No. S155742

IN THE

SUPREME COURT OF CALIFORNIA

DANIEL AND KATHLEEN SHEEHAN,

Plaintiffs and Appellants,

v.

THE SAN FRANCISCO 49ers, LTD.,

Defendant and Respondent.

After a Decision by the Court of Appeal,
First Appellate District, Division Four
Case No. A114945

PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW

This case involves a privacy challenge to a San Francisco 49ers policy that requires every man, woman and child attending a 49ers home football game to submit to a full-body pat-down search before entering the stadium. By a divided vote, the court of appeal held that plaintiffs failed to state a cause of action under Article I, section 1 of the California Constitution because they knew of the 49ers' mass, suspicionless pat-down search policy before buying their 2006 season tickets. This petition for review thus presents the following issue:

> Whether a business may prevent any judicial scrutiny of a privacy intrusion under Article I, section 1 of the California Constitution, no matter how severe or unjustified the intrusion may be, simply by informing customers that they must acquiesce in the forfeiture of their constitutional rights as a condition of obtaining access to its commercial goods or services.

II. WHY REVIEW SHOULD BE GRANTED

The court of appeal's decision in this case radically alters the landscape of Article I, section 1 jurisprudence. And it does so in a way that will dilute the California Constitution's protection across the entire spectrum of previously recognized privacy interests.

The majority opinion holds that, as a matter of law, a commercial entity may constitutionally require its patrons to give up their privacy rights as a condition of doing business, so long as the patrons have advance notice of the condition. The nature and severity of the privacy intrusion, as well as the necessity for its imposition, are irrelevant to the legal analysis. The existence of notice and any subsequent acquiescence in the privacy invasion–even under protest–is now deemed to constitute an "implied consent" to the intrusion that necessarily forecloses a claim under Article I, section 1 in all cases.

This ruling is inconsistent with–and remarkably cavalier in disregarding–this Court's landmark privacy decisions. The majority affirmed dismissal of the case at the demurrer stage without requiring the 49ers to provide *any* justification for a substantial invasion of plaintiffs' right of bodily integrity. The majority holds that plaintiffs' decision to buy season tickets knowing of the pat-down search policy negates their ability to establish a reasonable expectation of privacy, one of the three elements of a plaintiff's prima facie case set out in *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1 (1994). The majority thus disregards this Court's admonition in *Loder v. City of Glendale*, 14 Cal.4th 846, 892 (1997), that *Hill* does not permit the rejection of a claim involving a significant intrusion upon a constitutionally protected privacy interest "without considering or weighing the justification supporting the intrusive conduct." Rather, as *Loder* 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. Yet, the majority dismisses this Court's decision in *Loder*, reaffirmed in *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 330-31 (1997) ("*AAP*"), as simply an ineffectual "attempt" to clarify *Hill* that has no precedential significance.

In addition, the majority opinion fundamentally conflicts with *Hill* itself, which for prima facie case purposes is indistinguishable from this case. In *Hill*, student athletes brought a privacy challenge to the NCAA's mandatory drug testing policy. As in this case, the defendant NCAA was a private organization; the plaintiffs had advance notice of the drug testing policy and had even signed written consent forms acquiescing in it. *Hill*, 7 Cal. 4th at 9, 11. But rather than dismissing the case at the pleading stage on that basis, this Court held that, although "diminished by the athletic setting and the exercise of informed consent, plaintiffs' privacy interests are not thereby rendered de minimis," *Id.* at 43, and proceeded to

engage in a lengthy and detailed analysis of not only the seriousness of the privacy invasion, but also the NCAA's justifications for the testing program and the feasibility of less intrusive alternatives on a fully developed evidentiary record.

This case involves the right to avoid having a stranger run his or her hands over one's body as the price of admission to a public event. In upholding that search without considering its justification, the majority eliminates the need to justify any other searches that a private entity wishes to impose as a condition of doing business–even a strip search according to counsel for the 49ers–so long as it has notified its customers in advance. Similarly, a private employer would now be free to impose regular drug testing and body searches on its employees based merely on prior notice. A private obstetrics practice could require as a condition of prenatal care that its patients agree to genetic tests and abortions upon a diagnosis of fetal abnormality.

Nor is the rule established by the published opinion below limited in its rationale to autonomy privacy; it would extend to informational privacy as well. Hospitals could avoid any Article I, section 1 obligation to keep medical records private by conditioning patients' access to health care on their agreement that their records may be disclosed to others at the hospital's discretion. Banks, telephone companies, insurers, and private colleges could similarly shrug off any inconvenient confidentiality obligations imposed by our Constitution. Consumers would be limited to statutory protection, despite the voters' intent that a basic constitutional safeguard exist for intimate data.

The majority below does not address these concerns, although the dissent recognizes the unavoidably far-reaching applications of the opinion. (Dissent at 6) Rather, the majority leaves individuals with a stark choice when confronted with a private–sector demand that they relinquish their constitutional right to privacy: take it or leave it.

The linchpin of the majority approach is that customers may always refuse to do business with a company intent on invading their privacy. Putting aside the fact that the company may be the only game in town–as the 49ers quite literally are for San Francisco football fans–this market-based approach ignores the will of California voters. As this Court recognized in *Hill*, the Privacy Initiative was intended to check private as well as governmental abuses. This Court recently recognized that fundamental public policies cannot always be extinguished by contractual principles of express or implied consent. *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747 (2007) (release of future liability for injuries caused by gross negligence). In enacting Article I, section 1, the people of California established that the protection of individual privacy may not be left to the vagaries of the marketplace.

To be sure, the dignitary interest implicated in being forced to endure the unwanted groping of a stranger may, at times, have to give way to other, more important interests. But courts, not companies, decide whether privacy rights must be sacrificed, and they make that decision after carefully evaluating the facts and after balancing the severity of the intrusion against its necessity. The constitutional protection afforded to bodily integrity cannot be cast aside on the ground that it has been unilaterally subordinated to some commercial transaction. Otherwise, Article I, section 1 offers virtually no protection in the private sector.

Plaintiffs urge the Court to review this important constitutional case.

III. FACTS

Daniel Sheehan and Kathleen Sheehan are longtime fans of the San Francisco 49ers, Ltd.[1] (Slip op. at 2) Daniel Sheehan has purchased 49ers season tickets

[1] The following facts are taken directly from the allegations of the 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).

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.* at 8 (dissent))

Beginning in September 2005, the Sheehans, along with every other ticketholder entering Monster Park, were subjected to a pat-down search by "Event Staff" screeners before they were allowed into the stadium. (*Id.* at 2) 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 legs. (*Id.* at 1-2) A few feet away, members of the San Francisco Police Department stood and observed these pat-down searches. (*Id.* at 2) 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," requiring all NFL teams to conduct physical searches of every ticketholder entering every NFL game. (*Id.* at 1, fn. 2).

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. (*Id.* at 3) And they object to being forced to undergo the pat-down searches in order to continue attending 49ers home games.

