LA FOLLETTE, JOHNSON, DEHAAS, FESLER & AMES
Michael A. Bell (SBN 034900)
MBell@jdfa.com
A Professional Corporation
2280 Market Street, Suite 140
Riverside, California 92501
Telephone: (951) 275-9192
Facsimile: (951) 275-9249

CITY ATTORNEY, CITY OF MORENO VALLEY
Robert D. Herrick (SBN 100916)
bobh@moval.org
ASSISTANT CITY ATTORNEY, CITY OF MORENO VALLEY
Robert L. Hansen (SBN 130677)
bobha@moval.org
14177 Frederick Street
Moreno Valley, CA 92552
Telephone: (951) 413-3000
Facsimile: (951) 413-3034

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates (SBN 110364)
Tcoates@gmsr.com
Michael Anthony Brown
tbrown@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

Attorneys for Defendants
Dennis Longdyke and Lori Miller

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

KEVON GORDON, RONALD JONES, RAYMOND BARNES, QUINCY BROWN Plaintiffs, v. CITY OF MORENO VALLEY, a Municipal Corporation; COUNTY OF RIVERSIDE; RICK HALL, CHIEF OF THE MORENO VALLEY POLICE DEPARTMENT, in his	Case No. ED CV 09-00688 SGL (SSx) **MOTION OF DEFENDANTS DENNIS LONGDYKE AND LORI MILLER TO DISMISS FIRST AMENDED COMPLAINT UNDER FRCP 12(b)(6)** Date: August 17, 2009 Time: 10:00 a.m. Courtroom: Hon. Stephen G. Larson

official capacity; KRISTY UNDERWOOD, EXECUTIVE OFFICER OF THE CALIFORNIA BOARD OF BARBERING AND COSMETOLOGY, in her official capacity; STAN SNIFF, RIVERSIDE COUNTY SHERIFF, in his official capacity; TONY HEISTERBERG, DENNIS LONGDYKE, LORI MILLER, SETH HARTNETT, ROBERT DUCKETT MARIO HERRERA, ERIC BREWER, ANTHONY JOHNSON, CHRISTOPHER GASTINGER, RICHARD HUTSON, JOE BROWN, XOCHI CARMARGO, ARLEN BAUBY, and DOES 1 through 20, in their individual capacities,

Defendants.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT at 10:00 a.m. on August 17, 2009, or as soon thereafter as the matter may be heard in the above-entitled court, located at 3470 Twelfth Street, Riverside, California, 92501, defendants Dennis Longdyke and Lori Miller will move the court under Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiffs' First Cause of Action in their First Amended Complaint ("Complaint") for failure to state a claim upon which relief can be granted.

The grounds for this motion are that Plaintiffs' allegations, even if taken as true, do not make out a plausible, as opposed to merely possible, equal protection violation. Furthermore, Officers Longdyke and Miller are entitled to qualified immunity from Plaintiffs' First Cause of Action because (i) Plaintiffs' Complaint does not state an equal protection violation, and (ii) it was not "clearly established" at the time of the events alleged that the conduct of Officers Longdyke and Miller described in the Complaint violated Plaintiffs' equal protection rights.

The motion will be based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities filed with it, the oral argument of counsel, all pleadings and papers filed in this action, any evidence of which the Court may take judicial notice, and any other matter the Court may take into consideration.

This motion is made after counsel for the parties, pursuant to Local Rule 7-3, met and conferred via an exchange of various emails concerning the substance of the motion.

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This email exchange commenced on Jun 19, 2009, and concluded on June 30, 2009, after which, despite the best efforts of counsel for the parties to resolve matters, it became necessary to file this motion.

DATED: July 6, 2009

LA FOLLETTE, JOHNSON, DEHAAS, FESLER & AMES

OFFICE OF THE CITY ATTORNEY, CITY OF MORENO VALLEY

GREINES, MARTIN, STEIN & RICHLAND LLP

By: MA Brown
Michael Anthony Brown
Attorneys for Defendants
DENNIS LONGDYKE and LORI MILLER

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I. INTRODUCTION

The Plaintiffs in this action are four African-American barbers who cut hair at two barber shops in the City of Moreno Valley ("City" or "Moreno Valley"). Plaintiffs' action is based on health and business license inspections conducted by officers from the City of Moreno Valley's Code and Neighborhood Services Division ("Code Enforcement"), the California Department of Consumer Affairs' Board of Barbering and Cosmetology ("Board"), and the Moreno Valley Police Department ("MVPD") at their barber shops. In their First Amended Complaint ("Complaint" or "FAC"), Plaintiffs allege these inspections violated various federal and state constitutional rights.

