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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

KEVON GORDON, RONALD JONES, RAYMOND BARNES and QUINCY BROWN

Plaintiffs,

v.

CITY OF MORENO VALLEY; CITY OF MORENO VALLEY POLICE DEPARTMENT; RICK HALL, CHIEF OF THE MORENO VALLEY POLICE DEPARTMENT, in his official capacity; KRISTY UNDERWOOD, EXECUTIVE OFFICER OF THE CALIFORNIA BOARD OF BARBERING AND COSMETOLOGY, in her official capacity; STAN SNIFF, RIVERSIDE COUNTY SHERIFF, in his official capacity; and DOES 1-20

Defendants.

Case No. ED CV 09-00688 SGL (SSx)

PLAINTIFFS' OPPOSITION TO MOTION OF DEFENDANTS DENNIS LONGDYKE AND LORI MILLER TO DISMISS FIRST AMENDED COMPLAINT

Judge: Hon. Stephen G. Larson
Courtroom: 1
Date: Aug. 17, 2009
Time: 10:00 a.m.

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I. INTRODUCTION

On April 2, 2008, Moreno Valley police officers and code inspectors, accompanied by state agents charged with regulating barbering, conducted a series of warrantless, racially targeted raids on local African American barbershops under the guise of administrative business inspections. But the raids were far more aggressive than anything necessary to check compliance with business or health regulations. Armed and armored police officers stormed the shops and blocked exits. While police and inspectors thoroughly searched the premises (including areas where no barbering was performed) and questioned customers and barbers, police conducted warrant checks and answered one barber who protested the aggressive treatment by handcuffing him and placing him in the back of a police car.

In the aftermath of these searches, the barbers wondered why they had been targeted for such unusually aggressive raids. An explanation quickly became apparent. In a city that is less than 20% African-American, five of the six businesses raided on that day were owned and operated by African Americans, patronized primarily by African American customers, and which served as social centers for the African American community in Moreno Valley. This disparity strongly suggests that that the defendants deliberately targeted African American barbershops for such unusual treatment.

Plaintiffs, four barbers who were subjected to the raid-style "inspections" of April 2, 2008, brought this action which, among other claims, seeks damages against the officers involved for unreasonable intrusions under the Fourth Amendment and race discrimination in violation of the Fourteenth Amendment. Defendants Longdyke and Miller are two of the three code enforcement officers who participated in these raids.[1] Longdyke and Miller move to dismiss only

[1] Plaintiffs' original complaint named the code enforcement officers as Doe defendants. Prior to the filing of the First Amended Complaint ("FAC"), attorneys

plaintiffs' claim for unlawful discrimination under the Fourteenth Amendment, on three grounds.

First, Longdyke and Miller argue that plaintiffs have failed to provide facts that make their claim of race discrimination plausible. In doing so, however, they wrongly characterize the gravamen of plaintiffs' equal protection concern as being that defendants "selectively enforced Moreno Valley's business license inspection ordinance." Mot. 7:19-21. If plaintiffs have not pled facts to adequately support that claim, it is because it is not the claim they make. Plaintiffs' claim is, in fact, that defendants targeted plaintiffs not for ordinary inspections, but for aggressive and unlawful searches, on the basis of their race, and there are more than sufficient factual allegations to render that claim plausible.

Second, Longdyke and Miller argue that the barbershops were likely targeted not because they were African American owned and operated, but because they were "social centers." However, they fail to point to any reason that the shops' friendly atmosphere or conversation between customers and barbers would violate any law or regulation, and they fail to explain why this rationale would justify carrying out the inspections in an unlawfully aggressive manner.

Third, Longdyke and Miller suggest that the complaint lacks sufficient facts to plausibly suggest discriminatory intent, as there is no allegation that they made racial slurs or other overtly racist remarks. Here, defendants rely on the recent Supreme Court opinion in *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (May 18, 2009), which held that a plaintiff had failed to allege facts that plausibly supported his allegation of discriminatory intent by high-level government officials in charge of the departments he alleged had discriminated against him. But unlike the defendants in *Iqbal*, Longdyke and Miller are not high-level government employees far removed from the acts at issue — they are the very officers who

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for the City of Moreno Valley provided plaintiffs' counsel with the names of the officers involved.

performed the discriminatory acts. Their direct participation in the discriminatory operation renders the allegation of discriminatory intent plausible.

Finally, Longdyke and Miller also argue that they are entitled to qualified immunity. But at the time the raids occurred in 2008, it was clearly established that law enforcement officers could not select targets for inspection, or for unusually or unlawfully aggressive inspections that occurred in this case, on the basis of race.

Longdyke and Miller's challenges to the adequacy of plaintiffs' discrimination claim fail, and plaintiffs respectfully request that the Court deny their motion to dismiss.