IV. PROCEDURAL HISTORY

The Sheehans filed their complaint for declaratory and injunctive relief in December 2005. (*Id.* at 2) The 49ers responded with a general demurrer. (*Id.*) At the hearing on the demurrer, the trial judge, sua sponte, raised a concern over a potential "standing issue," as the Sheehans' complaint alleged only ticket purchases

for the 2005 regular season, which had ended. (*Id.*) 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. (*Id.*) Following these procedural steps, the trial court requested and received supplemental briefing on the legal significance of the Sheehans' renewal of their season tickets with knowledge of the 49ers' continuing pat-down search policy. (*Id.*)

The trial court then sustained the demurrer, concluding that the Sheehans had "voluntarily consented" to the pat-down searches by purchasing their 2006 season tickets with "full notice of the pat-down policy." (*Id.*) More precisely, it held that the complaint failed to allege a prima facie claim under Article I, section1 because the renewal of their season tickets with knowledge that access to the stadium was conditioned on submission to a pat-down search eliminated any reasonable expectation of privacy by the Sheehans and deprived them of the ability to allege a sufficiently serious privacy invasion. (*Id.*)

On July 17, 2007, a divided panel of the First District Court of Appeal issued its decision affirming the trial court's order. The majority acknowledged that the Sheehans had alleged a legally protected privacy interest, the first element of the *Hill* prima facie standard. (*Id.* at 5) However, the majority held that, *as a matter of law*, the renewal of their season tickets with knowledge of the search condition foreclosed the Sheehans' ability to demonstrate a reasonable expectation of privacy, the second element of the *Hill* standard. (*Id.* at 6-7)[2] The justification for the search here—or in any other case in which an individual does business with a private entity

[2] The court of appeal did not address the trial court's conclusion that the renewal of season tickets with notice of the the pat-down condition renders the privacy invasion too trivial to state a claim under Article I, section 1.

knowing that he or she must submit to a search in order to obtain access to goods or services—was deemed irrelevant to the inquiry. The majority thus gave short shrift to *Loder's* admonition that *Hill's* three threshold elements were intended to weed out only the most de minimis of privacy claims, characterizing *Loder* as a decision which "attempted to clarify" the limited, threshold screening purpose of the *Hill* elements, but, as a plurality opinion, had not "attain[ed] the status of precedent." (*Id.* at 3, fn. 4)

In dissent, Justice Rivera argued that neither *Hill*, nor any of its progeny fairly read, recognized "implied consent" based only on advance notice of a privacy intrusion as anything more than a *"diminishment* of privacy expectations, " which by itself cannot defeat an Article I, section 1 claim. (*Id.* at 9, 11-12 (dissent))

V. ARGUMENT

A. The Courts Must Protect Constitutional Privacy By Evaluating the Justification for Non-Trivial Privacy Intrusions.

In *Hill,* this Court confirmed the reach of Article I, section 1's privacy protection to the realm of private organizations and businesses, holding that California residents have a constitutionally protected privacy interest not only in their interactions with government authority, but in this important part of their everyday lives as well. "'Privacy is protected not merely against state actions; it is considered an inalienable right which may not be violated by anyone.'" *Id.* at 18, quoting *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829-30 (1976). *Hill* also articulated the now-familiar three-prong test for an Article I, section 1 prima facie claim: "(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.

This Court has had occasion twice now to review and clarify *Hill*'s three-prong test, in *Loder,* and again in *AAP*. While reaffirming this test as the recognized

criteria for a prima facie claim, *Loder* emphasized that these criteria did not represent "significant new requirements or hurdles that a plaintiff must meet," and did not displace the traditional standard for adjudicating actionable privacy invasions:

> Accordingly, 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 (emphasis added). In *AAP*, the Court reaffirmed this relationship between the traditional balancing standard and the subordinate screening role of the three-prong *Hill* test, in an extended discussion and approval of *Loder*. *AAP*, 16 Cal.4th at 330-31.

1. *Loder* and *AAP* Establish California Privacy Doctrine.

The lower court's assertion that *Loder* lacks any precedential authority is, quite simply, wrong. A plurality opinion is binding authority on all issues it addresses, excepting only in cases where one or more concurring opinions either expressly disagree or only concur in the result without elaboration. *People v. Terrell*, 141 Cal. App. 4th 1371, 1383-84 (2006). The sole case relied on by the majority, *Bd. of Supervisors v. Local Agency Formation Commissioner*, 3 Cal. 4th 903, 918 (1992), involved just such a situation, where concurring opinions specifically disagreed with the plurality on an issue of strict scrutiny. In *Loder*, none of the concurring opinions took issue with the lead opinion's clarification of

the *Hill* three-prong test, and none were merely concurrences in the result. *Loder* is thus authoritative precedent on this issue.[3]

The lower court's opinion and its disregard of *Loder* also stand squarely at odds with the many California appellate courts that have expressly followed *Loder*'s clarification of the *Hill* three-prong standard in their subsequent Article I, section 1 privacy decisions. *Coalition Advocating Legal Housing Options v. City of Santa Monica*, 88 Cal. App. 4th 451, 460 (2001) ("*Loder* was clear that *Hill* did *not* adopt 'a sweeping new rule' under which a challenge to conduct that significantly affects a privacy interest may be rejected without considering 'the legitimacy or strength' of the justification for it." (quoting *Loder*, 14 Cal.4th at 893-94; emphasis in original).); *Alfaro v. Terhune*, 98 Cal. App. 4th 492, 509 (2002), *cert. denied*, 537 U.S. 1136 (2003) ("The key element in this process is the weighing and balancing of the justification for the conduct in question against the intrusion on privacy resulting from the conduct whenever a genuine, nontrivial invasion of privacy is shown." (Citing *Loder*, 14 Cal.4th at 893)); *In re Carmen M.*, 141 Cal. App. 4th 478, 492 (2006) ("Under the general balancing approach utilized in *Hill* . . . and *Loder* . . ., the identification of the legally recognized privacy interests at stake 'is the beginning, not the end, of the analysis.'" (quoting *Hill*, 7 Cal.4th at 41).); *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 186-87 (1997).[4]

Pioneer Electronics (USA), Inc. v. Superior Court, 40 Cal. 4th 360, 370-371 (2007), invoked by the majority below, is consistent with *Loder*'s recognition of the

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[3] And so is *AAP*, where the plurality, lead opinion's endorsement of *Loder* was joined by substantive concurring opinions that indicated no disagreement with the endorsement.

[4] Federal courts adjudicating Article I, section 1 claims in diversity have likewise consistently construed *Loder*'s clarification of the *Hill* three-prong test as authoritative. *Leonel v. American Airlines*, 400 F. 3d 702, 712 (9th Cir. 2005); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F. 3d 1260, 1271, fn. 16 (9th Cir. 1998).

Hill standard's limited screening function for de minimis privacy intrusions.[5] The court of appeal majority notes that *Pioneer* discusses the *Hill* prima facie standard without explicit reference to *Loder.* But that indicates that *Loder*'s clarifying influence no longer needs to be discussed more than a decade after *Loder* was decided. Indeed, the *Pioneer* Court, in discussing the third *Hill* element, a serious invasion of privacy, expressly discusses it in *Loder* terms, noting that " trivial invasions afford no cause of action." *Pioneer*, 40 Cal. 4th at 371; *see also Bel Aire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554, 559 (2007) (*Hill*'s third element requires a serious privacy invasion, since "trivial invasions do not create a cause of action," citing *Pioneer).*

The importance of evaluating the competing interests implicated in a case like this, and in having an evidentiary record that informs that evaluation, are illustrated by the federal district court's decision in *Johnston v. Tampa Sports Authority*, 442 F. Supp. 2d 1257 (M.D. Fla. 2006), *reversed on other grounds*, 490 F.3d 820 (11th Cir. 2007). Like this case, *Johnston* challenges the constitutionality of pat-down searches at NFL football games. Defendant TSA sought to justify the

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[5] *Pioneer* involved a pre-class certification discovery dispute in which plaintiffs sought contact information for customers who had filed product complaints with Pioneer. The trial court allowed disclosure of the information, but only after notice informing the affected individuals that they could have the information withheld. In rejecting Pioneer's contention that affirmative consent was required before disclosure, this Court held that the disclosure to plaintiffs of contact information would not unduly interfere with customers' privacy, "given that the affected persons readily may submit objections if they choose." *Id.* at 372.

