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IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

DANIEL AND KATHLEEN SHEEHAN,

Plaintiffs and Appellants,

v.

THE SAN FRANCISCO FORTY NINERS, LTD.,

Defendant and Respondent.

On Appeal from an Order of the Superior Court
of California, County of San Francisco

Hon. James L. Warren

Case No. CGC-05-447679

RESPONDENT'S BRIEF

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COPY

No. ____

IN THE COURT OF APPEALS FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

DANIEL SHEEHAN et. al.,

Plaintiffs-Appellants,

vs.

THE SAN FRANCISCO 49ERS, LTD.,

Defendant-Respondent.

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On Appeal from the San Francisco Superior Court
The Hon. James L. Warren, Judge
Case No. CGC-05-447679

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Pursuant to California Rule of Court 14.5(d), Defendant-Respondent The San Francisco Forty-Niners, Ltd. identifies the following persons and entities:

- San Francisco Forty-Niners, LLC
- The DeBartolo Corporation
- Denise DeBartolo York
- Dr. John York

Respectfully submitted,

DATED: August 2, 2006

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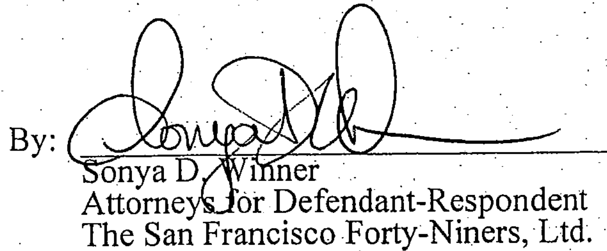
By: 
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INTRODUCTION

The question on this appeal is whether a private party may permissibly condition attendance at its own privately sponsored events on compliance with security measures that include a light pat-down. Appellants, two fans of the San Francisco 49ers football team, seek to invoke the privacy clause of Article 1 of the California Constitution to force the 49ers to grant them attendance at 49ers games on terms of their own choosing. Specifically, appellants do not wish to submit to pat-down inspections that the 49ers have adopted as a condition to attendance at their games. Yet there is no dispute in this case that these pat-downs are strictly consensual and can easily be avoided by not attending the games.

The California Constitution does not grant plaintiffs the right to dictate their own terms of attendance at a privately sponsored event. In certain circumstances, the California Constitution constrains the rights of private parties to engage in actions that impose *involuntary* invasions of privacy, but the Supreme Court and the Courts of Appeal have repeatedly made clear that such constraints do not apply where a plaintiff voluntarily consents to the alleged invasion in order to obtain a private benefit. Accordingly, the trial court sustained the demurrer to appellants' complaint. That order should be affirmed.

FACTS AND PROCEDURAL HISTORY

The San Francisco Forty Niners, Ltd., a limited partnership doing business as the San Francisco 49ers ("49ers"), is a member club of the National Football League ("NFL"). (AA 104, ¶ 3.) The 49ers play their home games at Monster Park in San Francisco. (*Id.*)

Beginning in the 2005 season, the NFL adopted a policy requiring each person entering an NFL stadium on game day to submit to a limited pat-down inspection as a condition of entry. (*Id.* ¶¶ 9, 10.) In San Francisco, this policy is implemented by the 49ers, a private party. (*Id.* ¶¶ 3, 9.) The pat-downs are conducted by private "event staff" screeners. Those inspected are asked to stand still while screeners "touch," "pat" or "lightly rub" their backs and down the sides of their clothed bodies. (*Id.* ¶¶ 9, 10.)

Appellants, two long-time season ticket-holders, each attended seven or more of the 49ers' home games in 2005; on each occasion, they submitted to a pat-down inspection as a condition of entry. (*Id.* ¶ 5, 10.)

Although the pat-downs were initiated in August 2005, and appellants attended most or all of the 49ers' home games during the 2005 season, this suit was not filed until December 2005. (AA 1-2.) Appellants' complaint asserted a single cause of action under the "privacy clause" of

Article 1, Section 1 of the California Constitution.[1] The complaint sought declaratory and injunctive relief. (AA 4-5.)

On January 30, 2006, the 49ers filed a timely demurrer to appellants' complaint. (AA 7.) The demurrer was heard on March 20, 2006, before the San Francisco Superior Court, the Hon. Judge James Warren presiding. At the outset of the hearing, Judge Warren asked whether the expiration of the 2005 NFL season created a standing problem for appellants, as their original complaint included only allegations about that season. (RT 2:11-25.) Appellants' counsel responded that appellants had just renewed their season tickets for the 2006 season. (RT 3:16-20.) The parties then agreed that appellants could amend their complaint to include allegations incorporating this fact, and that the 49ers' demurrer (and the oral argument on that demurrer to which the court then proceeded) would apply to the newly amended complaint. (RT 2:11-8:21.)

Appellants filed their amended complaint on March 23, 2006, alleging that

> "In or about February 2006, Daniel and Kathleen Sheehan purchased 49ers season tickets for the 2006-2007 NFL season. The Sheehans are informed and believe that the 49ers intend to continue conducting physical pat-down searches of all persons entering or

[1] The privacy clause was adopted pursuant to a voter initiative in 1972 and is commonly referred to as the "Privacy Initiative."

> reentering Monster Park during the 2006-2007 season." (AA 106, ¶ 12.)

On April 19, 2006, Judge Warren ordered supplemental briefing to address the significance of appellants' decision to purchase 2006 season tickets with knowledge of the 49ers' pat-down policy. (AA 122.) Appellants' original complaint had alleged that they did not learn about the pat-downs until after they had purchased their 2005 season tickets; this allegation obviously did not apply to their purchase for the 2006 season, which indisputably occurred after they not only knew about the pat-down inspections, but had complied with them on numerous occasions. Thus, Judge Warren observed:

> "In reviewing the First Amended Complaint, the issue of notice now takes on a different contour in this case. In prior briefing on this demurrer, Plaintiffs alleged that they had no notice of the 49ers' pat-down policy when they purchased their season tickets for the 2005-2006 season. The First Amended Complaint alleges that Plaintiffs purchased 49ers season tickets for the 2006-2007 season, and of course this time they necessarily had knowledge of the 49ers pat-down policy prior to entry to a game. Nevertheless, with this knowledge, Plaintiffs proceeded to purchase tickets for this year's season." (AA 123.)

On June 20, 2006, following receipt of the parties' supplemental briefs, Judge Warren issued an order sustaining the 49ers' demurrer. (AA 196.) Relying on *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, Judge Warren considered whether

appellants had alleged a prima facie violation of the Privacy Initiative. He pointed out that, under *Hill*, a complaint must allege facts sufficient to establish three threshold elements:

> "First, there must be a specific legally protected informational or autonomy privacy interest. [7 Cal. 4th] at 35. Second, there must be a reasonable expectation of privacy, i.e., 'an objective entitlement founded on broadly based and widely accepted community norms,' on plaintiffs' part. *Id.* at 36, 37. Third, '[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right."

(AA 197 [quoting *Hill*, 7 Cal. 4th at 35, 36, 37].) Judge Warren held that appellants' claim "fails under the second and third elements of *Hill*." (AA 198.)

On the second element – reasonable expectation of privacy – Judge Warren observed that *Hill* requires a plaintiff to "conduct himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested, either specifically or by conduct, a voluntary consent to the invasive actions of defendant." (AA 198 [citing *Hill*, 7 Cal. 4th at 26].) Judge Warren found it clear, on the face of the Amended Complaint, that "Plaintiffs had full notice of the pat-down policy – and the requirement of consent to a pat-down prior to game entry – prior to purchasing their tickets for the 2006–2007 season." He therefore

concluded that, as a matter of law, "Plaintiffs' voluntary consent to the pat-down policy by their purchase of the 49ers 2006-2007 season tickets shows that Plaintiffs do not have a reasonable expectation of privacy in regards to the pat-downs before entry to the 49ers games." (AA 199.)

Judge Warren went on to hold, in the alternative, that appellants' voluntary renewal of their season tickets for the 2006 season "also shows that the pat-downs are not sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (AA 199.) Having made the voluntary decision to buy the tickets with "foreknowledge" of the pat-down policy, appellants "cannot now claim that the pat-downs are 'highly offensive to a reasonable person" so as to violate the Privacy Initiative. (*Id.*)

Based on these holdings, Judge Warren sustained the demurrer. He did so without leave to amend "[b]ecause [appellants] cannot allege that they did not consent to the pat-down policy, and because their consent is fatal to their complaint...." (AA 199.) Based on this ruling, the trial court entered judgment dismissing the complaint on July 5, 2006. (AA 202.) Appellants then noticed this appeal. (AA 206.)

