CASE NO. 1:23-cv-01576

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AQUA TEXAS, LLC,

Plaintiff,

v.

HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT, and BRUCE MOULTON, LINDA KAYE ROGERS, DAVID SMITH, CARLOS TORRES-VERDIN and DOC JONES, in their official capacities as directors of the District,

Defendants

DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS PLAINTIFF'S CLAIMS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT ("District"), BRUCE MOULTON ("Moulton"), LINDA KAYE ROGERS ("Rogers"), DAVID SMITH ("Smith"), CARLOS TORRES-VERDIN ("Torres-Verdin"), and DOC JONES ("Jones"), in their official capacities as Directors of the District, and pursuant to Fed. R. Civ. P. 12(b)(6) files this motion to dismiss all of Plaintiff's claims asserted against them for failure to state a claim upon which relief can be granted and in support thereof would show the following:

I. RELEVANT FACTUAL BACKGROUND

The District was created by the Texas Legislature in 2001 with the mission to conserve, preserve, recharge and prevent waste of groundwater within western Hays County, Texas. *See* Tex. Spec. Dist. Loc. Laws Code §8843.001 *et seq.* Plaintiff is a retail public utility providing water and wastewater service to customers within the jurisdictional boundaries of the District. Complaint, ¶ 15. The District has issued operating permits to Plaintiff for groundwater

withdrawals. Complaint, ¶ 16. The District issued Plaintiff a Notice of Alleged Violation ("NOAV") in April 2023 for exceeding the limits of its operating permit production for 2022. Complaint, ¶ 17. Plaintiff does not contest or deny that it overpumped and exceeded what its operating permits allow. Instead, Plaintiff complains that the District should forgive the NOAV and offset the "penalty" assessed against Plaintiff. Plaintiff filed the instant case requesting that this Court enjoin the District from taking any enforcement action in court against it. Plaintiff also has asserted claims against the District and its Directors alleging that the District's purported settlement policy relating to notice of violations for overpumping violates equal protection and deprives it of due process. Plaintiff also asserts claims that the District's enforcement action constitutes an unconstitutional taking.[1]

At its core, Plaintiff requests that this Court order the District to forgive Plaintiff its years of overpumping and credit Plaintiff with what Plaintiff concedes is proposed *future* investment into its water utility infrastructure. In that vein, Plaintiff postures itself as an aggrieved entity, treated unfairly by the District despite acknowledging its years of noncompliance with District rules and regulations, yet not meeting the enumerated factors for reduction of the amount to settle the District's civil penalty claims. Plaintiff does not challenge the District's ability to enforce District rules or the rules themselves. Instead, Plaintiff, by conclusory allegations, implies that Plaintiff's inability to settle a proposed enforcement action is evidence that the District treats Plaintiff differently than other similarly-situated water utilities. The law does not extend to offer Plaintiff protection in this regard. For the reasons set forth below, Plaintiff has failed to state a claim for which relief can be granted and dismissal is appropriate pursuant to Fed. R. Civ. P. 12(b)(6).

[1] As of the date of filing of this Motion, the District has taken no formal action against Plaintiff relating to overpumping or other violations of the District's rules.

II. MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits dismissal if a party fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id*. "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id*. (internal citations omitted).

To resolve a Rule 12(b)(6) motion, courts must determine "whether in the light most favorable to the plaintiff[s] and with every doubt resolved [on their] behalf, the complaint states any valid claim for relief." *Gregson v. Zurich Am. Ins. Co.*, 322 F.3d 883, 885 (5th Cir. 2003). A complaint states a "plausible claim for relief" when the factual allegations contained therein indicate actual misconduct on the part of the defendant, not a "mere possibility of misconduct." *Iqbal*, 556 U.S. at 679. The complaint "'does not need detailed factual allegations, 'but must provide the plaintiff's grounds for entitlement to relief — including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

III. ARGUMENTS AND AUTHORITIES

1. AS A MATTER OF LAW, PLAINTIFF CANNOT MAINTAIN ITS CLAIMS AGAINST THE DIRECTORS OF THE DISTRICT IN THEIR INDIVIDUAL CAPACITIES.

Plaintiff's Claims are Duplicative of Claims Against the District.

Plaintiff's claims against the Directors in their official capacities should be dismissed because all are duplicative of its claims against the District. It is well established that a suit against a governmental official in his or her official capacity should be treated as a suit against the governmental entity. *Hafer v. Melo,* 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State"). An official capacity suit is "only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n. 55 (1978)).

