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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

KEVON GORDON *et al.*

Plaintiffs,

v.

CITY OF MORENO VALLEY *et al.*,

Defendants.

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

REPLY OF DEFENDANTS DENNIS LONGDYKE AND LORI MILLER IN SUPPORT OF THEIR MOTION TO DISMISS FIRST AMENDED COMPLAINT UNDER FRCP 12(b)(6)

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

I. INTRODUCTION

Plaintiffs ask this Court to go forward on an equal protection claim against Moreno Valley Code Enforcement Officers Dennis Longdyke and Lori Miller based on no more than allegations that those Officers were present at administrative inspections, during which officers from the Moreno Valley Police Department ("MVPD") acted in what Plaintiffs characterize as an "unusually aggressive" manner. The Court should not let this happen.

Plaintiffs' First Amended Complaint ("Complaint" or "FAC") fails to allege that others similarly situated were treated differently or to state facts that plausibly establish Officers Longdyke and Miller acted with discriminatory intent. Doing so isn't necessary, Plaintiffs argue, because the inspections involved only African American businesses and were "unusually aggressive." But this argument suffers from several fatal flaws, including that: (i) the Complaint never actually alleges the Officers acted aggressively during the inspections; (ii) the Complaint's narrow focus on six inspections conducted on a single day is legally inadequate to establish dissimilar treatment or intent; (iii) allegations about the MVPD's behavior, however aggressive, cannot establish the Officers' discriminatory intent; and (iv) the Officers' alleged behavior is consistent with lawful conduct.

Plaintiffs' allegations boil down to a charge that the administrative inspections were conducted unlawfully, and a suspicion that the inspections were conducted this way because Plaintiffs are African American. But, absent allegations that inspections at non-African American barber shops either did not occur or did occur but were conducted differently, Plaintiffs' contention about the unreasonableness of the inspections is insufficient to raise an inference of racial discrimination or state an equal protection claim. *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 948 (9th Cir. 2003) ("Essentially, Bingham argues that[,] because he is African-American, the officer is white, and they disagree about the reasonableness of the traffic stop, these circumstances are sufficient to raise an

inference of racial discrimination. We disagree that this is sufficient to state an equal protection claim.").

Even if the Court finds Plaintiffs' Complaint does state an equal protection claim, the Officers are entitled to qualified immunity because the conduct alleged—unnecessarily broad administrative inspections conducted at mostly African American businesses in a single day—was not "clearly prohibited" at the time of the inspections.

For these reasons—and because the Opposition indicates Plaintiffs intend to proceed exclusively under their novel, though legally invalid, equal protection theory—Officers Longdyke and Miller ask the Court to dismiss Plaintiffs' equal protection claim with prejudice.

II. PLAINTIFFS DO NOT STATE AN EQUAL PROTECTION CLAIM

A. Plaintiffs Do Not Allege Dissimilar Treatment.

The Equal Protection clause of the 14th Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 786 (1985). That is why, to properly plead an equal protection claim against Officers Longdyke and Miller, Plaintiffs must allege that other Moreno Valley barber shops were either not subject to, or not subject to the same treatment during, administrative inspections conducted by those Officers. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995).

This the Complaint simply fails to do. As Officers Longdyke and Miller demonstrated in their Motion, the Complaint nowhere alleges that they did not conduct inspections at non-African American barber shops, or that the Officers treated non-African American barbers any differently during business inspections. *See* Mot. 9-10, 11. And nowhere in their Opposition do Plaintiffs identify any such allegations in the Complaint. "[D]iscrimination cannot exist in a vacuum; it

can be found only in the unequal treatment of people in similar circumstances." *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989) (internal quotation marks omitted). Because the Complaint identifies no group to whom the Plaintiffs can be compared to establish dissimilar treatment, Plaintiffs fail to make out one of the elements of their claim. *Id.*

Census data concerning Moreno Valley's racial make-up cannot properly be used to show dissimilar treatment, as Plaintiffs suggest. *See* Opp. 5:1-3, 11:19–12:7. Doing so would be tantamount to comparing the plaintiff barbers to all other residents of Moreno Valley. But the appropriate "control group" in this case includes only others "similarly situated," i.e., Moreno Valley barbers, who were treated differently. And the Complaint lacks any such allegations.

