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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ADDISON DEMOURA, JESSICA
DEMOURA, AND JOHN DOE,

Plaintiffs,

v.

ANDREW J. FORD, et al.,

Defendants.

1:09-cv-01344-OWW-GSA

MEMORANDUM DECISION REGARDING
MOTION TO DISMISS (Doc. 46)

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I. INTRODUCTION.

Plaintiffs Addison Demoura, Jessica Demoura, and John Doe, a minor, ("Plaintiffs") proceed with an action pursuant to 42 U.S.C. § 1983 against Defendants Andrew Ford, the County of Tuolumne, and others. On July 2, 2010, Plaintiff's original complaint was dismissed, with leave to amend. (Doc. 33).

Plaintiffs filed a first amended complaint ("FAC") on September 1, 2010. (Doc. 34). On September 2, 2010, Defendants Ford and the County of Tuolumne ("Defendants") filed a motion to dismiss the FAC. (Doc. 46). Plaintiffs filed opposition to the motion to dismiss on October 25, 2010. (Doc. 52). Defendants filed a reply on November 4, 2010. (Doc. 59).

The court heard Defendants' motion on November 15, 2010. (Doc. 62). At the close of the hearing, the court granted

1 counsel's request to submit supplemental briefing on whether the
2 exhaustion requirement of the California Tort Claims Act applies to
3 claims brought against an individual. (Id.). Defendants filed a
4 supplemental brief on November 17, 2010. (Doc. 61). Plaintiffs
5 filed a response to Defendants supplemental brief on November 22,
6 2010. (Doc. 63).

7 **II. FACTUAL BACKGROUND.**

8 On, July 25, 2007, Defendant Ford presented a Statement of
9 Probable Cause ("Statement") in support of a search warrant to a
10 magistrate for the search of Plaintiffs' residence and of Addison
11 Demoura's place of business, which operated under the business
12 name Oakdale Natural Choice Collective ("ONCC"). (FAC at 5). The
13 FAC alleges that at all times relevant, ONCC was an association of
14 medical marijuana patients commonly known as a medical marijuana
15 collective that was established under the provisions of the
16 California Medical Marijuana Program Act, and that Plaintiffs and
17 ONCC were operating legally under relevant California law. (FAC at
18 10). The FAC further alleges that all Defendants possessed
19 knowledge ONCC was operating lawfully within the provisions of the
20 California Medical Marijuana Program Act. (FAC at 12).

21 Ford's Statement detailed facts learned through surveillance
22 of Plaintiffs residence and of ONCC. Ford's Statement provided, in
23 pertinent part¹:

24
25 ¹ The facts listed below are those that are material to the issue of whether
26 Ford's statement contained sufficient information to support a finding of
27 probable cause regarding the unlawful sale of marijuana at ONCC. Plaintiffs
28 submitted a copy of the Statement in connection with a request for judicial
notice. (Doc. 53, Ex. 7). Although Ford's Statement was not appended to the FAC,
it is incorporated by reference therein, and the court may consider the Statement
without converting the motion to dismiss into a motion for summary judgment. See,
e.g., United States v. Ritchie, 342 F.3d 903, 910 (9th Cir. 2003).

1 I and other agents...are currently investigating the
2 illege [sic] possession, possession for sales /and or
3 sales of marijuana from a business identified as the
4 "Oakdale Natural Choice Collective" (ONCC)...Assisting
5 agents in this investigation is a confidential reliable
6 informant, hereinafter referred to as CRI...

7 On 06/02/07 at approx. 1400 hours, Stanislaus Drug
8 Enforcement Agency Sherriff's Segeant William Pooley
9 Walked by ONCC. Pooley observed three male subjects
10 standing in front of the business. All were wearing
11 hospital scrubs, appeared to be employees, and were
12 letting customers in and out of the business. Pooley
13 could smell a strong odor of marijuana coming from inside
14 the business.

