No. A114945

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT

DIVISION FOUR

DANIEL AND KATHLEEN SHEEHAN,

Plaintiffs and Appellants,

v.

THE SAN FRANCISCO 49ers, LTD.,

Defendant and Respondent.

After Judgment by the
San Francisco County Superior Court, CGC-05-447679
Honorable James Warren, Judge

APPELLANTS' OPENING BRIEF

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A114945 Division 4

Case Name: Sheehan, et al. v. San Francisco 49ers

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I. INTRODUCTION

Article I, section 1 of the California Constitution expressly grants to all citizens of this state a right of privacy. Since enactment of this provision by voter initiative in 1972, developing case law has confirmed its application to intrusions on personal privacy by both government as well as private businesses and organizations, and has extended its reach to a wide variety of situations, including cases where privacy interests have clashed with such competing considerations as government information gathering, workplace safety, and regulation of reproductive choice. This case presents a claim of privacy invasion that involves a new competing interest, and one perhaps inevitable in this post-9/11 world: a commercial business's attempt to impose mass, suspicionless pat-down searches on its patrons in the name of anti-terrorist security.

Plaintiffs and appellants Daniel and Kathleen Sheehan are longtime season-ticket holders of the defendant and respondent San Francisco 49ers, Ltd. By this action, the Sheehans seek to enjoin the 49ers from conducting intrusive and unnecessary pat-down searches of persons entering Monster Park to attend 49ers home games. The searches, first begun a year ago now, were not implemented as a result of any specific threat to the stadium, but instead as part of a National Football League directive to the 49ers, and every other NFL franchise, to conduct pat-downs of football fans throughout the country. The NFL directive has been challenged as unconstitutional in pending legal actions elsewhere, and already has resulted in a federal court preliminary injunction in Tampa Bay, Florida.

Here in California, the 49ers' pat-down searches violate the right of privacy guaranteed to the Sheehans by Article I, section 1. The Sheehans possess a privacy interest in their own bodies, and reasonably expect that they will not have to sacrifice this interest and subject themselves to these intrusive and degrading searches by the 49ers as a condition of retaining and using their season tickets, particularly where the searches are nothing but an ineffective response to a generalized and unsubstantiated fear of terrorism.

The 49ers demurred to the complaint, arguing that the Sheehans cannot satisfy any of the threshold privacy-claim elements articulated by the California Supreme Court in *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1 (1994), and that even if they could, the 49ers' asserted need to prevent terrorism outweighs the Sheehans' privacy rights. The demurrer was without merit and should have been overruled. Instead, it was sustained without leave to amend by the court below, which ruled that the Sheehans necessarily "consented" to this continued privacy invasion by the mere act of renewing their 49ers season tickets, and thus have no claim.

The trial court's ruling was wrong. It applied an overly broad reading of *Hill*, ignoring the California Supreme Court's later admonition in *Loder v. City of Glendale*, 14 Cal.4th 846 (1997), that *Hill* does not permit the rejection of a claim involving significant intrusion upon a constitutionally protected privacy interest "without considering or weighing the justifications supporting the intrusive conduct." *Loder*, 14 Cal.4th at 892. Rather, as the *Loder* court explained, the *Hill* elements are to be used only "to weed out claims that involve so insignificant or de minimis an intrusion on a

constitutionally protected privacy interest as not even to require an explanation or justification by the defendant." *Id.* at 893-4.

This is not such a case. As will be seen, the Sheehans have properly pleaded a cause of action for violation of their privacy interests under well-established criteria for stating a prima facie Article I, section 1 claim. The Sheehans have never consented to the pat-down searches, and as *Loder* and a host of other cases make plain, any implied "consent" that could be derived from the Sheehans' awareness that they will continue to be subjected to them unless they stop attending 49ers home games would constitute, at most, merely one factor that will have to be weighed along with many others in evaluating their privacy claim. These factors, which include the asserted need for the search policy, the availability of alternatives, and the extent to which the searches intrude upon the Sheehans' reasonable privacy expectations, all present questions of fact which are incapable of resolution by demurrer, and must instead be developed and tested through discovery and trial.

II. FACTS

The following facts are taken directly from the allegations of the Sheehans' first amended complaint and, in the context of an appeal from an order sustaining a general demurrer, are accepted as true. *Serrano v. Priest*, 5 Cal.3d 584, 591 (1971).[1]

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[1] As noted by the court of appeal in *Montclair Parkowners Ass'n. v. City of Montclair*, 76 Cal. App. 4th 784, 790 (1999):

> On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of

(continued...)

Daniel Sheehan and Kathleen Sheehan are longtime fans of the San Francisco 49ers, Ltd. (AA 104.) Daniel Sheehan has purchased 49ers season tickets every year since 1967, and attended every 49ers home game at Monster Park during the 2005 regular season. Kathleen Sheehan has purchased 49ers season tickets every year since 2002, and attended every regular season home game in 2005 but one. (*Id.*)

Beginning in September 2005, the Sheehans, along with every other ticket holder entering Monster Park, were subjected to a pat-down search by "Event Staff" screeners before they were allowed into the stadium. On each occasion, after being herded through barricades, the Sheehans were forced to stand rigid, with their arms spread wide, to allow the screeners to run their hands around their backs and down the sides of their bodies and their legs. A few feet away, members of the San Francisco Police Department stood and observed these pat-down searches taking place. (AA 105.)

According to the 49ers' website, the team instituted these intrusive searches as a result of the National Football League's newly promulgated "Pat down Policy," which required all NFL teams to conduct physical searches of every ticket holder entering every NFL game. (*Id.*) In February 2006, having filed this action, the Sheehans renewed their season tickets for the 49ers' 2006 current regular season. (AA 106.)

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[1](...continued)
action as a matter of law. . . . We deem to be true all material facts properly pled . . . and those facts that may be implied or inferred from those expressly alleged . . . .

(Citations omitted.)

Daniel and Kathleen Sheehan possess a right to privacy that entitles them to freedom from unwanted physical intrusions to their persons, a right protected under Article I, section 1 of the California Constitution. The Sheehans believe the 49ers' pat-down searches constitute a serious invasion of this right, as they find the searches to be intrusive and highly offensive. (AA 105-106.) And they object to being forced to undergo the pat-down searches in order to continue attending 49ers home games. (AA 106.)

III. PROCEDURAL HISTORY

The complaint for declaratory and injunctive relief was filed on December 15, 2005. (AA 1.) On January 30, 2006, the 49ers responded with a general demurrer, challenging the complaint for failure to state a cause of action. (AA 7.) The Sheehans filed their opposition to the demurrer on February 17, 2006, and on February 27, 2006, the 49ers filed their reply. (AA 42, 81.)

The hearing on the demurrer was held on March 20, 2006, before the Honorable James Warren. At the outset of the hearing, the court raised *sua sponte* a concern over a potential "standing issue," as the Sheehans' complaint alleged only ticket purchases for the 2005 regular season, which had ended. (RT, 2:11-25.) Following colloquy with counsel, it was agreed that the Sheehans, by stipulated order, would file an amended complaint with the added allegation that they had renewed their tickets for the 2006 regular season, and the 49ers' demurrer would be deemed made to the complaint as so amended. The hearing then proceeded with the arguments of counsel. (RT, 3:5-8:21.)

On March 23, 2006, the stipulation and order for the amended complaint were filed, along with the first amended complaint itself. (AA 99; AA 103.) On April 19, 2006, the court issued a minute order requesting supplemental briefing on the legal significance, if any, of the Sheehans' renewal of their 49ers tickets for the 2006 regular season with knowledge of the 49ers' continuing pat-down search policy. (AA 122.) The parties then filed supplemental briefs on May 3, 2006, with reply briefs on May 9, 2006. (AA 152, 160, 167, and 173.)

On June 20, 2006, the court issued its order sustaining the 49ers' demurrer without leave to amend. (AA 196.) The court relied on *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1, 37 (1994), as establishing three elements for an Article I, section 1 claim: (1) a specific, legally protected privacy interest, (2) a reasonable expectation of privacy on plaintiff's part, and (3) a sufficiently serious privacy invasion by the defendant. The court then determined that the Sheehans had "full notice of the pat-down policy" prior to purchasing their 2006 season tickets and therefore "voluntarily consented" to the pat-down searches, thereby precluding them from alleging either that they have a reasonable expectation of privacy "in regards to the pat-downs," or that the pat-down searches are "sufficiently serious in their nature, scope, and actual or potential impact" to be actionable. (AA198-199.) Finally, the court ruled that because the Sheehans' consent "is fatal to their complaint, leave to amend cannot be granted." (AA 199.)

