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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

KEVON GORDON, RONALD JONES, RAYMOND BARNES, QUINCY BROWN

Plaintiffs,

v.

CITY OF MORENO VALLEY, a Municipal Corporation; COUNTY OF RIVERSIDE; 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; TONY HEISTERBERG, DENNIS LONGDYKE, LORI MILLER, SETH HARTNETT, ROBERT DUCKETT, MARIO HERRERA, ERIC BREWER, ANTHONY JOHNSON, CHRISTOPHER GASTINGER, RICHARD HUTSON, JOE BROWN, XOCHI CAMARGO, ARLENE BAUBY, and DOES 1-20, in their individual capacities,

Defendants.

ED CV 09-00688 SGL SSx

DEFENDANT UNDERWOOD'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: July 13, 2009
Time: 10:00 a.m.
Courtroom: 1
Judge: Hon. Stephen G. Larson

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Defendant Kristy Underwood, sued in her Official Capacity as Executive Officer of the Board of Barbering and Cosmetology, submits the following Memorandum of Points and Authorities in support of her Motion to Dismiss the claims against her in Plaintiffs' First Amended Complaint.

INTRODUCTION

This is a 42 U.S.C. § 1983 action brought for declaratory and injunctive relief. On April 2, 2008, two licensed barbershops (Fades Unlimited and Hair Shack), along with four others in the same Moreno Valley neighborhood, were inspected by California Board of Barbering and Cosmetology ("Board") inspectors, in conjunction with the Moreno Valley Police and City of Moreno Valley Inspectors. Plaintiffs Ronald Jones, Raymond Barnes, and Quincy Brown are Board-licensed barbers or cosmetologists who worked at two of the shops during the inspections. Plaintiff Kevon Gordon owns Hair Shack. Both shops were cited by the Board for various violations.

Plaintiffs bring this action against the City of Moreno Valley, the County of Riverside, the Police Chief, the police officers, the code enforcement officers, as well as the Sheriff and Board inspectors who participated in the inspections (hereinafter the "Municipal Defendants") and Kristy Underwood, in her Official Capacity as the Executive Officer of the Board.

Based upon the events alleged in the First Amended Complaint ("FAC"), Plaintiffs allege that Defendant Underwood (1) violated their rights under Article 1, section 13 of the California Constitution and California Civil Code § 52.1 by subjecting the licensed barbershops to "unreasonable searches" and (2) violated their rights to equal protection under Article 1, section 7 of the California Constitution and California Civil Code § 52.1. As to Defendant Underwood, Plaintiffs seek an injunction "prohibiting the conduct of administrative searches as described" in the FAC. The Fifth Cause of Action also seeks unspecified

declaratory relief against unspecified Defendants. The claims against Defendant Underwood in the FAC should be dismissed for failure to state a claim.

CALIFORNIA'S REGULATION OF BARBERSHOPS

The laws governing the regulation of barbers and barbershops are contained in the Barbering and Cosmetology Act, California Business & Professions Code ("Cal. Bus. & Prof. Code") §§ 7301-7444.1 and California Code of Regulations ("Cal. Code Regs."), tit. 16, div. 9, §§ 901-999. The Board oversees the licensing and discipline of barbers, cosmetologists, and barbershops.[1] Public protection is the highest priority for the Board in exercising its licensing, regulatory, and disciplinary functions. Cal. Bus. & Prof. Code § 7303.1.

The practice of barbering and cosmetology is defined in California Business and Professions Code section 7316. Only licensed professionals may practice barbering and cosmetology. Cal. Bus. & Prof. Code §7317. The board also issues "establishment" licenses to barbershops. An establishment is any premises, building, or part of a building where an activity licensed by the Board is practiced. Cal. Bus. & Prof. Code §§ 7346- 7347. An establishment must always be under the charge of an individual licensed by the Board and all individuals providing professional services at the establishment (except student interns) must be licensed. Cal. Bus. & Prof. Code §§7348 and 7349. The Barbering Act provides that the Board shall engage in random and targeted inspections of establishments to ensure compliance with applicable laws relating to public health and safety and the conduct and operation of licensed establishments. Cal. Bus. & Prof. Code §§7313 and 7353.