STANDARD OF REVIEW

This Court applies a de novo standard of review to the trial court's decision sustaining the demurrer. (*Montclair Parkowners Ass'n v.*

City of Montclair (1999) 76 Cal. App. 4th 784, 790.) In doing so, the Court applies the same standard in evaluating the demurrer as is applied in the trial court. (*Id.*)

A demurrer tests the legal sufficiency of the factual allegations in a complaint. (*Rakestraw v. Cal. Physician's Servs.* (2000) 81 Cal. App. 4th 39, 42-43.) Under California Code of Civil Procedure § 430.10, a defendant may demur if a complaint does not state facts sufficient to constitute a cause of action. (*See, e.g., Rakestraw,* 81 Cal. App. 4th at 43; *Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal. App. 3d 531, 536.) While a demurrer provisionally admits facts properly pleaded in the complaint, it does not admit contentions, deductions, or conclusions of law. (*Serrano v. Priest* (1971) 5 Cal. 3d 584, 591.) Where it is apparent on the face of the complaint that a plaintiff's claim lacks merit as a matter of law, the demurrer is properly sustained. (*Ankeny*, 88 Cal. App. 3d at 536.)

ARGUMENT

Judge Warren properly sustained the demurrer in this case by applying the standards enunciated by the Supreme Court in *Hill* and finding that, in light of appellants' consent to the pat-downs, they could not establish two of the three threshold elements of a Privacy Initiative claim.

Appellants begin their brief with a puzzling (and meritless) argument that *Hill* is in important respects no longer good law. Much of

the remainder of their brief is devoted to extended discussion of Fourth Amendment precedents – even though appellants have not presented – and could not present – a Fourth Amendment claim in this case. Appellants also offer extended discussions of elements of their claim that Judge Warren did not reach.

The 49ers will respond to each of appellants' arguments as appropriate, but this brief will primarily address the rulings Judge Warren actually made on the claim that is actually presented in this case – a challenge under the Privacy Initiative to the implementation *by a private party* of security measures for a *privately sponsored event* – and the appellants' consent to those measures as a condition of entry to that event.

I. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD.

A. THE STANDARD ESTABLISHED IN *HILL* IS THE GOVERNING LAW.

The controlling case on the interpretation and application of the Privacy Initiative is *Hill v. NCAA* (1994) 7 Cal. 4th 1. In *Hill*, the Supreme Court presented a comprehensive analysis of the purpose and scope of the Privacy Initiative, based upon, *inter alia*, the history of privacy law in California and the ballot information presented to voters. (7 Cal. 4th at 20-27.) The *Hill* case itself considered whether the Privacy Initiative applies at all to actions of private parties and, if so, the pertinent standards for such application. The Court answered the first question in the

affirmative but cautioned that the Privacy Initiative does *not* impose on private parties the same standards that the Privacy Initiative and the Fourth Amendment impose on state actors. (*Id.* at 34-35, 38-39, 47, 50.)

Hill sets out the minimum threshold elements of a prima facia claim under the Privacy Initiative. In sum, a plaintiff "must establish … (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (7 Cal. 4th at 39-40.) If (and only if) the plaintiff establishes all three of these elements, the court then balances the privacy intrusion against "other important interests" justifying the challenged conduct. (*Id.* at 37, 40.) In the case of a private party, such "important interests" take into account the important and legitimate interests of that private party; no separate showing of public benefit is required. (*Id.* at 38.)

Hill states explicitly that each of the three threshold elements of a plaintiff's claim may be adjudicated as a matter of law where the pertinent facts are not in dispute. On the elements at issue here, the Court stated:

> Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. *If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.*"

(7 Cal. 4th at 40 [emphasis added].)

Virtually every subsequent case to consider claims under the Privacy Initiative has explicitly cited and applied the *Hill* standard.[2] Appellants, however, argue that the Supreme Court changed the applicable standard in *Loder v. City of Glendale* (1997) 14 Cal. 4th 846. (*See* App. Br. at 7-11.) This argument lacks support either in *Loder* itself or in the case law more generally.

Loder involved a challenge brought under both the Fourth Amendment and the Privacy Initiative against drug-testing requirements for employees and job applicants imposed by a government employer. A fractured Supreme Court – no single opinion was joined by more than two justices – upheld some of the requirements and rejected others. In the opinion cited by appellants, Chief Justice George *confirmed* the framework established in *Hill*, including the prima facie elements to be used in screening out claims that do not involve a significant intrusion on a reasonable expectation of privacy. (14 Cal. 4th at 890-91, 893.)

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2 *See, e.g.*, *In re Marriage Cases* (October 5, 2006, Nos. A110449, A110450, A110451, A110463, A110651, A110652) --- Cal. App. 4th ---; *Tom v. City and County of San Francisco* (2004) 120 Cal. App. 4th 674, 679; *Vo v. City of Garden Grove* (2004) 115 Cal. App. 4th 425, 447; *Barbee v. Household Auto. Fin. Corp.* (2003) 113 Cal. App. 4th 525, 533; *TGB Ins. Servs. v. Superior Court* (2002) 96 Cal. App. 4th 443, 449. In all of these cases – and the many others cited throughout this brief – the Courts of Appeal (as well as the Supreme Court itself) have routinely analyzed Privacy Initiative claims under the *Hill* rubric without the slightest hint that *Hill* is anything other than the controlling law.

The discussion that appellants cite addressed a different issue: whether, *if the three prima facie elements are established*, a court may still reject a claim based on its analysis of those factors alone without considering the government's reasons for the challenged conduct and balancing those reasons against the severity of the intrusion. Chief Justice George opined that *Hill* had not intended to permit a court to avoid the full balancing analysis of all pertinent factors *if the threshold elements are present*. (*Id.* at 891-92.)

Loder, moreover, did not involve a challenge to private conduct. The defendant in that case, a municipality, was indisputably a state actor. *Loder* accordingly includes no discussion of how the *Hill* factors are appropriately applied to a private party, and it certainly does not purport to overrule the discussion in *Hill* of how the prima facie standards should be applied in a wholly private context.[3]

Finally, the *Loder* opinion on which appellants rely could not have changed the law established in *Hill*, because it reflected the views of

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[3] In a footnote to his opinion, Chief Justice George observed that the *Loder* appellants had not disputed that the three elements set out in *Hill* applied to cases involving government actors. (*Id.* at 894 n.21.) He went on to observe that "so long as the elements set forth in *Hill* are applied properly, the screening function served by those elements may be useful in protecting government entities, as well as private entities, from unnecessarily extended litigation with regard to state constitutional claims that involve only insignificant or de minimis intrusions upon reasonable expectations of privacy." (*Id.*) He did not purport to address how the *Hill* elements would be "applied properly" to a private party.

only two justices. (*Id.* at 853 n.1, 900.)[4] That opinion therefore does not have the status of precedent and cannot be read to limit, change, or otherwise affect the majority opinion in *Hill.* (*Board of Supervisors v. Local Agency Formation Comm'n* (1992) 3 Cal. 4th 903, 918 [a plurality opinion "lacks authority as precedent"]; *People v. Karis* (1988) 46 Cal. 3d 612, 632 [plurality opinions not binding].)[5]

In short, *Hill* remains binding on this Court and requires screening out Privacy Initiative claims that, on the undisputed facts, do not present a serious invasion of a reasonable expectation of privacy. This was the purpose for which Judge Warren used the *Hill* test, and he did so properly.

B. THE TRIAL COURT APPLIED THE CORRECT STANDARD FOR DEMURRERS.

Appellants suggest that a Privacy Initiative case cannot be resolved on demurrer, because such claims inevitably involve mixed

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4 Justice Mosk offered his own proposed revision to the *Hill* standard (*id.* at 915-17); Justice Kennard wrote only about the Fourth Amendment (*id.* at 921); and neither the opinion of Justice Chin nor that of Justice Brown expressly discussed the Privacy Initiative.