II. STATEMENT OF FACTS

On April 2, 2008, MVPD officers and agents from the California Board of Barbering and Cosmetology and the City of Moreno Valley Code and Neighborhood Services Division conducted raid-like inspections of six barbershops in the City of Moreno Valley. FAC ¶ 3. Despite the complete absence of any physical threat and the peaceful nature of all previous health and business inspections, the raiding party adopted an unusually aggressive approach. FAC ¶¶ 3, 4. Five MVPD officers armed with handguns and wearing bulletproof vests, three Board officers and three Code Enforcement inspectors rushed into the two shops involved here, while MVPD officers blocked the front doorways. FAC ¶¶ 24, 25. At one of these shops, a police officer guarded the back door with a police car. FAC ¶ 24. For approximately one-half hour at each shop, the MVPD, Code Enforcement, and Board officers conducted extensive searches and questioned employees and customers. FAC ¶¶ 24, 25. The searches were more extensive and intrusive than necessary to determine compliance with barbering or business regulations, and the searches extended to areas where no barbering was even performed. FAC ¶ 24. During the searches, MVPD officers followed Board

officers closely and looked in the drawers and cabinets as Board officers opened them and searched their contents. FAC ¶ 24, 25.

During the searches, MVPD officers questioned employees and customers, collected drivers' licenses from them, and ran warrant checks on them. FAC ¶ 25. When one of the plaintiffs expressed his objections to the searches, an MVPD officer handcuffed him, took him to a police car in the parking lot, placed him handcuffed in the back of the car, and told him they had found an outstanding warrant. After about ten minutes, officers released him and allowed him back inside the shop. *Id.*

Upon information and belief, this joint operation was initiated and undertaken at the request of MVPD officers. FAC ¶ 3. MVPD officers had searched one of the barbershops involved here twice over approximately the prior six months. On both occasions, officers checked identification of customers and barbers, and during at least one of these inspections, they ran warrant checks on customers and barbers. FAC ¶¶ 26, 27. MVPD officers also took one of the barbers to his residence, searched it with his consent, and returned him to the shop. FAC ¶ 27. On the second of these prior occasions, a Code Enforcement officer accompanied the MVPD officers and conducted a cursory visual inspection of the shop. FAC ¶ 28. The MVPD used this agency inspection as an excuse once again to collect identification from and run warrant checks on all the barbers, while police and the Code Enforcement opened barbers' drawers, cabinets and containers and inspected inside. *Id.*

None of the searches involved here was conducted pursuant to a warrant. FAC ¶¶ 23, 24, 26, 27. The FAC alleges that the inspections conducted at the other African-American businesses on April 2, 2008 were conducted in a similarly invasive and intrusive manner. FAC ¶ 29.

While there was no justification offered for the unprecedented display of force and intense nature of the searches, one feature of the searches was obvious –

the searches showed a stark racial disparity. In a city that is less than 20% African American,[2] five of the six of the barbershops searched on April 2, 2008, were owned, operated and primarily frequented by African Americans. FAC ¶ 4. The barbershops at issue here displayed magazines targeted to African Americans in their lobbies, posters of model haircuts using all African American models, and had art depicting African Americans on their walls. FAC ¶¶ 20, 21. One of the establishments, Fades Unlimited, draws its name from a type of haircut popular among African American men. FAC ¶ 21.

Plaintiffs' shops were more than just legitimate, respected businesses; they were social centers for the African American community. FAC ¶ 3. Many of the clients at these business consisted of repeat customers who returned for their haircuts every one to three weeks, so barbers and customers knew each other well. The atmosphere in each shop was friendly – barbers, customers who were being served, and those who were waiting all talked with one another about politics, sports and current events. On weekends at the Hair Shack, customers often stayed to socialize after their haircuts were finished, and long-time customers stopped by to talk without getting a haircut at all. The Hair Shack also allowed customers to play cards and dominoes in a back room not used for barbering. FAC ¶ 22.

Following the April 2, 2008, raids, there was an understandable outcry among members of the community, leading to several media stories and a

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[2] According to the U.S. Census Bureau, Moreno Valley is 19.9% African American. *See http://quickfacts.census.gov/qfd/states/06/0649270.html* (last visited June 22, 2009). This Court can take judicial notice of census data under Federal Rule of Evidence 201(b), because they are "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See United States v. Esquivel*, 75 F.3d 545, 549 (9th Cir. 1996) (taking judicial notice of Hispanic demographics in Southern California); *Cactus Corner v. Dept. of Agriculture*, 346 F.Supp.2d 1075, 1098 (E.D. Cal. 2004) ("Public records, such as census data, is appropriate subject matter for judicial notice."). "On a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment." *Gemtel Corp. v. Comm. Redev. Agency*, 23 F.3d 1542, 1544 (9th Cir. 1994) (quotation omitted).