The court filed its order of dismissal following demurrer on June 20, 2006. (AA 202.) Notice of entry of the order was given on July 12, 2006. Notice of appeal was filed on July 18, 2006. (AA 206.)

IV. STATEMENT OF APPEALABILITY

This Court has jurisdiction pursuant to Code of Civil Procedure sections 577 and 904.1(a)(1). The appeal is from a judgment that finally disposed of all issues between the parties.

V. ARGUMENT

A. The *Hill* Three-Prong Test for an Article I, Section 1 Claim States Only Minimal Pleading Requirements, Established to Screen Out Trivial or De Minimis Privacy Intrusions, and Does Not Replace the Need to Consider and Balance the Severity of Any Significant Intrusion Against the Legitimacy of Its Offered Purpose.

In 1972, California voters overwhelmingly approved Ballot Initiative 11, which added "privacy" to the list of rights guaranteed by Article I, section 1 of the California Constitution. Subsequent court decisions have confirmed that Article I, section 1's privacy guarantee secures protection against invasions of personal autonomy, including unwarranted physical intrusions upon an individual's person. *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307 (1997). In 1994, the California Supreme Court addressed the issue of whether Article I, section 1's privacy protection applies not only against the government but also against non-governmental organizations and businesses. *Hill*, 7 Cal.4th at 15. The case involved a challenge by Stanford University students to the NCAA's mandatory drug testing program for college athletes. The court held that the Privacy Initiative codified in Article I, section 1 "creates a right of action against

private as well as government entities." *Id.* at 20. As the court observed, "'[p]rivacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.'" *Id.* at p. 18 (quoting *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829-30 (1976)).

Where action by a private business or organization is challenged as a violation of the privacy right to personal autonomy, and excepting cases involving fundamental matters such as procreation, Article I, section 1 prohibits the privacy invasion unless supported by a legitimate, competing interest, which cannot be served by feasible, less intrusive alternatives. *Hill*, 7 Cal.4th at 40. The court articulated a three-prong test for a prima facie claim under Article I, section 1: "(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." *Id.* at 39-40.

In explaining the first prong of the test, the court in *Hill* observed that legally protected privacy interests should derive from "the usual sources of positive law governing the right to privacy – common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative." *Id.* at 36. The court described the second prong of the test, reasonable expectation of privacy, as "an objective entitlement founded on broadly based and widely accepted community norms," noting that "customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." *Id.* at 36. The court also noted that: "the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations

of the participant." *Id.* at 37. As to the third prong of the test, the court described actionable privacy invasions as "sufficiently serious in their nature, scope and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Id.* at 37.

The California Supreme Court provided important clarification of this standard in *Loder v. City of Glendale*, 14 Cal.4th 846 (1997), *cert. denied*, 522 U.S. 807 (1997), a case challenging mandatory drug testing of city employees for hiring and promotion. The court held that the critical factor in the privacy analysis is the "particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests . . . ." *Id.* at 890. Although the court recurred to the three-part test established in *Hill*, it rejected any notion that *Hill*'s elements represent "significant *new* requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right to privacy under the state Constitution":

> Under such an interpretation, *Hill* would constitute a radical departure from *all* of the earlier state constitutional decisions of this court cited and discussed in *Hill* (7 Cal.4th at p. 34, fn. 11), decisions that uniformly hold that when a challenged practice or conduct intrudes upon a constitutionally protected privacy interest, the interests or justifications supporting the challenged practice must be weighed or balanced against the intrusion on privacy imposed by the practice.

Loder, 14 Cal.4th at 891 (emphasis in original). The court emphasized the primacy of its traditional standard for determining actionable privacy invasions, which requires a careful examination and balancing of the asserted privacy interest and the offered justification for the challenged intrusion or imposition upon it, and clarified the subordinate role of the three-pronged *Hill* test from this perspective:

> The "three elements" set forth in *Hill* properly must be viewed simply as "threshold elements" that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision. These elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest.

Loder, 14 Cal.4th at 893. The court in *Loder* was also at pains to clarify that *Hill*'s description of the third prong as requiring an "egregious" intrusion of privacy interest was not meant to denote anything more than a nontrivial impact on privacy rights, and that "this element is intended simply to screen out intrusions on privacy that are de minimis or insignificant." *Loder*, 14 Cal.4th at 895, fn.22. The California Supreme Court reaffirmed these Article I, section 1 standards in *Lungren*, 16 Cal.4th at 330-31, in an extended discussion and approval of *Loder*.

Loder's critical limitation on the *Hill* three-prong test as a threshold screening standard for prima facie privacy claims under Article I, section 1 was overlooked entirely by the trial court in its ruling on the 49ers' demurrer. Instead of recognizing the pleaded allegations of the Sheehans' amended complaint as presenting a genuine and significant invasion of a protected privacy interest from the 49ers' suspicionless pat-down search policy, the trial court instead engaged in what was essentially an adjudication of the weight and validity of the Sheehans' privacy expectations and the severity of the 49ers' invasion of their privacy, with no developed evidentiary record and no consideration at all of the "legitimacy or strength" of the 49ers' "justification for the conduct," as *Loder* mandates. *Loder*, 14 Cal.4th at 895. The trial court's approach to

this case – its assumption that the Sheehans need to leap high hurdles before the 49ers are put to any justification of their intrusive bodily searches – is precisely what *Loder* was intended to prevent. It is telling that the trial court's written decision supporting its order sustaining the demurrer cites or quotes directly from *Hill* ten times, but mentions *Loder* not at all.

B. The Amended Complaint Properly Pleads a Violation of the Sheehans' Article I, Section 1 Right to Privacy as a Result of the 49ers' Pat-down Search Policy.

The 49ers contended in their demurrer that "the allegations of the complaint are insufficient as a matter of law to describe a prima facie violation of the Privacy Initiative under the *Hill* standard," and further claimed that the Sheehans failed to "specifically denominat[e]" a protected privacy interest. (AA 17.) This is simply not true. Here are the relevant allegations of the Sheehans' amended complaint, using the three-prong *Hill* test as a template:

(1) A legally protected privacy interest:

> The Sheehans have a right to privacy that entitles them to freedom from unwanted physical intrusions. (AA 105.)

(2) A reasonable expectation of privacy in the circumstances:

> It is reasonable for the Sheehans to expect they will not have to sacrifice this privacy as a condition for participating in public events, including 49ers home games. (AA 105-106.)

(3) Conduct by defendant constituting a serious invasion of privacy:

> The pat-down searches conducted by the 49ers are unnecessary, intrusive and highly offensive to the Sheehans, and constitute a serious invasion of their privacy.

> The Sheehans object to being forced to undergo these suspicionless searches as a condition of retaining their season tickets. (AA 106.)

For purposes of demurrer, these facts are assumed to be true, and under *Hill* and *Loder*, they establish a prima facie violation of Article I, section 1.

For this reason alone, the demurrer should have been overruled. As the California Supreme Court has noted, "[w]hether 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.*" *Hill*, 7 Cal.4th at 40 (emphasis added). Moreover, included in the balancing test are further considerations of whether the party invading a protected privacy interest has a legitimate competing interest in doing so and whether feasible alternative courses are available. *Id.* And though the *existence* of countervailing interests and feasible alternatives present "threshold questions of law for the court . . . . the *relative strength* of countervailing interests and the *feasibility* of alternatives present *mixed questions of law and fact*" as well *Id.* at 40 (emphasis added).

Consistent with *Loder's* limitation on the *Hill* test as a screening standard for de minimis privacy claims, there have been only a very few appellate court decisions affirming dismissal of an Article I, section 1 privacy claim on demurrer. Although the factual situations vary, each represents an apt example of the sort of trivial privacy challenge susceptible to disposition on demurrer under the *Hill* test. *See, e.g., City of Simi Valley v. Superior Court*, 111 Cal. App. 4th 1077, 1085 (2003) (family members of deranged man killed following armed standoff with police claimed Article I, section

1 privacy violation from police refusal to allow them access to man during efforts of crisis negotiating team); *Heller v. Norcal Mutual Ins. Co.*, 8 Cal.4th 30, 36, 42-44 (1994) (plaintiff in medical malpractice action claimed privacy violation when medical information discoverable in that action was provided to defendant's medical expert witness for evaluation); *Mansell v. Otto,* 108 Cal. App. 4th 265, 272-79 (2003) (assault victim claimed privacy violation against criminal defendant and his counsel who received access to her mental health records pursuant to a court order specifically authorizing their production); *see also, Stackler v. Department of Motor Vehicles*, 105 Cal. App. 3d 240, 246-48 (1980) (predates *Hill*; plaintiff claimed privacy violation from the California DMV's requirement that driver's licenses include a photograph of driver).