[1] Courts have upheld the state's right to regulate the occupations of barbering and cosmetology under its police power. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1104 (S.D. Cal. 1999); *Doyle v. Board of Barbering Examiners*, 219 Cal. App. 2d 504, 507 (1963).

STANDARDS ON MOTION TO DISMISS

Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") tests the legal sufficiency of the claims alleged in the pleadings. "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1988). Defendants are entitled to prevail, as a matter of law, where there are no allegations of facts which show the violation of a federally protected right. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). All inferences reasonably drawn from these alleged facts are construed in favor of the non-moving party. However, a court need not accept as true allegations that contradict facts which may be judicially noticed by the court. *Mullis v. U.S. Bankruptcy Court*, 828 F.2d 1385, 1388 (9th Cir. 1987). Moreover, the Court need not accept as true conclusory allegations or legal characterizations nor accept unreasonable inferences or unwarranted deductions of fact. *Beliveau v. Caras*, 873 F. Supp. 1393, 1395-96 (C.D. Cal. 1995).

Furthermore, the factual allegations must show a right to relief that is more than mere speculation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). In its decision last month, the Supreme Court strongly reaffirmed that a complaint stated in conclusory terms may not withstand a Rule 12(b)(6) motion to dismiss. *Ashcroft vs. Iqbal*, 556 U.S. 1937, 1949-1950, 129 S. Ct. 1937 (May 18, 2009) (Reversing district court's denial of Rule 12(b)(6) motion to dismiss and the affirmance of that denial by the court of appeals because plaintiff's complaint of discrimination at the hands of the government contained conclusions, but no facts).

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ARGUMENT

I. THE CLAIMS FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING TO BRING SUCH CLAIMS.

The only claim for relief in the prayer directed to Defendant Underwood is for "an injunction prohibiting the conduct of administrative searches as described herein." (FAC ¶ 55b) Plaintiffs do not establish standing for injunctive relief because the FAC does not allege sufficient facts to show an imminent injury.

In *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983), Defendant police officers applied a chokehold to plaintiff after stopping him for a Vehicle Code violation. The chokehold rendered him unconscious and damaged his larynx. The lower court entered an injunction limiting the use of chokeholds. The Supreme Court held that the plaintiff lacked standing to seek an injunction against the use of chokeholds because he failed to allege that the threat of future injury was both real and immediate. His claims of past exposure to illegal conduct did not mandate injunctive relief. *Id. at* 105-106. Because plaintiff's allegations concerning his previous injury did not show a real and immediate threat of similar police misconduct in the future, he failed to allege a case or controversy as required by Article III of the U.S. Constitution. *Id.* at 101-102.

In *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976), a class action was brought on behalf of minority citizens and Philadelphia residents against the Mayor, City Managing Director, and Police Commissioner of Philadelphia. The complaint alleged the defendants encouraged police activity violating constitutional rights of citizens and failed to act in a manner that would prevent this activity. The lower court ordered petitioners to submit a comprehensive program for improvement of handling citizens' complaints which was incorporated into a final judgment. The Supreme Court reversed the decision finding that 42 U.S.C. §1983 should not be extended to fashion "prophylactic procedures for a state agency." *Id.* at 378.

Plaintiffs have brought this action alleging that their rights were violated by an inspection one time one year ago. Other than alleging that they suffered from one allegedly unreasonable search one time last year, Plaintiffs have made no showing of any danger of a real and immediate threat of future injury to them.

Plaintiffs allege that the municipal Defendants have made statements in the press that the sweeps are a "city issue" and "not a one-time event." (FAC ¶ 8). Even if these statements were made, they do not support a finding of a reasonable threat to Plaintiffs' rights that is likely to cause irreparable injury and that can only be resolved by an injunction. Furthermore, with respect to an injunction aimed at the Board, Plaintiffs do not state any facts regarding concern about future inspections by Board inspectors nor do they allege any real or immediate threat that the Board would participate in future allegedly "unreasonable" inspections.