Finally, to the extent Plaintiffs's claim is based on allegations that five of the six barber shops inspected on April 2, 2008, were owned and patronized by African Americans, it fails because the time period involved is too limited to establish dissimilar treatment. *See United States v. Bourgeois*, 964 F.2d 935, 936-37 (9th Cir. 1992). As Officers Longdyke acknowledged in their Motion, *Bourgeois* concerns the showing a criminal defendant must make to obtain discovery on a selective enforcement defense. *See* Mot. 9. But this fact alone does not make *Bourgeois* completely "inapposite" here, as Plaintiffs argue. Opp. 10 n.4. As the Ninth Circuit noted in *Bourgeois*, "selective prosecution claims are evaluated 'according to ordinary equal protection standards.'" *Id.* at 938 (quoting *United States v. Wayte*, 470 U.S. 598, 608-09, 105 S. Ct. 1524, 1531-32, 84 L. Ed.2d 547 (1985)). Furthermore, the "colorable basis" standard applied in *Bourgeois* is similar to, though somewhat more stringent than, the "plausibility" standard required by *Ashcroft v. Iqbal*. *Compare id.* at 939 ("We hold that to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on

the part of government actors.") *with Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").[1] Finally, the policy arguments supporting the *Bourgeois* court's decision are equally applicable to the task of evaluating the sufficiency of the pleadings in a § 1983 claim. *See* 964 F.2d at 940 ("As a policy matter, Bourgeois' narrow time focus is untenable. If adopted, it would severely limit law enforcement efforts directed at specific groups of criminals. . . . Operations targeted at Wall Street bankers, alien smugglers, or any of the gangs listed by Bourgeois in his brief are likely to result in the prosecution of several people of the same race. This, in itself, does not suggest the prosecution decisions were based on race.").

B. Allegations that the Inspections Were "Unusually Aggressive" Do Not Make Up for the Absence of Allegations of Dissimilar Treatment.

Plaintiffs' Opposition as much as concedes that the Complaint's focus on a single day's inspections is inadequate to make out an equal protection claim:

> If the only 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. Opp. 10:12–11:5.

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[1] It should be kept in mind that *Rodriguez v. California Highway Patrol*, 89 F.Supp.2d 1131 (N.D. Cal. 2000), which Plaintiffs cite to distinguish *Bourgeois*, *see* Opp. 10, n.4, was decided before *Iqbal* established the "plausibility" standard for evaluating the sufficiency of pleadings in civil rights actions.

But, Plaintiffs argue, their equal protection claim is saved by the fact that, "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." Opp. 11:5-8 (citing FAC ¶ 4). In other words, it is not the *fact* of the inspections, but their *manner*, that, according to Plaintiffs, gives rise to their cause of action for unlawful discrimination.

Even if this were the case, Plaintiffs still have to allege that the "unusually aggressive" treatment was discriminatory, i.e., that Officers Longdyke and Miller treated non-African Americans differently. *See Freeman*, 68 F.3d at 1188. But Plaintiffs' Opposition points to no such allegation in the Complaint, and none can be found there. To address this fatal flaw in the Complaint, Plaintiffs contend that "a fair reading" of the "unusually aggressive" allegation is that "Code Enforcement did not treat *any* other licensees in this fashion." Opp. 11:5-8. Plaintiffs are essentially asking the Court to cure this deficiency in the pleadings by inferring an allegation of discriminatory treatment from their characterization of the inspections as "unusually aggressive."

The Court should not do so for the following reasons. First, the Complaint does not actually allege that Officers Longdyke or Miller acted in an aggressive manner during the inspections. In fact, the "unusually aggressive" allegation that Plaintiffs repeatedly cite in their Opposition refers to the conduct of the MVPD. *See* FAC ¶ 4 ("[T]he unusually aggressive conduct ***of the MVPD*** during the raid-style inspections indicate that Defendants' decision to target these business[es] in the manner they did was based . . . on the race of the barbers and their clientele." (emphasis added)). This is consistent with the rest of the Complaint, which attributes all the allegedly aggressive conduct during the alleged administrative inspections to the MVPD.[2] By contrast, the full extent of allegations against

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[2] *See, e.g.*, FAC ¶¶ 3 ("Despite the complete absence of any physical threat and the peaceful nature of all previous health and business inspections, the MVPD

Officers Longdyke and Miller is that they "conducted an extensive search" of the barber shops in a manner the Plaintiffs characterize—in conclusory fashion—as "more intrusive than necessary to determine compliance with . . . business regulations." *See* FAC ¶¶ 24, 25. These allegations do not plausibly suggest that Officers Longdyke and Miller were "unusually aggressive."