Importantly, and though the discovery issue was thus resolvable under the *Hill* prima facie standard, this Court nevertheless went on to discuss the justification for the privacy intrusion involved in the disclosure, noting that contact information regarding the identity of potential class members is generally and appropriately discoverable and that no revelation of intimate activities or information, and no undue intrusion into personal affairs, was implicated. *Id.* at 373-374.

pat-down policy on the theory that NFL games present an attractive target for terrorists. The district court, after holding an evidentiary hearing that included expert testimony (*Johnston*, 442 F. Supp. 2d at 1260, 1266), concluded that TSA had failed to show that the asserted threat was "real" rather than merely "hypothetical," and thus failed to establish the "concrete danger" required to satisfy the special needs exception to the Fourth Amendment. *Id.* at 1266-69. Whether some other court would agree with that assessment is, for present purposes, beside the point—although the two state court opinions that had earlier considered the need for the pat-downs reached the same conclusion. *See Johnston v. Tampa Sports Authority*, 2005 WL 4947365 (Fla. Cir. Ct. 2005); *Johnston v. Tampa Sports Authority*, 914 So. 2d 1076, 1080-81 (Fla. Dist. Ct. App. 2005). The significant point here is that the issue of whether the asserted justification for the searches is sufficient to outweigh the invasion of the Sheehans' privacy interests presents a question of fact that cannot be decided on demurrer. [6]

The court below went seriously awry in focusing entirely and myopically on whether the Sheehans knew of the pat-down condition at the time they renewed their season tickets. Courts throughout the country have characterized pat-down searches as a substantial affront to dignity.[7] Thus, before their Article 1, section 1 claim can

[6] The Eleventh Circuit reversed the district court in a perfunctory decision, holding that plaintiff consented to the search by attending Buccaneer games knowing of the search condition. *Johnston v. Tampa Bay Sports Authority*, 490 F. 3d 820 (11th Cir. 2007). That ruling suffers from the same analytical flaw as that of the court of appeal here. The Eleventh Circuit therefore did not reach the question of whether TSA's articulated justification for the search was sufficient to overcome Johnston's Fourth Amendment claim. That decision is currently the subject of a petition for rehearing en banc.

[7] *See*, e.g., *United States v. Albarado*, 495 F. 2d 799, 807 (2nd Cir. 1974) ("normally a frisk is considered a gross invasion of one's privacy."); *Wheaton v. Hagan*, 435 F. Supp. 1134, 1146-47 (M.D.N.C. 1977) (random pat-down searches of patrons entering sports 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)).

be adjudicated, the Sheehans are entitled to require the 49ers to put forth facts to justify this substantial invasion of their privacy. Only with a fully developed record can the parties' competing interests be evaluated. See *Loder*, 14 Cal. 4th at 895.

2. The Decision Below Conflicts With Appellate Cases Applying *Hill* to Sustain Demurrers Only in Trivial Cases.

The majority opinion in this case is an anomaly that will confuse California lower courts. Until this opinion was issued, the three-prong *Hill* test was used to winnow out Article I, section 1 claims on demurrer only in cases where the complaint alleged a trivial or de minimis intrusion on privacy. For example, in *Stackler v. Dept. of Motor Vehicles*, 105 Cal. App. 3d 240, 246-48 (1980), plaintiff claimed a privacy violation from the California DMV's requirement that driver's licenses include a photograph of the driver. That case, though it predates *Hill*, is an apt example of a trivial, even frivolous privacy claim properly disposed of on demurrer. Indeed, it is the case cited as an example for this point in *Loder*, 14 Cal. 4th at 894.[8]

The majority below sought to distinguish one particular decision in this group, *Heller v. Norcal Mut. Ins. Co.*, 8 Cal. 4th 30 (1994), arguing that it presents a case resolved by demurrer despite the pleading of a substantial privacy interest under Article I, section 1. (Slip op. at 5) But *Heller* is not actually distinguishable on this basis. There, plaintiff, in a suit against a doctor, claimed a privacy violation from sharing health information among doctors in her earlier medical malpractice case, despite established case and statutory law requiring disclosure of plaintiffs' health records in medical malpractice actions. *Heller* is thus a case in which the

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[8] Another example of a case where a trivial Article I, section 1 claim was properly resolved by demurrer is *City of Simi Valley v. Superior Court*, 111 Cal. App. 4th 1077, 1085 (2003), in which family members of a deranged man killed following an armed standoff with police claimed that the police violated their privacy rights by refusing to allow them access to the man during the tense negotiations by the crisis negotiating team.

plaintiff's privacy claim was clearly barred by settled law. In that context, *Hill*'s basic screening function made its disposition by demurrer appropriate. (Slip op. at 10 (dissent))

In contrast, where a plaintiff has pleaded a substantial privacy intrusion, courts have consistently recognized that the plaintiff's reasonable expectation of privacy presents a mixed question of law and fact, which necessitates a balancing of interests and which is therefore inappropriate for resolution at the demurrer stage. *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).

B. Under Both *Hill* and *Loder*, "Consent" is But One of the Factors to Be Considered In Determining Whether Article I, Section 1 Has Been Violated.

The Sheehans have always objected to enduring full-body pat-down searches as a requirement for attending Monster Park home games since the start of the 2005 regular season. Actually, they object so strongly that they have sued the 49ers seeking an injunction to end the practice. Yet they lost this case on the fiction that they agreed to the search policy. This ruling confuses the concept of true voluntary consent with a legal construct known as "implied consent," which in fact is unwilling acquiescence. As a result, the court below short-circuited the careful balancing of interests required in an Article I, section 1 case, treating the Sheehans' supposed "consent" as dispositive. The decision, in a published appellate opinion, will cause mischief throughout the courts unless corrected.

1. The Sheehans Have Never Voluntarily Consented to the Full-Body Pat-Down Searches as a Condition of Entering Monster Park.

Voluntary consent and the sort of extracted consent relied upon by the majority in this case are fundamentally different concepts. True voluntary consent is a familiar doctrine in search-and-seizure law. It means consent to a search or other privacy invasion that is freely given, i.e., unconstrained by either the coercive show of authority or conditions imposed on its exercise. *People v. Hyde*, 12 Cal.3d 158, 162 fn.2 (1974) ("Consent, to be valid, must be free and voluntary."). Under the Fourth Amendment, truly voluntary consent may serve to validate an otherwise unconstitutional search or seizure. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Whether the consent is express, as in a written document, or conveyed by the actions of the person sought to be bound, the hallmark of true consent is its unconstrained and voluntary nature.

The sort of extracted or "implied consent," relied on by the majority here describes the situation in which an individual receives advance notice of a search or other privacy intrusion as a condition of engaging in some activity and, though objecting to the intrusion, nevertheless submits to it in order not to be barred from that activity. Every bargain, of course, includes some element of extracted consent in the sense that each party gives up something in exchange for receiving some desired benefit. But some bargains are impermissible. *See, e.g., City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747 (2007) (written release of future liability for injuries caused by gross negligence unenforceable as a matter of public policy). In determining whether the condition imposed by the 49ers here is permissible, the critical issue is not whether the Sheehans renewed their season tickets knowing of the pat-down condition. The issue instead is whether Article I, section 1 permits the imposition of that condition as part of the price of attending 49ers games.

While the Sheehans' acquiescence in the condition may be relevant to the analysis, the strong public policy of preserving the privacy rights of Californians

embodied in Article I, section 1 means that such "extracted consent" is not dispositive of the underlying question of whether that condition may be made part of the bargain. That is the teaching of both *Hill* and *Loder*. Certainly the voters who amended our Constitution in 1972 never anticipated that businesses could eliminate privacy by so simple an expedient as issuing advance notice that they had no intention of respecting privacy interests. As the dissent correctly notes, the majority's opinion here "effectively relegates to free market forces the acceptable norms of privacy intrusions." (Dissent at 6)

2. *Hill* and *Loder* Establish That "Consent" Is Not an Absolute Defense to All Article I, Section 1 Claims.

The thesis of the 49ers' demurrer in this case, a thesis wrongly adopted by the court of appeal majority, is that Article I, section 1 permits a commercial business to condition customer access to its goods and services on forfeiture of privacy rights, so long as the customer goes ahead with the transaction knowing of the condition. The seriousness of the privacy intrusion, its justification, and the availability of alternatives are never evaluated, so long as there is notice of the condition and a submission to it. This theory of "notice and consent," however, is not the law. As this Court's decisions in *Hill* and *Loder* make explicit, acquiescence in the forfeiture of privacy rights in order to obtain some benefit is but one factor in the Article I, section 1 analysis.

Hill itself demonstrates that the majority's interpretation of Article I, section 1 is wrong. As the dissent recognizes, "a *diminishment* of privacy expectations is not the same as an *elimination* of privacy expectations." (Dissent at 3 (emphasis in original)) Importantly, the plaintiffs in *Hill* expressly consented to drug testing by signing written consent forms and participating in NCAA competitions after notice of the search policy. *Hill*, 7 Cal.4th at 42-43. According to the majority's analysis, that should have been the end of the *Hill* decision. But obviously it was not, as this

Court instead proceeded to *reject* the categorical notion that such consent in private-sector settings necessarily precludes any Article I, section 1 violation:

> *Although diminished by the athletic setting and the exercise of informed consent, plaintiffs' 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.