community meeting with the Mayor of Moreno Valley. FAC ¶ 30. In comments to the media and to the public, the Mayor, City Council members, and defendant MVPD Chief Hall defended the raids as legitimate law enforcement operations. *Id.* Defendant Sheriff's Department characterized the sweeps as a "City issue." A Code Enforcement official told members of the press his department would conduct such sweeps in the future, saying, "This is not a one-time event," and characterized the joint operation as successful. *Id.* The FAC alleges that no action has been taken to discipline officers and officials involved, to correct policies or procedures that led to the searches, or to make clear to officers or to the community that the searches were unlawful. *Id.*

III. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires only that a complaint contain " 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (quotation and citation omitted).

In *Twombly* and more recently in *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (May 18, 2009), the Supreme Court addressed the pleading standards under Rule 8, rejecting the oft-cited formulation of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that a motion to dismiss should be granted only if there is "no set of facts on which plaintiff would be entitled to relief," and instead requiring "that the facts alleged in a complaint state a claim that is plausible on its face," *Moss v. U.S. Secret Service*, ___ F.3d ___, 2009 WL 2052985, 8 (9th Cir. July 16, 2009).

Iqbal and *Twombly* suggest a two-part approach in order to ensure that the allegations of a complaint give rise to more than a "sheer possibility" of wrongdoing. *Iqbal*, 129 S. Ct. at 1949–50. First, a court reviews the complaint for any allegations of legal conclusions that "amount to nothing more than a formulaic recitation of the elements" of the claim alleged, to which the court need

not give any deference. *Id.* at 1951. Next, the court examines the remaining factual allegations, and, in doing so, "should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 1949.

Even under the newly articulated standards of *Iqbal* and *Twombly*, Rule 8 does not require "detailed factual allegations," but requires only "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (May 18, 2009); *see also Twombly*, 550 U.S. at 563 ("a complaint must allege facts suggestive of illegal conduct"). As one federal district court in California recently explained:

> When the district court reviews the sufficiency of a complaint at the procedural stage of a motion to dismiss, "before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Therefore, to survive a motion to dismiss, a plaintiff's burden is limited to setting forth factual allegations sufficient to "raise the right to relief above the speculative level." *Twombly*, 550 U.S. at 545. A plaintiff need only plead "enough facts to raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 550 U.S. at 556. That is, a plaintiff must allege facts that, taken as true, are "suggestive of illegal conduct." *Id.* at 564 n. 8.

Padilla v. Yoo, 2009 WL 1651273, at *8 (N.D. Cal. Jun. 12, 2009).

Nothing in *Iqbal* or *Twombly* alters the longstanding rule that when a court considers a motion to dismiss, it must construe all allegations of the complaint in the plaintiff's favor. *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191

(9th Cir.1987). In particular, "[c]ivil rights complaints are to be liberally construed." *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir.1992). It is only the extraordinary case in which dismissal under Rule 12(b)(6) is proper. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

IV. ARGUMENT

A. Plaintiffs Have Adequately Pleaded a Claim of Unlawful Discrimination.

In order to prevail on a claim of unlawful discrimination at trial, plaintiffs must prove that defendants' actions had a discriminatory impact and that the discrimination was intentional. *Washington v. Davis*, 426 U.S. 229, 239-241, 96 . Ct. 2040, 48 L. Ed.2d 597 (1976); *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 948 (9th Cir. 2003). At the pleading stage, the Ninth Circuit has held that a plaintiff must "allege facts that are at least susceptible of an inference of discriminatory intent." *Byrd v. Maricopa County Sheriff's Department*, 565 F.3d 1205 (9th Cir. 2009) (quoting *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1026 (9th Cir. 1998)). This is consistent with the standard applied by the Supreme Court in *Iqbal*, in which it held the complaint insufficient because it lacked "any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind." *Iqbal*, 129 S. Ct. at 1952.

1. Defendants' Discussion of Plaintiffs' Claim as "Selective Enforcement" Omits Key Allegations of Discrimination

The heart of plaintiffs' complaint is that their barbershops were subjected to a series of "raid-style searches" by a team of thirteen officers from three agencies who stormed the barbershops, blocked exits, detained and interrogated customers and barbers, ran warrant checks, and searched far beyond the extent necessary to check compliance with health or business regulations. FAC ¶ 4, 24, 25. Certainly, plaintiffs' allege that the nature and extent of this warrantless intrusion

violated the Fourth Amendment, and Longdyke and Miller do not challenge that claim. *See id.* ¶¶ 42-46. But the nature and extent of the intrusion also justifies plaintiffs' Equal Protection claim that defendants subjected them to "unusually aggressive" raids because of their race and the race of their co-workers and customers. *Id.* ¶ 4, 36-41.