Plaintiffs fail to state any facts establishing a real and immediate threat that the Board will engage in any wrongdoing against them in the future. Accordingly, any injunction by the Court prohibiting future inspections on these facts would amount to the very "prophylactic procedure" that the *Rizzo* Court counseled against. *Rizzo v. Goode,* 423 U.S. at 378.[2] Because Plaintiffs have failed to establish a case or controversy entitling them to injunctive relief, the claim should be dismissed.

II. THE THIRD CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE A VIOLATION OF THEIR RIGHT TO EQUAL PROTECTION UNDER THE LAW.

The Third Cause of Action alleges that Defendant Underwood violated the rights of Plaintiffs to equal protection under the laws under Article I, Section 7 of the California Constitution. (FAC ¶¶ 47-49.) The Barbering Act provides that the Board shall engage in random and targeted inspections of establishments to ensure compliance with applicable laws relating to public health and safety and the

[2] Although it is unclear whether Plaintiffs' claim for injunctive relief is based upon federal or state law, California similarly requires a showing of irreparable and impending injury to justify injunctive relief. *Intel Corp. v. Hamai,* 30 Cal. 4th 1342, 1352 (2003); *East Bay Municipal Utility District v. Ca. Dept. of Forestry and Fire,* 43 Cal. App. 4th 1113, 1126 (1996).

conduct and operation of licensed establishments. Cal. Bus. & Prof. Code §§ 7313 and 7353. Plaintiffs have not alleged that the statute permitting the inspections of the subject barbershops facially discriminated against them on the basis of race. The statute mandates inspections of all licensed establishments and is neutral on its face.

In the case of a neutral statute, to state a viable equal protection claim under section 1983 "a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001).[3] Plaintiffs have alleged no facts from which this Court may find discriminatory intent or purpose.

A. Plaintiffs Have Alleged No Facts Demonstrating An Intent Or Purpose To Discriminate Against The Barbershops Based Upon Race.

The basis of Plaintiffs' equal protection claim is the factually unsupported statements that the April 2, 2008 Moreno Valley barbershop inspections "targeted African American barbershops" and were "racially targeted raids." (FAC ¶ 1.) As support for these blanket accusations, Plaintiffs allege that five of the six barbershops inspected that day were owned, operated, and primarily frequented by African Americans. (FAC ¶ 4.) This fact alone, even if true, does not demonstrate discriminatory intent on the part of the Defendants.

If the Defendants set out to discriminate against African American barbershops, why did they inspect one shop that was allegedly neither owned, operated, or primarily frequented by African Americans? Furthermore, given that all of the inspected shops were in the Moreno Valley area, Plaintiffs have failed to

[3] Since the Equal Protection Clauses in the United States Constitution and the California Constitution guarantee substantially similar rights, courts analyze them in a similar fashion. *Griffiths v. Superior Court*, 96 Cal. App. 4th 757, 775 (2002), review denied (June 12, 2002).

allege facts reflecting that Defendants specifically targeted only Moreno Valley shops that were owned, operated, or primarily frequented by African Americans.

Even if the Court were to find the allegations in the FAC sufficient to show disparate impact in the enforcement of the inspection statute, proof of discriminatory intent is still required to show that state action having a disparate impact violates the Equal Protection Clause. See, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 194, 97 S. Ct. 555, 50 L. Ed. 2d 450 (2003).

Plaintiffs next allege that five of the six shops were owned, operated, and frequented by African Americans, which is a "stark disparity" and this disparity coupled with the "unusually aggressive conduct of the MVPD during the raid style inspections indicate that Defendants' decision to target these business [sic] in the manner they did was based, in part or in whole, on the race of the barbers and their clientele." (FAC ¶ 4.) However, more facts would have to be alleged to demonstrate the "stark disparity" which Plaintiffs suggest is shown by the mere allegation that five of the six inspected shops in Moreno Valley were owned, operated, and frequented by African Americans. These facts are lacking to demonstrate an intent to discriminate against African American barbershops.