Second, even if the Complaint can fairly be read to allege the Officers were "unusually aggressive," it certainly cannot fairly be read to suggest that they "did not treat *any* other licensees in this fashion." Opp. 11 n.5. Indulging such a stretched reading of the Complaint would automatically convert every unlawful search and seizure claim into an equal protection claim, and make inconsequential Federal Rule of Civil Procedure 11's requirement that factual allegations be based on "an inquiry reasonable under the circumstances."

C. Allegations About Others' Aggressive Behavior Cannot Establish the Officers' Discriminatory Intent.

Recognizing that their Complaint does not allege Officers Longdyke and Miller acted in an "unusually aggressive" manner, Plaintiffs contend that "the fact that [other officers] in these coordinated, multiagency raids behaved in such an unusually aggressive manner suggests that the entire operation, in which [Officers Longdyke and Miller] were an integral part, was based on discriminatory intent." Opp. 17 n.6. But such an inference is specifically prohibited in a § 1983 claim, where "a plaintiff must plead that each Government-official defendant, ***through***

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officers were armed with handguns and wore bulletproof vests."), 6 ("The above raids by the MVPD trampled Plaintiffs' right to Equal Protection ... ."), 24 ("Approximately five MVPD officers wearing bulletproof vests and side arms ran into [Hair Shack] accompanied by about three Board officers and about two officers from Code Enforcement. One MVPD officer stood in the front doorway ... . The [MVPD] officer in the alley guarded the back door to the Hair Shack from his police car."), 25 ("Also on April 2, 2008, MVPD officers ... rushed into Fades Unlimited, blocking the entrance so that no one could enter or leave. MVPD officers questioned employees and customers, collected drivers licenses from them, and ran warrant checks on them. ...When plaintiff Brown expressed his objections to the searches, an officer handcuffed him in the back of a car ... .").

the official's own individual actions, has violated the Constitution." *Iqbal*, 129 S. Ct. at 1948 (emphasis added).

Furthermore, the Complaint does not allege that either Officer participated in the decision to target the barber shops—a failure Plaintiffs do not actually dispute. *See* Opp. 14:28–15:4. Nor does the Complaint contain any other allegations that are reasonably susceptible to this inference. In fact, the facts actually alleged—that MVPD initiated and requested the operation, FAC ¶ 3; and that MVPD, Board, and Code Enforcement supervisors approved in advance the targets and the manner in which the inspections would be conducted, *id.* ¶ 35—reasonably lead only to the opposite conclusion: Officers Longdyke and Miller had nothing to do with the selection of Plaintiffs' barber shops for inspection. As to the Officers' conduct during the inspection, the Complaint, as pointed out above, alleges only that they accompanied the MVPD and conducted searches that were allegedly too broad in scope. *See id.* ¶¶ 24, 25. But a mere dispute about the scope of the inspections does not raise an equal protection claim. *See,* e.g., *Bingham*, 341 F.3d at 948-949; *Annamaria M. v. Napa Valley Unified School Dist.*, 2006 WL 1525733, at *9 (N.D. Cal. 2006) ("[T]he allegations that (1) Annamaria is a member of a protected class, (2) the individual defendants are members of a different class and (3) the individual defendants acted unreasonably do not cumulatively establish either a racially discriminatory intent or differential treatment and thus fail to state an equal protection claim.").

D. The Actions Plaintiffs Describe Are Consistent with Lawful Conduct.

Iqbal holds that allegations "merely consistent" with liability do not "cross the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S. Ct. at 1949. Absent allegations concerning dissimilar treatment of others similarly situated, the Complaint states facts that are, at best, "merely consistent" with lawful conduct and therefore fall short of a plausible claim for relief.

Plaintiffs allege that (i) Hair Shack and Fades Unlimited "were used by

members of the African American community as social centers," FAC ¶ 3; (ii) Hair Shack "allowed customers to play cards and dominoes in a back room not used for barbering," *id.* ¶ 22; and (iii) Cosmetology Board supervisors helped select the barber shops to be inspected on April 2, *id.* ¶ 35. Given these facts—along with the absence of allegations that non-African American barber shops were not inspected—it would be reasonable to conclude the barber shops were selected for inspection because of potential health and safety concerns, *see* Cal. Bus. & Prof. Code § 7350; and that this, not racial animus, explains the apparently disproportionate number of African American businesses selected.