In arguing that the allegations of the complaint fall short of plausibly alleging discrimination, Longdyke and Miller mischaracterize plaintiffs' claim as one of "selective enforcement." *See* Mot. at 7:19-21 ("The gravamen of Plaintiffs' equal protection claim against Officers Longdyke and Miller is that they selectively enforced Moreno Valley's business license inspection ordinance against Plaintiffs because of their race."); *id*. at 8:7-8 ("Plaintiffs repeatedly contend that they were targeted for business licenses inspections because they and their clientele are African-American."). They paint a distorted picture of plaintiffs' claim, erroneously asserting that it arises solely from the fact that defendants selected plaintiffs for ordinary business license inspections, not from the fact that defendants targeted plaintiffs for these unusually aggressive searches.

However, the complaint could not be clearer that plaintiffs' discrimination claim is based not just on the fact of the searches, but on the unusually aggressive manner in which they were executed. The complaint alleges:

> Five of the six barbershops Defendants selected as targets for their raid-style inspections on April 2, 2008, were owned, operated, and primarily frequented by African Americans. This stark disparity and the unusually aggressive conduct of the MVPD during the raid-style inspections indicate that Defendants' decision to target these businesses ***in the manner they did*** was based, in part or in whole, on the race of the barbers and their clientele.

FAC ¶ 4 (emphasis added). This unequivocal allegation and the emphasis throughout the complaint on the aggressive manner in which the searches were

conducted gave defendants notice as to the nature of plaintiffs' equal protection claim. This Court should reject defendants' distortion of the complaint.[3]

By asserting this cramped and inaccurate reading of plaintiffs' discrimination claim, defendants ignore the most potent evidence of discrimination in the complaint — the extraordinary nature of the raids to which plaintiffs were subjected. Under the pretense that plaintiffs are complaining only about being selected for ordinary business license inspections, Longdyke and Miller argue that the mere fact that five of the six barbershops searched in one day of inspections were owned and operated by African-Americans does not plausibly suggest that the inspections were targeted based on race, and they build on this erroneous argument by asserting plaintiffs' focus on the single day of raids artificially narrows the proper scope of comparison.[4] *See* Mot. at 7, 9-10. If the only

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[3] Defendants may argue that some isolated references in the complaint to plaintiffs' discrimination claim could be interpreted as referring to a selective enforcement claim, rather than a claim of unlawful treatment based on race. In evaluating a motion to dismiss, a court reads the complaint "in the light most favorable to the [plaintiff]," and "reads the complaint as a whole, … rather than isolating allegations and taking them out of context." *In re Countrywide Financial Corp. Securities Litigation*, 588 F.Supp.2d 1132, 1145 (C.D. Cal. 2008); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007) (holding that in evaluating motion to dismiss securities fraud complaint for failure to adequately plead facts supporting scienter, "[t]he inquiry…is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard").

[4] In support of this assertion, defendants cite *United States v. Bourgeois*, 964 F.2d 935 (9th Cir. 1992). As an initial matter, *Bourgeois* addresses the threshold for obtaining discovery on selective enforcement in a criminal case, and holds little value in deciding the completely different question of whether allegations of a civil complaint state a claim. *See Rodriguez v. California Highway Patrol*, 89 F.Supp.2d 1131, 1141 (N.D. Cal. 2000) (distinguishing case law regarding discovery on selective enforcement in criminal cases as irrelevant to evaluating whether civil plaintiff had stated equal protection claim under Rule 8).

Even were the issues similar, *Bourgeois* is inapposite because the conduct which the criminal defendant there complained was discriminatory — the prosecution for federal firearms violations — occurred regularly, such that consideration of racial disparities in the conduct across a longer time frame would be more instructive than consideration of the disparities over the single day that Bourgeois advocated. By contrast, here the very basis of plaintiffs' claim is that the overly aggressive treatment to which they were subjected during the inspections of April 2, 2008 was unusual and completely unjustified; therefore, the racial composition of the barbershops searched on that day is probative of discrimination.

discriminatory treatment plaintiffs alleged had been that they were visited by Code Enforcement for ordinary inspection, Longdyke and Miller might rightly argue that they could not allege discrimination on the basis of a single day's inspections, and must look to the pattern of ordinary Code Enforcement inspections over a longer period of time. But plaintiffs focus on the single day of inspections because, as alleged in the complaint, the businesses visited that day were subjected to "unusually aggressive…raid-style inspections" — indeed, so aggressive as to violate the Fourth Amendment.[5] FAC ¶ 4.