Apart from these few frivolous cases, both *Hill* and all of its progeny have consistently adjudicated Article I, section 1 privacy claims on a fully developed, and in some instances extensive, evidentiary record. *See, Hill*, 7 Cal.4th at 13 (challenge to NCAA drug-testing policy decided following bench trial that included expert testimony from "scientists, physicians and sports professionals"); *Loder*, 14 Cal.4th at 857 (challenge to employment-based drug testing decided on 500-page joint statement of facts plus testimony from city officials and expert witnesses); *Smith v. Los Angeles Bd. of Supervisors*, 104 Cal. App. 4th 1104, 1112 (2002) (challenge to home-visit program as condition of welfare benefits decided following bench trial); *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 183-84 (1997) (challenge to employer drug testing resolved by summary judgment, on record that included extensive deposition and document discovery); *Feminist Women's Health Center v. Superior Court*, 52 Cal.

App. 4th 1234, 1238 (1997) (challenge to personally invasive job requirement for health center employee resolved on summary judgment, based on extensive deposition discovery and "multiple declarations"); *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 323 (1997) (challenge to parental consent requirement for minor's abortion decided following trial involving 31 witnesses).

1. The Sheehans' Privacy Interest in Retaining Autonomy Over Their Bodies is Fundamental, Not Minimal.

One of the most fundamental rights possessed by all citizens is control and autonomy over their bodies, including the right to be free from unwanted touching by those they do not know or care to know. Federally, the Fourth Amendment guarantees that every citizen will be free from unwarranted searches, including pat-down searches, of their persons by state agents. California citizens have gone further, amending the state constitution with the specific intent of guaranteeing that their personal autonomy – i.e., their "right to be let alone" – is protected from intrusion by government and private actors alike. *See Hill*, 7 Cal.4th at 24; *Loder*, 14 Cal.4th at 893.

Remarkably, the 49ers – far from acknowledging this fundamental right – contend that the Sheehans cannot satisfy the first prong of the *Hill* test because they have but a "minimal" interest in "avoiding a few seconds of light patting over their clothed backs and sides . . . ." (AA 17, 18.) But the pat-down searches are clearly intrusive to any person with a reasonable expectation of bodily privacy. *United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974) ("Normally a frisk is considered a gross invasion of one's privacy.") The 49ers not only ignore this reality, they also ignore the large collection

of cases, from jurisdictions throughout the country, holding that pat-down searches at such venues as sporting events and arena concerts constitute a serious invasion of one's personal autonomy.

The most directly pertinent such authority is the recent federal district court decision in *Johnston v. Tampa Sports Authority*, 442 F. Supp. 2d 1257 (M.D. Fla. 2006), reaffirming a preliminary injunction against the NFL-mandated pat-down search policy as implemented by the Tampa Bay Buccaneers. There, plaintiff Gordon Johnston, a long-time Buccaneers season ticket holder, sued to prevent the Tampa Sports Authority from conducting pat-down searches of all fans entering Raymond James Stadium as an unreasonable search in violation of Article I, Section 12 of the Florida Constitution. A preliminary injunction against the TSA was entered by the Florida state court where the action was initially filed, which was affirmed on interim appeal in a decision that unqualifiedly recognized the pat-down search policy as a serious and unlawful invasion of personal privacy. *Tampa Sports Authority v. Johnston*, 914 So. 2d 1076, 1081 (Fla. App. 2005).

TSA removed the action to the federal district court when a Fourth Amendment claim was added to the complaint. TSA then moved to reconsider and dissolve the preliminary injunction, but the federal district court instead reaffirmed it. The court's decision summarily dismissed TSA's argument that the pat-down search policy involved only some brief, inconsequential intrusion on personal privacy:

> The sanctity of one's person is . . . the starting point for the requisite Fourth Amendment analysis.

> The Supreme Court, in scrutinizing a stop and frisk of an individual suspected of being involved in criminal activity, found the frisk to be a "serious intrusion upon the sanctity of the person . . . not to be undertaken lightly." *See Terry v. Ohio*, 392 U.S. 1, 17 (1968). The Court rejected the argument, one that might be made here, that a frisk was a mere "petty indignity." *Id.*
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> * * *
>
> Pat-downs or searches of an individual's person have been regarded as far more intrusive than container searches, sniff searches performed by canines, and magnetometer searches applied to the public at large.

Johnston, 442 F.Supp. 2d at 1264, 1270.[2]

A host of other court decisions have similarly recognized that pat-down searches at stadiums or arenas are serious, not trivial, intrusions upon personal privacy:

- *State v. Seglen*, 700 N.W. 2d 702, 709 (N.D. 2005): Warrantless pat-down searches of patrons entering University of North Dakota-University of Minnesota hockey game were "very intrusive" and not justified in absence of evidence of history of injury or violence.
- *Collier v. Miller*, 414 F. Supp. 1357, 1365 (S.D. Tex. 1976): Pat-down searches imposed before rock concert were "conducted without any

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[2] A separate legal challenge to the NFL's pat-down search policy also was filed recently to enjoin searches of fans attending Chicago Bears home games at Soldier Field. *Chicago Park Dist. v. The Chicago Bears Football Club, Inc.*, 2006 WL 2331099 (N.D. Ill.) The action, brought by the public authority responsible for security and crowd control at the stadium, sought an injunction against "using taxpayer funds to pay for mass suspicionless pat-down searches at Soldier Field" as a violation of the Fourth Amendment. *Id.*, 2006 WL 2331099 at *1. In August 2006, the federal district court dismissed the action on the grounds that the District did not have standing to assert the claim on behalf of Chicago Bears fans, and because of pending arbitration proceedings between the District and the Chicago Bears over the District's obligation to conduct and pay for the pat-down searches. *Id.*, 2006 WL 2331099 at *2.

definitive basis for suspicion" and were "serious intrusions which can be both annoying and humiliating."

- *Jacobsen v. City of Seattle*, 658 P.2d 653, 674 (Wash. 1983): "We hold highly intensive pat-down searches by police officers of patrons attending rock concerts to be unconstitutional."
- *Wheaton v. Hagan*, 435 F. Supp. 1134, 1146-47 (M.D.N.C. 1977): Random pat-down searches of persons entering municipally owned arena ruled unconstitutional, noting that such searches can be "'annoying, frightening, and perhaps humiliating'" (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968)).
- *Gaioni v. Folmar*, 460 F. Supp. 10, 14 (M.D. Ala. 1978): Pat-down searches of patrons attending rock concerts were "very intrusive and not very effective."
- *Jensen v. City of Pontiac*, 317 N.W. 2d 619, 624 (Mich. App. 1982): "A physical pat-down search by a guard is more intrusive than a limited visual search."
- *State v. Iaccarino*, 767 So. 2d 470, 479 (Fla. App. 2000): Pat-down searches of patrons attending "Zenfest" music concert ruled of "questionable" effectiveness and overly intrusive.

The contention that the Sheehans have no more than a de minimis interest in being free from pat-down searches withers under this line of authority.

Although these decisions primarily adjudicate privacy interests under the Fourth Amendment, they nonetheless bear direct relevance to Article I, section 1 privacy analysis, and for several reasons. First, the California Supreme Court emphasized in *Loder* that Article I, section 1's privacy guarantee is at least as protective as the Fourth Amendment. Noting that the guarantee of privacy is an express provision of the California Constitution, while only an implied right under the federal Constitution, the court observed:

> Nothing in the ballot arguments considered by the electors who voted to incorporate an express protection of privacy into the California Constitution suggested that the provision would be *less* protective of privacy than the federal Constitution, and, since its enactment, the state constitutional privacy provision never has been so interpreted.

Loder, 14 Cal.4th at 893 (emphasis in original). In addition, *Hill* made clear that Article I, section 1, particularly in its protection of autonomy privacy, was explicitly supported and informed during the ballot initiative process by reference "to the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference . . . ." *Hill*, 7 Cal.4th at 36. *Hill* also observed that the first prong of its prima facie test for a privacy claim, a legally protected privacy interest, is "to be determined from the usual sources of positive law governing the right to privacy," which certainly includes Fourth Amendment jurisprudence. *Id.*[3]

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[3] This is undoubtedly the reason why California appellate court analysis of Article I, section 1 privacy claims often recurs to Fourth Amendment case authority and commentary. *See, e.g., Hill*, 7 Cal.4th at 29-30, 54-55; *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 156-58 (1999).

2. The Sheehans Reasonably Expect to Attend 49ers Football Games Without Being Forced to Submit to Full Body Pat-Down Searches.

The 49ers' demurrer also challenged the Sheehans' complaint on the second prong of the *Hill* test, arguing that because football games are crowded, the Sheehans' expectation that they will not be subjected to a full body pat-down search is unreasonable. As the 49ers would have it, "no fan can reasonably expect to avoid all physical contact as he jostles with others walking to and entering the stadium, in refreshment and restroom lines, and on concourses, and as he climbs over others to reach his seat." (AA 18.)