Plaintiffs counter that using the barber shops as social centers does not violate the barbering regulations. *See* Opp. 12-13. But Plaintiffs' argument misses the point. Whether the circumstances described constitute actual violations is irrelevant. The only relevant question is whether those facts provide a reasonable explanation, other than race, for why the barber shops were chosen for inspection. They do: the barbers, known to permit others to use their shops for non-barbering activities, had their businesses inspected for potential violations of the barbering regulations.[3]

III. PLAINTIFFS' FIRST CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE OFFICERS LONGDYKE AND MILLER ARE ENTITLED TO QUALIFIED IMMUNITY

Officers Longdyke and Miller are entitled to qualified immunity because the facts alleged in Plaintiffs' Complaint fail to make out a violation of a constitutional right. *Pearson v. Callahan*, 129 S. Ct 808, 816-818, 172 L. Ed. 2d

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[3] Plaintiffs also argue that the "unusually aggressive" nature of the inspections, together with the fact that five of six barber shops inspected were African American, "makes an inference of race discrimination plausible." Opp. 14:7-13. But because the Complaint does not, in fact, allege that Officers Longdyke or Miller acted aggressively, this argument fails.

565, 576 (2009). Even if the Court finds otherwise, the Officers are entitled to qualified immunity because their alleged conduct did not violate "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

The right the Officers allegedly violated must have been "clearly established" in a "particularized" sense that is "relevant" to the actual facts alleged. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Indeed, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Plaintiffs' proposed framing of the inquiry—whether intentionally selecting businesses for unlawfully aggressive inspections on the basis of race, *see* Opp. 20:24-28—is not particularized to the Complaint in any relevant sense because it ignores the scope of Plaintiffs' claim (i.e., that the inspections occurred on one day) and incorporates facts not even alleged against the Officers (i.e., that the officers were "unusually aggressive"). The Court's inquiry should therefore be more narrowly tailored to the relevant, particular facts alleged, as follows: Would a reasonable business license inspector in April 2008 have understood that conducting unnecessarily extensive inspections at predominately African American businesses on a single day would violate those business owners' equal protection rights?

The answer to that question is "No." The law in April 2008 was clearly established that, absent dissimilar treatment of others similarly situated, even allegedly unreasonable administrative inspections would not violate Plaintiffs' equal protection rights. *See, e.g., Bingham*, 341 F.3d at 948-949.

IV. PLAINTIFFS' FIRST CAUSE OF ACTION SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND

Plaintiffs do not claim that, if ordered to do so, they could amend the Complaint to state facts that would make out an equal protection claim. To the contrary, the Opposition indicates Plaintiffs' intention to proceed exclusively on the theory the "unusually aggressive" nature of the inspections constitutes the violation.[4] Because granting leave to amend would, under these circumstances, be "an exercise in futility," the Court should dismiss Plaintiffs' claim without leave to amend. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998).

IV. CONCLUSION

For the foregoing reasons, Officers Longdyke and Miller respectfully request that the Court dismiss Plaintiffs' First Cause of Action with prejudice.

DATED: August 10, 2009

LA FOLLETTE, JOHNSON, DEHAAS, FESLER & AMES

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[4] *See, e.g.*, Opp. 2:8-10 ("Plaintiffs' claim is, in fact, that defendants targeted [them] not for ordinary inspections, but for aggressive and unlawful searches, on the basis of their race."), 10 n. 3 ("[H]ere 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."), 11:5-8 ("Plaintiffs focus on a 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.").

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On August 10, 2009, I served the foregoing document described as: **REPLY OF DEFENDANTS DENNIS LONGDYKE AND LORI MILLER IN SUPPORT OF THEIR MOTION TO DISMISS FIRST AMENDED COMPLAINT UNDER FRCP 12(b)(6)** on the parties in this action by serving:

(SEE ATTACHED SERVICE LIST)

(X) By Envelope - by placing () the original **(X)** a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

() **By Facsimile Transmission:** On _____ at ___ _.m., I caused the above-named document to be transmitted by facsimile transmission telephonically to the offices of the addressee(s) at the facsimile number(s) so indicated above, The transmission was reported as complete and without error. A copy of the transmission report properly issued by the transmitting facsimile machine is attached hereto.

Executed on **August 10, 2009**, at Los Angeles, California.

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

(X) (Federal) I declare that I am employed by the office of a member of the bar of this court at whose direction the service was made.

Leslie Juarez

Re:Gordon, et.al. v. City of Moreno Valley, et. al.
United States District Court Case No.: ED CV 09-00688 SGL (Ssx)

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