Against Code Enforcement Officers Dennis Longdyke and Lori Miller specifically, Plaintiffs bring two claims under 42 U.S.C. § 1983, seeking monetary damages for violations of their Fourteenth Amendment equal protection rights and their Fourth Amendment right to be free from warrantless searches. This Motion concerns only the equal protection claim, Plaintiffs' First Cause of Action.

Plaintiffs' equal protection claim should be dismissed against Officers Longdyke and Miller because the Complaint fails to allege facts raising a plausible claim to relief. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 883 (2009). That claim, for selective enforcement of the law, is based on allegations that five of six health and business license inspections conducted at Moreno Valley barber shops on a single day in April 2008 occurred at shops owned and patronized primarily by African Americans. Even if these allegations were true, they would not make out an equal protection claim because events from such a narrow time frame are not legally sufficient to establish a discriminatory effect, let alone intent. Moreover, Plaintiffs' Complaint contains allegations that raise an obvious lawful alternative explanation for the searches, i.e., that Plaintiffs' permitted their barber shops to be used as social gathering places, a potential

violation of the health and safety statute governing barber shops and potential violation of business licensing requirements. In addition, Plaintiffs' Complaint does not claim that Officers Longdke and Miller selected Plaintiffs' barber shops for inspection; in fact, Plaintiffs allege that supervisors at Code Enforcement, the Board, and MVPD made this decision. Thus, the Complaint fails to plead facts sufficient to establish discriminatory intent as to these individual defendants.

Finally, Officers Longdyke and Miller are entitled to qualified immunity from Plaintiffs' equal protection claim because the Complaint fails to show that their actions, as alleged, violated clearly established law.

Accordingly, Officers Longdyke and Miller respectfully request that the Court dismiss Plaintiffs' First Cause of Action against them.

II. FACTUAL ALLEGATIONS RELEVANT TO THE CLAIMS AGAINST OFFICERS LONGDYKE AND MILLER

The allegations relevant to Plaintiffs' equal protection claim against Officers Longdyke and Miller are as follows:

- On April 2, 2008, MVPD, Board, and Code Enforcement officers conducted combined business license and health inspections at six Moreno Valley barber shops. First Amended Complaint ("Complaint" or "FAC") ¶¶ 3, 4, 23.
- "Five of the six barbershops Defendants selected as targets for the[se] raid-style inspections on April 2, 2008, were owned, operated, and primarily frequented by African Americans." *Id.* ¶ 4; *see also id.* ¶ 23.
- The "stark disparity" in the number of African American (as opposed to non-African American) barber shops inspected on April 2, 2008, as well as the "unusually aggressive conduct" of MVPD officers during the inspections, "indicate that Defendants' decision to target [Plaintiffs'] businesses in the manner they did was based, in

part or in whole, on the race of the barbers and their clientele." FAC ¶ 4.

- Hair Shack and Fades Unlimited, the barber shops where Plaintiffs work, were among the five African American barber shops selected for inspection on April 2, 2008. *Id.* ¶¶ 23-25.
- During the April 2, 2008, inspection at Hair Shack, five MVPD, three Board, and "about two" Code Enforcement officers conducted "an extensive search[,] including areas where no barbering was performed, and questioned employees and customers." *Id.* ¶ 24.
- During the Fades Unlimited inspection on April 2, an unidentified number of MVPD, Board, and Code Enforcement "[o]fficers and inspectors conducted an extensive search of the shop." *Id.* ¶ 25.
- These inspections were "more extensive and intrusive than necessary to determine compliance with barbering or business regulations." *Id.* ¶ 24; *see also id.* ¶ 25.
- These inspections "produced no evidence of wrongdoing other than routine issues concerning maintenance and storage of barbering supplies and equipment." *Id.* ¶ 3.
- The April 2 inspections at the other three African American barber shops were "conducted in a similarly invasive and intrusive manner." *Id.* ¶ 29.
- Fades Unlimited was also inspected in late 2007 and sometime in early 2008. *Id.* ¶¶ 26-28. No Code Enforcement officers participated in the early 2008 inspection. *Id.* ¶ 27. The one Code Enforcement officer who participated in the late 2007 inspection "conducted a cursory visual inspection of the shop" and, along with MVPD officers, "opened cabinets, drawers and containers belonging to some of the barbers." *Id.* ¶ 28.