Id., at 43 (emphasis added). As the dissent points out, "Had the court in *Hill* intended to equate notice and subsequent voluntary consent with relinquishment of reasonable privacy expectations, it would have said so. Plainly it did not." (Dissent at 3.)

Thus, rather than constituting the end of the analysis, consent was taken instead as only the beginning, as this Court then proceeded, in pages of detailed, fact-based analysis, to sift through all of the relevant considerations, including: the purpose underlying the NCAA's testing regime; the efficacy of the testing in serving that purpose; the significance of the privacy intrusion upon the student athletes involved; the voluntary, associational nature of the relationship between the athletes and the NCAA; the availability of less invasive alternatives to testing; and the significance of whatever consent can be derived from the advance notice of the testing regime the athletes were provided. *Hill*, 7 Cal.4th at 43-57.

This Court discussed and reaffirmed the subordinated status of consent in *Loder*, a case involving a challenge to mandatory drug testing of city employees:

> 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.

Following *Hill* and *Loder*, all cases—until the decision below—rejected the facile notion that informing the public of a proposed intrusive policy was sufficient to defeat a constitutional privacy claim.[9]

The majority below relied heavily on *TBG Insurance Services Corp. v. Superior Court*, 96 Cal. App. 4th 443 (2002), as support for its conclusion that it need look no further than the Sheehans' renewal of their tickets knowing of the search condition. That reliance was misplaced. *TBG* was a wrongful termination action, in which the employer sought discovery of the contents of plaintiff's company-owned home computer, in order to refute his claim that he had not intentionally downloaded the pornography found on his office computer that was the basis for his discharge. Plaintiff objected based on Article I, section 1. However, in

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[9] See *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 696 (9th Cir. 2001) ("Nothing in *Hill* suggests that *all* privacy determinations turn on issues of consent." (emphasis in original)), *cert. denied*, 534 U.S. 1078 (2002); *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th at 193 (notice and implied consent is "generally viewed as a factor" in the balancing analysis "and not as a complete defense to a privacy claim"); *Barbee v. Household Automotive Finance Corp.*, 113 Cal. App. 4th 525, 533 (2003) (advance notice of employer prohibition on intra-company relationships "diminished" employee's reasonable privacy expectation, but did not obviate required balancing analysis); *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 162 (1999) (advance notice of employer drug screening "decreased" employee's expectation of privacy, but *Hill* prima facie standard nevertheless satisfied); *Feminist Women's Health Center v. Superior Court*, 52 Cal. App. 4th 1234, 1248-49 (1997) (health worker's advance notice of job requirement for demonstrating cervical self-examination to clinic patients did not foreclose privacy challenge or obviate need to evaluate justification for workplace requirement under Article I, section 1). The court of appeal made no effort to distinguish these cases. *See, e.g.*, Slip. Op. at 7 (citing but not distinguishing *Kraslawsky*).

accepting the company's computer for work at home, plaintiff had agreed that he would use the computer only for business purposes and that the company could monitor his use of its computer in the same way it monitored his use of its office computer.

Under these facts, it is not surprising that the court of appeal concluded that plaintiff had no reasonable expectation of privacy in any personal information placed on the company's computer in his home. Plaintiff could claim no legitimate privacy interest in that personal information because the company had expressly prohibited personal use of the computer. *Id.* at 452-53. As the dissent in this case explains: "The employee in TBG affirmatively placed his own privacy interests in jeopardy by signing a written agreement limiting how the employer's computer could be used, and then violating that agreement." (Dissent at 4.) Thus it was not simply plaintiff's agreement that his employer could review the information on his home computer that overcame his Article I, section 1 claim. It was the fact that he had *also* agreed not to use the computer for personal purposes that undermined his privacy claim as a matter of law. [10]

Unlike *TBG*, this case does not involve the boss's rules about using office equipment. It involves the fans' own bodies and their personal dignity. The

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[10] Tellingly, the *TBG* court's analysis was not based simply on notice and consent, but also considered other circumstances of plaintiff's conduct, such as the legitimacy of the employer's restrictions on computer use according to "accepted community norms," including a detailed analysis of widespread use of and reasons for such policies throughout the business community. *Id.* at 450. Indeed, *TBG* represents a case in which the court carefully considered all relevant circumstances, on a fully developed record, including the justification for the asserted privacy intrusion through the relevance of the discovery sought; the justification for the employer's original restrictions on personal use of the computer; and the consequently reduced, indeed negligible, expectation of privacy that plaintiff had in the personal information he nonetheless stored on the computer in violation of his agreement.

Constitution protects those interests, absent a court finding that serious overriding concerns necessitate their intrusion.

C. Similar Searches Violate the Fourth Amendment, Which Is Less Protective Than Article I, Section 1 of the California Constitution.

The Fourth Amendment informed the original enactment of the Privacy Initiative by California citizens in 1972, and Fourth Amendment case authority remains an important source of insight in the development of Article I, section 1 doctrine, particularly in the area of autonomy privacy. *Hill*, 7 Cal.4th at 29-30, 54-55; *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 156-58 (1999). However, the voters passed the Privacy Initiative and added an explicit right to privacy to our state Constitution to *extend* the privacy recognized in federal rulings. It is thus anomalous that a challenge to mass, suspicionless body searches under Article I, section 1 would be dismissed at the pleading stage, when similar claims have prevailed under the less protective provisions of the federal Constitution.

Courts applying the Fourth Amendment have repeatedly condemned mass, suspicionless pat-down searches of patrons at stadium and arena events. *Wheaton v. Hagan*, 435 F.Supp. 1134, 1146-47 (M.D.N.C. 1977); *State v. Seglen*, 700 N.W. 2d 702, 709 (N.D. 2005); *Jacobsen v. City of Seattle*, 658 P.2d 653, 674 (Wash. 1983). These decisions recognize that advance notice of a privacy intrusion does not extinguish an otherwise reasonable expectation of privacy under the Fourth Amendment. *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 pre-notification 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 prior notice to employees, as notice insufficient to render an unconstitutional privacy intrusion constitutional).[11]

[11] See *also People v. Chapman*, 36 Cal. 3d 98, 112 (1984) (under California Constitution Article I, section 13, reasonable expectation of privacy in telephone

In a number of these cases, courts directly considered and rejected "implied consent" defenses, reaffirming that the government may not demand that an individual acquiesce in the forfeiture of constitutionally protected rights to enter an arena:

- *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.")
- *State v. Iaccarino*, 767 So. 2d 470, 479 (Fla. Dist. Ct. App. 2000) (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 v. Folmar*, 460 F. Supp. 10, 14 (M.D. Ala. 1978) (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 619, 621 (Mich. Ct. App. 1982) (football stadium search policy of carry-in bag visual inspections justified by demonstrated public necessity, but not by implied consent of

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records not eliminated by prior notice that telephone company may share them with law enforcement), *disapproved on other gds.*, *People v. Palmer*, 24 Cal. 4th 856, 861-64 (2001).

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.

The rationale of these cases fully applies in the private-sector Article I, section 1 context as well. The 49ers have extracted a waiver from football fans of their

constitutional right to bodily integrity as the price of admission. This is simply not consent in any meaningful sense. The voters who added Article I, section 1 to the state constitution required that courts evaluate the justification for such privacy intrusions. This safeguard for a fundamental constitutional right cannot be obviated by the simple expedient of notice and the fiction of consent.

D. The 49ers' Status as a Private Entity Is Not Determinative on Demurrer.

The majority below sought to justify a dismissal of this case on demurrer by stressing the difference between private and official conduct. As this Court recognized in *Hill*, there may be significant differences between the two for Article I, section 1 purposes because of (1) the coercive power of the government, (2) the broader range of choice in commercial and other private contexts, and (3) the associational interest present in private organizational contexts. *Hill*, 7 Cal.4th at 37-39. But those distinctions do not exist here.