5 Appellants' effort to obtain bootstrap support for their position by asserting that *Loder*'s supposed limitation of *Hill* was "reaffirmed" in *American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, has no greater merit. (*See* App. Br. at 10.) In *Lungren*, a challenge to a state law requiring a minor to obtain parental consent before obtaining an abortion, there was no serious dispute that the threshold elements of *Hill* were satisfied. Moreover, the *Lungren* opinion on which appellants rely was another plurality opinion joined by only three justices, and it in fact reiterated and applied the *Hill* standard. (*Lungren*, 16 Cal. 4th at 360 [plurality], 328-40 [applying the *Hill* standard].)

questions of law and fact. (App. Br. at 12, 37-38.)[6] But the Supreme Court made clear in *Hill* that, when the pertinent facts are not in question, the absence of one or more of the threshold elements may be determined as a matter of law. (7 Cal. 4th at 40.) Since facts pled in the complaint are deemed undisputed at the demurrer stage, it follows that a demurrer is properly sustained if those facts demonstrate that a valid claim does not exist.

In fact, many Privacy Initiative claims are resolved at the demurrer stage. (*See, e.g., Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal. 4th 30, 43 [holding that demurrer was properly sustained to Privacy Initiative claim].)[7] Appellants offer no support for their argument that only "trivial" cases are subject to demurrer (App. Br. at 12-13), offering only a string-cite to cases in which claims were rejected at later stages of litigation. There are any number of possible reasons why those cases were resolved later –

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6 Surprisingly, appellants rely on *Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal. App. 4th 365 for this proposition. (App. Br. at 19.) But the appellate court in that case *affirmed* (albeit on nonsubstantive grounds) the trial court's order sustaining a demurrer to the plaintiff's Privacy Initiative claim. (*Alza*, 86 Cal. App. 4th at 368 n.1.)

7 *See also Nahrstedt v. Lakeside Village Condominium Ass'n* (1994) 8 Cal. 4th 361, 387-88 [reversing the Court of Appeal, finding insufficient allegation of a Privacy Initiative claim]; *City of Simi Valley v. Superior Court* (2003) 111 Cal. App. 4th 1077 [granting writ of mandate directing Superior Court to sustain demurrer]; *Mansell v. Otto* (2003) 108 Cal. App. 4th 265 [affirming order sustaining demurrer]; *Clausing v. San Francisco Unified Sch. Dist.* (1990) 221 Cal. App. 3d 1224, 1239 [affirming demurrer].

the most obvious being that the dispositive facts may not all have been pled in the complaint. In arguing that their case falls into the category they have designated as "non-trivial" and hence unsuitable for resolution on demurrer, appellants simply assume their desired outcome.

Appellants further argue that the demurrer could not be sustained because their complaint includes allegations tailored to the *Hill* elements. (App. Br. at 11-12.) This argument ignores the distinction between alleged *facts*, which must be accepted as true, and *legal conclusions and contentions based on those facts*, which are not. (*Serrano*, 5 Cal. 3d at 591.) Appellants cannot avoid this distinction by characterizing a contention or conclusion as an allegation of fact.

Thus, for example, appellants cannot obviate the legal impact of their consent on their reasonable expectation of privacy merely by alleging in conclusory terms that "[i]t is reasonable for the Sheehans to expect they will not have to sacrifice this privacy as a condition for participating in . . . 49ers home games." (App. Br. at 11 [citing AA 105-106].) Assertions of legal contentions and conclusions of this kind are not assumed to be true and do not stand in the way of demurrer. (*See Lee v. City of Monterey Park* (1986) 173 Cal. App. 3d 798, 808 n.6 [rejecting contention that court must assume on demurrer that a ballot measure was an "amendment" to a city's general plan merely because the complaint alleged that it constituted an amendment to the plan].)

II. THE TRIAL COURT CORRECTLY APPLIED THE *HILL* TEST IN SUSTAINING THE DEMURRER.

A. THE 49ERS' STATUS AS A PRIVATE PARTY SUBSTANTIALLY AFFECTS THE PRIVACY INITIATIVE ANALYSIS.

Throughout their opening brief, appellants conflate the law applicable to searches by state actors and the law applicable under the Privacy Initiative to the conduct of private parties. (*See, e.g.*, App. Br. at 14-17; 27-30; 34-35.) In *Hill*, however, the Supreme Court explained that there are important differences between the standards applicable to state and private actors. (*Hill*, 7 Cal. 4th at 34-35, 38-39, 47, 50.)[8]

As *Hill* explain, these distinctions flow from several considerations. The first is the greater danger posed by the "pervasive presence of coercive government power." (*Hill*, 7 Cal. 4th at 38.) Appellants dispute this difference here, claiming that the 49ers' event screeners are "virtual proxies" for the police. (App. Br. at 24.) There is absolutely no record or legal support for this assertion.

Under California law, private security screeners are *not* proxies – virtual or otherwise – cloaked in the coercive power of the state.

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[8] *See also id.* at 59-60 (conc. and dis. op. of Kennard, J.) [agreeing with the majority's legal standard and noting that "the correct legal analysis will differ depending in part on the governmental or nongovernmental status of the defendant . . . when the actions of a nongovernmental entity or person are alleged to have invaded constitutional privacy rights, the majority opinion properly demands an additional degree of judicial caution."].

(*See In re Christopher H.* (1991) 227 Cal. App. 3d 1567 [holding that private security guards were not state actors, even though they searched, detained, and arrested suspects and then called in the police]; *People v. Taylor* (1990) 222 Cal. App. 3d 612 [security guard not a state actor despite searching, handcuffing, and detaining a suspect and then involving the police]; *cf. United States v. Cleaveland* (9th Cir. 1994) 38 F.3d 1092 [no state action when an electric company employee enlisted police aid as a "backup" while investigating potential illegal power-diversion].) Here, the only "coercion" faced by appellants was the 49ers' refusal to admit them to a football game unless they complied with the 49ers' security measures. That is not an exercise of the state's coercive power.

Appellants' effort to fill this gap by pointing to findings in a *different* case involving pat-downs conducted by a *different* party under *different* circumstances in Tampa (App. Br. at 23-24) is both improper and without merit. In the *Johnston* case (discussed in more detail at pp. 38-40 below), the defendant was a government instrumentality, and state action was explicitly pled as part of a claim under the Fourth Amendment. (*See Johnston v. Tampa Sports Authority* (M.D. Fla. 2006) 442 F. Supp. 2d 1257.) No such claim was made (or could have been made) here. Whatever role law enforcement personnel may or may not have played in

pat-downs conducted in Tampa, this Court cannot, as appellants ask, assume such an unpled role here.[9]

In addition to emphasizing the absence of government coercion, *Hill* pointed out that the private sector offers "choice[s] and alternatives" through which a citizen may avoid unwanted invasions of privacy. (7 Cal. 4th at 38.) Appellants concede that fans can watch 49ers games on TV (or choose to do something else entirely) but claim that this is not good enough, because the 49ers have a "monopoly" over in-person attendance at 49ers football games. (App. Br. at 25.) But most "landlords, employers, [and] vendors" (*Hill*, 7 Cal. 4th at 38) presumably offer houses, jobs, or products for which there are similarly no perfect substitutes.[10] The pertinent point is that the private market provides numerous entertainment alternatives that do not require pat-down inspections, including – for those who focus narrowly on "one San Francisco 49ers team" (App. Br. at 25) – watching the games on television.

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9 The portion of the *Johnston* decision that appellants quote in their brief (at 24) explicitly refers to evidence submitted in that case about the specific role of law enforcement officers in Tampa. Appellants' First Amended Complaint does not claim any involvement by the San Francisco Police beyond mere proximity. (AA 105, ¶ 9 ["Members of the San Francisco Police Department stood a few feet away from the screeners and observed the pat-down searches taking place."].) As appellants themselves implicitly recognize, this allegation is insufficient to demonstrate government involvement.

10 Indeed, in *Hill*, the Court observed that the NCAA, the defendant in that case, held a "a virtual monopoly on high-level intercollegiate athletic competition in the United States." (*Hill*, 7 Cal. 4th at 44.)

Hill also emphasized the importance of respecting the legitimate associational and other interests of the private parties who organize activities and events. As *Hill* noted, "[p]rivate citizens have a right, not secured to government, to communicate and associate with one another on mutually negotiated terms and conditions." (7 Cal. 4th at 39.) Here, the 49ers have chosen to provide the opportunity to attend live football games only to those who consent to a pat-down inspection. *Hill* confirms their right to do so.