15 On 06/04/07 Agent Gary Guffey and I were officially
16 assigned the case to investigate. From approx. 1400-1500
17 hours we conducted surveilliance at ONCC. We observed sic
18 customers go in to the business empty handed, and then
19 leave carrying small white paper bags. During the
20 survelliance Agent Guffey walked by the front of ONCC.
21 Guffey could smell a strong odor of marijuana coming from
22 inside.

23 On 06/04/07 I obtained a copy of the City of Oakdale's
24 Business License for the [ONCC]. The license listed the
25 owner as Addison Demoura, AKA: "Andrew". The license
26 listed Demoura's residence...Demoura listed the ONCC
27 business as "Retail Sales" and the products he sold as
28 being soaps, lotions, and "natural therapeutic products."

On 06/06/07 Agents conducted surveilliance at ONCC between
1700-1900 hours. During this time frame a total of
twelve customers were seen going in and out of ONCC. All
went in empty handed, and came out carrying small white
paper bags. During the surveilliance agents again saw
male subjects work as door/security men...

On 07/10/07 Agents met with a CRI at a prearranged
location for the purpose of conducting a controlled buy
of marijuana from ONCC...The CRI entered ONCC and
contacted a male subject...The CRI observed some props
and displays of soaps and/or lotions in the front lobby
area of the business. After completing paperwork the CRI
was led into a second room where a third employee...was
working behind a counter. The CRI was presented
marijuana displayed in jars and located on top of the
counter. The marijuana was individually named and color-
coded. The CRI estimated the marijuana...to be approx.
two pounds in total weight. The CRI purchased marijuana
with the provided funds from the employee working behind
the counter, and then immediately exited the business...

On 07/16/07 Agents conducted surveilliance at ONCC owner

1 Addison Demoura's residence...at approx. 1000 hours
2 Demoura left his residence carrying a backpack and drove
3 directly to ONCC. Within an hour, several customers were
4 seen going into the business empty handed, and the
5 leaving carrying white paper bags.

6 On 07/18/06, Agent Jaston Tosta contacted Stanislaus
7 County Counsel W. Dean Wright and requested insight
8 regarding Stanislaus County's policy and procedure
9 regarding cannabis clubs and marijuana dispensaries.
10 Attorney Wright advised Agent Tosta that Stanislaus
11 county does not recognize or permit businesses engaged in
12 the sale of "medical marijuana" within the County.

13 On 07/18/07 I contacted Oakdale City Manager Steven
14 Hallam via telephone and requested insight regarding The
15 City of Oakdale's policy and procedure regarding cannabis
16 clubs and marijuana dispensaries. City Manager Hallam
17 advised me that the City of Oakdale does not recognize or
18 permit businesses engaged in the sale of "medical
19 marijuana" within the County. Based on my conversation
20 with City Manager Hallam, it is clear to me the business
21 [ONCC] is operating illegally within the City of Oakdale.

22 Based on Ford's statement, a magistrate judge issued a search
23 warrant for ONCC and for Addison Demoura's residence.

24 Defendant Ford and others executed a search warrant at
25 Plaintiffs' residence and at ONCC on July 31, 2007. (FAC at 6). In
26 addition to alleging that the search was unlawful, the FAC alleges
27 that the officers executing the search warrant employed excessive
28 force during the search.

29 **III. LEGAL STANDARD.**

30 Dismissal under Rule 12(b)(6) is appropriate where the
31 complaint lacks sufficient facts to support a cognizable legal
32 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
33 (9th Cir.1990). To sufficiently state a claim to relief and
34 survive a 12(b)(6) motion, the pleading "does not need detailed
35 factual allegations" but the "[f]actual allegations must be enough
36 to raise a right to relief above the speculative level." *Bell Atl.*

1 *Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d
2 929 (2007). Mere "labels and conclusions" or a "formulaic
3 recitation of the elements of a cause of action will not do." *Id.*
4 Rather, there must be "enough facts to state a claim to relief that
5 is plausible on its face." *Id.* at 570. In other words, the
6 "complaint must contain sufficient factual matter, accepted as
7 true, to state a claim to relief that is plausible on its face."
8 *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173
9 L.Ed.2d 868 (2009) (internal quotation marks omitted).