First, the Sheehans do not have a vast range of choices. They are not choosing a bank or a grocery store. The reality is that entering Monster Park to watch the 49ers play football represents, both figuratively and literally, the only game in town.[12] Considering the distinctive recreational value involved in such an experience, one that the 49ers themselves assiduously cultivate in all of their marketing efforts,[13] there is

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[12] *See* Rosenbaum, Thane N., *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. Miami Law Rev. 729, 784 (1987) ("Popular thinking in this area assumes that the product market of professional football, for instance, is so unique, that there are no reasonably interchangeable substitutes that consumers will accept as an alternative for Sunday afternoon games.")

[13] According to the 49ers' own website:

> It's one thing to watch it on TV, but it's another thing to be there live, celebrating every touchdown with thousands of screaming fans, tailgating with family and friends, and chanting 'De-fense' to pump up your favorite player. *Unless you go, you'll never know.*

here the very same sort of "virtual monopoly" that the court in *Hill* recognized was held by the NCAA in collegiate sports. *Hill*, 7 Cal.4th at 44.

Second, the searches, though conducted by 49ers event screeners, represent a quintessentially law enforcement activity, commonly conducted by the police as a security measure for admittance to publicly owned or operated venues such as arenas or stadiums, as well as airports and courthouses. Indeed, as the Sheehans allege in their complaint, the pat-down search policy is conducted at Monster Park in the immediate presence of police officers from the SFPD. Whatever the underlying arrangements among the 49ers, their event screeners, and the SFPD—an issue that requires discovery—the important point here is that the searches are conducted in a manner that presents the same situational dynamics as a police checkpoint, with all of the same aspects of coercive authority for the Sheehans and the thousands of other 49ers fans subjected to them.

Finally, and most importantly, the differences between governmental and private action would not justify affirming the dismissal of this case on demurrer, as they have no relevance to the *Hill* three-prong test for a prima facie claim. They all instead pertain to the multi-factor balancing analysis that the court must undertake to adjudicate the case once a prima facie claim under Article I, section 1 has been presented by proper pleading and the court has before it a full evidentiary record. That is made plain by the *Hill* decision itself. *Hill*, 7 Cal.4th at 38-39 (emphasis added).

Accordingly, whatever presence or weight any of these considerations may have in this case represents nothing that could support dismissal of the Sheehans' case on demurrer, and must instead await further development and assessment through discovery and trial.

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http://www.49ers.com/tickets/season.php?section=Tickets (emphasis in original).

V. CONCLUSION

The majority's opinion in this case "pronounces a new rule, applicable to private entities, that is rigid and unqualified" (Dissent at 6) and diminishes all Californians' privacy. This Court should review this important constitutional case to protect those fundamental rights.

Dated: August 24, 2007

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WORD COUNT CERTIFICATE

(Cal. Rules Ct. 14(c)(1))

The text of this brief consists of 6,637 words as counted by the Microsoft Word word processing program used to generate the brief.

Dated: August 24, 2007

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DANIEL SHEEHAN et al., Plaintiffs and Appellants, v. THE SAN FRANCISCO 49ERS, LTD., Defendant and Respondent.	A114945 (San Francisco County Super. Ct. No. CGC05447679)

Appellants Daniel and Kathleen Sheehan sued respondent San Francisco 49ers, Ltd. (49ers) for violation of article 1, section 1 of the California Constitution (Privacy Initiative), based on the team's implementation of a patdown policy mandated by the National Football League (NFL). They challenge the dismissal of their cause following the sustaining of the 49ers' demurrer without leave to amend. We conclude that the Sheehans cannot demonstrate that they had a reasonable expectation of privacy under the circumstances, and accordingly affirm the judgment.

I. FACTS[1]

In the fall of 2005, in response to an inspection policy promulgated by the NFL,[2] the 49ers instituted a patdown inspection of all ticket holders attending the

[1] On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we assume that the facts alleged in the challenged complaint are true. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

[2] As recently explained in *Johnston v. Tampa Sports Authority* (11th Cir. June 26, 2007, No. 06-14666) __ F.3d __ [2007 WL 1814197, *1] (*Johnston II*): "The NFL urged the pat-down policy to protect members of the public who attend NFL games. The NFL concluded that NFL stadia are attractive terrorist targets based on the publicity that would be generated by an attack at an NFL game." (Fn. omitted.)

49ers' home games at Monster Park as a condition for entry to the games. The patdowns were conducted by private screeners who, according to the NFL mandate, were instructed to physically inspect by "touching, patting, or lightly rubbing" all ticket holders entering the stadium. The 49ers' specific practice consisted of screeners running their hands around ticket holders' backs and down the sides of their bodies and their legs. Officers of the San Francisco Police Department stood nearby during these inspections. The Sheehans are 49ers season ticket holders and were subject to patdowns throughout the 2005 season before each game at Monster Park.

In December 2005, the Sheehans filed suit against the 49ers alleging that the 49ers breached their privacy rights, in violation of the Privacy Initiative. They sought declaratory and injunctive relief, requesting that the court (1) find the patdown policy in violation of the Privacy Initiative, and (2) enjoin the 49ers from continuing the patdown policy at home games.

The 49ers demurred, arguing that the pleaded facts did not constitute a cause of action under the Privacy Initiative. At the hearing the trial court questioned whether the relief sought by the Sheehans was ripe, since the 49ers' 2005 season was over. The Sheehans stipulated that they did buy the 49ers' 2006 season tickets and subsequently amended their complaint to include this detail. Additionally, both parties stipulated that the demurrer would apply to the amended complaint.

The plaintiff in *Johnston II* was a season ticket holder of the Tampa Bay Buccaneers, an NFL franchise. He brought a state court suit against the Tampa Sports Authority (TSA), claiming that the patdown policy implemented by the TSA violated his Fourth Amendment rights. The TSA removed to federal court and subsequently moved to vacate and dissolve the preliminary injunction issued by the state court prior to removal. The district court denied the TSA's motion. (*Johnston v. Tampa Sports Authority* (M.D.Fla. 2006) 442 F.Supp.2d 1257, 1273 (*Johnston I*).) During the pendency of this appeal, the Eleventh Circuit reversed. (*Johnston II*, *supra*, ___ F.3d at p. ___ [2007 WL 1814197, *4].) Throughout the instant proceeding, the Sheehans have relied heavily on the now-reversed *Johnston I*.

Following submission of supplemental briefing addressing the significance of the Sheehans' 2006 season ticket purchase relative to their Privacy Initiative cause of action, the trial court sustained the 49ers' demurrer without leave to amend, and dismissed the action with prejudice.

II. DISCUSSION

We undertake an independent review of an order sustaining a demurrer to determine if, as a matter of law, the complaint states facts sufficient to constitute a cause of action. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) We accept as true the factual allegations of the pleading but not any conclusions of fact or law contained in it. (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 638.) We may also take judicial notice of facts subject to judicial notice. (*Ibid.*) We will uphold the trial court's ruling if any ground for the demurrer is well taken. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

The Sheehans urge us to reverse the judgment because the trial court misapplied the relevant law, excluding pertinent factors from its decision. We disagree. The trial court correctly ruled that the Sheehans' Privacy Initiative claim fails because they cannot show any reasonable expectation of privacy under the pertinent circumstances.