- Code Enforcement Officers Tony Heisterberg,[1] Longdyke, and Miller participated in the April 2, 2008, inspections at Hair Shack and Fades Unlimited "and/or" the early 2007 inspection at Fades Unlimited. FAC ¶ 33.
- "[S]upervisors at Code Enforcement, MVPD (or the Sheriff's Department) and/or the Board approved in advance the manner in which the raids would be conducted, which businesses would be selected for raid, or the manner in which businesses would be selected for raids." *Id.* ¶ 35.

III. PLAINTIFFS FAIL TO STATE AN EQUAL PROTECTION CLAIM AGAINST OFFICERS LONGDYKE AND MILLER

To state a claim under 42 U.S.C. § 1983, Plaintiffs must allege that a person acting under color of state law deprived them of a right secured by the United State Constitution and laws. *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40, 49-50 (1988). Here, Plaintiffs have failed to plead a deprivation of their Fourteenth Amendment equal protection rights.

A. Plaintiffs' Claim Should Be Dismissed If Their Well-Pleaded Facts, Taken As True, Do Not Show a Plausible Claim for Relief

A cause of action may be dismissed as a matter of law for (i) lack of a cognizable legal theory; or (ii) insufficient facts under a cognizable legal theory. Fed. R. Civ. P. 12(b)(6); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). "On a motion to dismiss for failure to state a claim, the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

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[1] Heisterberg has not yet been served with Plaintiffs' Complaint or a summons.

In its recent decision, *Ashcroft v. Iqbal*, the United State Supreme Court clearly established the degree of factual specificity required by Federal Rule of Civil Procedure ("FRCP") 8 and, therefore, necessary to survive a motion to dismiss under FRCP 12(b)(6). Iqbal, a Pakistani Muslim, charged various federal officials and corrections officers with violating his constitutional rights in connection with his detention and treatment while confined in a maximum security facility, pending trial for identification fraud, in the months immediately following the September 11 attacks. *Iqbal*, 129 S. Ct. at 1943-1944. Two of those officials, former U.S. Attorney General John Ashcroft and former FBI Director Robert Mueller, moved under FRCP 12(b)(6) to dismiss Iqbal's First and Fifth Amendment discrimination claims against them. *Id.* at 1944. The district court denied that motion, and the Second Circuit affirmed. *Id.*

In reversing, the Supreme Court laid out two principles governing evaluation of the sufficiency of the pleadings for purposes of a motion to dismiss under FRCP 12(b)(6). First, "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. In short, the pleading must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1965, 167 L. Ed. 2d 929 (2007)). A claim is plausible, as opposed to merely possible, if its factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556). A complaint alleging facts that are "'merely consistent with' a defendant's liability, [however,] 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). The Court incorporated these principles into the following two-pronged approach:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 1950.

The *Iqbal* decision illustrates this two-pronged approach. First, the Court rejected Iqbal's formulaic recitations of the elements of a constitutional discrimination claim, including (i) that Ashcroft and Mueller "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'"; (ii) that Ashcroft was "the 'principal architect' of this invidious policy"; and (iii) that Mueller "was 'instrumental' in adopting and executing it." *Id.* at 1951 (internal citations omitted).

Next, the Court examined Iqbal's factual allegations to determine if they plausibly suggested entitlement to relief. *Id.* The relevant allegations for Iqbal's claims were: (i) that the FBI, under Mueller's direction, "arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11"; and (ii) that Ashcroft and Mueller approved a policy of holding these detainees in highly restrictive conditions of confinement until the FBI determined they were not linked to the September 11 attacks or other terrorist activity. *Id.* Though Iqbal did not challenge his arrest, the Court concluded that, in any case, it could not plausibly infer purposeful, invidious discrimination based on the arrest because of an "obvious alternative explanation," i.e., given the mastermind and perpetrators of the September 11 attacks were Arab, "a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims." *Id.* at 1951 (internal quotation marks omitted). As for Iqbal's actual claims based on his detention and subsequent treatment in the maximum security facility, the Court held that the relevant factual allegations plausibly suggested

only that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 1954. Accordingly, the Court concluded that Iqbal failed to plead sufficient facts to state a claim against Ashcroft and Mueller. *Id.* at 1954.