As a result, when a plaintiff sues a government official and the government entity itself, "[t]he official-capacity claims and the claims against the governmental entity essentially merge." *Brown v. City of Houston*, No. H-17-1749, 2019 WL 7037391, at *2 (S.D. Tex. Dec. 20, 2019) (citing *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 485 (5th Cir. 2006)). And the official-capacity claims become redundant when the appropriate governmental taker is also named as a defendant. *See Brown*, 2019 WL 7037391, at *3 (*citing Marceaux v. Lafayette City – Parish Consol. Gov't*, 614 F. App'x 705, 706 (5th Cir. 2015) (per curiam) (affirming dismissal of official capacity claims against municipal officers as redundant of claims against the municipality). Even if Plaintiff has properly asserted viable claims, those claims should still be dismissed as duplicative and redundant of the claims against the District.

In this case, Plaintiff has sued both the District and the District's Directors, in their official capacities, asserting the same claims against all defendants. Therefore, the Court should dismiss all of Plaintiff's claims arising asserted against Moulton, Rogers, Smith, Verdin, and Jones as a matter of law.

Qualified Immunity Bars Plaintiff's Claims Against the Directors.

The Directors are entitled to qualified immunity as to Plaintiff's 42 U.S.C. § 1983 claims. Qualified immunity shields governmental officials from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is properly asserted in a Rule 12(b)(6) motion. *Anderson v. Valdez*, 845 F.3d 580, 589-90 (5th Cir. 2016). In such circumstance, the court must first determine whether the complaint satisfies the requirements of Federal Rules of Civil Procedure 8(a) before determining whether, in its discretion, it should require the plaintiff to file a Rule 7(a) reply. *Id.* Claims of qualified immunity should be decided as early as possible "because immunity is effectively lost if a case is erroneously permitted to go to trial." *Randle v. Lockwood*, 666 F. App'x 333, 335 (5th Cir. 2016) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985)).

Courts employ a two-step test when analyzing whether qualified immunity applies. *Garcia v. Blevins*, 957 F.3d 596, 600 (5th Cir. 2020). First, a court must ask "whether the facts, viewed in the light most favorable to the party asserting injury, show the official's conduct violated a constitutional right." *Id.* Second, they must ask whether the right was "clearly established." *Id.* Courts may conduct those inquiries in either order and may "resolve the case on a single prong." *Id.*

It is difficult for a plaintiff to satisfy the "clearly established" prong. *Cunningham v. Castloo*, 983 F.3d 185, 191 (5th Cir. 2020) (citing *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019)). A right can only be clearly established if "it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). While a case that is directly on point is not required, "existing precedent must

have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The United States Supreme Court has repeatedly told lower courts "not to define clearly established law at a high level of generality." *Id.* at 742. Courts should, instead, undertake that inquiry "in the light of the specific context of the case, not as a broad general proposition." *Id.* (*quoting Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). In sum, qualified immunity is to be broadly applied, and is intended to protect all "but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Because Plaintiff's Complaint has failed to plead facts sufficient to state claims on which relief could be granted, and has not alleged any actions by individual Directors, it has not satisfied the first prong of the qualified immunity inquiry. Stated differently, Plaintiff has not shown that any individual Director violated any established or constitutional right of which a reasonable person would have knowledge. Even if Plaintiff satisfied the first prong, however, it has failed to identify a "clearly established" right which any individual Director violated with respect to any particular conduct. Plaintiff cites only to the proposition that it has a vested property right in the permitted groundwater but does not identify any decisional law that would put the Directors on notice that any specific conduct alleged would violate Plaintiff's constitutional rights.

Qualified Immunity Bars Plaintiff's State Taking Claim.

As to the state taking claim, the Directors are entitled to official immunity under Texas law for discretionary, good faith actions taken within their authority as directors. Official immunity in Texas is "often characterized as 'qualified immunity' or 'quasi-judicial immunity.'" *Perry v. Tex. A & I Univ.*, 737 S.W.2d 106, 109-10 (Tex. App.—Corpus Christi-Edinburg 1987, writ ref'd n.r.e.). Texas government employees are entitled to official immunity where: (1) they are performing discretionary duties; (2) in good faith; and (3) they are acting within the scope of their

authority. *Baker v. Story*, 621 S.W.2d 639, 644 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.); *Wyse v. Dep't of Pub. Safety*, 733 S.W.2d 224, 227 (Tex. App.—Waco 1986, writ ref'd n.r.e.). An action is discretionary if it "involves personal deliberation, decision and judgment," whereas it is ministerial if it is required by "obedience to orders" or involves the performance of a duty in which "the actor has no choice." *Wyse*, 733 S.W.2d at 227.