A. Hill *and its Progeny*

The Privacy Initiative[3] provides an "inalienable right[]" in attaining and preserving one's privacy. (Cal. Const., art. I, § 1; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 16 (*Hill*).) In seeking to define the rights inherent in the Privacy Initiative, our Supreme Court has confirmed that it protects individuals from nongovernmental entities that may intrude on an individual's privacy. (*Hill, supra,* at p. 16.) The *Hill* court elaborated that a plaintiff asserting a Privacy Initiative claim must establish three essential elements: (1) a legally protected privacy interest; (2) a

[3] Article 1, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining . . . privacy."

reasonable expectation of privacy; and (3) conduct on the part of the defendant constituting a serious invasion of privacy. (*Id.* at pp. 35-37, 39-40.) The presence or absence of a legally recognized privacy interest is a question of law for the court to decide. (*Id.* at p. 40.) The reasonable expectation of privacy and no serious invasion elements may also be adjudicated as a matter of law where the material facts are not in dispute. (*Ibid.*)

In a later plurality opinion, the Supreme Court attempted to clarify[4] that the elements articulated in *Hill* are " 'threshold elements' " intended to "screen out" claims that do not qualify as a significant intrusion on a privacy interest guaranteed by the Privacy Initiative. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893.) In other words, these threshold elements "permit courts 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." (*Ibid.*, fn. omitted)

A defendant may defeat a Privacy Initiative claim by negating one or more of the *Hill* criteria or by demonstrating that the invasion of privacy is justified by a countervailing interest. (*Hill, supra,* 7 Cal.4th at p. 40.) The *Hill* court explained that "privacy interests [must] be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test.' " (*Id.* at p. 37.) An invasion of privacy may be excused if it serves an important and legitimate function of a public or private entity. (*Id.* at p. 38.) In countering a competing interest, a plaintiff may show that there are "protective measures, safeguards, and alternatives" that the defendant can utilize which would reduce the privacy interference. (*Ibid.*)

The Sheehans maintain that their complaint alleges facts amounting to "a genuine and significant invasion of a protected privacy interest." They accuse the

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[4] Only two justices subscribed to the clarifying language and thus it does not attain the status of precedent. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918.)

trial court of inappropriately balancing and weighing their privacy expectation against the severity of the invasion, without any evidence, or consideration, of the justification for the conduct. As we explain, rather than engaging in a flawed weighing process, the trial court properly screened out their privacy claim. Additionally, we note that recently, and without any reference to *Loder*, the Supreme Court reiterated that (1) the *Hill* factors may be assessed as a matter of law on undisputed material facts; and (2) the balancing of competing interests only comes into play when the plaintiff has established the factors constituting an invasion of a privacy interest. (*Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370-371.) We turn now to analysis of the first two elements of a Privacy Initiative claim.

B. *Legally Protected Privacy Interest*

The Sheehans assert that the 49ers private screeners' patdown inspections at Monster Park before 49ers' games breached their legally protected privacy interest. They claim that the inspections are intrusive and degrading to their bodies. The 49ers counter that the Sheehans have not pled a legally protected privacy interest because their allegations have "little to do with the kind of 'intimate and personal decisions' typically recognized" as an actionable invasion of autonomy privacy.

There are two types of legally protected privacy interests: (1) informational privacy; and (2) autonomy privacy. (*Hill*, *supra*, 7 Cal.4th at p. 35.) Autonomy privacy safeguards "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference." (*Ibid.*)

Here, the trial court correctly ruled that the Sheehans have a legally protected privacy interest in their bodies being free of unwanted patdown inspections by private security screeners. Such patdowns inherently invade one's autonomy. Nonetheless, an actionable Privacy Initiative claim requires more.

C. *Reasonable Expectation of Privacy*

1. *Advance Notice and Voluntary Consent*

The Sheehans argue that it is premature to resolve, at the pleading stage, whether they enjoyed a reasonable expectation of privacy under the circumstances. This question, they contend, involves a mixed question of law and fact. However, to reiterate, where the facts are undisputed, we may decide the issues as a matter of law. (*Hill, supra,* 7 Cal.4th at p. 40.)

We concur with the trial court's decision that the Sheehans have no reasonable expectation of privacy because, by attending the 2005 season games, they had advance notice of the patdown policy and thereafter impliedly consented to the patdowns by voluntarily purchasing the 2006 season tickets. In assessing whether one has a reasonable expectation of privacy, we are mindful that this "is an objective entitlement founded on broadly based and widely accepted community norms." (*Hill, supra,* 7 Cal.4th at p. 37.) Thus, customs and physical settings of certain activities may impact an individual's reasonable expectation of privacy. (*Id.* at p. 36.) Moreover, a plaintiff's expectation of privacy may be diminished by advance notice of a potential invasion of a privacy interest and by subsequent voluntary consent to the privacy invasion. Further, "[i]f voluntary consent is present, a defendant's conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability." (*Id.* at p. 26.)

In this case the Sheehans were subject to the patdowns by private screeners when they attended 49ers' games in the 2005 season. Because the season had ended by the time the demurrer was heard, a standing issue developed. Without objection, the Sheehans amended their complaint, affirming that they had bought tickets for the upcoming 2006 season. Thus, there is no question that they had full notice of the patdown policy and the requirement of consenting to a patdown prior to entering the stadium for a game. With notice and knowledge of this prospective intrusion, they nevertheless made the decision to purchase the 2006 season tickets. By voluntarily re-upping for the next season under these circumstances, rather than opting to avoid

the intrusion by not attending the games at Monster Park, the Sheehans impliedly consented to the patdowns. On these undisputed facts we determine, as a matter of law, that the Sheehans have no reasonable expectation of privacy. Furthermore, the trial court did not abuse its discretion by not allowing leave to amend because there is no reasonable possibility that the Sheehans could amend their complaint to state sufficient facts to establish this element.[5]

Citing, among other authority, *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 193, the Sheehans insist nonetheless that advance notice and implied consent only diminish the reasonable expectation of privacy but do not vitiate this prima facie element. However, case law is to the contrary.

TBG Ins. Services Corp. v. Superior Court (2002) 96 Cal.App.4th 443, 452-453 is instructive. There, the reviewing court held that an employee had no reasonable expectation of privacy in the company-owned computer installed at his home which the employee had used for his own benefit. In reaching this conclusion the court focused on the employee's advance notice of the company's computer monitoring policy and his agreement, pursuant to that policy, to use the computer only for business purposes. (*Ibid.*)

Even more helpful is *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30. The *Heller* plaintiff prosecuted a medical malpractice action against one treating

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[5] The dissent would "overrule the demurrer" or reverse and remand to afford the Sheehans an opportunity to amend their complaint. (Dis. opn., *post*, at pp. 7-8.) We offer the following observations: First, at the time the Sheehans stipulated to include amended allegations in their complaint about the purchase of 2006-2007 season tickets, the court opened up the possibility of additional allegations: "And I'm not sure what else you want to put in there." Sheehans' counsel responded that if there were any additional factual allegations regarding the purchase and sale, those would be included, but nothing more would be added. Second, thereafter the Sheehans did not attempt, through noticed motion, to offer any *additional* amendments going to the issue of notice and consent, notwithstanding that the court had ordered supplemental briefing on these matters. (See Code Civ. Proc., §§ 473, subd. (a)(1), 576.) Nor did their supplemental briefs reference any potential additional factual allegations. It is the plaintiff's burden to show the manner in which a complaint might be amended. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

physician and then sued another physician, not a party to the first action, for invasion of privacy and other relief. Apparently the defendant in the second action had disclosed confidential medical information to the malpractice insurer. Our Supreme Court held that by placing her physical condition at issue in the medical malpractice litigation, the plaintiff's expectation of privacy was "substantially lowered." (*Id.* at p. 43.) Under these circumstances, and as a matter of law, her privacy claim failed because she could not plead facts supporting a conclusion that any expectation of privacy regarding her medical condition would be reasonable. (*Ibid.*) *Heller* is directly on point because the plaintiff's privacy claim was defeated as a matter of law on demurrer based on her implied consent to the offending activity.

It also bears noting that the *Johnston II* court, although resolving a Fourth Amendment challenge to the NFL patdown policy, not a Privacy Initiative claim, specifically took issue with the district court's finding that the plaintiff did not voluntarily consent to the patdown searches: "[T]he Court concludes that Johnston voluntarily consented to pat-down searches each time he presented himself at a Stadium entrance to attend a game. The record is replete with evidence of the advance notice Johnston was given of the searches including preseason notice, pregame notice, and notice at the search point itself. It was clear error for the district court to find that Johnston did not consent to the pat-down searches which were conducted." (*Johnston II, supra*, ___ F.3d at p. ___ [2007 WL 1814197,*4].)

2. *Unconstitutional Conditions Doctrine*

The Sheehans further insist that the 49ers' patdown policy invokes an unconstitutional condition for entry into the games and is thus illegal. Not so.

