This claim fails to state a claim to relief under Section 1983 for two reasons.

First, there is no federal property interest in acquiring property that would entitle plaintiffs to procedural due process under the Fourteenth Amendment. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. at 569; *Wedges/Ledges, Inc. v. City of Phoenix, Ariz.*, 24 F.3d at 62.

Second, California Constitution, article I, section 1, does not protect to corporations. It protect individual "people." *Roberts v. Gulf Oil Corp.*, 147 Cal. App. 3d 770, 791-93 (1983); *accord Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.*, 42 Cal. App. 4th 1260, 1287 (1996). As corporations, the two Prime plaintiffs lack standing to assert a claim under article I, section 1. *Roberts*, at 79-93.

3. Plaintiffs' Fail to Plead a Viable Vagueness Claim Under the Fourteenth Amendment

A statute's alleged vagueness is typically challenged under either the First or Fourteenth Amendments. Only the latter is raised by Prime, but it does not apply to this case. Under Fourteenth Amendment vagueness jurisprudence, due process is denied when a criminal statute subjects a person to a deprivation of liberty but is framed in terms that fail "to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *U.S. v. Williams*, 553 U.S. 285, 304 (2008) (citations omitted); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1032 (9th Cir. 2013). No criminal statute, and no liberty or property interest, is implicated here.

For the foregoing reasons, Count IV fails to plead a viable claim under 42 U.S.C. § 1983. Its allegations under article I, section 1 and article III, section 3 of the California Constitution must be treated as supplemental state law claims. These claims are also subject to dismissal under Rule 12(b)(6), as discussed in Section V of this Argument, *post.*

E. Qualified Immunity Also Protects the Attorney General from the Claims Brought Under 42 U.S.C. § 1983

Qualified immunity protects the Attorney General from the section 1983 claims, even accepting the allegations of wrongful motivation as true. Qualified

immunity shields an official from civil-damages liability unless the conduct violated a clearly-established law which a reasonable official would have been aware of. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, officials are afforded "ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal quotes and citation omitted).

These principles are applicable to each of Prime's section 1983 claims. Qualified immunity applies to shield the Attorney General from Count I for violation of due process rights as the complaint fails to establish a protected liberty or property right. Qualified immunity also applies to shield the Attorney General from Counts II and III as the complaint fails to allege facts that show a violation of equal protection (Count II) or NLRA rights (Count III), and facts alleging wrongful motive are *not* relevant to either claim, even if wrongful motive were sufficiently pled. *Supra* at 24; *Jeffers*, 267 F.3d at 906 (where defendant's mental state is not a critical element of constitutional claim, a defendant's subjective intent is not relevant to qualified-immunity defense).

The application of qualified immunity is also supported by policy principles. The policy basis of the qualified immunity doctrine is two-fold; it holds public officials accountable when they exercise power irresponsibly, but protects them from harassment, distraction, and liability when they perform their duties well. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). It allows public officials to use their expertise – based on years of observation and practice – to maintain order without fear of liability for doing what seemed reasonable at the time. *See Jeffers v. Gomez*, 267 F.3d 895, 917 (9th Cir. 2001). In *Pearson*, the Supreme Court held that a state official is entitled to qualified immunity unless: (1) plaintiff alleges facts that show a constitutional violation; and (2) it is clearly established at the time that the conduct was unconstitutional. 555 U.S. at 232.

Applying to this case the policy underlying qualified immunity, the contours of the law governing the constitutional rights set forth above are not clear, and would not be clear to a reasonable public official. Taking Prime's core allegation as true, it would not have been reasonable for the Attorney General to impose ten-year conditions in exchange for campaign contributions. However, it would have been reasonable for her to conclude that doing so would not constitute a violation of Prime's constitutional rights. In such circumstances, to allow the suit to proceed to discovery on woefully insufficient allegations of wrongful motive, and on allegations that do not establish a constitutional right would have the effect of stripping the Attorney General of the qualified immunity to which she entitled. She should not be subjected to burdensome litigation on the thinnest allegations of wrongdoing, related to claims that are themselves not sufficient to state claims for relief – this is precisely the type of suit that qualified immunity was meant to prevent. *See Ashcroft v. Iqbal*, 556 U.S. at 685-86; *Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1316 (9th Cir. 1989).

IV. TO THE EXTENT THAT COUNT IV'S CLAIMS UNDER THE CALIFORNIA CONSTITUTION ARE BROUGHT AS SUPPLEMENTAL STATE LAW CLAIMS, THEY ARE BARRED BY THE ELEVENTH AMENDMENT

If Count IV's claims challenging the constitutionality of California Corporations Code sections 5914-5925 are brought directly under the California Constitution as supplemental state law claims, they are barred by the Eleventh Amendment. Count IV's state constitutional claims are brought against the Attorney General in her official capacity. FAC ¶¶ 124-125, 127-130. Count IV alleges that the state statutes violate California Constitution, article I, section 1, and article III, section 3. *Id.* The Eleventh Amendment prohibits federal lawsuits by private parties against a state or a state agency, unless the State has consented to the suit or Congress has abrogated Eleventh Amendment immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984). California has not waived its Eleventh Amendment immunity allowing the suit on the state constitutional

claims, nor has Congress abrogated the immunity where an action is brought under 42 U.S.C. § 1983. *Id.* at 99 (citing *Quern v. Jordon*, 440 U.S. 332, 342 (1979)).