Appellants offer no recognition of the 49ers' rights in this case.[11] They argue that the 49ers somehow lost their associational rights because the pat-down inspections were "unilaterally imposed" rather than individually "negotiated" with each fan. (App. Br. at 25.) But appellants do not explain how the 49ers' failure to engage in tens of thousands of individual negotiations on the pat-down policy limits the their right to do business only with those who comply with that policy.

Appellants' argument implicitly assumes that they somehow have a "right" (apart from whatever contractual right attaches to their

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[11] Nor do they recognize the rights of the tens of thousands of other 49ers fans who choose to attend 49ers games with this security measure in place – at least some of whom doubtless consider the security measures a *positive* factor in their decision to attend. Under appellants' logic, such fans would have no associational rights to choose to attend events that offer security of a kind that gives them comfort, because no event organizer could lawfully offer them that option.

purchase of tickets) to attend 49ers games. But "it appears to be the almost universal rule in the United States that in the absence of statute there exists no constitutional or common law right of access to race tracks or other places of public amusement." (*Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal. 2d 736, 742). Appellants certainly have the right to associate with friends, family, and other fans (App. Br. at 25-26); but they have no right to compel a private party – the 49ers – to provide the venue and entertainment for such a meeting on terms and conditions acceptable to appellants. (*See James v. City of Long Beach* (C.D. Cal. 1998) 18 F. Supp. 2d 1078, 1082-83 [no constitutionally protected associational interest in "recreational viewing of a sports event"].)

Thus, *Hill* makes clear that the considerations to be applied under the Privacy Initiative to private parties are very different than those applicable to state actors under the Fourth Amendment. Notwithstanding this, appellants rely extensively throughout their brief on Fourth Amendment decisions.[12] While there are instances in which a court may appropriately look at Fourth Amendment decisions in considering a Privacy

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12 Appellants point to a sentence in *Hill* in which the Court stated that "[t]he 'privacy' protected by the Privacy Initiative is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment or by article I, section 13 of the California Constitution." (7 Cal. 4th at 30 n.9.) That sentence does not imply that the Privacy Initiative is co-extensive with the Fourth Amendment, much less that the two are the same as applied to private parties. To the contrary, much of the *Hill* decision is dedicated to explaining why they are *not* the same.

Act claim, that is because conduct that does *not* offend the Fourth Amendment will almost surely not offend the Privacy Initiative either. But *Hill* makes clear that one cannot simply import limitations imposed on state actors under the Fourth Amendment to a Privacy Initiative case involving only private parties.

B. APPELLANTS' CONSENT ELIMINATED ANY REASONABLE EXPECTATION OF PRIVACY.

In applying the *Hill* test here, Judge Warren focused on the second and third of the *Hill* elements, implicitly assuming for purposes of his decision that appellants had adequately pled the existence of a legally protected privacy interest.

Hill explained that a claimed reasonable expectation of privacy can be undermined by "advance notice" and the ability to consent. (7 Cal. 4th at 36-37.) It is clear from these factors that appellants have no reasonable expectation of privacy.

1. APPELLANTS HAD FULL NOTICE OF THE PAT-DOWN POLICY.

It is undisputed that appellants have notice of the pat-downs at Monster Park when they purchased 2006 season tickets. (AA 104-06.)

Appellants' original complaint alleged that they did *not* have notice of the pat-down policy when they bought their season tickets for the 2005 season. (AA 3, ¶ 8.) Any ambiguity on this point was eliminated, however, when appellants chose to purchase their season tickets for 2006

after they had attended multiple games during the 2005 season and been patted down each time, and *after* they had filed this lawsuit challenging the policy. (AA 1-3; 103-06.)[13]

It is well recognized that advance notice substantially reduces any expectation of privacy. (*Hill*, 7 Cal. 4th at 36.) This is true, not only under the Privacy Initiative, but also in the context of the more restrictive standards of the Fourth Amendment. (*See, e.g.*, *Smith v. Fresno Irrigation Dist.* (1999) 72 Cal. App. 4th 147, 162 [advance notice of a suspicionless drug test decreased employee's expectation of privacy]; *Ingersoll v. Palmer* (1987) 43 Cal. 3d 1321, 1346 [citing notice of police sobriety checkpoints as important factor supporting their validity under the Fourth Amendment]; *see also Barbee v. Household Auto. Fin. Corp.* (2003) 113 Cal. App. 4th 525, 533 [holding that an employee's knowledge of employer's policy on intra-company relationships diminished employee's reasonable expectation of privacy].)

Thus, where a plaintiff has notice of a prospective intrusion, his expectation of privacy is necessarily reduced. Where, as here, that

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[13] Since appellants seek only prospective relief, any ambiguity about whether they had notice before they bought their tickets for the 2005 season is moot.

notice is accompanied by an opportunity to avoid the intrusion, no *reasonable* expectation of privacy can remain.[14]

2. THE 49ERS ARE ENTITLED TO REQUIRE CONSENT TO PAT-DOWNS AS A CONDITION OF ATTENDANCE AT THEIR GAMES.

As the Supreme Court observed in *Hill*, "the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." (7 Cal. 4th at 37.)

The pat-downs at Monster Park are entirely consensual. They are required as a condition of access to the stadium on game day (AA 105-06), and persons attending 49ers' games are deemed to consent to the pat-downs by choosing to enter the stadium. Anyone who wishes to avoid a pat-down can simply elect not to attend the game, or can walk away before the pat-down takes place.[15]

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[14] Appellants argue that notice is insufficient to preclude their claim because they cannot modify their behavior to attend 49ers home games without submitting to pat-down inspections. (App. Br. at 39-41.) This simply misses the point. If appellants truly object to the pat-downs, they can eliminate any privacy invasion entirely, *simply by not attending the game*.

[15] Appellants' argument that their consent was not "voluntary" because they "object" to giving it (App. Br. at 27-30) thus misses the point. Their choice to purchase tickets and attend games, with knowledge that pat-downs are a condition of doing so, was indisputably a voluntary one. In a wholly private context, where there is no involvement of "coercive government power," nothing else is required. (*Hill*, 7 Cal. 4th at 38, 42.)

California courts have repeatedly upheld the rights of private parties to establish conditions on their private business relationships that implicate potential invasions of privacy – in some instances very severe invasions. (*See, e.g., Feminist Women's Health Ctr. v. Superior Court* (1997) 52 Cal. App. 4th 1234, 1249 [employment conditioned on consent to semi-public self-demonstration of a gynecological procedure]; *TGB Ins. Servs. v. Superior Court* (2002) 96 Cal. App. 4th 443 [employer's provision of computer for employee's home use conditioned on consent to employer's access to data on the computer]; *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034 [offer of private employment conditioned on submission to a drug test]; *see also Hill*, 7 Cal. 4th at 42-43 [ability to participate in intercollegiate sports conditioned on drug test].)

Feminist Women's Health Center is directly on point. The plaintiff was required, as a condition of her employment at a health-care center, to demonstrate – in front of her co-employees and others – "cervical self-examination." (52 Cal. App. 4th at 1247.) She challenged this requirement under the Privacy Initiative. Recognizing that the privacy invasion would otherwise be severe (*id.*), the court upheld the employer's right to make it a condition of employment. By accepting a job at the center with knowledge of this requirement, the plaintiff gave her consent to the invasion of privacy that the requirement entailed. (*Id.* at 1248-49.) Concluding that summary adjudication on the Privacy Initiative claim was

required, the court stated: "[W]e return to plaintiff's consent to demonstrate cervical self-examination as part of her employment agreement with the Center. The Center was not obligated to hire plaintiff, and consent remains a viable defense even in cases of serious privacy invasions." (*Id.* at 1249.)[16]

Similarly, *TGB Insurance Services v. Superior Court* (2002) 96 Cal. App. 4th 443, upheld an employer's right to retrieve private personal data that an employee had put on a company-owned computer kept at his home. Granting a preemptory writ that ordered discovery of the material, the Court of Appeal assumed (as Judge Warren did here) the existence of a privacy interest, but concluded that the employee did not have a reasonable expectation of privacy, because he knew of the company's computer monitoring policy, had consented to the policy, and then had used the company's computer for personal use. (*Id.* at 454.) The court observed that the employee, aware that the company had reserved the right to monitor its employees' computer usage, could easily have avoided any invasion of his private information by not putting it on the computer in the first place. He therefore had "the opportunity to consent to or reject the very thing that he now complains about." (96 Cal. App. 4th at 452; *see also*

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[16] Thus, contrary to appellants' argument (App. Br. at 36), although the court in *Feminist Women's Health Center* discussed the center's reasons for the requirement, it explicitly based its holding on the existence of consent.