Once again, whether one has a reasonable expectation of privacy is a mixed question of law and fact, and is thus inappropriate for resolution at the demurrer stage. *Hill*, 7 Cal.4th at 39; *Semore v. Pool*, 217 Cal. App. 3d 1087, 1097-1100 (1990) (refusing to determine intrusiveness of eye-scan drug test implemented by employer at demurrer stage); *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal. App. 4th 365, 371-73 (2001) (reversing order sustaining demurrer as to invasion of privacy claim arising from unauthorized presence of non-medical observer at oncology examination). But even were that not so, it is hardly unreasonable for the Sheehans, or any other 49ers fan for that matter, to distinguish the ordinary "jostling" that occurs at any crowded public gathering from the pat-down searches conducted by 49ers "screeners." The pat-down searches challenged here are distinct in quality and degree from whatever minor, inadvertent touching occurs while attending the game itself. It is the difference between being accidentally bumped and deliberately groped.

The 49ers may be oblivious to this basic difference, but the courts have not been. This same "jostling" argument was advanced and rejected in *Johnston*, the Tampa Bay case, where the TSA argued that plaintiff had no reasonable expectation of privacy because Buccaneers football games were crowded. The state trial court disagreed: "Even if Mr. Johnston might be inadvertently jostled by other football fans while entering the gate, he still retains an expectation of privacy in not being forced to subject his person to unwanted intentional touching by state actors." (AA 69.) In its decision reaffirming the injunction, the federal district court also reaffirmed this fundamental point:

> Defendants have presented no persuasive authority establishing that Plaintiff had a minimal expectation of privacy simply because he attends NFL games. To the contrary, the Eleventh Circuit has held that "[t]he text of the Fourth Amendment contains no exception for large gatherings of people."

Johnston, 442 F.Supp. 2d at 1270 (quoting *Bourgeois v. Peters*, 387 F.3d 1303, 1311 (11th Cir. 2004)).

Even the trial court in this case, despite its ruling sustaining the demurrer on consent grounds, was unable to credit the 49ers' attempt to equate crowd jostling with pat-down searching. Note this exchange with the 49ers' counsel at the demurrer hearing:

> **THE COURT**: If you are standing in line to get your seat or to get a hot dog and somebody comes and starts rubbing his hands down you like that (indicating), isn't there a substantial difference between the sort of organized pat-down we are talking about here and the fact that clearly you will get jostled at a ball game?
>
> **MS. WINNER**: There is a difference, Your Honor, but it is not a huge difference.
>
> **THE COURT**: Well, the guy who is doing the pat-down in the hot dog line might find himself with a black eye.

* * *

> Because it's so very different. Sure you are going to get bumped. People get bumped running in and out of court.

(RT, 17:25-18:11.)

3. The Pat-Down Searches Conducted by the 49ers Constitute a Serious Invasion of the Sheehans' Privacy, Which in Practical Terms Is Indistinguishable from One Conducted by the Police.

The Sheehans also readily satisfy *Hill*'s third threshold element by alleging that the pat-down searches are unnecessary, intrusive and highly offensive. In attempting to negate this element, the 49ers contend – improperly, given the stage of proceedings – that the searches do not violate social norms because: (1) the limited contact occasioned by the pat-down searches is not "significantly different in extent or kind" from getting jostled at the game; (2) the searches do not invade "parts of the body that are . . . particularly sensitive"; and (3) the pat-down searches are conducted by a private entity. (AA 24.)

All of these contentions are off point. First, as already noted, there is an obvious and significant difference between being forced to undergo a body pat-down search and being bumped in line at the concession stand. Second, as already noted, both common experience and prior case authority across the country make clear that pat-down searches, far from being minimally intrusive, constitute a gross invasion of one's privacy, even if they do not involve whatever parts of the body the 49ers believe are "particularly sensitive." Finally, the fact that the 49ers are a private business does not mean that the constitutional protections afforded by Article I, section 1 are diminished.

Indeed, the particular circumstances of the privacy invasion challenged here render the offered distinction between intrusion by government versus business organization far more apparent than real. The court in *Hill* addressed this issue and identified three potentially distinguishing circumstances between cases of government action as opposed to action by businesses or private organizations that may intrude on personal privacy: (1) the "pervasive presence of coercive government power," (2) the "greater choice and alternatives in dealing with private actors than when dealing with the government," and (3) the interests of "voluntary associations of persons" in organizational settings to "communicate and associate with one another on mutually negotiated terms and conditions." *Hill*, 7 Cal.4th at 38-39. None of these three distinguishing considerations applies with any force or pertinence here.

The first consideration, privacy intrusion by coercive government power, is actually present in this case in indirect but unmistakable terms. Monster Park is a public stadium owned by the City and County of San Francisco and leased to the 49ers for their season home games. Although it is the 49ers, under the lease, that provide stadium security through their "Event Staff" security personnel, the function they perform is fundamentally a law enforcement function: searching citizens for security purposes at entrance gates as a condition of stadium admission. It is no coincidence that, in virtually all of the public stadium and arena cases in which mass, suspicionless searches have been challenged on privacy grounds in recent years, this very same security function has been performed by the police, thereby subjecting the search policies to Fourth Amendment scrutiny.

Note also, as alleged in the Sheehans' amended complaint, that members of the San Francisco Police Department stand a few feet away from the pat-down searches by the Event Staff screeners at the Monster Park entrance gates and observe the searches taking place. (AA 105.) At the hearing on the 49ers' demurrer, their counsel scoffed at the significance of this when the point arose in colloquy with the court:

> **THE COURT**: The impression I got is that the police were not simply wandering by but the police were there for the express purpose of monitoring, looking at, following the pat-downs, because clearly a pat-down could be something that will move quickly in the wrong circumstances from a pat-down to something a bit more offensive.
>
> **MS. WINNER**: If there were such facts, Your Honor, I think we could confidently assume that they would have been alleged and I think we can confidently assume that we would be in a Fourth Amendment case here or the California equivalent of a Fourth Amendment case.
>
> * * *
>
> I mean we have that one stray allegation from them in the complaint but they don't allege that the police did anything and they couldn't. The police don't do anything.
>
> I mean yes, there are police officers in all sorts of places, in all sorts of events but there is no allegation, there could be no allegation that they play any role in the pat-down inspections.

(RT, 9:11-10:18.)

It is now evident from the recently issued decision affirming the preliminary injunction in the Tampa Bay case that the trial court's perception here regarding police presence was incisive and the representations of the 49ers' counsel were misinformed.

As the district court in *Johnston* noted from the record evidence regarding the NFL's pat-down policy:

> The evidence presented at the preliminary injunction indicates that the police officers were prepared to do more than just observe the pat-down searches. Robert Hast, the NFL's Director of Event Security testified that "[w]e requested that stadiums place a law-enforcement officer at each of the gates to support the private security because they don't have authority to make arrests. . . ." According to Hast, the screeners were trained to call law enforcement over to detain or arrest any individual found to have contraband. . . .
>
> Similarly, Mickey Farrell, TSA's Director of Operations, testified that police officers are strategically positioned near the screeners and have discretion to conduct "extended searches," if necessary.

Johnston, 442 F.Supp. 2d at 1264, fn.11.

Accordingly, and with the 49ers' Event Staff screeners serving as virtual proxies for the police in performing an essentially police function of conducting the pat-down searches, backed up by the immediate law enforcement presence of the police themselves, this primary consideration for distinguishing between government and non-governmental intrusion on personal privacy is, for all practical purposes, nonexistent here. The "pervasive presence of coercive governmental power," as *Hill* describes it, appears to be both a visible and intended element of the 49ers' pat-down search program, which significantly enhances the seriousness of the privacy intrusion.[4]

The second potential distinction, the greater range of "choice and alternatives" that individuals often have in dealing with businesses versus the government, has little

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[4] This critical aspect of the 49ers' pat-down search procedure also brings Fourth Amendment case authority even more squarely to bear on the Article I, section 1 analysis.

if any application here either. The court's reference to this consideration in *Hill* contemplated consumer choices among banks, restaurants, and shopping malls. But there is only one San Francisco 49ers football team, and only one way to attend their regular season games: by purchasing admission to them at Monster Park. The pat-down searches are thus imposed to control public access to a unique benefit, one on which the 49ers enjoy a monopoly, much as the government does on many of the benefits and services it provides on a regulated basis to the public. While it is certainly true that fans of the 49ers, including the Sheehans, can watch the game on television instead, or can seek diversion on a Sunday afternoon in any number of other publicly available entertainments or recreational opportunities, all of those "choices" are qualitatively different, rendering any practical consideration of choice correspondingly problematic.

