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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

7
8 ADDISON DEMOURA, JESSICA
9 DEMOURA, AND JOHN DOE,

10 Plaintiffs,

11 v.

12 ANDREW J. FORD, et al.,

13 Defendants.
14

1:09-cv-01344-OWW-GSA

MEMORANDUM DECISION REGARDING
MOTION TO DISMISS SECOND
AMENDED COMPLAINT (Doc. 78)
AND MOTION FOR SANCTIONS (Doc.
88)

15 I. INTRODUCTION.

16 Plaintiffs Addison Demoura, Jessica Demoura, and John Doe, a
17 minor, ("Plaintiffs") proceed with an action pursuant to 42 U.S.C.
18 § 1983 against Defendants Andrew Ford, the County of Tuolumne, and
19 others. On January 14, 2011, Plaintiff's first amended complaint
20 ("FAC") was dismissed, with leave to amend. (Doc. 68).

21 Plaintiffs filed a second amended complaint ("SAC") on January
22 18, 2011. (Doc. 69). On February 22, 2011, Defendant Ford filed
23 a motion to dismiss the SAC. (Doc. 78). Plaintiffs filed
24 opposition to the motion to dismiss on May 2, 2011. (Doc. 91).

25 II. FACTUAL BACKGROUND.

26 This action arises out of the execution of search warrants at
27 Plaintiffs' residence by law enforcement officers purportedly
28 working on behalf of the Tuolumne County Sheriff's Office, the

1 Stanislaus County Sheriff's Office, the City of Oakdale, and two
2 law local law enforcement agencies: the Central Valley High
3 Intensity Drug Trafficking Area Task Force ("HIDTA") and the
4 Stanislaus Drug Enforcement Agency ("SDEA").

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

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

22 I and other agents...are currently investigating the
23 illege [sic] possession, possession for sales /and or
24 sales of marijuana from a business identified as the

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 "Oakdale Natural Choice Collective" (ONCC)...Assisting
2 agents in this investigation is a confidential reliable
informant, hereinafter referred to as CRI...

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

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

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

24 On 06/06/07 Agents conducted surveilliance at ONCC between
25 1700-1900 hours. During this time frame a total of
26 twelve customers were seen going in and out of ONCC. All
27 went in empty handed, and came out carrying small white
28 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
Addison Demoura's residnece...at approx. 1000 hours
Demoura left his residence carrying a backpack and drove
directly to ONCC. Within an hour, several customers were

1 seen going into the business empty handed, and the
2 leaving carrying white paper bags.

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

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

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

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

26 **III. LEGAL STANDARD.**

27 Dismissal under Rule 12(b)(6) is appropriate where the
28 complaint lacks sufficient facts to support a cognizable legal
theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
(9th Cir.1990). To sufficiently state a claim to relief and
survive a 12(b)(6) motion, the pleading "does not need detailed
factual allegations" but the "[f]actual allegations must be enough
to raise a right to relief above the speculative level." *Bell Atl.
Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d
929 (2007). Mere "labels and conclusions" or a "formulaic

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

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

20 In deciding whether to grant a motion to dismiss, the court
21 must accept as true all "well-pleaded factual allegations" in the
22 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
23 however, "required to accept as true allegations that are merely
24 conclusory, unwarranted deductions of fact, or unreasonable
25 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
26 (9th Cir.2001). "When ruling on a Rule 12(b) (6) motion to dismiss,
27 if a district court considers evidence outside the pleadings, it
28 must normally convert the 12(b) (6) motion into a Rule 56 motion for