Nor does the unsupported allegation of "unusually aggressive conduct" by the police provide any indicia of intent to racially discriminate against Plaintiffs. In *Ashcroft vs. Iqbal*, 556 U.S. at 1949-1950, the Supreme Court clarified that a section 1983 complaint with conclusory allegations of discrimination should be dismissed pursuant to Rule 12(b)(6). To state a claim, parties must "plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion or natural origin." *Id.* at 1948; *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555 (a pleading that merely recites the elements

of a cause of action, labels, conclusions, and assertions with no factual support is inadequate).

Here, Plaintiffs have failed to allege any facts supporting their allegation of racial discrimination. The Court need not accept Plaintiffs' conclusory allegations of discrimination as true. *Ashcroft vs. Iqbal*, 556 U.S. at 1949-1950 [for purposes of a motion to dismiss, a court need not accept a "legal conclusion couched as factual allegation" as true]. Accordingly, the third cause of action should be dismissed for failure to state a claim.

B. Even If The Court Finds That Plaintiffs Have Stated An Equal Protection Claim, Defendant Underwood Should Be Dismissed From The Claim.

Even if the Court finds that the Plaintiffs have stated an equal protection claim arising from the inspections, the Court should dismiss the claim against Defendant Underwood. In the FAC, Plaintiffs fail to make any particularized allegations against Defendant Underwood, as the Executive Officer of the Board.

Plaintiffs allege that there were two prior warrantless searches of the same shops allegedly undertaken by the Municipal Defendants. (FAC ¶¶ 5- 6, ¶¶ 26-28, ¶¶ 32-34.) There is no allegation that the alleged prior searches targeted any group of barbershops. Plaintiffs do not allege that the Board was aware of or involved in these alleged prior searches. Plaintiffs do allege that the April 2, 2008 joint inspections of the shops "was initiated and undertaken at the request of MVPD officers." (FAC ¶ 3.) Plaintiffs finally allege that the "unusually aggressive conduct of the MVPD during the raid style inspections indicate that Defendants' decision to target these business [sic] in the manner they did was based, in part or in whole, on the race of the barbers and their clientele." (FAC ¶ 4.) None of these conclusory allegations are adequate to state a claim against the Defendants and *none* of these allegations are directed at Defendant Underwood.

In order to be liable under section 1983, a Defendant must cause the deprivation of one or more of the plaintiff's constitutional rights. See, *Van Ort v.*

Estate of Stanewich, 92 F. 3d 831, 836-37 (9th Cir.1996). "Traditional tort law defines intervening causes that break the chain of proximate causation." *Id.* Plaintiffs must allege some facts reflecting that Defendant Underwood in some way caused them harm. See, *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir.1981) [liability under section 1983 claim attaches when defendant directly or indirectly causes the deprivation, but the defendant's acts must be the proximate cause of the injury]. Plaintiffs make no particularized allegations here.

California's Barbering Act makes no distinction with respect to the race of any licensee or of its employees or customers. The legislative scheme merely mandates that inspections take place to ensure compliance with the Barbering Act and Health and Safety laws. The only allegation here is that the Board of Barbering and Cosmetology inspected these two shops on April 2, 2008. Because Plaintiffs have failed to make any particularized allegations against Defendant Underwood as the Executive Officer of the Board of intent or purpose to discriminate against Plaintiffs on the basis of their race, their equal protection claim against her should be dismissed.

III. THE FOURTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE A VIOLATION OF THEIR RIGHT TO PROTECTION FROM UNREASONABLE SEARCHES.

The Fourth Cause of Action alleges that Defendant Underwood violated the rights of Plaintiffs to be free from unreasonable searches under Article I, Section 7 of the California Constitution. (FAC ¶¶ 47-49.) Although their claim is not entirely clear, Plaintiffs do not seem to be alleging that inspection by the Board's inspectors violated their rights, nor that the Board must have a warrant to engage in regular administrative inspections.[4] FAC ¶ 24 ["the officers never claimed that they

[4]The second cause of action alleging Fourth Amendment violations against other defendants alleges "unreasonable warrantless searches" (FAC ¶ 43) whereas the fourth cause of action against Defendant Underwood under the California Constitution merely alleges "unreasonable searches." (FAC ¶ 51).

had a warrant to conduct a search and never produced a warrant."] Rather, the claim appears to be that the resulting search was constitutionally unreasonable. Plaintiffs have failed to allege adequate facts to support their claim.