The third potential distinction between government and non-governmental action for Article I, section 1 privacy purposes noted in *Hill* – the freedom of association sometimes entailed in privately sponsored gatherings or activities – is also missing here. Although the 49ers in their arguments for demurrer sought to advance this point, the practical realities, once again, show it to be inapposite. There really is nothing voluntarily associational about the adoption or implementation of the pat-down search policy at Monster Park by the 49ers. Far from being the result of some process among 49ers fans to "communicate and associate with one another on mutually negotiated terms and conditions" as envisioned in *Hill*, 7 Cal.4th at 38, the pat-down search policy was instead unilaterally imposed by the 49ers organization on its fans – and in fact was imposed on the 49ers organization itself by the NFL. Moreover, the Sheehans have their

own associational interest in attending 49ers' home games with their family, friends, and other fans of the team, an interest which the pat-down search policy impermissibly burdens.

C. By Transacting with the 49ers, the Sheehans Do Not Impliedly Consent to Violation of Their Constitutional Privacy Rights.

The Sheehans are long-time season ticket holders of the 49ers. Dan Sheehan has attended 49ers home games for almost 40 years, his wife for the past five years. They first learned of the pat-down policy after purchasing tickets for the 2005 season, when they went to Monster Park in September 2005 to attend the first regular season game. The 49ers argued as one of their several grounds for demurrer that the Sheehans' continued attendance at 49ers games subsequent to learning of the pat-down policy signified their implied consent to the searches. The trial court went further than that in its order sustaining the demurrer, finding that the Sheehans' renewal of their tickets for the 2006 season, with notice of the pat-down policy, constituted "voluntary consent" to the searches, thereby vitiating as a matter of law both their reasonable expectation of privacy and any serious violation of that privacy by the 49ers, the second and third requirements of the *Hill* test.

This was error by the trial court, as the pleaded facts of the amended complaint do not support a consent defense for the 49ers, either actual or implied.

1. The Sheehans Have Never Voluntarily Consented to the Pat-Down Searches.

Voluntary consent is a familiar doctrine in constitutional search analysis, under both Article I, section 1 and the Fourth Amendment. The critical prerequisite for any

consent, in order for it to support an otherwise unconstitutional search, is that it represent a free and unconstrained choice on the part of the consenting individual. *People v. Hyde*, 12 Cal.3d 158, 162 fn. 2 (1974) ("Consent, to be valid, must be free and voluntary."); *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (in a Fourth Amendment context, consent is only valid if given voluntarily); *United States v. Chrispin*, 2006 WL 1457689, at *3 (11th Cir. 2006) (unpublished) ("In order for consent to a search to be deemed voluntary, it must be the product of an essentially free and unconstrained choice."); *Shapiro v. State of Florida*, 390 So. 2d 344, 348 (Fla. 1980) ("consent must be free and unconstrained, and the question of voluntariness is a question of fact to be determined from the totality of the circumstances.")

In this case, there is and was no voluntary consent. The Sheehans do not consent to the full body pat-down searches at Monster Park. They never have. They object to them. Actually, they object so strongly that they have sued the 49ers seeking an injunction to end the practice.

The 49ers argue that the Sheehans "impliedly consent" to the pat-down searches because they continue to attend 49ers games with notice of the continuing pat-down search policy. That argument will be addressed shortly, but as a threshold matter, it needs to be recognized that the trial court's determination of "voluntary consent" is directly contrary to the well-pleaded allegations of the amended complaint, and factually wrong.

2. The Sheehans' Submission to the Unconstitutional Pat-Down Search Condition Is Involuntary and Thus Ineffective As "Consent."

In addition to the Sheehans' objection to the pat-down searches as degrading and offensive, there is a further reason why their continued submission to them during this 2006 season cannot be used by the 49ers to justify the search policy as genuinely consensual. And that is because the 49ers refuse to permit the Sheehans entry into Monster Park unless they subject themselves to the searches. This unilateral condition threatens to bar the Sheehans from the games which they have paid to see through their season ticket renewal. As a result, the "choice" offered to the Sheehans to secure their submission to the searches is really no choice at all. The 49ers have sought to condition the Sheehans' bought-and-paid-for benefit of personally attending home games at Monster Park on their acquiescence in a violation of their Article I, section 1 privacy rights. That is an unconstitutional condition and invalidates the justification of consent for the pat-down search policy.

This same argument of consent was raised and rejected by the federal district court in *Johnston* on this basis:

> Defendants contend the pat-down search is constitutional because Plaintiff consented to the search by repeatedly attending NFL games knowing in advance that he would either be subjected to a pat-down search or denied entry to the Stadium. . . . In other words, defendants contend that Plaintiff was not compelled to submit to the pat-down search, but rather consented to the search by choosing to attend the Buccaneers game.
>
> This type of implied consent, where the government conditions receipt of a benefit (attending the Stadium event) on the waiver of a constitutional right (the right to be free from suspicionless searches), has been deemed invalid as an unconstitutional condition . . . .

> Plaintiff's property interest in his season tickets and his right to attend the games and assemble with other Buccaneers fans constitute benefits or privileges that cannot be conditioned on relinquishment of his Fourth Amendment rights.

Johnston, 442 F. Supp. 2d at 1271.

Other state and federal courts have consistently rejected consent defenses in cases where mass, suspicionless searches were imposed on patrons attending concerts or sporting events:

- *Nakamoto v. Fasi*, 635 P.2d 946, 951-52 (Haw. 1981) (search of patron's personal effects as condition of entry to the City arena for a rock concert held unconstitutional; a citizen should not be "required to relinquish his constitutional right to be free from unreasonable searches and seizures, in order to be allowed to exercise a privilege for which, incidentally . . . he has paid.");
- *Iaccarino*, 767 So.2d at 479 (finding no implied consent where the "failure to acquiesce in a search would result in a deprivation of a patron's right to attend the concert, if not their ticket cost as well");
- *Gaioni*, 460 F. Supp. at 14 (the "simple answer" to the contention that challenged searches fell within the consent exception "is that defendants cannot condition public access to the Civic Center on submission to a search and then claim those subjected to the searches voluntarily consented");
- *Jensen v. City of Pontiac*, 317 N.W. 2d at 621 (football stadium search policy of carry-in bag visual inspections justified by demonstrated public necessity, but not by implied consent of patrons; "the consent exception, when

used in circumstances such as those present here, is of questionable constitutionality.").

In *Collier v. Miller*, 414 F.Supp. 1357 (S.D. Tex. 1976), a challenge was made to a written policy imposing searches of large purses and pockets of patrons for cans and bottles at auditorium events. The court sustained the challenge, finding all of the potential Fourth Amendment exceptions, including consent, inapplicable under the circumstances:

> First, if public access to Hofheinz Pavilion or Jeppesen Stadium is conditioned on submission to a search, that submission would be coerced and hence not consensual. . .. . Moreover, the Supreme Court has ruled that: "[T]he rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution."

Id. at 1366 (citations omitted).

Similarly, in *Stroeber v. Commission Veteran's Auditorium*, 453 F. Supp. 926 (S.D. Iowa 1977), a challenged rock concert pat-down policy for male patrons with bulky clothing or large pockets and physical search of purses was held unconstitutional, despite an argument that patrons impliedly consented to the search policy by subjecting themselves to it:

> Whether told of their right to have their tickets refunded before or after being asked to submit to a search is of little consequence. Under the circumstances, which are marked by coercion and duress, the Court cannot possibly conclude that any ensuing consent to search was of a voluntary nature. Nor have the defendants, despite bearing the burden of proof, introduced substantive evidence to suggest that consent was unequivocally and freely given. The mere fact that most patrons submitted to search bespeaks more of coercion and duress than voluntariness.

Id. at 933.

3. The Sheehans Have Not "Impliedly Consented" to the Pat-down Searches by Their Season Ticket Renewal or Continued Attendance at 49ers Games with Notice of the Search Policy, Circumstances Which Constitute at Most One Factor of Many in the Article I, Section 1 Analysis.

The 49ers argued in their demurrer that once the mandatory pat-down policy was implemented at Monster Park and the Sheehans became aware of the policy at the start of the 2005 regular season, their continued attendance of 49ers home games at the stadium constituted "implied consent" to the searches, foreclosing their Article I, section 1 privacy claim. According to the 49ers, because the Sheehans subjected themselves to searches they found highly offensive, any "vestigial expectation of privacy that plaintiffs might otherwise claim is eliminated by their consent." (AA 20.)