The purpose of official immunity is to "insulate the functioning of government from the harassment" of litigation. *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994) (citing *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)). It recognizes that the "public would suffer if government officers, who must exercise judgment and discretion in their jobs, were subject to civil lawsuits that second-guessed their decisions." *Kassen*, 887 S.W.2d at 8 (internal citations omitted).

Here, the Directors are entitled to official immunity as to the state taking claim as Plaintiff does not allege individual actions outside of each Director's role as District Director. The crux of its complaint is directed at the District's rules on NOAVs. It is clear that, in adopting District rules, the Directors were performing their discretionary duties in good faith and acting within the scope of the authority conferred upon them by the District's enabling legislation and Section 36 of the Texas Water Code. Therefore, Plaintiff's state taking claim, asserted against the Directors, should also be dismissed on that basis.

2. PLAINTIFF FAILS TO STATE AN EQUAL PROTECTION CLAIM.

In November 2023, the District amended its rules to include guidance for settlement of Notices of Alleged Violations.[2] That amendment provides:

> (10.1.2.1) Settlement of an NOAV for violating the withdrawal limitations in a permit may include, but is not limited to: a. payment of the settlement amount; b. negotiation of a settlement amount based on receipts proving repair to a water system negatively

[2] The District's Rules are attached hereto as Exhibit A and may be found at HTGCD-District-Rules-Nov.-2023-12-6-23-FINAL.pdf (haysgroundwater.com).

> impacted by a "force majeure"; and c. negotiation of a settlement amount based on receipts proving installation of improved water conservation or management systems.

Plaintiff's equal protection claim purports to arise from this rule and what Plaintiff contends is the District's "establishment of a policy and practice of granting complete penalty forgiveness to similar water utilities for the penalties assessed by NOAVs based on money spent on conservation efforts, while refusing to likewise forgive" Plaintiff. Complaint, ¶ 35. However, the rule does not create a right to a settlement of an NOAV, merely factors that the District may weigh when considering forgiveness of a civil penalty, which penalties the District is entitled to pursue in court. There is no right to a settlement created by the rule and there is no other rule that Plaintiff points to which would create such a protected right. Therefore, even assuming that the District has taken enforcement action, there is no right to settlement created by the rule or policy for Plaintiff's benefit. Because there is no protected right to settlement, Plaintiff cannot state a claim for Defendants' purported violation of that right. As such, dismissal of Plaintiff's equal protection claim is appropriate.

3. THE DISTRICT'S RULES ARE NOT AN UNAUTHORIZED EXERCISE OF THE DISTRICT'S POWERS AND CANNOT FORM THE BASIS OF A DUE PROCESS CLAIM OR STATE LAW CLAIM.

The District May Limit Consideration of Operating Permit Applications During Drought.

Plaintiff's due process claim is based on two purported actions by the District: the District's rule limiting consideration of new operating permit applications during drought curtailments (Complaint, ¶ 39); and, the District's refusal to forgive Plaintiff's NOAV "assessed penalty" (Complaint, ¶ 43). Procedural due process requires that governmental action depriving individuals of life, liberty or property be implemented fairly. However, procedural due process is satisfied when a legislative body performs its responsibilities in the normal manner prescribed by law.

Covington Greens Assocs. II v. Covington Water Dist., 931 F. Supp. 738, 741 (W.D. Wash. 1996) (citing *Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1260 (9th Cir. 1994)). There is no factual allegation that the District acted outside its normal manner with regard to either purported action.

Without citing it directly, Plaintiff's claim of an unauthorized moratorium on new operating permit applications refers to District Rule 13.3.3(B) which provides:

> During Stage 3 (Critical) or Stage 4 (Emergency) conditions, the District will not accept any application for a new operating permit or any amendment to increase production under an existing operating permit.

Plaintiff does not allege that the District did not follow its normal legislative process in adopting Rule 13.3.3. or that the rule is an unauthorized legislative act. There is no allegation that the District, in adopting Rule 13.3.3. acted arbitrarily or capriciously. Because Plaintiff's Complaint is completely devoid of any factual basis bearing on these factors, Plaintiff's claim should be dismissed.