Iqbal thus requires that, to survive a motion to dismiss under FRCP 12(b)(6), the pleadings must state facts, not mere recitations of the elements of a claim, that are at the very least susceptible to an inference of liability. *Iqbal* also makes it clear that, when a complaint describes conduct that may reasonably be interpreted as either lawful or unlawful, the plaintiff should not be permitted to go on a fishing expedition for evidence that might support his or her claim. Instead, that claim should be dismissed.

This is especially so where, as in *Iqbal*, government official defendants are entitled to assert qualified immunity, because failure to enforce FRCP 8's pleading requirements would effectively undermine qualified immunity's purpose of "free[ing] public officials from the concerns of litigation, including avoidance of disruptive discovery." *Id.* at 1953 (internal quotation marks omitted).

B. Plaintiffs Fail To State an Equal Protection Claim

The gravamen of Plaintiffs' equal protection claim against Officers Longdyke and Miller is that they selectively enforced Moreno Valley's business license inspection ordinance against Plaintiffs because of their race. *See, e.g.*, FAC ¶¶ 1, 6, 38.

But exercising some selectivity in enforcement is not in itself a federal constitutional violation. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995). To state an equal protection claim for impermissible selective enforcement, Plaintiffs allegations must, if taken as true, show (i) a discriminatory effect, i.e., that Officers Longdyke and Miller did not take, or took different, action against others similarly situated; and (ii) a discriminatory purpose, i.e., that

the Officers undertook the alleged selective enforcement because of the Plaintiffs' race. *Id.* at 1187; *see also Rosenbaum v. City and County of S.F.*, 484 F.3d 1142, 1153 (9th Cir. 2007) (citing *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547, 556 (1985)).

1. Plaintiffs' Allegations Do Not Show a Discriminatory Effect.

Plaintiffs repeatedly contend they were targeted for business license inspections because they and their clientele are African-American. *See, e.g.*, FAC ¶¶ 1 (alleging that inspections at Hair Shack and Fades Unlimited were "racially targeted"); ¶ 6 ("The above raids by the MVPD trampled Plaintiffs' right to Equal Protection under the Fourteenth Amendment to the United States Constitution, ... providing that the government cannot target individuals or businesses for investigation on the basis of race."); ¶ 38 ("Defendants' actions deprived Plaintiffs of their right to equal protection under the law by selecting Plaintiffs' businesses for search and inspection on the basis of Plaintiffs' race and the race of the owners, employees and clientele at Plaintiffs' businesses."). But under the first prong of *Iqbal*'s two-pronged approach, such naked assertions of racial targeting are not entitled to the assumption of truth and cannot, in themselves, sustain a claim for relief. *Iqbal*, 129 S.Ct. at 1951.

Under the second prong of the *Iqbal* analysis, Plaintiffs' factual allegations do not plausibly give rise to an equal protection claim because they are focused on too narrow a period of time, are "merely consistent with" liability, and do not describe disparate treatment.

a. The Complaint's focus on the events of a single day is too narrow to establish selective enforcement.

To state a selective enforcement claim based on an impermissible classification by race, a plaintiff must allege facts showing a general practice of discriminatory enforcement not confined to a single incident.

In *United States v. Bourgeois*, 964 F.2d 935, 936-37 (9th Cir. 1992), an African American man was arrested as part of a two-day, multi-district sweep of suspected gang members and later convicted of a firearms violation. *Id.* at 936-37. Before trial, Bourgeois sought to raise a selective enforcement defense, but the district court denied his request for discovery. *Id.* at 937. On appeal from the conviction, Bourgeois contended he was entitled to discovery based on the fact that, of the more than 100 persons arrested during the two-day sweep in his area, only ten of those arrested were prosecuted for firearms violations and all ten were African American. *Id.* at 936, 940. He argued that "[c]ommon sense, demographic evidence and statistical probability strongly suggest[ed] . . . that the government could as readily have identified and prosecuted non-blacks for firearms violations." *Id.* at 940. But the Ninth Circuit rejected Bourgeois's arguments, holding that his two-day focus was too narrow to raise a colorable claim that others similarly situated had not been prosecuted because there was "no showing that the government does not generally prosecute felons of all races who possess firearms." *Id.* at 940.