A. Administrative Inspections Of Licensed Barbershops Do Not Require A Warrant.

The April 2, 2008, Board inspections of the licensed barbershops were conducted without a warrant. The inspections were done pursuant to the Barbering Act, which provides that the Board shall engage in random and targeted inspections of establishments to ensure compliance with applicable laws relating to public health and safety and the conduct and operation of licensed establishments. Cal. Bus. & Prof. Code §§7313 and 7353.

The United States Supreme Court has held that the prohibition against unreasonable searches contained in the Fourth Amendment does apply to administrative inspections of private commercial property. *Donovan v. Dewey*, 452 U.S. 594, 599, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981). However, statutory schemes authorizing warrantless, administrative searches of commercial property do not necessarily violate the Fourth Amendment. See, e.g., *U.S. v. Biswell*, 406 U.S. 311, 317, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972) [warrantless search of gun dealer's locked store room during business hours as part of inspection pursuant to gun control laws was not unreasonable]; *U.S. v. Argent Chem. Labs, Inc.*, 93 F.3d 572, 575 (9th Cir. 1996) [warrantless search of facility manufacturing veterinary drugs upheld.]

The latitude that courts grant to conduct warrantless inspections of commercial property reflects the lower expectation of privacy that business owners have in their commercial property than they would in their home, and that privacy interests in their commercial property may be adequately protected by regulatory schemes authorizing warrantless inspections. *Donovan v. Dewey*, 452 U.S. at 598-602 [warrantless inspections by federal mine inspectors of underground mines and stone

quarries to insure compliance with health and safety standards did not violate Fourth Amendment]; *U. S. v. Biswell*, 406 U.S. at 316. In particular, warrantless administrative inspections may be permissible in closely or pervasively regulated businesses which have long been subject to close supervision and inspection. *Id.* at 316.[5] An individual who accepts a license to run such a business does so with the knowledge that their business is subject to statutorily permitted administrative inspections. *Ibid.*[6]

Although California courts have never decided whether barbering establishments are closely or pervasively regulated, they clearly fit within this exception, as they have been subject to close government supervision pursuant to the Barbering Act, a statutory scheme enacted to protect the public health and welfare, since the Act was enacted in 1939. An analysis by a court in the western district of Kentucky is persuasive in this regard because its statutory scheme mirrors California's Barbering Act:

The court holds that barbering and barber shops are regulated and licensed industries such that the Board may conduct routine inspections of barbershops without a search warrant. Everyone who practices barbering, teaches barbering, or operates a barbershop must obtain a license from the state. . . . The Board is authorized to prescribe rules and regulations pertaining to health and sanitation, the location of barbershops, and the quantity and quality of equipment, supplies, and materials required in barbershops. . . . Statutory sanitation requirements cover details as miniscule as providing a relaundered towel for each customer and placing a strip of cotton or towel around each patron's neck…. Failure to comply with the

[5] See generally, Ann K. Wooster, Validity of Warrantless Administrative Inspection of Business That is Allegedly Closely or Pervasively Regulated; Cases Decided Since *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970), 182 A.L.R. Fed. 467 (2002).

[6] California Courts recognize this same exception. See *People v. Potter*, 128 Cal. App. 4th 611, 618 (2005) [warrantless search of auto repair shop pursuant to Vehicle Code]; *People v. Calvert*, 18 Cal. App. 4th 1820, 1827-1829 (1993); *People v. Easley*, 90 Cal. App. 3d 440, 443 (1979).

rules and regulations of the Board is grounds for license revocation. . . . Since barbering is closely regulated, supervised, and inspected by the state, it is not unreasonable for the Board to conduct warrantless inspections to protect the health and safety of the public. (Citations omitted.)

Stogner v. Com. of Ky., 638 F. Supp. 1 (W.D.Ky. 1985) [Barbering board may conduct warrantless inspections of a barbershop, including occupied barbering booths]; citing *U.S. v. Biswell*, 406 U.S. 311 and *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970).