But the Sheehans' actions do not constitute "consent" in any meaningful sense of the word. If private businesses or organizations, including the 49ers, could avoid the reach of Article I, section 1 simply by claiming that any person transacting with them had thereby impliedly consented to any and all subsequent privacy intrusions, then *Hill* and *Loder* and their progeny, and the privacy protections for personal autonomy they establish, would be effectively annulled. The 49ers' implied consent argument is nothing more than the assertion that the Sheehans are always free to forego attending 49ers games if they do not wish to be subjected to the pat-down searches. The obvious defect in this argument is that it proves too much. If accepted, it would mean that Article I, section 1 would never apply to invasions of personal autonomy by private businesses or organizations, no matter how egregious and unjustified, since, after all, people can

always choose instead not to attend that sporting event or concert, or not to seek that employment position or promotion, or not to shop at that mall, or attend that public protest.

The trial court adopted this same basic concept of implied consent, though with an added twist that casts the illogic of the argument as applied here in even sharper focus. According to the trial court, the Sheehans had no standing to continue with their Article I, section 1 claim following the end of the 2005 regular season unless and until they confirmed by amended complaint that they had renewed their 49ers tickets for the 2006 season. Once they had done so, however, the trial court then took this same season-ticket renewal and concluded that it constituted an implied "consent" to the pat-down searches that, by itself, was "fatal" to their claim. The Catch-22 notion that, under Article I, section 1, an individual can either have standing to claim a privacy invasion, or can have an invasion of privacy to claim – but can never have both because the mere act of securing the one nullifies the other – well illustrates the internal inconsistency of the 49ers' implied consent defense.

What's wrong with the analysis? Simply that "implied consent," based only on an individual's awareness of a privacy intrusion and submission to it, cannot, standing alone, be a complete and sufficient legal justification for the intrusion. Instead, implied consent based on such circumstances is at most a *factor*, among many others, in the overall evaluation of the Article I, section 1 claim, to be weighed and evaluated along with the nature of the privacy interest involved, the severity of the intrusion, the

importance of the interest served by the intrusion, and the availability of less intrusive alternatives.

This was made clear by the California Supreme Court in *Loder*, which emphasized that implied consent based on advance notice is only a consideration, not a conclusive element, in the privacy analysis:

> Our conclusion with regard to job applicants' reasonable expectations of privacy in relation to medical examinations does not depend upon the circumstances that, in the present case, the city notified job applicants at the outset that a medical examination and drug screening were part of the hiring process and the applicants applied for positions with knowledge of the screening requirement. As the court explained in *Nat. Federation of Fed. Employees v. Weinberger*, (D.C. Cir. 1987) 818 F.2d 935, 943 [260 App. D.C. 286]: "[A] search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment. Advance notice of the employer's condition, however, may be taken into account as one of the factors relevant to the employees' legitimate expectation of privacy."

Loder, 14 Cal.4th at 886, fn. 19.

Even in *Hill*, the California Supreme Court did not find notice and implied consent to vitiate either the student athletes' reasonable expectation of privacy or the seriousness of its invasion by the NCAA:

> Although diminished by the athletic setting and the exercise of informed consent, plaintiff's privacy interests are not thereby rendered de minimis . . . . The NCAA's use of a particularly intrusive monitored urination procedure justifies further inquiry, even under conditions of decreased expectations of privacy.

Hill, 7 Cal.4th at 42-43.

Hill's and *Loder*'s recognition of notice and implied consent as merely a factor, not a dispositive consideration, in the Article I, section 1 privacy analysis has been

acknowledged and reconfirmed in subsequent cases. *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 696 (9th Cir. 2001) (rejecting employer's claim that implied consent to invasive drug-testing policy was a blanket defense to privacy invasion claims; "Nothing in *Hill* suggests that *all* privacy determinations turn on issues of consent.") (Emphasis in original); *Smith v. Fresno Irrigation District*, 72 Cal. App. 4th at 161 ("advance notice of drug testing does not automatically defeat an employee's argument that the testing is unconstitutional, it does decrease his expectation of privacy"); *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 193 (1997) (notice and implied consent is "generally viewed as a factor" in the balancing analysis and "not as a complete defense to a privacy claim," citing *Loder*, 14 Cal.4th at 886-887).

Similarly, under the Fourth Amendment, advance notice of a privacy intrusion does not extinguish an otherwise reasonable expectation of privacy. *Nissan Motor Co. v. Nissan Computer Corp.*, 180 F. Supp. 2d 1089 (C.D. Cal. 2002) (plaintiff retained reasonable expectation of privacy in private conversations despite prenotification that they were subject to recording); *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (employee drug testing program invalid under Fourth Amendment despite notice to employees, as notice insufficient to render an unconstitutional privacy intrusion constitutional); *see also People v. Chapman*, 36 Cal.3d 98, 112 (1984) (under California Constitution Article I, section 13, reasonable expectation of privacy in telephone records not eliminated by prior notice that telephone company may share them with law enforcement; "since respondents' privacy claim is a reasonable one, it cannot be wiped out 'by the simple and expedient device of its universal violation.'")

(Quoting *Delancie v. Superior Court*, 31 Cal.3d 865, 876 (1982)), *disapproved on other gds. by People v. Palmer*, 24 Cal.4th 856, 861-66 (2001).

In the Fourth Amendment context, the typical absence of genuine, voluntary consent has even led a number of courts to redefine the very concept of "implied consent" to include also consideration of additional circumstances relevant to the overall privacy analysis, including the justification for the search and the availability of less intrusive alternatives. *Johnston*, 442 F. Supp. 2d at 1272; *Iaccarino*, 767 So. 2d at 476. As the court noted in *McGann v. Northeast Illinois Regional Commuter Railroad, Corp.*, 8 F. 3d 1174, 1181 (7th Cir. 1994), finding no implied consent for an employer's search of employee vehicles in a parking lot despite posted notice that cars were subject to search by transit police:

> Because of the concerns inherent in inferring consent, courts have not accepted [defendant's] notion of implied consent characterized simply by notice and voluntary conduct. To be sure, notice and voluntary conduct are relevant in evaluating the legality of a warrantless search under the doctrine of implied consent. These two factors, however, have tended to be necessary but not sufficient conditions in finding the search lawful. *See McMorris v. Alioto*, 567 F.2d 897, 900-01 (9th Cir. 1978) (Kennedy, J.) (courthouse search).
>
> * * *
>
> Generally, in deciding whether to uphold a warrantless search on the basis of implied consent, courts consider whether (1) the person searched was on notice that undertaking certain conduct, like attempting to enter a building or board an airplane, would subject him to a search, (2) the person voluntarily engaged in the specified conduct, (3) the search was justified by a "vital interest", (4) the search was reasonably effective in securing the interests at stake, (5) the search was only as intrusive as necessary to further the interests justifying the search, and (6) the search curtailed, to some extent, unbridled discretion in the searching officers.

The 49ers claimed below that two privacy cases were "directly on point" in demonstrating that implied consent through advance notice, by itself, can represent a complete defense to an Article I, section 1 privacy claim: *Feminist Women's Health Center v. Superior Court*, 52 Cal. App. 4th 1234 (1997) and *TBG Ins. Services Corp. v. Superior Court*, 96 Cal. App. 4th 443 (2002). (*Id.*) But neither case represents anything of the sort. In both, employees – not customers – challenged job requirements specifically tailored to jobs they had applied for and accepted. In *Feminist Women's Health Center*, plaintiff had accepted employment at a reproductive health clinic with notice that she would be required, as one of her job functions, to demonstrate cervical self-examination to the clinic's patients, but later claimed this was a violation of her privacy. Only after balancing the clinic's interest in having its employees demonstrate the cervical examination against the invasion of the plaintiff's privacy interests did the court rule in favor of the clinic. 52 Cal. App. 4th at 1248.

TBG is equally inapposite. It involved a discovery dispute in a wrongful termination action, centering on whether defendant employer TBG was entitled to examine the computer it had provided plaintiff for home use. The appellate court held that examination of the home computer was directly relevant to TBG's asserted ground for the termination, i.e., plaintiff's downloading of pornographic images on his office computer, as it might aid TBG's rebuttal of plaintiff's claim that those pornographic images had just "popped up." 96 Cal. App. 4th at 447. In rejecting plaintiff's privacy claim that the home computer also contained a great deal of personal information, the court noted that at the time plaintiff was furnished the computer, he was informed by

TBG that it was not to be used for anything other than office business and that TBG retained the right to inspect its contents. *Id.* at 452-53. The court also specifically found TBG's computer monitoring policy to be reasonable and supported by legitimate business considerations. *Id.* at 451-52.