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

8 **IV. DISCUSSION.**

9 Defendant Ford contends that the SAC's seventh cause of action
10 pursuant to California Civil Code section 52 *et seq.* must be
11 dismissed for failure to comply with the California Tort Claims
12 Act. The California Tort Claims Act requires that a tort claim
13 against a public entity or its employees be presented to the
14 California Victim Compensation and Government Claims Board no more
15 than six months after the cause of action accrues. See Cal. Gov't
16 Code §§ 905.2, 910, 911.2, 945.4, 950-950.2. Presentation of a
17 written claim, and action on or rejection of the claim, are
18 conditions precedent to suit. *State v. Superior Court of Kings*
19 *County (Bodde)*, 32 Cal. 4th 1234, 1245, 13 Cal. Rptr. 3d 534, 90
20 P.3d 116 (2004); *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d
21 1470, 1477 (9th Cir. 1995). Where compliance with the California
22 Tort Claims Act is required, the plaintiff has the burden of
23 pleading and proving compliance with the California Government
24 Claims Act. *Id.*

25 The SAC alleges that Plaintiffs complied with the California
26 Tort Claims Act as to Stanislaus County, and that Defendant Ford
27 was employed by the SDEA and HIDTA--agencies purportedly established
28 by Stanislaus County--and acting under their authority at the time

1 of the incident. Defendant Ford contends that the SAC's allegation
2 that he was employed by SDEA and HIDTA are false.

3 The California Tort Claims Act "defines a public employee,
4 tautologically, as 'an employee of a public entity;' an employee
5 may be 'an officer...employee, or servant, whether or not
6 compensated.'" *Briggs v. Lawrence*, 230 Cal. App. 3d 605, 613 (Cal.
7 Ct. App. 1991) (citing Cal. Gov. Code §§ 811.4, 8.10.2). The
8 California Legislature intended for the word "servant" to be more
9 restrictive than the term "agent." *Townsend v. Cal.*, 191 Cal. App.
10 3d 1530, 1533 (Cal. Ct. App. 1987). California courts consider the
11 criteria set forth in the Restatement Second of Agency in
12 determining whether or not an individual is a "servant" within the
13 meaning of California Government Code section 8.10.2:

14 The Restatement defines a "servant" (generally equivalent
15 to an employee) as "a person employed to perform services
16 in the affairs of another and who with respect to the
physical conduct in the performance of the services is
subject to the other's control or right to control. . .

17 In determining whether one acting for another is a
18 servant or an independent contractor, the following
matters of fact, among others, are considered:

19 (a) the extent of control which, by the agreement, the
20 master may exercise over the details of the work;

21 (b) whether or not the one employed is engaged in a
distinct occupation or business;

22 (c) the kind of occupation, with reference to whether, in
23 the locality, the work is usually done under the
direction of the employer or by a specialist without
supervision;

24 (d) the skill required in the particular occupation;

25 (e) whether the employer or the workman supplies the
26 instrumentalities, tools, and the place of work for the
person doing the work;

27 (f) the length of time for which the person is employed;
28

1 (g) the method of payment, whether by the time or by the
2 job;

3 (h) whether or not the work is a part of the regular
4 business of the employer;

5 (i) whether or not the parties believe they are creating
6 the relation of master and servant; and

7 (j) whether the principal is or is not in business.

8 *See Briggs*, 230 Cal. App. 3d at 615-16 (relying on Rest.2d Agency,
9 § 220 in determining applicability of section 8.10.2); accord
10 *Townsend*, 191 Cal. App. 3d at 1534 (same). In addition to the
11 Restatement, California courts also turn to the statutory and
12 decisional law of California's workers compensation scheme in
13 determining the applicability of section 8.10.2. *See Townsend*, 191
14 Cal. App. 3d at 1535 ("Of course the statutory law is a primary
15 source of public policy declarations, and one of the most
16 significant modern adjuncts of the employer-employee relationship
17 is the workers compensation scheme. Hence, the Legislature's
18 definition of "employee" in that area is of great significance in
19 analyzing the issue confronting us.").