The unconstitutional conditions doctrine was developed to prevent state actors from conditioning the grant of governmental benefits on the giving up a constitutionally protected right. (*Perry v. Sindermann* (1972) 408 U.S. 593, 597.) This doctrine does not apply to private entities. (*Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1050.) Hence where, as here, the 49ers organization restricts entry to games on its terms, it is not subject to the unconstitutional

conditions doctrine: The organization is a private entity and is not offering any government benefit to its patrons.[6]

Moreover, as *Hill* makes clear, our assessment of the relative strength and significance of privacy norms can differ where the offending action is conducted by a private as opposed to public party. (*Hill, supra*, 7 Cal.4th at p. 38.) For example, "the pervasive presence of coercive government power" more gravely imperils the freedom of citizens than action by the private sector. (*Ibid.*) The inspections in this case were not conducted pursuant to the police power of the state with authority to arrest; rather, they were conducted by private screeners, on behalf of a private entity. So, too, individuals generally have "greater choice and alternatives in dealing with private actors than in dealing with the government." (*Ibid.*) Thus, rather than submit to the patdown the Sheehans had the choice of walking away, no questions asked.

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[6] Citing the discussion in *Johnston I, supra*, 442 F.Supp.2d 1264, footnote 11, regarding the roles of the police and private security in implementing the patdown searches at the Tampa Bay stadium, the Sheehans propose that the private screeners here are mere proxies for the San Francisco Police Department officers who stood a few feet away while the screeners conducted the inspections. This case is inapposite. The Tampa Bay Buccaneers played in a state-owned and operated stadium. The Florida Legislature granted the TSA, a public entity, authority to manage the stadium. The TSA contracted with private screeners to conduct patdowns prior to the games. The court held that the screeners were instruments of the TSA and thus the patdowns they performed were not insulated from state action status. (*Id.* at p. 1263.) In this case, the 49ers lease the stadium from the City and County of San Francisco. (See San Francisco Recreation and Parks, Monster Park <http://www.parks.sfgov.org/site/recpark_index.asp?id=18977>.) As tenants, the 49ers obtain the right of possession and use of Monster Park in consideration of rent. (*Parker v. Superior Court* (1970) 9 Cal.App.3d 397, 400.) The 49ers have contracted with the private screeners and since the sports organization is not controlled by the City and County of San Francisco, the private screeners are not proxies for a governmental entity.

III. DISPOSITION

The judgment is affirmed.

Reardon, J.

I concur:

Ruvolo, P.J.

Dissenting Opinion of Rivera, J.

The majority reasons that appellants Daniel and Kathleen Sheehan (Sheehans) have impliedly consented to the patdown searches by respondent San Francisco 49ers, Ltd. (49ers) because they purchased season tickets with knowledge of the search policy. (Maj. opn., *ante*, at p. 6.) On this basis alone, the majority holds that the Sheehans have relinquished all reasonable expectations of any constitutional right to be free from such searches and that, as a matter of law, they can allege *no facts* that could demonstrate otherwise. (*Id.* at pp. 6-7.) I disagree with both conclusions.

A. Failure to Grant Leave to Amend

The court below sustained the demurrer without leave to amend, concluding the Sheehans "cannot allege that they did not consent to the pat-down policy, and . . . their consent is fatal to their complaint." In my view this was a clear abuse of discretion.

As stated in *McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-304, "[a] ruling sustaining a general demurrer without leave to amend will only be upheld if the complaint alleges facts which do not entitle plaintiff to relief on any legal theory. [Citation.] Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not. Liberality in permitting amendment is the rule, not only where a complaint is defective as to form but also where it is deficient in substance, if a fair prior opportunity to correct the substantive defect has not been given. [Citation.]"

Here, the Sheehans were never given the opportunity to amend their complaint nor even to importune the court to allow an amendment.[1] Moreover, on this record, leave to amend is clearly warranted.

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[1] The sustaining of the demurrer without leave to amend is particularly troublesome in this case because of the unusual series of events leading up to the ruling. At the hearing on the demurrer, the court raised the question of standing sua sponte, and in the course of a colloquy, the Sheehans were told that the addition of the allegation

The amended complaint does not allege that the Sheehans *will attend* the games; only that they have paid the cost of admission. The record also indicates that the Sheehans intended to seek a preliminary injunction in August 2006, before the opening of the new season, after completing discovery. Indeed, they requested the case be given preferential treatment because "[t]he interests of justice require that important pretrial motions be heard before the NFL football season resumes in August 2006."

At least one reasonable inference from this record is that the Sheehans would decide whether to attend the 2006 season games after they had sought a preliminary injunction before the next season began, in which case no consent can be inferred from the purchase of the tickets. Sheehans might also have alleged, as has been pointed out by the Sheehans, that they decided to purchase the next season's tickets in order to protect their 40-year seniority pending resolution of this action. Although it was not unreasonable for the court to infer that the Sheehans would attend the games even if they were subjected to patdown searches because they have done so in the past, a court must liberally construe the allegations of the complaint and indulge all inferences favorable to the plaintiff in ruling on a demurrer. (*Carney v. Simmonds* (1957) 49 Cal.2d 84, 93; *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1401-1402.)

At minimum, the Sheehans should have been granted leave to amend to allege additional facts pertaining to their reasonable expectation of privacy.

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concerning the purchase of the following season's tickets was merely a "technical point" necessary to ensure the appellate courts would not use lack of standing as a means to avoid the merits of the case. Once the first amended complaint was filed, however, it became, in the court's mind, the determinative factor in the case. And, while the parties were permitted to submit additional briefing, there was no tentative ruling and no oral argument, so the Sheehans did not have the usual opportunity to hear or respond to the court's concerns, either by argument or by requesting leave to amend.

B. Reasonable Expectation of Privacy

The majority holds that the Sheehans' decision to purchase season tickets with knowledge of the patdown policy extinguishes their reasonable expectation to be free from that privacy intrusion, as a matter of law. (Maj. opn., *ante*, at p. 6.) I disagree, first, with the majority's legal analysis.

The majority begins by paraphrasing *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*) as saying that the "customs and physical settings of certain activities may impact an individual's reasonable expectation of privacy," and that an expectation of privacy "may be diminished by advance notice of a potential invasion of a privacy interest and by subsequent voluntary consent to the privacy invasion." (Maj. opn., *ante*, at p. 6.)[2] This is a fair characterization of some of the factors discussed in *Hill*. But the majority's conclusion does not follow from these general teachings. First, my colleagues do not cite to any "customs" or "physical settings" that might impact the Sheehans' privacy expectations in this case, presumably because there is nothing in the record before us on these subjects that is relevant to privacy expectations. Second, a *diminishment* of privacy expectations is not the same as an *elimination* of privacy expectations. Had the court in *Hill* intended to equate notice and subsequent voluntary consent with relinquishment of reasonable privacy expectations, it would have said so. Plainly, it did not.

The majority also relies on two cases to support their conclusion that this case can, and should, be decided as a matter of law: *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30 (*Heller*) and *TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443 (*TBG*). (Maj. opn., *ante*, at pp. 7-8.) Neither case controls.

In *TBG* an employee sued his employer for wrongful termination. The employer claimed the employee had been terminated for violating company rules

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[2] The majority also quotes from *Hill* for the proposition that " '[i]f voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort liability.' " (Maj. opn., *ante*, at p. 6.) But the Sheehans have not sued in tort; they seek only declaratory and injunctive relief based on their constitutional claim.

against accessing pornographic materials on the company's computers. The employee contended that this was a pretext. (*TBG*, *supra*, 96 Cal.App.4th at p. 446.) In the course of discovery the employee objected to his employer examining the contents of a computer he used at home on privacy grounds. (*Id.* at p. 447.) It was undisputed, however, that the computer in question had been provided by the employer to the employee for work-related use, and that the employee had signed an agreement that contained an express no-personal-use restriction and a provision reserving to the employer the right to inspect its contents. (*Id.* at pp. 452-453.) Needless to say, the employee's claim that he had a reasonable expectation of privacy under these circumstances was soundly rejected.