10 The Ninth Circuit has summarized the governing standard, in
11 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
12 survive a motion to dismiss, the nonconclusory factual content, and
13 reasonable inferences from that content, must be plausibly
14 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
15 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
16 quotation marks omitted). Apart from factual insufficiency, a
17 complaint is also subject to dismissal under Rule 12(b)(6) where it
18 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or
19 where the allegations on their face "show that relief is barred"
20 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.
21 910, 166 L.Ed.2d 798 (2007).

22 In deciding whether to grant a motion to dismiss, the court
23 must accept as true all "well-pleaded factual allegations" in the
24 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
25 however, "required to accept as true allegations that are merely
26 conclusory, unwarranted deductions of fact, or unreasonable
27 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
28 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,

1 if a district court considers evidence outside the pleadings, it
2 must normally convert the 12(b)(6) motion into a Rule 56 motion for
3 summary judgment, and it must give the nonmoving party an
4 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,
5 907 (9th Cir. 2003). "A court may, however, consider certain
6 materials-documents attached to the complaint, documents
7 incorporated by reference in the complaint, or matters of judicial
8 notice-without converting the motion to dismiss into a motion for
9 summary judgment." *Id.* at 908.

10 **IV. DISCUSSION.**

11 **A. Tuolumne County**

12 **1. Federal Claims**

13 The complaint contains only two allegations pertaining to the
14 County of Tuolumne: (1) that Defendant Ford was employed by
15 Tuolumne County Sheriff's Department at the time of the search, and
16 (2) that "Defendants acted under color of state law and under the
17 official policy, custom and practice of the Tuolumne County
18 Sheriff's Department." Neither of these allegations are sufficient
19 to state a claim against Tuolumne County under section 1983. There
20 is no *respondeat superior* liability under section 1983. *Monell v.*
21 *Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

22 The complaint fails to alleges facts sufficient to give rise
23 to a reasonable inference that the Tuolumne County Sheriff's
24 Department employed an official policy, custom, or practice of
25 countenancing materially misleading warrant applications or the use
26 of excessive force. *See id.* Nor does the complaint allege facts
27 sufficient to give rise to a reasonable inference that Tuolumne
28 County employs a policy, custom, or practice of causing unlawful

1 searches in violation of California's medical marijuana laws. In
2 short, the FAC is devoid of any colorable allegations of wrongdoing
3 by Tuolumne County; it states no more than a conclusion of law.
4 Plaintiffs' federal claim against Tuolumne County is DISMISSED,
5 without prejudice.

6 **2. State Law Claims**

7 At oral argument, Plaintiffs counsel conceded that Plaintiffs
8 did not exhaust any claims against the County of Tuolumne County
9 and that Plaintiffs unexhausted state law claims are barred.
10 Plaintiffs' unexhausted state law claims against Tuolumne County
11 are DISMISSED, with prejudice.

12 **B. Defendant Ford**

13 Defendants' motion to dismiss contends that Defendant Ford did
14 not violate Plaintiffs' constitutional rights. Alternatively,
15 Defendants argue Ford is entitled to qualified immunity.
16 Defendants contend that state law claims alleged against Ford are
17 unexhausted.