With regard to Plaintiff's claim relating to the drought curtailment procedures, whether couched as a state taking claim or a violation of due process, it is still untenable. Here, the moratorium advances a legitimate state interest (conservation of the aquifer) and does not deny Plaintiff of all economically viable use of its property. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998). The District has not acted outside its enabling legislation, as Rule 13.3.3 is a reasonable limitation adopted to sustain the aquifer and for the benefit of the public. *See Estate of Scott*, 778 S.W.2d at 590. Regardless, Plaintiff offers no articulable basis otherwise and does not allege any of the factors analyzed in *Mayhew*. Plaintiff's claim in that regard is, therefore, properly dismissed.

The District Has Enforcement Powers.

Like its claim that the moratorium is an unauthorized exercise of the District's enabling statute, Plaintiff also asserts a claim that the "penalty assessed" against it (which was, in fact, the District's offer of settlement to resolve the District's civil penalty claims), and the District's failure to forgive that "penalty" are actions that exceed the District's authority. However, Plaintiff has wholly failed to establish articulable facts that the action was an unreasonable exercise of the District's governmental authority. *See City of Dallas v. Crownrich*, 506 S.W.2d 654 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); *Albert-Bailey Corp. v. City of Carrollton*, 1978 Tex. App. LEXIS 3884 (Tex. Civ. App.—Texarkana 1978, no writ). While the District acknowledges that it only has such powers expressly granted to it by the Legislature, it nonetheless has those implied powers necessary to carry out its express powers. *See Benavides Ind. Sch. Dist. v. Guerra*, 681 S.W.2d 246, 249 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (indicating that a political subdivision cannot act in a manner contrary to express or implied statutory authority or else its action is void); Attorney General Op. No. JC-0011 (March 8, 1999) (citing *Tex. Roofing Co. v. Whiteside*, 385 S.W.2d 699, 701 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e as standing for the proposition that political subdivisions have "only those powers expressly conferred on them by the constitution or by statute or those necessarily implied from the powers conferred"); *cf., State v. P.U.C. of Tex.*, 883 S.W.2d 190, 194 (Tex. 1994) (stating that an administrative agency has only those powers expressly conferred and those necessary to accomplish its duties); and *Jackson Cnty. Hosp. Dist. v. Jackson Cnty. Citizens for Continued Hosp. Care*, 669 S.W.2d 147, 154 (Tex. App.—Corpus Christi 1984) (stating that the powers of hospital board are only those powers expressly delegated to it by the legislature and which exist by clear unquestioned implication). In Chapter 36 of the Texas Water Code, the Legislature has granted to groundwater conservation

districts the authority to make and enforce rules "to provide for conserving, preserving, protecting, and recharging of groundwater . . . in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by this chapter." Tex. Water Code Ann. § 36.101(a). The Water Code likewise expressly grants groundwater conservation districts the ability to penalize those who violate district rules. Tex. Water Code Ann. § 36.102(b); *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, n. 3 (Tex. 2011).

Plaintiff makes no argument or allegation that the District is without authority to enforce the District's rules. Rather, Plaintiff conflates the maximum amount a district may charge for groundwater production (Tex. Water Code Ann. § 36.204(c)(2)) with the maximum penalty a district may obtain from a party for violating a district rule (Tex. Water Code Ann. § 36.102(b)). The NOAV penalty offered by the District complies with Section 36.102(b).

Moreover, Plaintiff makes no allegation that the District's enforcement rule (Rule 10.1) serves no legitimate purpose. There are no pleaded facts to suggest that the District enacted the rule for its own advantage, or that the restrictions imposed by the rule are unreasonable. *See Estate of Herdon Scott v. Victoria Cnty.*, 778 S.W.2d 585, 591 (Tex. App.—Corpus Christi 1989, no writ). Plaintiff has wholly failed to plead any cognizable facts in support of its claim.

Because the Water Code specifically grants districts the ability to obtain penalties against those who violate a district's rules, and as the offered settlement of its civil penalty claim complies with the Water Code's allowable penalty, the complained of actions are clearly within the District's legislatively delegated authority.

4. PLAINTIFF HAS NO COGNIZABLE TAKING CLAIM.

Plaintiff alleges that it has suffered a state law taking by the application of the District's moratorium on new operating permit applications. Complaint, § VII. Texas courts analyzing taking claims generally look to federal jurisprudence for guidance. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 838 (Tex. 2012) (citing *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004)).