Fairly reading plaintiffs' discrimination claim to challenge the fact that plaintiffs were selected for overly and unlawfully aggressive raids, there are ample facts in the complaint to render their claim plausible. The complaint sets forth sixteen paragraphs of detailed factual allegations describing an "unusually aggressive" series of inspections, in which a total of thirteen agents stormed the barbershops, including armed police wearing bulletproof jackets. FAC ¶¶ 24, 25. Police blocked exits and monitored the back alley, while officers questioned customers and barbers, and police took identification and ran warrant checks, and when one barber complained about the searches, defendant police officers handcuffed him and placed him in the back of a patrol car outside the barbershop. *Id.* ¶ 25. The complainant alleges that the common characteristic among nearly all of the barbershops subjected to the searches was race— five of the six shops searched were owned and operated by African Americans with primarily African

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[5] Defendants also suggest that plaintiffs' complaint fails because they do not allege that plaintiffs treated non-African Americans differently. *See* Mot. at 11:13-12:1. But a fair reading of plaintiffs' allegations that the raids were "unusually aggressive" is that Code Enforcement did not treat *any* other licensees in this fashion, and singled out plaintiffs for different treatment on this occasion because of their race. *See* FAC ¶4 ("Th[e] stark disparity [in the race of those target by the raids] and the unusually aggressive conduct of the MVPD during the raid-style inspections indicate that Defendants' decision to target these business in the manner they did was based, in part or in whole, on the race of the barbers and their clientele.").

American clientele, in a city where the African American population is less than 20%. *Id.* ¶¶ 4, 23, 29; *see supra* note 1 (describing census information). The occurrence of such unusual inspections raises the question – what prompted defendants to act differently in inspecting these businesses? The allegation that a highly disproportionate number of African American businesses were inspected renders more than plausible plaintiffs' claim that the explanation for such disparate treatment was racial animus. These allegations far surpass the minimal threshold established in *Iqbal* that factual allegations need only be "sufficient to plausibly suggest [defendants'] discriminatory state of mind." *Id.* at 1949, 1952.

2. Defendants Do Not Provide An "Obvious Alternative Explanation" That Renders Plaintiffs' Claim of Discrimination Implausible

The Supreme Court in *Iqbal* and *Twombly*, in questioning the plausibility of the claim raised by the allegations, placed great reliance on the existence of an "obvious alternative explanation" that the Court reasoned was far more likely than unlawful conduct to explain the facts set forth in the complaint. *Iqbal*, at 1951–52 (citing *Twombly*). In *Twombly*, the complaint of "parallel conduct" was not plausible because the pricing alleged, while consistent with conspiracy, was "not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Iqbal*, 129 S. Ct. at 1950. Similarly, in *Iqbal*, the Court stated that the higher proportion of Arab Muslims who were detained by authorities after 9/11 was far less plausibly explained by discrimination, as alleged by plaintiffs, than by the neutral, legitimate reason that a higher proportion of Arab Muslims are related to Al Qaeda than people who are not Arab Muslims. *Id.* at 1951–52. The Court concluded that "[a]s between the 'obvious alternative explanation' for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." *Id.*

In their Motion, Longdyke and Miller do offer an alternative explanation,

but one that is far from "obvious." Longdyke and Miller speculate that plaintiffs' barbershops might have been subjected to these extraordinary, raid-style inspections for the nondiscriminatory reason that, as the complaint alleges, the businesses "were used by members of the African American community as social centers," and that the Hair Shack had previously "allowed customers to play cards and dominoes in a back room not used for barbering." Mot. At 10:16-11:11; FAC ¶¶ 3, 22. Defendants assert that these allegations somehow demonstrate violations of the barbering regulations or other laws that provide a more probable and race-neutral reason for the inspections. This argument fails for two reasons.

First, nothing in the description of the barbershops as social centers reveals anything approaching unlawful activity that would justify inspection. The FAC states:

> [B]arbers and customers [in the shops] knew each other well. The atmosphere in each place was friendly – barbers, customers who were being served, and those who were waiting all talked with one another about politics, sports and current events. On weekends at the Hair Shack, customers often remained to socialize after their haircuts were finished, and long-time customers would stop by to talk without getting a haircut at all. Hair Shack also allowed customers to play cards and dominoes in a back room not used for barbering.

FAC ¶ 22. Defendants implausibly suggest that conversation between customers and barbers, a "friendly" atmosphere, or even customers playing cards and dominoes somehow constitutes unlawful use of the barbershop "for residential purposes" or "other purpose that would tend to make the room unsanitary, unhealthy, or unsafe, or endanger the health and safety of the consuming public." Bus. & Prof. Code § 7350. This suggestion is preposterous. Defendants offer absolutely no reason why good conversation about sports, politics, or current events, or a friendly game of cards or dominoes, would possibly constitute unlawful conduct that would justify aggressive raids and searches of the barbershops. Defendants offer no sensible explanation of why being a "social center" might justify these unprecedented raids on plaintiffs' barbershops, much

less an explanation so compelling as to render plaintiffs' claim of discrimination implausible.