Wilkinson, 215 Cal. App. 3d at 1049 [observing that applicants for employment who wished not to submit to drug testing could simply decline the offer of employment].)[17]

Appellants' effort to distinguish these cases on the ground that they involve employees rather than customers (App. Br. at 36) is futile. The *Feminist Women's Health Center*, *TGB*, and *Wilkinson* decisions hold that a private party may permissibly condition employment (through which people earn the means to pay for life's necessities) upon consent even to a "serious" privacy invasion. (*Feminist Women's Health Ctr.*, 52 Cal. App. 4th at 1249.) If anything, those holdings offer compelling support for the 49ers' ability to condition entrance to an *entertainment event* upon consent to a limited pat-down inspection.

Conditioned consent has also been upheld as valid in the Fourth Amendment context. Thus, searches of persons and their luggage as a condition to airport travel have been routinely upheld on the ground that travelers know that they are subject to search if they wish to board an airplane and evidence their consent by entering the airport security inspection area. In *Gilmore v. Gonzalez* (9th Cir. 2006) 435 F.3d 1125, the

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[17] Once again, appellants are incorrect in asserting that the *TGB* court weighed the justification for the company's computer monitoring policy in a general balancing approach. In fact, the *TGB* court expressly stated that "we view [plaintiff's] consent as a *complete defense* to his invasion of privacy claim." (96 Cal. App. 4th at 450 n.5 [emphasis added].)

Ninth Circuit observed that "an airline passenger has a choice regarding searches: He may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave. If he chooses to proceed, that choice, whether viewed as a relinquishment of an option to leave or an election to submit to the search, is essentially a 'consent.'" (435 F.3d at 1139 [internal quotation marks omitted].)[18]

The same principle has been applied under the Fourth Amendment in numerous other circumstances. For example, in *Mathis v. App. Dept.* (1972) 28 Cal. App. 3d 1038, 1040, the driver of a motor vehicle was deemed to have consented to search of the vehicle after entering and parking in a parking lot with a sign warning that vehicles would be subject to search. And in *McMorris v. Alioto* (9th Cir. 1978) 567 F.2d 897, 901, in an opinion by Judge (now Justice) Kennedy, the Ninth Circuit held that an attorney consented to magnetometer and pat-down searches when he sought to enter the San Francisco Hall of Justice to attend

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18 *See also, e.g., United States v. Doran* (9th Cir. 1973) 482 F.2d 929, 932 ["Having been exposed to the existence of the regulations and having chosen to participate in the activity, the implication of his consent is unavoidable."]. Indeed, in the airport search context, courts have deemed consent to be a valid basis for search once a person enters the inspection area even if he subsequently seeks to withdraw that consent and to leave upon realizing that contraband is likely to be discovered. (*See United States v. Pulido-Baquerizo* (9th Cir. 1986) 800 F.2d 899, 902 [finding implied consent to visual inspection and limited hand search of briefcase after inconclusive x-ray].) Obviously, appellants are free to walk away from pat-downs at Monster Park at any time.

court proceedings, even though his consent was "exacted as the price of entering the courthouse to discharge duties necessary to his profession." (*See also Loder*, 14 Cal. 4th at 853-54 [upholding drug testing requirement as condition of employment offer by public employer]; *Morgan v. United States* (9th Cir. 2003) 323 F.3d 776, 778 [approving search of persons entering military bases based on implied consent].)

In the Fourth Amendment context, of course, there are additional considerations bearing on the analysis of the permissible scope of conduct by a state actor, and the analysis of consent in some such instances takes into account other factors (such as the unconstitutional conditions doctrine, discussed below) that are not pertinent to a claim against a private party under the Privacy Initiative. But the principle of consent – whether denominated as "voluntary," because of a person's voluntary participation in an activity that he knows is conditioned on a search, or "implied," because he proceeds after receiving notice of the search requirement – is pervasively recognized as a validating factor even under the more rigorous standards applied under the Fourth Amendment.

That a private party may condition access upon consent is confirmed by the fact that the Privacy Initiative was adopted by the voters with a focus on *involuntary* invasions of privacy. As the Supreme Court made clear in *Hill*, the principal focus of the initiative was protection of citizens from *involuntary* intrusions into privacy interests, particularly in

the area of informational privacy. (*Hill*, 7 Cal. 4th at 16-18.) Thus, the Court cited to statements in the official ballot pamphlet referring to excessive stockpiling and misuse of databases of private information. (*Id.* at 17.) Such concerns are absent where a party has advance notice and the opportunity to consent to (or reject) the alleged invasion at issue.

In short, the mere fact that the Privacy Initiative imposes some restriction on a private actor's ability to invade the privacy interests of individuals on an *involuntary* basis does not mean that an invasion to which a person has voluntarily *consented* is actionable; nor does it preclude private actors from conditioning their economic activities on such consent.

3. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE DOES NOT APPLY TO PRIVATE PARTIES.

Appellants' fundamental argument on appeal is that the 49ers may not lawfully condition entry into Monster Park upon consent to a pat-down inspection. In making this argument, appellants seek to impose on the 49ers a constitutional doctrine – the "unconstitutional conditions" doctrine – that applies *only* to the government.

"Participation in any organized activity carried on by a private, nongovernment organization necessarily entails a willingness to forgo assertions of individual rights one might otherwise have in order to receive the benefits of communal association." (*Hill*, 7 Cal. 4th at 43.) Nonetheless, appellants rely upon cases addressing the unconstitutional

conditions doctrine to argue that their consent cannot be deemed "voluntary," because it was conditioned on an alleged privacy intrusion. (App. Br. 28-30.) What is noticeably absent from this discussion is the citation to a single case that deems the unconstitutional conditions doctrine applicable to the actions of a private party. And there is none.

The "unconstitutional conditions" doctrine is inherently a restriction on the powers *of the government.* The doctrine was developed to restrict the ability of a *state actor* to condition the grant of a *government benefit* upon consent to an invasion of constitutional rights. (*Perry v. Sinderman* (1972) 408 U.S. 593, 597; *Robbins v. Superior Court* (1985) 38 Cal. 3d 199, 213.) The doctrine has no application to private parties. (*Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1050 [rejecting argument that the unconstitutional conditions doctrine has any applicability to a private person or entity].)

Appellants argue – again without citation to a single authority – that the 49ers' conditioned consent argument "proves too much." (App. Br. at 31.) They appear to mean by this that the recognized right of a private party to require consent as a condition of its transactions would allow a private entity to avoid Privacy Initiative challenges simply by giving notice of its policies and requiring consent before a transaction

moves forward. Appellants are exactly right. But that is not "too much" – it is the law, as multiple decisions have recognized.[19]

Thus, a private employer may not force its employees to undergo embarrassing semi-public displays of private gynecological procedures – unless it first provides notice that such procedures are a condition of employment and gives employees an opportunity not to take the job. (*See Feminist Women's Health Center*, 52 Cal. App. 4th at 1249.) Similarly, the Privacy Initiative might bar an employer from taking a computer from an employee's home and retrieving private data from it – unless the employer has warned the employee in advance that the computer is for business use only and that the employer reserves the right to view any data on it. (*TGB Ins. Servs.*, 96 Cal. App. 4th at 446-48.)[20]

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[19] As *Hill* made clear, the marketplace provides a powerful answer to appellants' implied bugaboo of economy-wide privacy invasions imposed under the rubric of notice and consent. (*See Hill*, 7 Cal. 4th at 38-39 [pointing to consumers' ability to choose among competing sources for privately supplied goods and services]; *cf. Gilmore v. Gonzales* (9th Cir. 2006) 435 F.3d 1125, 1136 [airport searches did not infringe right to travel in light of other available modes of transportation].) If such competitive factors prove inadequate, "individuals and groups may turn to the Legislature to seek a statutory remedy against a specific business practice regarded as undesirable." (*Hill*, 7 Cal. 4th at 39 [citing Cal. Labor Code § 432.2(a), prohibiting conditioning employment upon a polygraph test].)