A suit against a state official is barred under the Eleventh Amendment when the state is the real, substantial party in interest. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 110. "[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself." *Id.* at 117. The bar applies regardless of the relief sought. *Id.* at 101-02. On Count IV, the State is the real, substantial party in interest to the count challenging the ten-year conditions under the California Constitution. *See id*. at 92, 101. "[A] suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Id.* at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

If declaratory relief were granted on Count IV declaring that California Corporations Code sections 5914-5925 violate the California Constitution, the relief would restrain the State from enforcing the California Corporations Code, implicating the Eleventh Amendment. The court's pendent jurisdiction would therefore not extend to these state law claims allowing them to be heard as supplemental state claims. *Id*. at 118-121. In the case of state law claims brought into federal court under pendent jurisdiction, the Court in *Pennhurst* commented that "[i]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106.

V. CALIFORNIA CORPORATIONS CODE SECTIONS 5914-5925 ARE NOT UNCONSTITUTIONAL UNDER THE CALIFORNIA CONSTITUTION

Even if Count IV's challenge to the constitutionality of California Corporations Code section 5914-5925 could be heard as supplemental state claims

without violating the Eleventh Amendment, the claims fail on their merits. The statutory scheme is not an unconstitutional delegation of legislative power to the Attorney General, either facially or as applied to Prime. FAC ¶¶ 125, 128, 129. Prime contends that section 5917 gives the Attorney General "unfettered discretion" over nonprofit hospital transactions. *Id.* ¶ 128. Article III, section 3 provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal. Const., art. III, § 3.

A. Section 5917 Is Facially Constitutional

Section 5917 is facially constitutional because there is a strong presumption of constitutionality that Prime cannot overcome, and because the Legislature established appropriate standards to govern the Attorney General's action.

Prime bears the very heavy burden of overcoming a presumption of constitutionality. A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it, whether or not the basis has a foundation in the record. *Heller v. Doe,* 509 U.S. 312, 320 (1993). All presumptions support the validity of a statute, and a court may not declare a statute invalid unless it clearly is so. *Tobe v. City of Santa Ana,* 9 Cal. 4th 1069, 1102 (1995).

California courts applying article III, section 3, are particularly reluctant to invalidate a statute as an unconstitutional delegation, because taking such drastic action itself carries the risk of a violation of the separation of powers by the judiciary. Thus, "[o]nly in the event of a total abdication of [legislative] power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an unlawful delegation, and then only to preserve the representative character of the process of reaching legislative decision." *Kugler v. Yocum*, 69 Cal.2d 371, 383-84 (1968).

No unconstitutional delegation occurs where the Legislature resolves the "truly fundamental" policy issues, "establish[es] an effective mechanism to assure the proper implementation of its policy decisions," and accompanies the grant of authority with "safeguards adequate to prevent its abuse." *Kugler*, 69 Cal.2d at 376-77, 381-82. The Legislature is not required to establish explicit constraints governing the exercise of the quasi-legislative authority. The standards to guide discretionary authority may be implied from the statutory purpose, *People v. Wright*, 30 Cal.3d 705, 713 (1982), or related statutes, *Cal. State Auto., etc., Bureau v. Downey*, 96 Cal. App. 2d 876, 906–907 (1950). *See also State Bd. of Educ. v. Honig*, 13 Cal. App. 4th 720, 751 (1993).

Here, the Legislature has properly delegated discretionary authority to the Attorney General. The Legislature resolved the fundamental policy at issue by including in section 5917 a set of standards the Attorney General must consider in evaluating a transaction. The standards include whether the transaction would have a significant effect on the availability or accessibility of healthcare services to the affected community, § 5917(h); Cal. Code Regs. tit. 11, § 999.5(f)(8)-(9), and whether the transaction is in the public interest, § 5917(i); Cal. Code Regs. tit. 11, § 999.5(f)(12). A requirement that the decision be grounded in those factors and other relevant factors is implied. *See Honig*, 13 Cal. App. 4th at 750-51 (legislative bodies have neither resources nor expertise to deal with every minor question potentially within jurisdiction). These standards provide more than sufficient guidance for the exercise of discretion.

California courts have routinely upheld delegating legislation that establishes standards framed in terms far more broad and general. For example, in *People v. Wright*, the California Supreme Court held that a statute authorizing the state Judicial Council to adopt rules establishing aggravating or mitigating sentencing factors in order to promote "uniformity" provided a sufficiently precise standard to satisfy the nondelegation doctrine. 30 Cal. 3d at 712-13; see *S. Pac. Transp. Co. v.*

Public Util. Comm'n, 18 Cal. 3d 308, 313 (1976) ("public convenience and necessity" was a sufficient standard for promulgation of railroad regulations, and inclusion of that standard in one section of statutory scheme required reading it into adjacent section being challenged).