Plaintiffs' selective enforcement claim is, if anything, even more narrowly focused than the one at issue in *Bourgeois*. It is based exclusively on six inspections conducted on a single day. FAC ¶¶ 4, 23.[2] But, as in *Bourgeois*, the inspections conducted on one day in April 2008 do not, and cannot, in themselves

[2] Plaintiffs do not allege that Code Enforcement officers took part in the early 2008 inspection at Fades Unlimited. As for the late 2007 inspection of Fades Unlimited, the Complaint makes no allegations as to whether any other business license inspections were conducted on the same day. Because Plaintiffs allege no "control group" for the late 2007 inspection of Fades Unlimited, they necessarily fail to plead a discriminatory effect with regard to that inspection.

reasonably suggest that the officers who authorized and participated in those inspections chose the inspections sites because of race. To make such a showing, Plaintiffs would have to allege additional facts from which the Court could reasonably infer that a classification had, in fact, been made, e.g., (i) that the defendants conducted business license inspections infrequently, suggesting that the pattern on April 2 reflected a one-time decision that can be evaluated in isolation; or (ii) that inspections over a longer period of time reflect the same perceived pattern of April 2. However, the Complaint contains neither of these allegations—nor any others—that could allow the Court reasonably to infer that Officers Longdyke or Miller inspected Hair Shack and Fades Unlimited on April 2, but avoided inspecting other barber shops, because of the owners' or clientele's race. *See Iqbal*, 129 S. Ct. at 1949.

b. Because the actions Plaintiffs allege are consistent with lawful conduct, they do not plausibly establish an actionable discriminatory effect.

Plaintiffs allege that the barber shops inspected on April 2 "were used by members of the African American community as social centers." FAC ¶ 3; *see also id.* ¶ 21. They further allege that Hair Shack "allowed customers to play cards and dominoes in a back room not used for barbering." *Id.* ¶ 22. Finally, Plaintiffs contend that MVPD, Board, "and/or" Code Enforcement supervisors were responsible for selecting the barber shops to be inspected on April 2. *Id.* ¶ 35. These allegations reasonably suggest that Plaintiffs' barber shops were selected for inspection, *not* by Officers Longdyke and Miller because their patrons were African-American, but instead by MVPD or Board supervisors because the shops' use as social gathering spots—including the use of back rooms for card and domino playing—violated California's Barbering and Cosmetology Act.[3] *See,*

[3] It is worth noting that Plaintiffs own allegations underscore the lawful purpose of the inspections. For example, the Complaint admits that the April 2

e.g., Cal. Bus. & Prof. Code § 7350 (making it a misdemeanor "to permit any room or part thereof" in a barber shop "to be used for residential purposes or for any other purpose that would tend to make the room unsanitary, unhealthy, or unsafe, or endanger the health and safety of the consuming public"). This non-racial selection criterion could, given the circumstances alleged in the Complaint, produce a disparate, though incidental, impact on African-Americans on this particular occasion.

But the Supreme Court has held that such a claim is, at best, "merely consistent with" liability and, thus, "stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 557) (internal quotation marks omitted). Consequently, it cannot survive a motion to dismiss. *Id.*

c. Plaintiffs' Complaint lacks allegations even suggesting Officers Longdyke and Miller took different action against other, non-African American barbers.

The Complaint does not allege that Officers Longdyke or Miller participated in the business license inspection at the one non-African American barber shop on April 2. *See, e.g.*, FAC ¶¶ 4, 23, 33. In addition, Plaintiffs do not allege that the Officers on any other occasion conducted business license inspections of African American barber shops differently from non-African American barber shops or businesses. Indeed, the Complaint lacks any factual allegations about the Officers' "usual" conduct during business license inspections, which are necessary to show that the Officers' conduct during the Hair Shack and Fades Unlimited

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inspections at Hair Shack and Fades Unlimited found violations related to "routine issues concerning maintenance and storage of barbering supplies and equipment." FAC ¶ 3. Nor do Plaintiffs allege that it was irrational or unfounded for Moreno Valley Code Enforcement Officers to conduct business license inspections of their barber shops.

inspections on April 2 was, as Plaintiffs contend, "unusually aggressive." FAC ¶ 4.

