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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.

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Reardon, J.

I concur:

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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.

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RIVERA, J.

Trial Court:	San Francisco County Superior Court
Trial Judge:	Hon. James L. Warren
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