The United States Supreme Court has grouped taking claims into several analytical categories: physical takings and regulatory takings. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-40 (2005). The "paradigmatic taking" involving a "direct government appropriation or physical invasion of private property" or physical taking is not at issue here. *See U.S. v. Peewee Coal Co.*, 341 U.S. 114 (1951) (government's seizure and operation of a coal mine was a taking). Rather, Aqua alleges the District's drought curtailment rules deprive it from having new operating permit applications considered by the District. Complaint, § VII. Under federal law, regulatory action may be a *per se* taking in two scenarios, neither of which apply here. In the first scenario, the government requires an owner to suffer a permanent physical invasion of her property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). In the second, the regulation completely deprives the property of all "economically beneficial uses." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). Neither are at issue here because Aqua has not alleged a permanent physical invasion as the result of a regulation or that the District Rules have deprived its property of all economically beneficial use.

Where an alleged regulatory taking is not *per se*, it is analyzed pursuant to factors articulated by the Supreme Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104

(1978). Courts evaluate the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as the character of the governmental action. *Id.* at 124. Takings are more readily found where the interference with property "can be characterized as a physical invasion by government" than when it "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citing *U.S. v. Causby*, 328 U.S. 256 (1946)).

Texas, following federal guidance, finds regulatory takings where regulations either "(1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1998) (internal citations omitted). As in the federal context, unreasonable interference contemplates two factors—the regulation's economic impact and the extent to which the regulation unreasonably interferes with the owner's distinct investment-backed expectations. *Id.* at 935. The first factor simply "compares the value that has been taken from the property with the value that remains in the property." *Id.* at 935-36. The loss of anticipated gains or potential future profits is not typically considered when analyzing this factor. *Id.* at 936. The second factor, the landowner's investment-backed expectation, primarily contemplates the existing and permitted uses of the property affected by the regulation. *Id.* The Texas Supreme Court has instructed courts to consider the parties' "[k]nowledge of existing zoning" at the time of a property's purchase when "determining whether the regulation interferes with investment-backed expectations." *Id.* at 936. "The existing and permitted uses of the property constitute the 'primary expectation' of the landowner that is affected by regulation." *Id.* at 936 (cited by *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 888 (5th Cir. 2004); *Hackbelt 27 Partners, LP v. City of Coppell*, No. 3:14-CV-2258-N, 2015 WL 13742342, *7 (N.D. Tex. Oct. 6, 2015)).

Aqua's Complaint fails to state taking claims under Section 17 of Article I of the Texas Constitution. Aqua has not alleged that it suffered a permanent physical taking of its property, nor that its property has been deprived of all economically beneficial use. Nor does Aqua's Complaint allege an unreasonable interference as in *Penn Central* or in *Mayhew*, which consider both the economic impact of the regulation and the regulation's interference with the landowner's reasonable investment-backed expectations. *Penn Central*, 438 U.S. 104; *Mayhew*, 964 S.W.2d at 930. In fact, Aqua has not alleged any change to the property's value, nor has it sufficiently pled any interference with its investment-backed expectations, which would have been formed at the time the property was purchased. Aqua's principal allegation is that the District's Rules on drought curtailments prevent it from having new operating permits considered. And while Aqua emphasizes its vested property rights in the groundwater beneath its land, Texas Water Code, Section 36.002, subsection (b-1)(1) specifies that such rights do not "entitle a landowner . . . to the right to capture a specific amount of groundwater below the surface of that landowner's land." Tex. Water Code Ann. § 36.002(b-1)(1). In sum, Aqua's Complaint has failed to state a taking claim and its state taking claim should, therefore, be dismissed.

IV. CONCLUSION

The Court should dismiss Aqua's Complaint for failure to state claims upon which relief can be granted. Aqua's claims against the District's Directors are properly dismissed as its Complaint is devoid of allegations regarding any individual Director's conduct. Additionally, all claims against the Directors should be dismissed as they are duplicative of the same claims against the District. Further, the Directors are entitled to qualified immunity as to the entirety of Aqua's federal claims and official immunity as to Aqua's state taking claims. Moreover, Aqua

has not pled cognizable equal protection, due process or taking claims against any Defendant because it has not alleged any unreasonable interference with its property or shown that the complained of rules have caused it any economic injury at all. Moreover, there is no interference with Aqua's interest giving rise to any constitutional claims or factual basis establishing that the District acted outside its delegated legislative authority.

Dated: April 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was duly served via CM/ECF on all counsel of record on April 30, 2024 on:

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/s/ Deborah C. Trejo
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