"To state the obvious, no one compelled [the employee] . . . to use the home computer for personal matters, and no one prevented him from purchasing his own computer for his personal use. With all the information he needed to make an intelligent decision, [the employee] agreed to [TBG's] policy and chose to use his computer for personal matters. By any reasonable standard, [the employee] fully and voluntarily relinquished his privacy rights in the information he stored on his home computer, and he will not now be heard to say that he nevertheless had a reasonable expectation of privacy." (*TBG*, *supra*, 96 Cal.App.4th at p. 453.)

The facts in *TBG* are dramatically inapposite to those before us. The employee in *TBG* affirmatively placed his own privacy interests in jeopardy by signing a written agreement limiting how the employer's computer could be used, and then violating that agreement. The Sheehans entered into no agreement with the 49ers and engaged in no misconduct to justify the 49ers' demand that they be searched. Rather, they were given a Hobson's choice; submit to a search or never attend a 49ers game. In any event, the usefulness of *TBG* in our analysis of this case is marginal at best, considering its procedural posture. The court in *TBG* was not ruling on whether a complaint stated a cause of action for violation of privacy rights; it was deciding a discovery dispute on a well-developed record.

In *Heller*, the plaintiff initiated a medical malpractice lawsuit. One of the doctors who had treated the plaintiff's condition was designated as an expert witness for the defense. To assist with the defense, the doctor held ex parte conversations with the defendants' insurance carrier, while he was still the plaintiff's treating physician, regarding the plaintiff's medical condition and prognosis. (*Heller, supra*, 8 Cal.4th at p. 36.) After settling the malpractice lawsuit, the plaintiff sued the treating doctor and the insurance company for invasion of privacy because the doctor "secretly disclosed [her] confidential information." (*Id.* at pp. 36, 42.) On appeal, the court affirmed the order sustaining the defendants' demurrers on two grounds. The court held that, because the information given to the carrier by the defense expert would "inevitably" be divulged in the course of discovery, the plaintiff could not reasonably expect to retain any right to privacy with respect to that information *and* the disclosures were not "sufficiently serious in their scope or impact to give rise to an actionable invasion of privacy." (*Id.* at p. 44.)

Heller simply does not resonate with this case. To begin with, it involves the unusual situation—not present here—of an individual who, in initiating a malpractice action, faced from the outset the well-established rule that medical information concerning the condition sued upon is not protected. The court simply rejected Heller's attempt to circumvent that rule by claiming her unprotected medical information had been disclosed in an improper *manner*. No such well-established rule comes into play in this case. More fundamentally, *Heller* is not a notice-and-voluntary consent case, and so does not apply here.

Conversely, *Hill is* a notice-and-voluntary consent case. The athletes in *Hill* had notice of the drug tests and voluntarily consented to them. Nonetheless, the court did not rule they had thereby lost their reasonable expectation of privacy as a matter of law. (*Hill, supra*, 7 Cal.4th at pp. 42-43.) Similarly, the Sheehans' receipt of notice of the patdown search condition and their so-called consent to it by purchasing tickets does not automatically eliminate their privacy expectations. (See also *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 193 ["consent is

generally viewed as a factor in the balancing analysis, and not as a complete defense to a privacy claim"].) Whether the Sheehans retained a reasonable expectation of privacy is a mixed question of fact and law, unsuitable to resolution on demurrer.

C. The Reasonableness of the Sheehans' Privacy Expectations Cannot Be Decided on the Bare Allegations of the Complaint

The majority's announcement of a bright-line rule based upon a skeletal pleading is troublesome also because it allows for little interpretive gloss. Although loosely attached to the allegations contained in the complaint, the majority pronounces a new rule, applicable to private entities, that is rigid and unqualified: Notice of a potential privacy invasion prior to payment for a benefit eliminates any reasonable expectation of privacy, because, having been put on notice, the public has the choice of paying for the benefit and consenting to the intrusion or "walking away, no questions asked." (Maj. opn at pp. 6-7, 9.) As I understand the majority's reasoning, for purposes of determining one's reasonable expectation of privacy there would be no principled distinction between a patdown search or a strip search, or between gaining entry to a football game or a grocery store. So long as there is advance notice and the public can choose between acquiescence ("consent") and declining the benefit, no constitutional privacy rights are implicated.

This new rule effectively relegates to free market forces the acceptable norms of privacy intrusions. In fact, the 49ers argued below that they have the right to impose *any* conditions of doing business and that consumer tolerance would sufficiently temper the more egregious invasions of privacy. In my view, the courts' role in protecting privacy rights should not be so readily abdicated, particularly where, as here, the private actor has an effective monopoly. If you are the only game in town, requiring your customers to either submit to a patdown search or walk away does not present the kind of genuine choice upon which the majority's reasoning is premised.

The law does not and should not give private entities unfettered discretion in imposing intrusive conditions on those who seek their benefits. While the majority

correctly points out that the unconstitutional conditions doctrine does not apply to nongovernmental actors (maj. opn., *ante*, at pp. 8-9), this fact does not give private entities *carte blanche* to intrude upon the autonomy privacy of California citizens. In *Hill*, our high court differentiated between conditions imposed by governmental versus nongovernmental actors, but it did so in the context of balancing the justifications proffered against the nature of the privacy intrusion. "Judicial assessment of the relative strength and importance of privacy norms *and countervailing interests* may differ in cases of private, as opposed to government, action." (*Hill, supra*, 7 Cal.4th at p. 38, italics added.) Indeed, *Hill* goes on to state there is no clear rule that can be applied in the private benefit context. Rather, there is more of a sliding scale approach to privacy rights depending upon countervailing interests in freedom of association, the range of choices available to the public, and the varying degrees of competition in the marketplace. (*Id.* at pp. 38-39.)

Applying the principles of *Hill*, a court may well ultimately conclude there was no constitutional violation, having balanced the Sheehans' right to privacy against whatever countervailing interests may be demonstrated by the 49ers, given the nature of the intrusion and its context, the type of commodity offered and the range of consumer choices. But the trial court's ruling precluded any such analysis by prematurely cutting off Sheehans' rights to plead and prove that their reasonable expectation of privacy was violated by the condition imposed on their right of entry.

D. Conclusion

I disagree that the purchase of future tickets with knowledge of the search policy—or acquiescence in a patdown search to gain entry to the 49ers games—supports a conclusion *as a matter of law* that the Sheehans have relinquished their reasonable expectation to be free from unjustified, intrusive searches. The Sheehans have filed this action to vindicate that expectation. They are entitled to their day in court.

On this record, I would direct the trial court to overrule the demurrer and require the 49ers to join the issue by way of answer, so that the court can conduct the

"comparison and balancing of diverse interests" which is "central to the privacy jurisprudence of both common and constitutional law." (*Hill, supra*, 7 Cal.4th at p. 37.) Short of that, and at a minimum, I would reverse and remand to give the Sheehans the opportunity to amend their complaint.

RIVERA, J.

Trial Court:	San Francisco County Superior Court
Trial Judge:	Hon. James L. Warren
Counsel for Appellants:	Chapman, Popik & White LLP Mark A. White Benjamin J. Riley American Civil Liberties Union Foundation of Northern California Ann Brick Margaret C. Crosby
Counsel for Respondent:	Covington & Burling LLP Sonya D. Winner Jonathan A. Patchen

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 August 27, 2007, I served the following document: Petition for Review on the parties involved addressed as follows:

Attorney for Respondent
Sonya D. Winner, Esq.
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Clerk of the Court to Judge Warren
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

Clerk of the Court
Division Four
Court of Appeal
350 McAllister Street
San Francisco, CA 94102

_____ **BY PERSONAL DELIVERY**: The within document(s) were served by hand in an envelope addressed to the addressee(s) above on this date. The Proof of Service by the process server will be filed within five (5) days.

__✔__ **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail, at San Francisco, California.

_____ **BY FEDERAL EXPRESS OVERNIGHT DELIVERY**: I caused each envelope, with delivery fees provided for, to be deposited in a box regularly maintained by Federal Express.

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 August 27, 2007.

Denise Brasher