18 **1. Constitutional Violation**

19 To prevail on their section 1983 claim that Defendant Ford
20 violated Plaintiffs' Fourth Amendment rights by submitting a
21 misleading warrant application, Plaintiffs "must show that the
22 defendant deliberately or recklessly made false statements or
23 omissions that were material to the finding of probable cause."
24 *E.g. Ewing v. City of Stockton*, 588 F.3d 1218, 1223 (9th Cir.
25 2009). In order to establish the materiality of Ford's alleged
26 omissions, Plaintiff must demonstrate that the search warrant would
27 not have issued had Ford's Statement contained the omitted
28 information. *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1126

1 (9th Cir. 1997). The FAC alleges facts sufficient to support an
2 inference that Ford intentionally omitted information from his
3 Statement. Whether Defendant Ford's alleged omissions were
4 material depends on the extent to which the omissions would have
5 implicated the magistrate's assessment of whether ONCC was engaged
6 in illegal marijuana sales.

7 California's Medical Marijuana Program Act ("MMPA") exempts
8 certain classes of persons from "criminal sanctions for possession
9 for sale, transportation or furnishing marijuana, maintaining a
10 location for unlawfully selling, giving away, or using controlled
11 substances, managing a location for the storage, distribution of
12 any controlled substance for sale, and the laws declaring the use
13 of property for these purposes a nuisance." *Urziceanu*, 132 Cal.
14 App. 4th 747, 785 (Cal. Ct. App. 2005) (discussing Cal. Health &
15 Safety Code § 11362.775). The MMPA provides:

16 Qualified patients, persons with valid identification
17 cards, and the designated primary caregivers of qualified
18 patients and persons with identification cards, who
19 associate within the State of California in order
20 collectively or cooperatively to cultivate marijuana for
21 medical purposes, shall not solely on the basis of that
22 fact be subject to state criminal sanctions

23 Cal. Health & Saf. Code 11362.775 (emphasis added). According to
24 the "Guidelines for the Security and Non-Diversion of Marijuana
25 Grown for Medical Use" issued by California's Attorney General on
26 August 25, 2008:

27 a properly organized and operated collective or
28 cooperative that dispenses medical marijuana through a
storefront may be lawful under California law, but ...
dispensaries that do not substantially comply with the
guidelines [covering collectives and cooperatives] are
likely operating outside the protections of [the CUA] and
the MMP[A], and ... the individuals operating such entities
may be subject to arrest and criminal prosecution under

1 California law. For example, dispensaries that merely
2 require patients to complete a form summarily designating
3 the business owner as their primary caregiver—and then
4 offering marijuana in exchange for cash 'donations'—are
5 likely unlawful.

6 *People v. Hochanadel*, 176 Cal. App. 4th 997, 1009 (Cal. Ct. App.
7 2009) (citing A.G. Guidelines).

8 The FAC alleges that Ford intentionally omitted, *inter alia*,
9 the following information from his Statement: (1) when the
10 confidential informant applied for membership to the ONCC, the
11 informant was required to present valid identification and a valid
12 physician's recommendation, (2) the informant was required to agree
13 to a formal association with all other qualified members of the
14 ONCC to collectively cultivate marijuana for medical purposes under
15 section 11362.775; and (3) the marijuana the informant received was
16 labeled "for medical use only." (FAC at 12). In light of the
17 scant information presented in Ford's Statement, the information
18 omitted by Ford was material.

19 Ford's Statement recounts observations concerning marijuana
20 sales at ONCC. However, placed in context by the various steps
21 ONCC was taking in an attempt to comply with the MMPA, the facts
22 alleged in Ford's Statement do not support a finding of probable
23 cause to believe that ONCC was selling marijuana in violation of
24 California law. By failing to present facts necessary to place
25 ONCC's conduct in context under the MMPA, Ford deprived the
26 magistrate of the information necessary to make a probable cause
27 determination. Allegations that ONCC was selling marijuana to
28 persons with valid physician's recommendations who had formally
agreed to an association with ONCC for the collective cultivation