Barbershops are pervasively regulated in order to insure that establishments only employ licensed professionals and that the services that are provided and the establishment itself is operated pursuant to the health and safety standards set forth in the Barbering Act.[7] An establishment must always be under the charge of an individual licensed by the Board and all individuals providing professional services at the establishment (except student interns) must be licensed. Cal. Bus. & Prof. Code §§ 7348 and 7349. Accordingly, the owners and barbers at licensed barbershops have minimal expectations of privacy in their shops and a warrant is not required in the ordinary course of an administrative inspection.

B. Warrantless Searches of Barbershops Pursuant to the Barbering Act Are Reasonable.

Even in the case of closely regulated or pervasively regulated commercial premises searches, courts hold that the ensuing warrantless search must be carried out in accordance with a regulatory scheme that provides a constitutionally adequate substitute for a warrant. In *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601(1987) (warrantless search of automobile junkyard held

[7] See, e.g., Cal. Code Regs. §978 [minimum supplies], § 979 [disinfecting non-electrical instruments and equipment], § 980 [disinfecting electrical instruments], § [procedures for cleaning and disinfecting whirlpool footspas], § 981 [instruments and supplies], § 983 [personal cleanliness], § 984 [disease and infestation], § 985 [neck strips], § 987 [towels], § 989 [prohibited hazardous substances], § 991 [invasive procedures], § 992 [skin peeling], § 993 [prohibited instruments], § 994 [cleanliness and repair], § 995 [building standards].

permissible), the Supreme Court held that a warrantless search is reasonable if three conditions are satisfied: 1) the underlying regulatory scheme advances a substantial government interest; 2) warrantless inspections are "necessary" to further the regulatory scheme; and 3) the inspection program provides a "constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702-703. The regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. *Burger*, 482 U.S. at 703; see also *Argent Chem. Labs.*, 93 F.3d at 576.

Each of these conditions are met here. First, the underlying regulatory scheme advances a substantial government interest. In this case, the Barbering Act provides that public protection is the highest priority for the Board in exercising its licensing, regulatory, and disciplinary functions. Cal. Bus. & Prof. Code § 7303.1. Public protection is advanced by the inspection program, in that it insures that every licensee complies with the health and safety requirements which protect consumers from the spread of disease and potential injury.

> The basic reason for licensing of barbers is to protect the public from the 'transmission of disease in view of the personal touch and contacts manifested and exercised in the barber business' and to avoid injury to the customer which might result from the service performed. This is accomplished by requiring that barbers have certain education and experience to assure knowledge of the possible effects of procedures (such as massage) and equipment (cutting instruments) and cosmetic and other agents (such as dyes) which they use on customers; the regulation and enforcement of sanitary procedures and conditions in shops; and the disciplining of licentiates whose continued practice would constitute a threat to the public. Demands of the Barber Board for a demonstration of competence in the performance of barbering service is a by-product of

the licensing statute oriented toward public health. …

Doyle v. Board of Barber Examiners, 219 Cal. App. 2d at 508.

Second, warrantless inspections are necessary to further this regulatory scheme. The Barbering Act provides that the Board shall engage in random and targeted inspections of establishments to ensure compliance with applicable laws relating to public health and safety and the conduct and operation of licensed establishments. Cal. Bus. & Prof. Code §§7313 and 7353. The inspections are random and unannounced so that the barbershops are not given an opportunity to remedy violations prior to the arrival of the inspectors. As in other unannounced warrantless inspections of highly regulated industries, advance notice of inspections could permit those violating the law to "temporarily correct violations and frustrate enforcement efforts." *U.S. v. V-1 Oil Co.*, 63 F.3d 909, 911-912 (9th Cir. 1995).

In finding that warrantless searches of a gun dealers locked storeroom during business hours was reasonable, the Supreme Court stated in Biswell that:

> Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

Biswell, 406 U.S. at 316.

These factors also apply to barbershops where the shop could be cleaned, instruments sanitized, forbidden instruments hidden, and towels laundered in time to make an otherwise dirty shop pass inspection if licensees had advance notice of the inspection. Furthermore, requiring a warrant for each inspection would pose an administrative burden that would hinder inspections by already overwhelmed government agencies.