20 The SAC contains a single factual allegation describing the
21 SDEA, which states only that SDEA "is an agency formed under
22 Government Code Section 6508, which operates within the County of
23 Stanislaus." The SAC also contains the conclusory allegation that
24 Defendants Ford, Guffey, and Tosta were "employed" by SDEA,
25 however, the SAC does not contain sufficient factual allegations to
26 support this assertion. *Inter alia*, the SAC does not allege facts
27 establishing the extent to which SDEA exercised control over
28 officers employed by other jurisdictions, the nature of SDEA's
authority with respect to other law enforcement agencies, or what

1 SDEA's operational role was in connection with the incident
2 Plaintiffs' complain of.

3 Defendant submits his own declaration, the declaration of the
4 Tulare County Undersheriff, and the declaration of an
5 Administrative Sergeant with the Stanislaus County Sheriff's
6 Office, as evidence in support of his factual assertion that he was
7 not employed by SDEA or HIDTA at the time of the incident.
8 Defendant seeks dismissal with prejudice based on the evidence he
9 has presented. None of the hearsay declarations is subject to
10 judicial notice and none may be considered in resolving Defendant's
11 motion to dismiss. See Fed. R. Civ. P. 12. Further, Defendant's
12 contention that, as a matter of law, he cannot be found to be an
13 employee of Stanislaus County because (1) he was employed by
14 Tuolumne County at the time of the incident; and (2) Stanislaus
15 County never paid him, are each incorrect. First, the fact that
16 Ford was employed by Tuolumne County does not establish that he was
17 not also an employee of another joint task force entity and acting
18 pursuant to his duties to that entity at the time of the incident.
19 See *Brassinga v. City of Mountain View*, 66 Cal. App. 4th 195, 209
20 (Cal. Ct. App. 1998) ("Where an employer sends an employee to do
21 work for another person, and both have the right to exercise
22 certain powers of control over the employee, that employee may be
23 held to have two employers--his original or 'general' employer and
24 a second, the 'special' employer.").² Second, lack of compensation

25
26 ² In *Brassinga*, it was undisputed that the defendant police officer was employed
27 by the Palo Alto Police Department. At the time of the accident underlying the
28 law suit, defendant was participating in an exercise carried out by a "Regional
Team" comprised of several separate police departments. The Court held that
defendant's employment with the Palo Alto Police Department did not preclude a
finding that he was also an employee of another city's police department at the

1 from an entity does not establish the lack of an employee-employer
2 relationship. See, e.g., *Munoz v. City of Palmdale*, 75 Cal. App.
3 4th 367, 371 (Cal. Ct. App. 1999) ("lack of compensation is not
4 dispositive of [] nonemployee status").

5 Nevertheless, because the SAC does not allege facts sufficient
6 to support an inference that Ford was an "employee" or "servant" of
7 either SDEA or HIDTA at the time of the incident, the SAC is
8 subject to dismissal without prejudice.

9 **V. MOTION FOR SANCTIONS.**

10 As discussed above, Plaintiffs have a colorable legal basis
11 for asserting that Ford was an "employee" or "servant" of
12 Stanislaus County within the meaning of the California's Tort
13 Claims Act for the purposes of the incident. Even if Plaintiffs
14 are ultimately unable to plead sufficient facts to properly allege
15 that Ford was an "employee" or "servant," there is sufficient
16 factual and legal basis to render Plaintiffs' position
17 nonfrivolous. Rule 11 sanctions are inappropriate.

18 **ORDER**

19 For the reasons stated, IT IS ORDERED:

- 20 1) Plaintiffs seventh cause of action is DISMISSED, without
21 prejudice;
- 22 2) Defendant's motion for sanctions is DENIED;
- 23 3) Plaintiffs shall file an amended complaint within thirty
24 days of electronic service of this decision; Defendants shall
25 file responsive pleading within thirty days of service of an
26 amended complaint; and

27 _____
28 time of the incident.

1 4) Defendants shall submit a form of order consistent with
2 this decision within five days of electronic service of this
3 decision.

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5 IT IS SO ORDERED.

6 **Dated: May 23, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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