1 of marijuana for medical use under the MMPA, standing alone, would
2 have been insufficient to support a finding of probable cause.
3 *Compare Hochanadel*, 176 Cal. App. 4th at 1019 (warrant supported by
4 probable cause where officer's statement indicated that purchasers
5 were not in legitimate cooperative relationship with the
6 dispensary, that marijuana was being purchased by the dispensary
7 from at outside supplier, that there was a large volume of cash-
8 only transactions, and that the price of the marijuana suggested a
9 for profit enterprise). The California Court of Appeal's decision
10 in *Hochandel* is instructive regarding the type of information
11 necessary to establish probable cause for violation of the MMPA:

12 [O]ur analysis is confined to the facts as described in
13 the search warrant affidavit. Those facts and application
14 of relevant law, including the A.G. Guidelines, provide
a reasonable suspicion to believe defendants were not
operating within the CUA and MMPA.

15 First, it appears that purchasers were merely required to
16 "complete a form summarily designating the business owner
17 as their primary caregiver" (A.G. Guidelines, *supra*,
18 at p. 11.) There was no evidence purchasers had any other
19 relationship with CannaHelp or that they were actual
20 members of a cooperative or collective. These facts are
21 a strong indication of unlawful activity. (Ibid.)
22 Moreover, the evidence showed at least some of the
23 marijuana CannaHelp offered for sale was purchased from
24 an outside source, Silva, as opposed to from one or more
25 of its own members. (Id. at p. 10.) Further, although it
26 was determined after the fact that CannaHelp was
27 operating at a loss, the large number of transactions,
28 the price of the marijuana, and the cash-only nature of
the business provided reasonable grounds for Detective
Garcia to believe CannaHelp was not operating as a
nonprofit enterprise, also a requirement for operation of
cooperatives and collectives. (Id. at p. 9; § 11362.765,
subd. (a).) Thus, even if facts discovered after the
warrant was issued showed a lack of probable cause,
Detective Garcia and the executing officers had
reasonable grounds to believe they had probable cause at
the time the search warrant issued, and the "good faith"
exception to the exclusionary rule applies. (United
States v. Leon, *supra*, 468 U.S. at pp. 922-923.)

1 176 Cal. App. 4 th at 1018. Ford's Statement was devoid of the
2 types of facts identified in *Hochanadel* that supported a finding of
3 probable cause.

4 Even with the benefit of the A.G.'s guidelines, it is
5 difficult to determine whether ONCC was operating illegally based
6 on the facts contained in the instant record. *See id.* (discussing
7 A.G. Guidelines, which provide that entities that do not
8 substantially comply with guidelines *may* be subject to prosecution)
9 (emphasis added). *A fortiori*, applying California law as it
10 existed in 2007, it would not have been clear that selling
11 marijuana to persons who had presented a valid physician's
12 recommendation and agreed to a formal association with ONCC for the
13 purpose of cultivating medical marijuana was illegal. *See*
14 *Urziceanu*, 132 Cal. App. 4th at 785 (noting that the MMPA exempts
15 qualified persons who associate in order to collectively or
16 cooperatively cultivate marijuana from prosecution for the sale of
17 marijuana; such qualification depends on intent and performance).
18 Ford's failure to even mention facts implicating ONCC's compliance
19 with the MMPA rendered his Statement materially misleading.

20 Defendants contend that ONCC was not in compliance with the
21 MMPA. Defendants argument is misguided. First, whether ONCC was
22 actually in compliance has no bearing on whether Ford's Statement
23 was sufficient to establish probable cause absent the material
24 omissions. *Hochanadel*, 176 Cal. App. 4th at 1018 (analysis of
25 probable cause challenge confined to facts stated in supporting
26 affidavit). Second, whether ONCC was in substantial compliance
27 with the MMPA is a factual question that is inappropriate for
28 resolution on a motion to dismiss. *See Qualified Patients Assn. v.*

1 *City of Anaheim*, 187 Cal. App. 4th 734, 751 (Cal. Ct. App. 2010).