[20] Appellants' argument that the trial court placed them in a "Catch-22" (App. Br. at 32), misses the mark. Just because appellants must participate in the pat-downs in order to have standing, it does not follow that they are entitled to prevail in that challenge where they – like everyone else – will be patted down only if they consent as a condition of entry to the game.

Similar examples of consensual privacy "invasions" are pervasive throughout the economy – whether it is a bank that will grant a mortgage only if given consent to retrieve the borrower's credit report, a doctor's refusal to treat a patient without access to confidential medical records, or the 49ers' own longstanding policy prohibiting fans from bringing bags into the stadium without opening them for inspection. (*See* RT 27:28 – 28:4.) Without consent, all of these actions might be subject to challenge under the Privacy Initiative; with consent, their lawfulness is beyond serious question.[21]

4. APPELLANTS' CONSENT IS DISPOSITIVE OF THEIR PRIVACY INITIATIVE CLAIM.

Appellants argue that consent is merely a "factor" in the balancing analysis and cannot be dispositive. (App. Br. at 32.) *Hill*, however, made clear that a *reasonable* expectation of privacy is a threshold requirement that must be established *before* the court is required to perform any "balancing" (7 Cal. 4th at 40.) *Hill* recognized that consent can be dispositive (*id.*), and multiple Courts of Appeal have held the same. (*See*

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[21] The existence of notice and the easy ability to withhold consent also answers plaintiffs' "preconditioning" argument. (*See* App. Br. at 41 n.6.) The cases upon which appellants rely simply caution that Fourth Amendment violations by state actors may not be brushed aside simply because people had been preconditioned to expect their privacy to be invaded. Here, of course, there is no Fourth Amendment issue. Moreover, the 49ers do not rest here merely on an announcement that pat-downs will take place. The pat-downs *cannot and will not occur* unless appellants themselves take affirmative action to attend a 49ers game.

TBG Ins. Servs. Corp., 96 Cal. App. 4th at 450 n.5; *Feminist Women's Health Ctr.*, 52 Cal. App. 4th at 1249.) Appellants' contrary reading of *Hill* cannot be squared with any of the subsequent Privacy Initiative case law, including the Supreme Court's own *Heller* decision.

In *Heller*, the Supreme Court required dismissal of a Privacy Initiative claim – without balancing – when a plaintiff was unable, due to implied consent, to establish a reasonable expectation of privacy. (*Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal. 4th 30.) In that case, a plaintiff in a medical malpractice action brought a second lawsuit against a non-party physician, alleging that the second physician had violated the plaintiff's privacy rights by discussing the plaintiff's medical condition with the first physician's insurer and disclosing her medical records. (8 Cal. 4th at 36.) The trial court sustained a demurrer in a ruling ultimately upheld by the Supreme Court, which held that "as a matter of law, plaintiff failed to state a cause of action" because she failed adequately to allege a reasonable expectation of privacy. (*Id.* at 43.)

As the Court explained, the *Heller* plaintiff had placed "her physical condition in issue," rendering any expectation that her confidential information would remain confidential "unreasonable." (*Id.* at 43-44.) She did not have to bring the first lawsuit, but once she did, she impliedly consented to the disclosure of her private medical information; any

expectation she might have had to the contrary was at that point rendered unreasonable.

Similarly, here, appellants do not have to go to 49ers games, but if they do choose to attend, they will have consented to the pat-down inspections, thus rendering unreasonable any expectation of privacy they may claim still to have. If anything, this case presents an easier situation than *Heller*, because the malpractice action – with the concomitant decreased expectation of privacy – was probably the only method by which the *Heller* plaintiff could seek compensation for her injury. (*Heller*, 8 Cal. 4th at 36.) Appellants do not face a similarly compelling need to attend 49ers games.[22] Like the claim in *Heller*, appellants' Privacy Initiative claim was properly rejected at the threshold for failure "to establish the second essential element of a state constitutional cause of action for invasion of privacy." (*Id.* at 43.)

The cases on which appellants rely are inapposite. They cite to a footnote from *Loder* that appears in a discussion, not of the Privacy Initiative, but of the Fourth Amendment, and speaks expressly about the standard applicable under the Fourth Amendment to a "public employer."

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22 Interestingly, *Heller* is one of the cases labeled by appellants as presenting a "trivial" privacy claim, even though the invasion at issue there was clearly more substantial than that involved here, and even though the "price" the plaintiff would have had to pay to preserve her privacy interests was unquestionably greater than that involved in forgoing attendance at a football game. (App. Br. at 12.)

(App. at 33, citing 14 Cal. 4th at 886 n.19.) Their quotation (App. Br. at 34) from *Smith v. Fresno Irrigation District* (72 Cal. App. 4th at 162), also addresses Fourth Amendment standards as applied to a government employer. *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 696, simply rejected the overly broad claim that employees' consent to drug-testing allowed an employer surreptitiously to monitor the employees' restroom for drug use. And in *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal. App. 4th 179, 188, the court expressly found that no consent was present.

Finally, appellants argue that the court should not have decided the issue of consent on demurrer because there may be "considerations unaddressed" by the demurrer. (App. Br. at 38-39.) But they do not say what those additional facts are. The only example offered is a description of the season-ticket regime in Tampa, accompanied by a hazy assertion that the same facts should be *assumed* to exist for the 49ers. (*Id.*)[23] Appellants neither offer any record support for this innuendo nor

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[23] In the *Johnston* case, discussed further at pp. 38-40 below, the court found that the analysis of notice and consent was affected by the fact that the plaintiff had made an investment in a personal seat license entitling him to purchase season tickets over a period of years, and that foregoing his tickets in one year could result in the loss of that investment and other rights extending beyond the season at issue. (*Johnston*, 442 F. Supp. at 1261, 1272.) Appellants have never alleged the existence of similar arrangements in San Francisco; nor could they do so. Their attempt to mislead this Court into thinking that the situations are comparable is not just unsupported by the record; it is flatly dishonest.

explain how such unidentified factors could possibly affect the analysis on consent. (*Hill*, 7 Cal. 4th at 42-43 [adverse consequences from refusing to consent do not render such consent involuntary "in any meaningful legal sense"].) Asking this Court to speculate on the existence of such non-alleged facts is both improper and, under *Hill*, legally irrelevant.

Appellants, with full notice that pat-downs are a condition of attendance at 49ers games, choose to go to those games anyway. They therefore have, as a matter of law, consented to the pat-downs and may not challenge them. If they decide they would rather not undergo pat-downs, they can stay home. Either way, there will be no invasion of any *reasonable* expectation of privacy.

C. APPELLANTS HAVE NOT PLED A "SERIOUS" VIOLATION THAT CONSTITUTES AN "EGREGIOUS" BREACH OF SOCIAL NORMS.

Judge Warren held that, in addition to failing to establish a reasonable expectation of privacy, the First Amended Complaint failed to satisfy the third of the three *Hill* elements: an "egregious breach of the social norms underlying the privacy right." (AA 198 [quoting *Hill*, 7 Cal. 4th at 37].) This element may be decided as a matter of law where the pertinent facts are not disputed. (*Hill*, 7 Cal. 4th at 40.)

Appellants assert in conclusory terms that the limited, consensual pat-downs at issue here are "unnecessary, intrusive and highly offensive" (App. Br. at 21), but the case law demonstrates that they are not

an egregious breach of any social norms. *People v. Carlson* (1986) 187 Cal. App. 3d Supp. 6, for example, involved a similar "light touch around the waist" by a member of a Secret Service protective detail guarding a presidential candidate walking near a crowd in downtown San Francisco. The agent had a practice of routinely conducting such limited pat-downs of all persons near the front of a rope line, typically under the pretext of merely jostling them in the crowd. Others in the crowd were targeted for similar pat-downs if they appeared to be suspicious. (187 Cal. App. 3d Supp. at 11-12.) The court held that the touching to which the defendant had been subjected was "similar to a touch any person in the crowd might have inflicted" and hence constituted a "minimal" intrusion. (*Id.* at 22.)