Second, even if the social aspect of these African American barbershops somehow justified a routine inspection to insure compliance with barbering or business regulations, it would not explain why defendants did not simply conduct such routine inspections, but instead subjected plaintiffs' shops to raids so aggressive as to be independently unlawful, as alleged in the complaint. As explained above, it is not the mere fact that plaintiffs' barbershops were inspected, but the unusually (and indeed unlawfully) aggressive nature of the inspections that, when taken together with the fact that five of the six business defendants raided were African American, not only makes an inference of race discrimination plausible, but makes race discrimination virtually the only explanation for defendants' misconduct.

3. The Factual Allegations of the FAC are More Than Sufficient to Render Plausible Plaintiffs' Claim that Longdyke and Miller Acted With Discriminatory Intent

Longdyke and Miller argue that the complaint lacks facts that plausibly show a discriminatory intent on their part as individual defendants. They reason that "Plaintiffs specifically claim that Code Enforcement, MVPD and Board supervisors made the decision to inspect Plaintiffs' barbershops," and that the complaint lacks allegations that would demonstrate discriminatory animus in the conduct of the raids, such as racial slurs or derogatory remarks. Mot. at 12-13.

Defendants' argument again mischaracterizes the complaint. The complaint does not allege that supervisors "made the decision" as to which businesses to target. It merely alleges that supervisors "approved in advance the manner in which the raids would be conducted, which businesses would be selected for raid, or the manner in which businesses would be selected for raids." FAC ¶ 35. Approving the decision is not the same as making the decision, and it certainly is not the same as carrying out the raids. This allegation does not suggest that

Longdyke and Miller, who did carry out the raids, did not participate in decisions about what businesses to target or in what manner to conduct the raids, and it certainly does not absolve them for "acting in conjunction" to execute the raids "under the ruse of conducting ordinary health and business inspections." FAC ¶ 3.

Longdyke or Miller suggest that there is no evidence of discriminatory animus on their part because plaintiffs allege no act of overt racism, stating: "For example, Plaintiffs do not claim that either Officer uttered a racial slur or made derogatory remarks about a barbers' or clientele's race." Mot. at 13:1-3.

Defendants in essence ask this Court to find that even where a complaint describes a raid that, from the factual allegations, clearly appears unlawful in scope and racially motivated, it is implausible to infer that any individual officers who executed that search possessed discriminatory animus without some overt act of racism or racially discriminatory remarks. Because clear evidence of intent is often in defendants' possession, such a rule would prevent plaintiffs from challenging even obviously discriminatory actions in court. *Iqbal* is not so broad.

Both *Twombly* and *Iqbal* are clear that the plausibility standard does not require a plaintiff to plead that defendants essentially admitted their discriminatory intent. The *Iqbal* Court warned against reading the plausibility standard as "akin to a 'probability requirement,'" instead describing the threshold as "ask[ing] for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949. The Court also made clear that while plaintiffs must provide factual allegations that support for the claims, "plausibility" may be based on the court's inferences from those facts: "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* To plead "enough facts to state a claim to relief that is plausible on its face," plaintiffs need only provide sufficient facts to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 547; *accord Iqbal*, 129 S. Ct. 1950-51.

The *Iqbal* Court also recognized that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950; *accord Chao v. Ballista*, 2009 WL 1910954, at *4 (D. Mass. July 1, 2009) (describing evaluation of plausibility under *Iqbal* as a "highly contextual enterprise — dependent on the particular claims asserted, their elements, and the overall factual picture alleged in the complaint"). The context in *Iqbal* was highly unusual — there, the plaintiff was one of more than 1,000 people detained by federal law enforcement in the wake of the terrorist attacks of September 11, 2001 on suspicion of links to the attacks or to terrorism in general, and one of a much smaller subset of those detainees deemed to be of "high interest" and detained under "restrictive conditions designed to prevent them from communicating with the outside world." *Iqbal*, 129 S. Ct. at 1943. Before the Court were Iqbal's claims against FBI director Robert Mueller and Attorney General John Ashcroft that they had subjected him to these conditions of detention because of his race and religion. "Ever-present in the majority's opinion was the fact that these high-ranking officials faced an unprecedented attack on American soil, 'perpetrated by 19 Arab Muslim hijackers.'" *Chao*, 2009 WL 1910954, at *4 (quoting *Iqbal*, 129 S. Ct. at 1951). The Court observed that because the 9/11 terrorists, and the bulk of the group Al Qaeda to which they belonged, were Arab Muslim, "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Iqbal*, 129 S. Ct. at 1951. Considering this explanation of the facts of the complaint, the Court found the claim that the allegations demonstrated discriminatory intent implausible. *Id.* at 1951-52.