2 Defendants also contend that, because marijuana is illegal
3 under federal law, “this court cannot sanction the plaintiffs
4 attempt to invoke federal civil rights law to secure the right to
5 commit acts that amount to crimes under federal law.” (Motion to
6 Dismiss at 10). Defendants misapprehend the basic concepts
7 underlying the Fourth Amendment, which tests the lawfulness of a
8 search and seizure under both state and federal law. See U.S.
9 Const., Amend. IV. Although federal law does not recognize the
10 California scheme for medical marijuana coops, the search and
11 seizure were conducted under state law, not federal criminal law.

12 The FAC alleges facts sufficient to support a reasonable
13 inference that Defendant Ford knew ONCC was in substantial
14 compliance with the MMPA, and that Ford intentionally omitted
15 material information from his Statement in order to mislead the
16 magistrate. Had the magistrate been apprised of the information
17 Ford allegedly omitted from his Statement, a finding of probable
18 cause could not have been sustained on then known facts. The FAC
19 is sufficient to allege a claim under section 1983 for violation of
20 Plaintiffs’ Fourth Amendment rights.

21 **2. Qualified Immunity**

22 It is objectively unreasonable for a law enforcement officer
23 deliberately or recklessly to make material omissions in a search
24 warrant application. *E.g. Lombardi v. City of El Cajon*, 117 F.3d
25 1117 (9th Cir. 1997). Thus, whether Ford is entitled to qualified
26 immunity depends on the factual inquiry of whether a reasonable
27 officer in Ford’s position would have understood the information
28 omitted was plainly material to the probable cause determination.

1 See, e.g., *id.* at 1126.²

2 A reasonable officer in California in 2007 would not have
3 believed that omitting information that was plainly relevant to a
4 target's compliance with the MMPA was appropriate in a search
5 warrant application regarding the alleged unlawful sale of
6 marijuana. In 2005, the California Court of Appeal had clearly
7 decided that the MMPA provided exemptions from criminal prosecution
8 and municipal nuisance ordinances for the sale of marijuana under
9 statutorily prescribed circumstances. See *Urziceanu*, 132 Cal. App.
10 4th at 785. Accordingly, Ford is not entitled to qualified
11 immunity at this time. If, however, evidence reveals that Ford was
12 not aware of the facts allegedly omitted from his Statement, the
13 analysis may change.

14 **3. Conspiracy**

15 Plaintiffs' opposition to the motion to dismiss does not
16 address Defendants' arguments regarding the FAC's deficiencies
17 related to the conspiracy cause of action. Further, the FAC does
18 not clearly allege the facts showing who, when, where, and why to
19 support an inference that Ford conspired with another individual to
20 present a misleading search warrant affidavit. Plaintiffs'
21 conspiracy claim is DISMISSED, without prejudice.

22 **4. Exhaustion of State Tort Claims**

23 Defendants contend that the state law claims alleged against
24 Ford may not proceed because Plaintiffs failed to exhaust their
25 claims pursuant to the requirements of California law. Defendant's

26
27 ² Defendants advance an incorrect and speculative standard: "in this case, there
28 is no binding or persuasive authority for the proposition that a person selling
medicinal marijuana in California is entitled to conduct that business without
fear of search warrants issuing." (Motion to Dismiss at 14).

1 cite California Government Code § 950.2, which provides:

2 "Except as provided in Section 950.41 , a cause of action
3 against a public employee or former public employee for
4 injury resulting from an act or omission in the scope of
5 his employment as a public employee is barred if an
6 action against the employing public entity for such
7 injury is barred under Part 3 (commencing with Section
8 900) of this division or under Chapter 2 (commencing with
9 Section 945) of Part 4 of this division. This section is
10 applicable even though the public entity is immune from
11 liability for the injury.