Third, the Barbering Act provides a constitutionally adequate substitute for a warrant because it advises the owners of the commercial premises that the search is

being made pursuant to the law. The board licenses barbershops. Cal. Bus. & Prof. Code §§ 7346- 7347. Barbershops must always be under the charge of an individual licensed by the Board and all individuals providing professional services at the establishment (except student interns) must be licensed. Cal. Bus. & Prof. Code §§ 7348 and 7349. The Barbering Act and regulations specify very detailed regulations regarding the operation of barbershops, including the proper storage and cleaning of equipment. The Barbering Act provides that the Board shall engage in random and targeted inspections of establishments to ensure compliance with applicable laws relating to public health and safety and the conduct and operation of licensed establishments. Cal. Bus. & Prof. Code §§ 7313 and 7353. Accordingly, any licensee working at a licensed establishment, such as Plaintiffs here, are well aware that the Board could come in at any time for an unannounced inspection of the shop and that if any violations are found, the individual barbers and the establishment may be cited.

Every licensee must know the health and safety requirements for his own work station, and establishment owners know they are responsible for the entire premises. Furthermore, licensees have full knowledge that every beauty salon and barbershop in California is subject to unannounced, random, or targeted inspection at any time. Licensees understand they are entering into a highly regulated vocation for the protection of consumers and themselves.

Violations of the Barbering Act result in citations, as was the case here. These citations provide a deterrent effect that insure shops are motivated to be in compliance with the strict health and safety provisions of the Act or suffer discipline.

Finally, the Barbering Act properly defines the scope of its inspections which limit the discretion of the inspectors during the inspection. In particular, section 7313 identifies who may perform inspections for the board, the timing of such inspections, and the scope of the inspections. Pursuant to these statutes, Plaintiffs

were clearly on notice that the shops were subject to lawful periodic inspections. See *Burger*, 482 U.S. at 703; *Donovan*, 452 U.S. at 600.

C. Plaintiffs Have Failed To Allege How The Board's April 2, 2008 Inspections Of The Barbershops Were Not Reasonable

Even if the Court were to find that a warrant was not necessary for the Board to engage in the inspection of Plaintiffs' establishments, and that warrantless searches of barbershops pursuant to the Barbering Act are reasonable, the issue remains whether the actual search of these establishments was reasonable.[8] Plaintiffs allege that the manner in which the searches took place was "unreasonable." (FAC ¶ 51.)

The facts supporting this claim are scant and none of them are directed toward the conduct of the Board inspectors performing the inspections of the barbershops. In particular, Plaintiffs allege that the police "acted in conjunction with … the Board and . . . Code Enforcement, under the ruse of conducting ordinary health and business inspections. The raid-style searches that ensued, however, were more intrusive in nature and scope than justified in any ordinary business inspection." (FAC ¶ 3.) They further allege that "the MVPD officers [were] armed with handguns and wore bullet proof vests" (FAC ¶ 3), that the MVPD officers "ran into" or "rushed into" the shops (FAC ¶¶ 24, 25), and that they "blocking the entrance so no one could enter or leave. MVPD officers questioned employees and customers, collected drivers licenses from them, and ran warrant checks on them." (FAC ¶ 25) Plaintiffs' further allege that "[w]hen plaintiff Brown expressed his objections to the searches, an officer handcuffed him, took him to the police car…" (FAC ¶ 25)

[8] The California Supreme Court has made clear that"[t]he touchstone for all issues under the Fourth Amendment and article I, section 13 of the California Constitution is reasonableness." *Ingersoll v. Palmer*, 43 Cal. 3d 1321, 1329 (1987). The right to be free from unreasonable searches under Article I, section 13 of the California Constitution parallels the Fourth Amendment inquiry into the reasonableness of a search. See e.g., *Smith v. Los Angeles County Bd. of Supervisors*, 104 Cal. App. 4th 1104, 1123-1124 (2002).