As one court has noted, **"**Plausibility, in this view, is a relative measure. . . . Th[e] analysis depends on the full factual picture, the particular cause of action, and the available alternative explanations." *Chao*, 2009 WL 1910954, at *5. The nature of the complaint before this Court is dramatically different from that in *Iqbal*: here, plaintiffs allege unjustified raids by local law enforcement officials that — due to their unusually aggressive nature, the fact they were overwhelming targeted at African American barbershops, and the lack of an "obvious alternative explanation" for their unusually aggressive nature — suggest discrimination as a more than plausible explanation for the raids, particularly on the part of the officers who executed the raids, including Longdyke and Miller.

Unlike defendants John Ashcroft and Robert Mueller in *Iqbal*, Longdyke and Miller are not "the Nation's top law enforcement officers," *Iqbal*, 129 S. Ct. at 1952, appointed officials far-removed from the actions at issue in the case, but rather are the very officers who the complaint alleges performed the discriminatory actions in question. FAC ¶¶ 24, 25, 28. Indeed, plaintiffs specifically allege that the Code Enforcement officers, including Longdyke and Miller, were directly involved by acting "in conjunction" with MVPD officers and Board agents to perform the "unusually aggressive" raids "under the ruse of conducting ordinary health and business inspections."[6] FAC ¶ 3. These actors were not acting under any exigencies at all, and certainly not exigencies comparable to those created by 9/11. Nor have defendants here offered a plausible "alternative explanation," much less an obvious one, that would provide a neutral nondiscriminatory reason that they subjected a disproportionate number of African American barbershops to these extraordinarily intrusive actions. Given the "context-specific" nature of the plausibility evaluation, application of "judicial experience and common sense" to

[6] Even if Longdyke and Miller, as civilians, did not behave in an unusually aggressive manner, the fact that they officer in these coordinated, multiagency raids behaved in such an unusually aggressive manner suggests the entire operation, in which they were an integral part, was based on discriminatory motive.

the allegations of discriminatory intent of this case compels a different conclusion than that the Court reached on the facts of *Iqbal*. *Iqbal*, 129 S. Ct. at 1950.

Plaintiffs' allegations meet *Iqbal*'s requirements. Even after *Iqbal*, "a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible." *Chao*, 2009 WL 1910954, at *5. The allegations that Longdyke and Miller participated in the discriminatory acts, specifically acting in concert with members of other agencies to conduct the searches in an unlawfully aggressive manner that targeted African-American owned businesses, easily constitute "factual allegation[s] sufficient to plausibly suggest petitioners' discriminatory state of mind," *Iqbal*, 129 S. Ct. at 1952, or to "nudge[]" plaintiffs' claims that defendants acted from discriminatory animus "across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1950-51. Plaintiffs' claim of discrimination is therefore well pleaded under Rule 8, and defendants' motion to dismiss should be denied.

B. Defendants Are Not Entitled To Qualified Immunity

Qualified immunity protects government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Tibbetts v. Kulongoski*, 567 F.3d 529, 535 (9th Cir. 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Defendants Longdyke and Miller seek qualified immunity on grounds that, "[w]hile it may have been apparent at that time that local governments may not selectively enforce the law against certain citizens because of their race, it certainly was not clear that law enforcement actions conducted on a single day which disproportionately affect persons of a particular class could, in and of themselves, constitute an equal protection violation." Mot. At 14:11-16. This argument suffers from two problems, each of them fatal.

First, Longdyke and Miller define the right at issue too narrowly, as the right to be free of "law enforcement actions conducted on a single day which disproportionately affect persons of a particular class." *Id.* As the Supreme Court has explained:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citations and quotations omitted). In *Hope*, the Supreme Court rejected the notion that for a right to be clearly established, there must be "fundamentally" or "materially" similar cases on the books, and held that the law is clearly established when "the state of the law [gives] [officers] fair warning" that their actions are unconstitutional. *Hope*, 536 U.S. at 741; *see also Lyons v. Busi*, 566 F.Supp.2d 1172, 1190 (E.D. Cal. 2008) ("When identifying the right allegedly violated, the court must define the right more narrowly than the constitutional provision guaranteeing the right, but more broadly than the factual circumstances surrounding the alleged violation."). Under this rule, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