12 Cal. Gov. Code § 950.2.

13 Plaintiffs respond that because they exhausted their state law
14 claims against the County of Stanislaus, and because Ford was
15 acting "under" Stanislaus County at all times relevant, Plaintiffs
16 have satisfied the exhaustion requirement. (Opposition at 11).
17 Plaintiffs contend that, at a minimum, exhaustion of their claims
18 against the County of Stanislaus constituted "substantial
19 compliance" sufficient to permit Plaintiffs to proceed with their
20 state law claims against Ford. The state law government claims
21 require identification of each party against whom a claim is
22 asserted.

23 The complaint does not allege that Ford was acting "under" the
24 authority of Stanislaus County, nor any facts sufficient to support
25 such an inference. To the contrary, the complaint alleges that
26 Ford was working under the authority of his employer, the Tuolumne
27 County Sheriffs Department. Plaintiffs' state law claims must be
28 DISMISSED, without prejudice.

29 **5. California Constitutional Claim**

30 Defendants contend that the FAC fails to state a cause of
31 action for violations of the California Constitution because
32 damages are not recoverable for alleged violations of the
33

1 California Constitution absent statutory or common law authority.
2 (Motion to Dismiss at 16). Plaintiffs point to California Civil
3 Code section 52.1(b), which provides:

4 Any individual whose exercise or enjoyment of rights
5 secured by the Constitution or laws of the United States,
6 or of rights secured by the Constitution or laws of this
7 state, has been interfered with, or attempted to be
8 interfered with, as described in subdivision (a), may
9 institute and prosecute in his or her own name and on his
or her own behalf a civil action for damages, including,
but not limited to, damages under Section 52, injunctive
relief, and other appropriate equitable relief to protect
the peaceable exercise or enjoyment of the right or
rights secured.

10 The FAC does not clearly allege a cause of action under section
11 52.1 predicated on the unlawful search Plaintiffs were subjected
12 to. The caption of Plaintiffs' fifth cause of action identifies
13 only Article I, section 13 of the California Constitution as the
14 basis for Plaintiffs' claim. Plaintiffs' counsel conceded at oral
15 argument that their California constitutional claim should be re-
16 pled under section 52.1. Plaintiffs' stand-alone cause of action
17 under the California Constitution is DISMISSED, with prejudice.

18 **6. Unruh Act Claims**

19 Defendants contend that the FAC fails to state a claim for
20 damages under California Civil Code section 52, California's Unruh
21 Act, because the FAC does not allege that Plaintiff's were members
22 of a protected class. See, e.g., *Koebke v. Bernardo Heights*
23 *Country Club*, 36 Cal. 4th 824, 840-41 (Cal. Ct. App. 2008)
24 (discussing three-part test for determining whether group is
25 subject to Unruh Act protections). The FAC fails to allege that
26 they were discriminated against on account of their membership in
27 a group protected under the Unruh Act. At oral argument,
28

1 Plaintiffs' counsel conceded that Plaintiff's claim is properly
2 brought under the Bane Act, not the Unruh Act. Plaintiffs' Unruh
3 Act claim is DISMISSED, with prejudice.

4 **ORDER**

5 For the reasons stated, IT IS ORDERED:

6 1) Plaintiffs' unexhausted state law claims against Tuolumne
7 County are DISMISSED, with prejudice;

8 2) Plaintiffs' federal claims against Tuolumne County are
9 DISMISSED, without prejudice;

10 3) Plaintiffs' federal conspiracy claim is DISMISSED, without
11 prejudice;

12 4) All state law claims against Defendant Ford are dismissed,
13 without prejudice,

14 5) Plaintiffs shall file an amended complaint within twenty
15 (20) days of service of the Memorandum Decision. Defendants
16 shall file a response within ten (10) days of service of the
17 amended complaint; and

18 6) Defendants shall submit a form of order consistent with
19 this Memorandum Decision within fifteen (15) days following
20 electronic service of this decision.

21
22 **IT IS SO ORDERED.**

23
24 Dated: December 22, 2010

/s/ OLIVER W. WANGER
United States District Judge