2. Plaintiffs' Allegations Do Not Show Discriminatory Intent

To state a claim under § 1983 against a government official in his or her individual capacity, a claimant's pleadings must show that the official, "through [his or her] own individual actions, has violated the Constitution." *Iqbal*, 129 S. Ct. at 1948. To show discriminatory purpose, a plaintiff must establish that a decision-maker "undert[ook] a course of action because of, not merely in spite of, [the action's] adverse effects upon an identifiable group." *Iqbal*, 129 S. Ct. at 1948 (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60 L. Ed. 2d 870, 887 (1979)) (internal quotation marks omitted).

But Plaintiffs' Complaint does not allege facts sufficient to allow the Court plausibly to infer that either Officer Longdyke or Officer Miller was in any way involved in selecting Hair Shack or Fades Unlimited for inspection on April 2. To the contrary, Plaintiffs' own allegations show that neither Officer Longdyke nor Officer Miller made, or even had authority to make, the decision to inspect Hair Shack, Fades Unlimited, or any other barber shop on April 2. According to the Complaint, that decision was "initiated and undertaken at the request of MVPD officers," FAC ¶ 3, and ultimately made by the Officers' supervisors:

> Upon information and belief, based on the open and deliberate manner in which the raids were carried out, the need for multi-agency coordination, and the unusual nature of the raids, it can be inferred that supervisors at Code Enforcement, MVPD (or the Sheriff's Department) and/or the Board approved in advance the manner in which the raids would be conducted, *which businesses would be selected for raid, or the manner in which businesses would be selected for raids*. These supervisors number among the Doe Defendants. FAC ¶ 35 (emphasis added).

Furthermore, the Complaint is devoid of other factual allegations that would permit the Court to draw the inference that, when conducting business license inspections at Plaintiffs' barber shops, Officers Longdyke and Miller acted upon a

discriminatory animus. *See Rosenbaum*, 484 F.3d at 1152-53. For example, Plaintiffs do not claim that either Officer uttered a racial slur or made derogatory remarks about the barbers' or clientele's race. Nor do they claim that either Officer has on any other occasion engaged in conduct that could be interpreted as racist.

Because Plaintiffs specifically claim that Code Enforcement, MVPD, and Board supervisors made the decision to inspect Plaintiffs' barber shops, and because the Complaint otherwise lacks allegations that might show Officers Longdyke and Miller acted with a discriminatory intent, Plaintiffs fail to plead facts necessary to state a claim for an equal protection violation against those Officers. *Freeman*, 68 F.3d at 1188; *Rosenbaum*, 484 F.3d at 1153.

IV. PLAINTIFFS' FIRST CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE OFFICERS LONGDYKE AND MILLER ARE ENTITLED TO QUALIFIED IMMUNITY

As local law enforcement and administrative officials sued personally for money damages, Officers Longduke and Miller may assert a qualified immunity defense. *See Anderson v. Creighton*, 483 U.S. 635, 638-39, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523, 530 (1987).

Qualified immunity is "an immunity from suit rather than a mere defense to liability [and thus] is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411, 425 (1985). For this reason, the Supreme Court has ruled that resolution of the qualified immunity defense should be made at the earliest possible stage in litigation. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589, 595 (1991). Indeed, the Supreme Court has specifically directed that, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Behrens v. Pelletier*, 516 U.S. 299, 306, 116 S. Ct.

834, 839, 133 L. Ed. 2d 773, 784 (1996) (internal quotation marks and citations omitted).

Officers Longdyke and Miller are entitled to qualified immunity if either: (i) the facts alleged in Plaintiffs' Complaint fail to make out a violation of a constitutional right; *or* (ii) that right allegedly violated was not "clearly established" at the time of the Officers' alleged misconduct. *Pearson v. Callahan*, 129 S. Ct 808, 816-818, 172 L. Ed. 2d 565, 576 (2009). The Court may begin its qualified immunity analysis with either of these determinations. *Id.* at 818.