In *Carlson* (which involved a Fourth Amendment claim), consideration of additional factors was needed before the court upheld the lawfulness of the agent's actions. But the persons patted down by the agent in *Carlson* had no notice of his intended actions and did not consent to them. Here, in contrast, appellants had full notice of the pat-downs and gave their consent by attending the games. Accordingly, Judge Warren properly held that appellants could not, as a matter of law, show that the pat-downs constitute an "egregious breach of ... social norms."

It is well established that notice can serve to minimize the severity of any alleged intrusion on privacy interests. (*Ingersoll*, 43 Cal. 3d at 1346 [holding that advance notice serves to "limit [the] intrusion upon

personal dignity and security"]; *Nat'l Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 672 [advance notice of drug testing minimizes the program's intrusion on privacy interests].) Where that notice is accompanied by consent – uncoerced by government action – it is difficult to imagine how any egregious breach of social norms could occur. Simply put, if the breach about which appellants complain was "egregious," it is hard to imagine that they (and tens of thousands of other people) would submit to them simply to be entertained for a few hours at a football game.

Other important factors reinforce the absence of any significant intrusion here. There is no impact on informational privacy, as no information is collected, stored, disseminated, or used for purposes other than the security screening of the pat-down itself. And much more extensive intrusions on "autonomy" interests (the other type of interest protected by the Privacy Initiative) have been dismissed as negligible in past decisions. For example, in *Fresno Irrigation District*, which involved a challenge to employee drug tests, the court held that the only relevant privacy interest was the informational privacy interest implicated by disclosure of test results. Any invasion of autonomy privacy through the collection process was "negligible." (72 Cal. App. 4th at 161.)[24]

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[24] In *Hill,* the court found that the collection process required by the NCAA's testing program did impose a significant invasion of privacy (albeit a justified one), but that was because the collection procedure (continued...)

In short, Appellants' allegations cannot, as a matter of law, support a conclusion that the challenged pat-downs amount to an *egregious* violation of social norms. Judge Warren was accordingly correct in holding that appellants had failed to establish a prima facie violation of the Privacy Initiative under the *Hill* standard.

III. THE *JOHNSTON* CASE IS NEITHER CONTROLLING NOR PERSUASIVE AUTHORITY HERE.

Appellants cite repeatedly to a recent decision, now on appeal to the Eleventh Circuit, upholding a preliminary injunction barring pat-down inspections at Tampa Stadium. (*Johnston*, 442 F. Supp. 2d at 1273.) There are critically important differences between that case and this one that render it of no persuasive, much less controlling, significance here.

In *Johnston*, the plaintiff was a Buccaneers season ticket-holder who claimed that he had purchased his season tickets (as well as additional ticket purchase rights extending into the future) without notice of the pat-down policy. (442 F. Supp. 2d at 1260.) The Tampa court found that the pat-downs had been implemented by the stadium authority, a public instrumentality that the court found constituted a state actor. (*Id.* at 1262-64.) The court therefore rendered its decision based on the Fourth

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involved direct monitoring of urination, which, under accepted societal norms, is viewed as a particularly private act. (7 Cal. 4th at 40-41.)

Amendment and its Florida counterpart, not on the Privacy Initiative or any similar Florida law applicable to private actors.

Appellants suggest on several occasions that this Court should assume the facts here to be the same as in Tampa, regardless of the absence of any actual record of such facts here or of any effort by appellants to plead them at any time. That is plainly improper; this demurrer must be judged on the facts as they appear within the four corners of the complaint, not based on other facts inferred from a decision in another case presenting different circumstances. (*See Thorburn v. Dept. of Corrections* (1998) 66 Cal. App. 4th 1284, 1287-88.)

Appellants also seek to rely on the legal conclusions in *Johnston* as support for their arguments here. But again, the legal standards that apply here are those of the Privacy Initiative under *Hill*, not those of the Fourth Amendment. The *Johnston* court, for example, rejected the TSA's consent argument based almost entirely on an unconstitutional conditions analysis. (442 F. Supp. 2d at 1271.) As discussed above, that doctrine does not apply to a defendant that is a private party. (*Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d at 1050.)

In short, *Johnston* involved conduct by a *different kind of entity* that was challenged under *an entirely different theory* by a plaintiff who (that court found) lacked the prior notice that the Sheehans admit now

having. The decision is obviously not controlling authority here; because of these critical differences, it is not persuasive authority either.

IV. THE OTHER ELEMENTS OF A PRIVACY INITIATIVE CLAIM ARE ALSO ABSENT IN THIS CASE.

Because Judge Warren found that the Complaint failed to establish the second and third elements of the *Hill* test, he had no occasion to address the parties' arguments on the remaining elements of appellants' claim. Appellants nonetheless devote large portions of their brief to these other elements. (App. Br. at 14-18, 42-47.) Although this Court may properly *affirm* Judge Warren's holding based on its independent consideration of these factors, they provide no basis for *reversing* his decision, as they were not necessary to it. This Court may affirm the ruling below "if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons." (*Bardin v. Daimlerchrysler Corp.* (2006) 136 Cal. App. 4th 1255, 1273 n.7 [quoting *Wolkowitz v. Redland Ins. Co.* (2003) 112 Cal. App. 4th 154, 162].)

A. APPELLANTS' PRIVACY INTEREST IS MINIMAL.

Judge Warren's ruling implicitly assumed that the Complaint satisfied the first threshold element required by *Hill*, the existence of a protected privacy interest. (*See Hill*, 7 Cal. 4th at 35.) That assumption was overly generous to appellants, because no protected privacy interest is present here.

"Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court." (*Id.* at 40.) Two potential types of privacy interests may be asserted: "informational privacy" (involving the dissemination of private information about an individual) and "autonomy privacy" (involving the autonomy of an individual to make personal choices about such fundamental matters as reproduction). (*Id.* at 35.)

No informational privacy issue is presented here. The protection of informational privacy under the Privacy Initiative "prevents government and business interests from [1] collecting and stockpiling unnecessary information about us and from [2] misusing information gathered for one purpose in order to serve other purposes or to embarrass us." (*Hill,* 7 Cal. 4th at 36 [citation omitted].) No information is "collected" during the pat-down inspections (except in the most ephemeral sense); and no private information is stored, disseminated to third parties, or used for any purpose other than the security check for which the pat-down is conducted.

This leaves only the possibility of an autonomy privacy claim, *i.e.*, the interest in "conducting personal activities without observation, intrusion, or interference." (*Hill*, 7 Cal. 4th at 35.) Appellants claim "the right to be free from unwanted touching by those they do not know or care to know." (App. Br. at 14.) This "right," as defined by

appellants, is far too broad to find support in the Privacy Initiative; it rather resembles a claim of "unbridled right of personal freedom of action" that the Supreme Court has expressly rejected as a sufficient basis for a Privacy Initiative claim. (*Hill*, 7 Cal. 4th at 36; *see also Nahrstedt*, 8 Cal. 4th at 387-88.) Indeed, the "right" appellants assert here has little to do with the kind of "intimate and personal decisions" typically recognized as protected autonomy privacy. (*Hill*, 7 Cal. 4th at 36, 40-41.)

Appellants rely on a series of inapposite Fourth Amendment cases, conflating state action with private action, to argue that they have a privacy interest against pat-downs. Each of those cases involved a frisk conducted pursuant to the coercive *physical power of the state*, often backed by badges and guns. (*See Hill*, 7 Cal. 4th at 38).[25] It is one thing to say – as courts often do – that citizens have a privacy interest against pat-downs from law-enforcement agents; it is another thing to say – as appellants do here with no judicial support – that such a right transfers to a limited pat-down conducted by a private party.

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[25] Moreover, police frisks are more invasive than the pat-downs at issue here. (*Compare* AA 105, ¶ 9 [allegation that pat-downs at Monster Park involve screeners running hands around backs and down the sides of the body and legs] *with Terry v. Ohio* (1968) 392 U.S. 1, 16-17 [describing police frisk involving "a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons"]; *State v. Iaccarino* (Fla. App. 2000) 767 So. 2d 470, 479 [describing extensive searches that included touching of the "crotch and groin" and pulling on a bra].)

B. THE 49ERS' LEGITIMATE INTERESTS IN ENHANCING SAFETY AND SECURITY OUTWEIGH ANY MARGINAL INTRUSION INTO PRIVACY INTERESTS THAT MAY EXIST.