Because Plaintiffs have failed to allege any facts to support a claim that the Board's administrative inspection of the licensed barbershops was unreasonable, the claim for injunctive relief against Defendant Underwood should be dismissed.

IV. THE CALIFORNIA CIVIL CODE SECTION 52.1 ALLEGATIONS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE FACTS SUPPORTING A CLAIM FOR VIOLATION OF THEIR RIGHTS OR THAT THE ALLEGED VIOLATION WAS ACCOMPLISHED BY MEANS OF THREATS, INTIMIDATION, OR COERCION.

In the Third and Fourth Causes of Action, Plaintiffs allege that Defendant Underwood deprived Plaintiffs of their California constitutional rights through threats, intimidation, and coercion or threats thereof. (FAC ¶¶ 47-52.) California Civil Code section 52.1 provides that any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.

In order to prevail on such a claim, Plaintiffs must show that (1) their rights have been interfered with or attempted to be interfered with and (2) that that interference or attempted interference took place by threat, intimidation, or coercion. *Jones v. Kmart*, 17 Cal. 4th 329, 334 (1998); *Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 843 (2004). A claim that fails to allege conduct that rises to the level of a threat of violence or coercion should be dismissed. *City and County of San Francisco v. Ballard*, 136 Cal. App. 4th 381, 408-409 (2006).

As argued above, Plaintiffs have failed to state a claim for a violation of their rights under either the federal or state constitution. Also, there are no facts supporting an allegation that the Board engaged in any conduct involving threats, intimidation, or coercion.

The allegations regarding the police officers who accompanied the Board inspectors and code enforcement officers at the inspections are similarly conclusory and do not support their Third and Fourth Causes of Action. They are set forth in the FAC as follows: (FAC ¶ 3 ["the MVPD officers armed with handguns and wore bullet proof vests"], ¶ 24 ["MVPD officers wearing bulletproof vests and side arms ran into the shop"], ¶ 25 ["MVPD officers, accompanied by Code Enforcement and Board inspectors, rushed into Fades Unlimited, blocking the entrance so no one could enter or leave. MVPD officers questioned employees and customers, collected drivers licenses from them, and ran warrant checks on them"], ¶ 25 ["When plaintiff Brown expressed his objections to the searches, an officer handcuffed him, took him to the police car…"].

Because there are no facts alleged supporting any allegations of threats, coercion, or intimidation with respect to the Board's conduct in the administrative inspection of the licensed barbershops, the California Civil Code section 52.1 claim fails and the Third and Fourth Causes of Action should be dismissed.

V. THE FIFTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF IS NOT RIPE

The Fifth Cause of Action makes a vague claim for seeking some declaration as to all of the Defendants that Defendants' conduct has deprived, and continues to deprive, Plaintiffs of their rights under the Constitution and laws of the United States. Plaintiffs allege that they anticipate Defendants will deny their contentions and that they will be subject to such unlawful and unconstitutional actions. (FAC ¶¶ 53-54)

No allegation of a violation of federal law has been made as to Defendant Underwood. Accordingly, declaratory relief regarding the violation of federal law should be dismissed as to her. Furthermore, as argued above, Defendants have only made allegations regarding a single incident, one year ago. They have failed to allege any likelihood of future injury. Plaintiffs' failure to establish a likelihood

of future injury renders their claim for declaratory relief unripe as to future, hypothetical conduct by the Defendants. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999).

> In suits seeking both declaratory and injunctive relief against a defendant's continuing practices, the ripeness requirement serves the same function in limiting declaratory relief as the imminent-harm requirement serves in limiting injunctive relief.

Ibid.

Thus, for the same reason that there is no imminent future injury that justifies prospective injunctive relief, the Plaintiffs' claim for declaratory relief should also be denied. *Texas v. U.S.*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) ["A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"]. Plaintiffs' declaratory relief claim, which seems to really request injunctive relief from the Court, should be dismissed.

CONCLUSION

For the foregoing reasons, Defendant Underwood respectfully requests that the Third, Fourth, and Fifth Causes of Action against her should be dismissed, and that the claim for injunctive relief against her should be dismissed.

Dated: June 11, 2009

Respectfully submitted,

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