As discussed above, *see supra* pp. 4-12, the allegations in Plaintiffs' Complaint do not make out an equal protection violation. Even if they did, it was not "clearly established" in April 2008 that the conduct alleged in Plaintiffs' Complaint constituted an equal protection. While it may have been apparent at that time that local governments may not selectively enforce the law against certain citizens because of their race, it certainly was not clear that law enforcement actions conducted on a single day which disproportionately affect persons of a particular class could, in and of themselves, constitute an equal protection violation. *See Bourgeois*, 964 F.2d at 940. Officers Longdyke and Miller are therefore entitled to qualified immunity from Plaintiffs' First Cause of Action.

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V. CONCLUSION

For the reasons discussed above, Plaintiffs' fail to state an equal protection claim against Officers Longdyke and Miller. Also, those Officers are entitled to qualified immunity from Plaintiffs' equal protection claim. Accordingly, Officers Longdyke and Miller respectfully request that this Court dismiss Plaintiffs' First Cause of Action against them. Fed. R. Civ. P. 12(b)(6).

DATED: July 6, 2009

LA FOLLETTE, JOHNSON, DEHAAS, FESLER & AMES

OFFICE OF THE CITY ATTORNEY, CITY OF MORENO VALLEY

GREINES, MARTIN, STEIN & RICHLAND LLP

By: _____
Michael Anthony Brown
Attorneys for Defendants
DENNIS LONGDYKE and
LORI MILLER

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On July 6, 2009, I served the foregoing document described as: **MOTION OF DEFENDANTS DENNIS LONGDYKE AND LORI MILLER TO DISMISS FIRST AMENDED COMPLAINT UNDER FRCP 12(b)(6)** on the parties in this action by serving:

(SEE ATTACHED SERVICE LIST)

(X) By Envelope - by placing () the original **(X)** a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

() **By Facsimile Transmission:** On _____ at ___ _.m., I caused the above-named document to be transmitted by facsimile transmission telephonically to the offices of the addressee(s) at the facsimile number(s) so indicated above, The transmission was reported as complete and without error. A copy of the transmission report properly issued by the transmitting facsimile machine is attached hereto.

Executed on **July 6, 2009**, at Los Angeles, California.

( ) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(X) (Federal) I declare that I am employed by the office of a member of the bar of this court at whose direction the service was made.

Leslie Juarez

Re:Gordon, et.al. v. City of Moreno Valley, et. al.
United States District Court Case No.: ED CV 09-00688 SGL (Ssx)

SERVICE LIST

Peter Bibring
Mark Rosenbaum
Peter J. Eliasberg
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
Attorneys for Plaintiffs Kevon Gordon, Ronald Jones, Raymond Barnes, Quincy Brown

Stacy Shartin
Rishi Puri
Seyfarth Shaw LLP
2029 Century Park East Suite 3300
Los Angeles, CA 9006/-3063
Attorneys for Plaintiffs Kevon Gordon, Ronald Jones, Raymond Barnes, Quincy Brown

John M. Porter
Lewis, Brisbois, Bisgaard & Smith
650 East HospitalityLane, Suite 600
San Bernardino, CA 92408
Attorneys for Defendants Stan Sniff, Rick Hall

Christopher Lockwood
Arias & Lockwood
225 West Hospitality Lane, Suite 314
San Bernardino, CA 92408
Attorneys for Defendants Stan Sniff, Rick Hall, Arlene Bauby, Eric Brewer, County of Riverside, Robert Duckett, Seth Harnett, Mario Herrera, Anthony Johnson, Richard Hutson, Christopher Gastinger

Michael A. Bell
La Follette, Johnson, Dehaas, Fesler & Ames
A Professional Corporation
2280 Market Street, Suite 140
Riverside, California 92501
Attorneys for Defendant City of Moreno Valley

Robert D. Herrick
City Attorney, City of Moreno Valley
Robert L. Hansen
Assistant City Attorney, City of Moreno Valley
14177 Frederick Street
Moreno Valley, CA 92552
Attorneys for Defendant City of Moreno Valley

Diane De Kervor
Deputy Attorney General
San Diego Licensing Section
CAAG - Office of the Attorney General
110 West A Street Suite 1100
P O Box 85266
San Diego, CA 92186-5266
Attorneys for Defendant Kristy Underwood