Even if the appellants' allegations were sufficient to demonstrate a serious invasion of reasonable privacy expectations, the complaint still would be insufficient to demonstrate that appellants' privacy interest – as defined and limited by appellants' reasonable expectations and the nature of the intrusion – outweighs the legitimate interests that the 49ers seek to promote through the pat-down policy. (*See Hill,* 7 Cal. 4th at 37.)[26]

Appellants acknowledge that the pat-downs were instituted as a security measure to enhance the safety of persons attending 49ers games. (AA 104, ¶ 10.) And one can hardly dispute that the 49ers have a right to take reasonable measures to avoid becoming the unwilling host to a terrorist attack that could kill or injure hundreds or even thousands of people. It is accordingly clear that the interest that the 49ers and the NFL seek to promote through the pat-down policy is "important" – which is all that *Hill* requires. (*See Hill*, 7 Cal. 4th at 37.)

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26 Appellants assert that at the demurrer stage the Court should not evaluate the 49ers' justification for the pat-downs. (App. Br. at 42.) But given the extremely minimal nature of the alleged privacy intrusion, it would take only the most general legitimate interest of the 49ers to justify the pat-downs. In light of the undisputed nature of those facts, this Court may adjudicate the question as a matter of law. (*Hill*, 7 Cal. 4th at 40.)

The threat that this minimal security measure is designed to address is supported not only by past experience with terror attacks of major sporting events, but also by common sense.[27] NFL games are attended by tens of thousands of spectators packed into confined spaces at a stadium, are broadcast live, and have a uniquely iconic status. (*See Cleveland Nat'l Airshow, Inc. v. United States Dep't of Transp.* (6th Cir. 2005) 430 F.3d 757, 766 [holding that "Congress legitimately could have determined that certain major sports events and the Disney theme parks were quintessentially American and therefore presented especially attractive targets to terrorists."].) Congress acted on this self-evident concern when it ratified the FAA's decision to prohibit aviation in the airspace around NFL games.[28]

Appellants' criticisms of the security choices reflected in the NFL's pat-down policy are entirely irrelevant if, as shown above, appellants cannot establish a prima facie Privacy Initiative claim. But even

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[27] The fact that (apart from numerous fictional depictions in popular novels and movies) no major terrorist attack has so far occurred at an NFL game does not undermine this conclusion. (*See Smith v. Fresno Irrig. Dist.*, 72 Cal. App. 4th at 162 ["An employer need not wait for an accident to occur prior to instituting [drug testing] policies which address their safety concerns."]; *see also Dimeo v. Griffin* (7th Cir. 1991) 943 F.2d 679, 684 [government entity entitled to address public safety risk instead of waiting for serious accident to occur].)

[28] *See* AA 29 [Request for Judicial Notice, Ex. A (Pub. L. No. 108-199, div. F, tit. V, § 521(2004)); Ex. B (FAA Notice to Airmen, FDC 3/1862 (2003)); Ex. C (14 C.F.R. § 91.137 (2001)].

apart from that deficiency, appellants do not dispute that the policy is motivated by genuine safety concerns, with at least some foundation in government findings and historical fact. Whatever appellants' personal opinions may be of the policy, and whatever analysis might have applied if state action were a factor, the undisputed facts established through the pleadings are more than sufficient to satisfy the standard established for *private* actors under *Hill*. *Hill* requires only that the 49ers, as a private entity, demonstrate that the pat-downs were adopted to serve a legitimate and important interest; no vindication of a broader public interest need be shown. (*Hill*, 7 Cal. 4th at 38.)[29]

None of the cases relied upon by appellants on this issue was analyzed under the *Hill* standard. Moreover, most involved risks that on their face were less substantial than those at issue here. (*See, e.g., Collier v. Miller* (S.D. Tex. 1976) 414 F. Supp. 1357, 1362 [holding that the "dangers posed by ... cans and bottles [as sought by the challenged bag search policy] pales in comparison to the dangers posed by a bomb"]; *Wheaton v. Hagan* (M.D.N.C. 1977) 435 F. Supp. 1134, 1145 [same]; *Gaioni v. Folmar* (M.D. Ala. 1978) 460 F. Supp. 10, 14 [inspections designed to

[29] On this point, appellants' reliance on *Johnston* is once again misplaced. *Johnston* applied the Fourth Amendment's special needs doctrine, which requires a higher showing of a "*special* [public] need," not just an important private interest. (*Compare Ferguson v. Charleston* (2001) 532 U.S. 67 [describing the special needs doctrine] *with Hill*, 7 Cal 4th at 37-38 [discussing the lesser standard applicable to private parties].)

seize drugs and alcohol which "present no public danger equivalent to that posed by a bomb"]; *State v. Seglen* (N.D. 2005) 700 N.W.2d 702, 705-708 [contrasting the minimal risk from animal carcasses thrown on the ice at hockey games with the bomb risk that motivated the airport and courthouse decisions].)

Finally, Appellants argue that one cannot rely upon a reflexive reference to the September 11 attacks as a pretext to invade civil liberties. (App. Br. at 46-47.) But it is equally true that one cannot reasonably assume that every terrorism-based security measure necessarily reflects a troubling invasion of protected civil liberties.

It is instructive to contrast this case with *Bourgeois v. Peters* (11th Cir. 2004) 387 F.3d 1303, upon which appellants rely heavily. In *Bourgeois*, a police agency took it upon itself to impose extensive security measures, including magnetometer searches, pat-downs, and bag searches, for all persons seeking to participate in a peaceful protest at a government facility. (*Id.* at 1306-07.) The police agency was, of course, not the sponsor of the protest – nor did the event's organizers adopt the security measures as conditions of participation. To the contrary, the court found that the police action was intended to interfere, and did interfere, with the ability of participants to pursue their First Amendment rights in participating in the protest. (*Id.* at 1316-23.) Moreover, the court expressed concern that the searches appeared to have been conducted

primarily for law enforcement purposes, observing that numerous people were arrested in the process. (*Id.* at 1312-13.) The police argued that, after the September 11 events, they were automatically justified in performing such searches at any "large gathering." (*Id.* at 1311.) It is hardly surprising that the court rejected this argument.

Here, in contrast, the pat-downs are conducted solely for security (not law enforcement) purposes by a private party, with the *consent* of all participants, as a condition to entry into a football game. In this context, the concerns expressed by the *Bourgeois* court about government interference with fundamental civil liberties find no echo.

CONCLUSION

The 49ers have no obligation to make their entertainment product available to appellants without condition; indeed, they have an affirmative right of their own *not* to do so if that is their choice. Appellants cannot establish a prima facie case under the Privacy Initiative, because any intrusion on the privacy interests that appellants seek to assert – to be free from minimally intrusive pat-downs before choosing voluntarily to attend a football game – occurs only if appellants consent.

This Court should accordingly affirm the trial court's order sustaining the 49ers' demurrer without leave to amend and dismissing the complaint.

DATED: November 9, 2006

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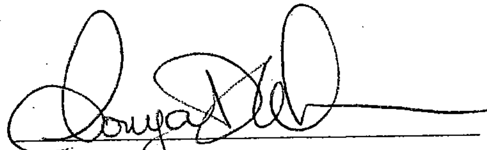
By: 

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WORD COUNT CERTIFICATION

Pursuant to California Rule of Court 14(c)(1), I certify that the text of this brief consists of 11,729 words, including footnotes, as counted by the Microsoft Word 2003 word processing program used to write this brief.

DATED: November 9, 2006

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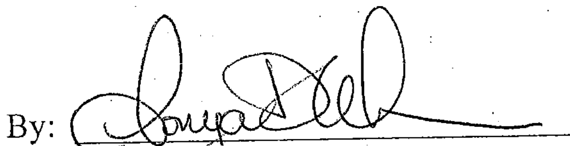
By: 

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PROOF OF SERVICE

I am a resident of the United States. My business address is One Front Street, 35th Floor, San Francisco, California 94111. I am employed in the City and County of San Francisco where this service takes place. I am over the age of 18 years, and not a party to the within cause. On the date set forth below, I served the foregoing document(s) described as:

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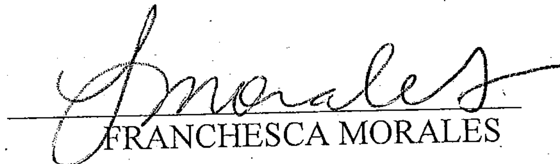
[X] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 9, 2006, at San Francisco, California.



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