Plainly, both *Feminist Women's Health Center* and *TBG* are factually inapposite to the Sheehans' privacy challenge here to a mass, suspicionless search of football fans. More importantly, however, both cases involved Article I, section 1 privacy analysis based on a fully developed evidentiary record that permitted careful consideration of all relevant factors, including the strength and legitimacy of the employer's offered justification for the privacy intrusion, with notice and consent being only one factor in the analysis.

The same multi-factor test controls here. Whatever suggestion of implied consent can be derived from the Sheehans' decision to subject themselves to the pat-down searches will have to be weighed with other competing considerations, including the Sheehans' reasonable expectations of bodily privacy, the nature and efficacy of the searches, and the feasibility of alternatives. The trial court was in no position to accomplish that fact-based, multi-part evaluation in the context of a demurrer.

4. Consent, Even as a Factor, Is a Mixed Question of Law and Fact Incapable of Resolution by Demurrer.

The trial court, in addition to mistakenly construing the 49ers' implied consent argument as a complete defense, also failed to appreciate that the issue of consent is a mixed question of law and fact, which is thus unsuited to adjudication by demurrer.

People v. Michael, 45 Cal. 2d 751, 753 (1955) ("Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances."); *Leonel v. American Airlines*, 400 F.3d 702, 712 (9th Cir. 2005) ("Whether a party has a reasonable expectation of privacy is a context-specific inquiry that should not be adjudicated as a matter of law unless 'the undisputed material facts show no reasonable expectation of privacy.'") (Quoting *Hill*, 7 Cal.4th at 13). The issue of notice and implied consent here turns out to be more complicated than the 49ers argued and the trial court supposed, as there are considerations unaddressed in the demurrer proceeding that bear directly on this issue and require further factual development.

To take one example, the trial court assumed that the Sheehans were entirely free to renew their season tickets for 2006 or not, and their ticket renewals with notice of the pat-down search policy thus necessarily constituted voluntary consent to the searches. But the true circumstances are more complicated than that. There are costs and burdens typically entailed in discontinuing the annual renewal of NFL season tickets for any fan of any team, that extend beyond merely foregoing the opportunity to personally attend home games for the coming season. One of these costs or burdens was identified in *Johnston*, where the court observed that even a full refund of season ticket price would still leave plaintiff disadvantaged by non-renewal:

> Even if plaintiff were permitted to return his 2005-2006 tickets for a refund, he would lose the remainder of his seat deposit and would be

relegated to the bottom of a long waiting list in the event he desired to purchase season tickets in the future.

Johnston, 442 F.Supp. 2d at 1261. Dan Sheehan, it is known from the amended complaint, has been a 49ers season ticket holder for almost 40 years. (AA 104.) It can only be assumed – because the trial court's order sustaining the demurrer has foreclosed any factual inquiry into the matter – that the 49ers have a similar system of season ticket priority for long-standing ticket holders, and that Dan Sheehan would lose decades' worth of priority by the "choice" of non-renewal that the 49ers seek to impose upon him as the cost of avoiding the pat-down searches.[5]

5. Implied Consent by Reason of Advance Notice Would Be of Negligible Significance Here in Any Event, Given the Inapplicability of the Doctrine's Underlying Rationale to the Circumstances Presented.

Although advance notice of a privacy intrusion has been repeatedly recognized as a significant factor in evaluating an individual's reasonable privacy expectation, as well as the seriousness of the intrusion itself, the underlying rationale is worth examining, as it has little, if any, application in this case. The California Supreme Court addressed this consideration in *People v. Hyde*, 12 Cal.3d at 162-69, where the court

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[5] Note also that the trial court in its decision found the season ticket renewal, standing alone, so conclusively "fatal" to the Sheehans' complaint that the demurrer was sustained on that basis without leave to amend to add any other or additional allegations that might have addressed these surrounding circumstances. (AA 199.) In addition, under the provisional arrangement worked out at the hearing on the demurrer to deal with the trial court's perceived standing issue, the Sheehans' counsel were limited to an amended complaint which added only the allegation that the tickets had been renewed for the 2006 regular season. Colloquy with counsel made clear that no additional allegations relating to that development would be permitted. (RT, 7:15-8:21.)

was called upon to determine the reasonableness of an airport luggage search under the Fourth Amendment. The court in its majority decision upheld the constitutionality of the search following analysis of the relevant circumstances, including the demonstrated security need for luggage searches in airline travel and the advance notice to airline passengers of the search procedure. Concurring in the decision, Chief Justice Wright, joined by Justices Tobriner and Sullivan, explained that the constitutional significance of advance notice derived from the opportunity it afforded individuals subject to the search process to modify their own conduct so as to minimize the privacy intrusion entailed, while still availing themselves of their right to travel:

> Advance notice enables the individual to avoid the embarrassment and psychological dislocation that a surprise search causes. For example, an airline passenger with advance notice of pre-boarding screening procedures can remove and place in his non-carry-on baggage any personal effects or other items which would cause him embarrassment if they were observed by airport officials conducting the screening inspection. Indeed, by the simple device of checking all baggage rather than carrying some aboard, an airline passenger traveling on domestic flights may transport all his baggage to his intended destination without any inspection of its contents.

Id. at 176. *See also Jeffers v. Heavrin*, 932 F.2d 1160, 1163 (6th Cir. 1991) (policy of parcel search for Kentucky Derby patrons upheld as consensual, based in part on advance notice to patrons that large parcels should be taken back to their cars or be subject to search, thus affording option of avoiding search and still attending the derby race event).

This same rationale was at the heart of *TBG Insurance Services*. There, as earlier discussed, a privacy challenge to an employer's policy of subjecting employees'

business computers to periodic search for prohibited personal files arose in the course of a discovery dispute in a wrongful termination action. The court upheld the discovery demand by the employer for access to the employee's computer pursuant to the search policy, based in significant part on the employee's prior notice and signed agreement to the policy. As the court reasoned, the advance notice in that situation allowed the employee to minimize or even entirely avoid any intrusion into the privacy of his personal files by the simple expedient of storing them somewhere other than his business computer. 96 Cal. App. 4th at 452-53.

In this case, the underlying rationale of advance notice, as a consideration that either undercuts the Sheehans' reasonable expectation of privacy or minimizes the seriousness of the pat-down privacy intrusion, simply does not obtain. The reason is that the pat-down searches invade privacy by the actual conduct of the pat-down procedure itself. It is the indignity and public embarrassment of being physically groped by a stranger that constitutes the privacy intrusion. No amount of advance notice is going to permit the Sheehans or any other 49ers fan to minimize that intrusion, let alone avoid it entirely, and still gain entrance to Monster Park to attend a 49ers home game.[6]

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[6] Moreover, there is nothing about advance notice of the pat-down searches that diminishes their invasiveness simply through preconditioning 49ers fans to expect them as continuing intrusions on their privacy rights. Under Article I, section 1, the government, as well as businesses and similar organizations, are not permitted to erode recognized privacy interests by numbing citizens to their repeated violation. *See People v. Hyde*, 12 Cal.3d at 164, fn. 4 ("Although it could be argued that the widespread measures employed to combat hijackings have resulted in the elimination of all expectations of privacy at airports, such a concept would sanction an erosion of the Fourth Amendment by the simple and expedient device of its

(continued...)

D. The Pat-Down Searches Conducted by the 49ers Are Not Justified by Generalized Concerns Over Terrorism or Irrelevant Factual References to Prior Terrorist Incidents.

The 49ers also demurred to the complaint on the ground that the pat-down searches were justified by a risk of terrorist attack on Monster Park and thus constituted a reasonable and legitimate intrusion on the Sheehans' privacy. The argument was not only factually unsupported, as will be discussed in a moment, but also was procedurally improper as an asserted ground for demurrer. As *Loder* makes clear, the competing interests offered by a defendant to justify a privacy intrusion under Article I, section 1 play no part in the test for a prima facie statement of claim under the three-prong *Hill* test, and though this consideration plays a significant part in the overall balancing analysis, it necessarily presents issues of fact, particularly so in this case, which foreclose its determination at the pleading stage.

1. The Same Arguments Advanced by the 49ers Regarding the General Risk of Terrorism to "Iconic" NFL Games Were Made and Rejected in the Tampa Bay Buccaneers Case.