For example, in *Kelley v. Borg*, 60 F.3d 664 (9th Cir. 1995), plaintiff sued prison officials for violations of the Eighth Amendment based on their failure to remove him from his cell after he complained of fumes entering through the air ducts, causing him to lose consciousness. The prison officials argued that they were entitled to qualified immunity because plaintiff did not have a clearly established right "for defendant correctional officers to immediately remove him from his cell in the Security Housing Unit during a lock down, when they first

were required to at least inform their superior officer that they needed to remove an inmate, be it any inmate, from his cell." *Id.* at 667. The Ninth Circuit held that the defendants "misapprehend[ed] the level of generality at which a law must be clearly established," reasoning that while the inquiry was more particularized than whether "the Eighth Amendment generally is clearly established," the proper question was whether "Eighth Amendment rights *in the prison medical context* are clearly established." *Id.* (quotations and citations omitted). The Court held the that the right was clearly established by the standard for Eighth Amendment violations in the prison medical context — that prisoners have a right to officials who are not "deliberately indifferent to serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 106 (1976) — and that "[t]o hold that the magistrate judge should have defined the right at issue more narrowly, and included all the various facts that Appellants recited in their proposed definition, would be to allow Appellants, and future defendants, to define away all potential claims." *Kelley*, 60 F.3d at 667.

Longdyke and Miller's argument suffers from a second, fatal flaw: by suggesting the law was not clear whether "law enforcement actions conducted on a single day which disproportionately affect persons of a particular class" worked a constitutional violation, defendants confuse the right at issue (to be free from intentional racial discrimination in law enforcement actions) with the evidence required to prove a violation of that right (racial disparities that give rise to an inference of discriminatory intent). It is the legal right that must be clearly established under *Hope* and other case law, not the particular evidence required to prove a violation of that right.

Properly framed, the inquiry for qualified immunity is whether, at the time of the raids in 2008, defendants were on "fair notice" that they would violate the equal protection clause if they intentionally selected subjects for inspection, or for unlawfully aggressive searching or detention during inspection, on the basis of the subjects' race. It is beyond question that in the

light of case law, the unlawfulness of such racially motivated law enforcement action was apparent. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race."); *Bingham v. City of Manhattan Beach* 341 F.3d 939, 948 (9th Cir. 2003) (noting that for driver to succeed on equal protection claim that police officer unlawfully pulled him over because of his race, he must prove that officer "acted in a discriminatory manner and that the discrimination was intentional");[7] *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (holding, based partly on Equal Protection values, that for purposes of border patrol enforcement, "Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required").

Defendants were therefore on fair notice that the discrimination alleged was unlawful and are not entitled to qualified immunity.

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[7] *See also Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 212-14 (5th Cir. 2009) (applying same standard as articulated in *Birmingham* to law enforcement raid on nightclubs); *Flowers v. Fiore*, 359 F.3d 24, 34-45 (1st Cir. 2004) (applying same standard to discriminatory vehicle stops and arrests); *Chavez v. Illinois State Police*, 251 F.3d 612, 635 (7th Cir. 2001) (holding that use of "impermissible racial classifications in determining whom to stop, detain, and search" would violate the Equal Protection clause, and applying same standard as *Bingham*); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003) (applying same standard to discriminatory vehicle stops); *Bradley v. United States*, 299 F.3d 197, 205 (3rd Cir. 2002) (applying same standard as in *Bingham* to claim of discriminatory airport searches); *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (applying same standard to discriminatory stops by police); *United States. v. Avery*, 137 F.3d 343 (6th Cir. 1997) (holding clearly established law under Fourteenth Amendment "protects citizens from police action, including the decision to interview an airport patron, based solely on impermissible racial considerations"); *Swint v. City of Wadley*, 51 F.3d 988, 1000 (11th Cir. 1995) (applying same standard to affirm denial of qualified immunity raised by officer and police chief in a law enforcement raid on African American-owned nightclubs).

In determining whether a right is "clearly established," this Court may look unpublished decisions, the law of other circuits, and district court opinions, in addition to Ninth Circuit precedent. *Prison Legal News v. Lehman*, 397 F.3d 692, 701-02 (9th Cir. 2005); *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir.2002).

V. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny the Motion to Dismiss by defendants Longdyke and Miller.

Dated: Aug. 3, 2009

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

By \s\ Peter Bibring
Peter Bibring

SEYFARTH SHAW LLP

By \s\ Stacy Shartin
Stacy Shartin
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Seyfarth Shaw LLP, 2029 Century Park East, Suite 3500, Los Angeles, California 90067-3021. On August 3, 2009, I served the within documents:

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT OF DEFENDANTS DENNIS LONGDYKE AND LORI MILLER

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by placing the document(s) listed above, together with an unsigned copy of this declaration, in a sealed Federal Express envelope with postage paid on account and deposited with Federal Express at Los Angeles, California, addressed as set forth below.

☐ by transmitting the document(s) listed above, electronically, via the e-mail addresses set forth below.

☐ electronically by using the Court's ECF/CM System.

SEE ATTACHED ADDRESSEE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 3, 2009, at Los Angeles, California.

s/ Christian Lebano
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