Section 5917 also establishes an effective mechanism to assure the proper implementation of the Legislature's policy decisions. See *Kugler*, 69 Cal. 2d at 376-77, 381-82. The Attorney General must obtain written notice and review documentation relating to the transaction and conduct one or more noticed public meetings to receive comment from interested parties. Section 5917 and implementing regulations establish procedural safeguards to protect against exercise of the delegated power in an arbitrary manner. *Id.* at 381. The applicant must be notified of the decision in writing, and the decision is reviewable in state court for abuse of discretion.

The preceding analysis is consistent with longstanding legislation and historical practice. The Attorney General's constitutional powers over charities pre-date and co-exist with section 5917 and are unique. Section 5917, enacted in 1996, is only the most recent example of legislation conferring authority over charitable organizations on the Attorney General. She has general supervisory authority over all charitable organizations under many statutes. *Supra* at note 1. She also has common law authority over charitable trusts to ensure that charities operate in the public interest. The decision in *Brown v. Memorial National Home Foundation*, 162 Cal. App. 2d 513 (1958) contains an extensive account of the history of common law powers of attorneys general and their relationship to modern grants of legislative authority. *Id.* at 536-37; *see* Kline, *supra* at 356-57. The unique historical role of attorneys general with respect to charitable trusts underscores a deeply-rooted legal principle: in the oversight of charitable organizations, the Attorney General is properly entrusted with the responsible exercise of broad discretion to act in the public interest.

B. Section 5917 Is a Constitutional Delegation as Applied to Prime

Prime also contends that section 5917's grant of "unfettered discretion" is an unconstitutional delegation of legislative power as applied to its proposed purchase. FAC ¶ 129. This claim fails for the same reason the facial challenge fails. An as-applied claim of unconstitutional legislative delegation adds nothing to, and is indistinguishable from, a facial challenge. All of the tests discussed above are different ways of getting at the same question: has the Legislature abdicated its responsibility to establish policy or has it conferred unbridled discretion on an executive official? The answer to this question is either yes or no. It does not turn on the facts of a particular case or plaintiff.

If the statute's delegation of quasi-legislative power is constitutional but a party claims it has been wronged by the decision in a particular case, the remedy lies in conventional judicial review of that decision for abuse of discretion. *Samples v. Brown*, 146 Cal.App.4th 787, 806 (2007) (where there has been no unconstitutional delegation, individuals who believe this statute has been improperly or illegally applied to them may seek redress in the courts).

C. Prime Lacks Standing to Challenge Section 5917's Constitutionality Under Article I, Section I of the California Constitution

Prime also contends in Count V that section 5917 is an unconstitutional grant of authority violating Prime's right to acquire property as guaranteed by California Constitution, article I, section 1. FAC ¶¶ 124. 127, 129. But as corporations, the Prime plaintiffs lack standing. As noted above, article I, section 1 applies by its terms only to "people." Corporations such as the Prime plaintiffs therefore have no standing to invoke its guarantee of the right to acquire property or any of the other "inalienable rights" it secures for human beings. *Roberts v. Gulf Oil Corp.*, 147 Cal. App. 3d at 791-93; *accord Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.*, 42 Cal. App. 4th at 1287.

VI. ALTERNATIVELY, THE COURT SHOULD ABSTAIN

If the Court nonetheless finds that any of the counts have been adequately pled, the Court should in any event abstain from hearing the dispute under the *Pullman* abstention doctrine. Abstention is appropriate "if constitutional adjudication could be avoided or if the constitutional issue could be narrowed by a ruling on an uncertain question of state law." *Pearl Inv. Co. v. City & Cnty. of San Francisco*, 774 F.2d 1460, 1462 (9th Cir. 1985); *Harman v. Forssenius,* 380 U.S. 528, 534 (1965); *R. Comm'n v. Pullman Co.,* 312 U.S. 498 (1941). "[A]bstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harman*, 380 U.S. at 534.

In *Pearl*, a building owner challenged on constitutional grounds a city planning commission's decision to condition issuance of a building permit on provision of relocation services and replacement housing. *Pearl*, 774 F.2d at 1462. The decision was made under an ordinance that gave the commission "discretionary review" powers, which the plaintiff alleged had been exercised in an arbitrary manner. *Id.* at 1464. The Ninth Circuit upheld the district court's decision to abstain, agreeing that federal constitutional issues could be avoided if a state court were to rule the commission had abused its discretion by acting arbitrarily, and order the building permit application approved as filed. *Id.* The complaint in this case follows a similar pattern, alleging the Attorney General abused statutory discretion and that section 5914-5925 is unconstitutional. The Court should decline to proceed on Prime's claims unless and until there is review of the ten-year conditions in state court. As in *Pearl*, *Pullman* abstention is appropriate here to avoid an unnecessary constitutional adjudication.

CONCLUSION

For these reasons, the Attorney General respectfully requests that the Court grant the motion to dismiss without leave to amend.

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Respectfully submitted,

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