The 49ers attempt to justify the suspicionless pat-down searches of their fans by asserting a general risk that terrorists might target NFL games because they are "iconic." (AA 27.) This same argument was rejected by the Florida trial and appellate courts in

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[6](...continued)
universal violation."); *People v. Chapman*, 36 Cal.3d at 113 (phone company notification to customers that phone records may be shared with local law enforcement held unlawful privacy invasion; "Whatever role the subjective expectation of privacy may play in determining the extent of a constitutional right, 'the state cannot curtail a person's right to privacy by announcing and carrying out a system of surveillance which diminishes that person's expectations,'" quoting *Delancie v. Superior Court*, 31 Cal.3d 865, 876 (1982).)

the Tampa Bay Buccaneers case, which found no substantial evidence of a threat of terrorist attack to Raymond James Stadium or NFL venues generally. *Tampa Sports Authority*, 914 So. 2d at 1081. The federal district court in *Johnston* agreed, following its own evidentiary hearing in support of its decision to leave the preliminary injunction in place:

> The only additional evidence presented by the TSA was evidence of a general concern that public events at which large crowds gather could be potential targets of terrorism. Christopher Ronay, President of the Institute of Makers of Explosives (a safety and security association representing the commercial explosives industry) testified that in his opinion NFL games "could be a very attractive target for terrorists, *as could any large venue or venue where people gather in great numbers* . . .," which in his opinion would include "churches, transportation venues, stadiums" and "shopping malls." [citation] Ronay testified that he was not aware of any specific threat to an NFL stadium . . .
>
> In summary, the evidence establishes that the NFL implemented a pat-down policy as a broad prophylactic measure in response to a general threat that terrorists might attack any venue where a large number of Americans gather. . . . [T]he evidence the TSA presented in support of a "special needs" exception is not sufficient to demonstrate the requisite "real" and "concrete" danger to public safety at the Stadium.

Johnston, 442 F. Supp. at 1268 (emphasis in original).

In contrast to the NFL's "iconic" venue argument, in cases where substantial evidence of a genuine terrorist threat or other danger to public safety actually is shown, suspicionless physical searches have been upheld under limited exceptions to the Fourth Amendment's general prohibition against them. The courts have long recognized two such specific exceptions: airports and courtrooms. *Collier*, 414 F. Supp. at 1362; *Nakamoto*, 635 P. 2d at 953. These special exceptions were first created in response to the wave of "unprecedented airport bombings, aircraft piracy and courtroom violence"

in the 1970s. *Collier*, 414 F. Supp. at 1362. But courts have consistently rejected efforts to extend these two narrow, well established exceptions to other public venues, including concerts and sporting events. *Gaioni*, 460 F. Supp. at 13-14 (need for suspicionless pat-down searches of all concert patrons found "minimal compared to that for airport searches"); *Ringe v. Romero*, 624 F.Supp. 417, 423 (W.D. La. 1985) (declining to find search of bar patrons as falling within the "airport and courthouse exceptions"); *Collier*, 414 F.Supp. at 1362 (mass pat-down searches of concert goers unreasonable and not legally justified by "the airport and courthouse" search exception); *Seglen*, 700 N.W.2d at 709 (searches of patrons entering hockey arena suspicionless and illegal, despite terrorist attacks of September 11). Although the 49ers cited and uncritically relied on a number of airport and courtroom search cases in their demurrer (AA 21-22, AA 26), they failed to cite any authority that would justify extending these two limited and well-defined exceptions to NFL games.

2. The Facts Alleged by the 49ers Relating to FAA Regulations and Two Historical Terrorist Incidents Are Irrelevant.

In an attempt to provide *some* factual foundation for their decision to implement the NFL's pat-down policy, the 49ers asked the trial court to take judicial notice that (1) the Federal Aviation Administration restricts airspace over certain public gatherings, including NFL games, and (2) terrorist attacks occurred at the Summer Olympic Games at Munich in 1972 and Atlanta in 1996. (AA 30.) But those facts are irrelevant to the threat of an attack on Monster Park.

The FAA regulation cited by the 49ers was issued in the wake of the attacks of September 11. The FAA restricted airspace in a three-mile radius above Disneyland, Walt Disney World, and stadiums which can seat more than 30,000 and which are hosting a "Major League Baseball, National Football League, NCAA Division One football, or major motor speedway event . . . ." *See Cleveland Nat'l Air Show v. United States Dept. of Transp.*, 430 F.3d 757, 759 (6th Cir. 2005). On its face, this regulation makes little sense: presumably, terrorists who have successfully hijacked an airplane with the intent of targeting one these events will be undeterred by threat of subsequent FAA citation. But even granting that the FAA must have some other, non-obvious justification for this rule, the regulation does no more than generically identify NFL stadiums and the other listed sports and entertainment venues as potential targets for terrorist attack, which is insufficient to substantiate the need for suspicionless pat-down searches of attendees under the Fourth Amendment or Article I, section 1. The district court in *Johnston* came to the same conclusion regarding the FAA regulations, which were also offered as substantiation for a terrorist threat justifying the pat-down search policy at Buccaneers games:

> All of the experts agree that NFL stadiums and large public venues are attractive targets. That is not to say, however, that Congress' recognition of NFL stadiums as potential terrorist targets demonstrates a "special need" to conduct mass suspicionless pat-downs of NFL patrons.

Johnston, 442 F.Supp. 2d at 1268, fn 16.

That terrorists have twice attacked the Summer Olympic Games is undisputed, but also irrelevant. The tragic kidnaping and murder of Israeli Olympic athletes in

Munich more than 30 years ago, hardly suffices as evidence of a specific and credible threat to Monster Park in San Francisco in 2006. The same is true for the Atlanta Summer Olympic bombing in 1996, perpetrated by a radical anti-abortion activist.

What the 49ers' offered facts mostly demonstrate is the dearth of substantiation for any specific risk of terrorist bombing at a 49ers home game. Whether such evidence will materialize in this case remains, on this record, an issue for discovery and future proceedings.

The unstated premise underlying the NFL's "Pat down Policy" thus becomes the unsubstantiated fear that terrorists *might* choose to target NFL games for attack. This same possibility, of course, holds true for countless other American events. But acknowledging this unfortunate and obvious possibility is no substitute for substantiation of an actual and significant risk of terrorist attack on Monster Park.

The Eleventh Circuit recently spoke to this point in *Bourgeois v. Peters*, 387 F.3d 1303, where the city of Columbus, Georgia sought to require protesters at a local U.S. Army base to submit to metal detector searches at a nearby checkpoint. The city contended that "post September 11, 2001," such a preventive measure "at large gatherings is constitutional as a matter of law." *Id.* at 1311. The Eleventh Circuit disagreed, finding that the mass, suspicionless metal detector searches violated the protesters' First and Fourth Amendment rights. After acknowledging that the threat of terrorism is omnipresent, the court rejected the argument that any large gathering was therefore subject to search: "In the absence of some reason to believe that international terrorists would target or infiltrate *this* protest, there is no basis for using September

11 as an excuse for searching the protestors." *Id.* at 1311 (emphasis added). Furthermore, under the city's theory, "mass suspicionless searches could be implemented for every person who attends any large event including: a high school graduation, a church picnic, a public concert in the park, an art festival, a Fourth of July Parade, sporting events such as a marathon, and fund-raising events such as the annual breast cancer walk." *Id.* Accordingly, the court refused to approve the City's "prophylactic dragnet":

> We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country.

Id. at 1312.

The same is true here. California citizens cannot be required to forego the privacy interest protected by Article I, section 1 of the California Constitution merely because of the generalized threat of terrorism. And absent some reason to believe international terrorists intend to target and infiltrate Monster Park, the pat-down searches are an unjustified intrusion upon the Sheehans' constitutionally protected rights.

VI. CONCLUSION

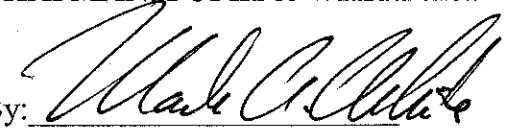
The Sheehans have properly pleaded facts satisfying each element of the *Hill* three-prong test for an Article I, section 1 privacy claim. The trial court erred in deciding that the Sheehans' renewal of their season tickets for 2006 constituted voluntary consent to the continuing pat-down search policy. The Sheehans' privacy

interest in avoiding unnecessary and intrusive pat-down searches as a condition of attending 49ers football games is protected by Article I, section 1, as they retain a reasonable expectation of privacy in the circumstances, and the pat-down searches constitute a serious intrusion of their privacy interest. Whether the 49ers will succeed in justifying the search policy by evidence of a meaningful and specific threat of terrorist attack on Monster Park, which cannot be addressed by less-invasive security procedures, are issues that now must be litigated through discovery and trial.

The order dismissing the Sheehans' amended complaint on general demurrer was error, and should be reversed.

Dated: October 10, 2006

CHAPMAN, POPIK & WHITE LLP

By: 

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WORD COUNT CERTIFICATE
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Dated: October 10, 2006

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CERTIFICATE OF SERVICE

I, Denise Brasher, declare:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is Chapman, Popik & White, 650 California Street, 19th Floor, San Francisco, California, 94108.

On October 10, 2006, I served the following document: Appellants' Opening Brief on the parties involved addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on October 10, 2006.

Denise Brasher