

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DEBRA FOLI, an individual; DANNY
BROWN, an individual; CAROLINE
ASLANIAN, an individual; RABYN
BLAKE, an individual,

Plaintiffs,

vs.

THE METROPOLITAN WATER
DISTRICT OF SOUTHERN CALIFORNIA,
a municipal corporation; JEFFREY
KIGHTLINGER, an individual,

Defendants.

CASE NO. 11CV1765 JLS (BLM)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT**

(ECF No. 15)

Presently before the Court is Defendants Metropolitan Water District ("MWD") and Jeffrey Kightlinger's ("Kightlinger," and collectively, "Defendants") Motion to Dismiss Plaintiff's First Amended Complaint. (MTD, ECF No. 15). Also before the Court are Plaintiffs' opposition, (Resp. in Opp'n, ECF No. 18), and Defendants' reply, (Reply in Supp., ECF No. 19). The hearing set for the motion on July 5, 2012 was vacated, and the matter taken under submission on the papers pursuant to Civil Local Rule 7.1.d.1. Having considered the parties' arguments and the law, the Court **GRANTS** Defendants' motion. Plaintiffs' claims under 42 U.S.C. § 1983 and § 1981 are **DISMISSED WITH PREJUDICE**. Pursuant to 28 U.S.C. § 1367(c), the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims. Accordingly, those claims

1 are **DISMISSED WITHOUT PREJUDICE**.

2 **BACKGROUND**

3 Plaintiffs, residents of San Diego, Ventura, and Los Angeles counties, bring this action for
 4 declaratory and injunctive relief against MWD and its General Manager, Kightlinger, seeking to
 5 end MWD's policy of "systematically add[ing] an unapproved drug, hydrofluosilicic acid
 6 [(“HFSA”)], to the water, and then caus[ing] the water to be delivered to water consumers like the
 7 Plaintiffs.” (First Amended Complaint (“FAC”), ¶ 17, ECF No. 14). MWD allegedly adds HFSA
 8 to the water supply “for the express purpose of administering [HFSA] to the Plaintiffs and other
 9 members of the general public receiving their water supply from MWD with the intention of
 10 altering their physical structure and body functions to prevent and to treat disease,” (*id.*), despite
 11 the fact that HFSA is not approved by the U.S. Food and Drug Administration (“FDA”) for such
 12 use (*id.* at ¶ 26).

13 The Court dismissed Plaintiffs’ original complaint on April 10, 2012 with leave to amend
 14 and Plaintiffs filed the operative FAC on April 24, 2012. (FAC, ECF No. 14). Plaintiffs have re-
 15 styled this suit as an action under 42 U.S.C. § 1983 for violations of the U.S. Constitution’s Fifth,
 16 Ninth, and Fourteenth Amendments; the federal Food, Drug, and Cosmetic Act (“FDCA”);
 17 provisions of the California Constitution; and provisions of California Health & Safety Code
 18 § 109875, *et seq.*, (“the Sherman Food, Drug, and Cosmetic Law,” or “Sherman Law”). Plaintiffs
 19 also allege discrimination under 42 U.S.C. § 1981 and unlawful, unfair, and deceptive business
 20 practices under California Business & Professions Code § 17200, *et seq.* (“Unfair Competition
 21 Law,” or “UCL”).

22 **LEGAL STANDARD**

23 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that
 24 the complaint “fail[s] to state a claim upon which relief can be granted,” generally referred to as a
 25 motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and
 26 sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain
 27 statement of the claim showing that the pleader is entitled to relief.” Although Rule 8 “does not
 28 require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned, the-

1 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937,
 2 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a
 3 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than
 4 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
 5 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a
 6 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*,
 7 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 557).

8 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 9 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*,
 10 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts
 11 pled “allow[] the court to draw the reasonable inference that the defendant is liable for the
 12 misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must
 13 be probable, but there must be “more than a sheer possibility that a defendant has acted
 14 unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability” fall short of a plausible
 15 entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept
 16 as true “legal conclusions” contained in the complaint. *Id.* This review requires context-specific
 17 analysis involving the Court’s “judicial experience and common sense.” *Id.* at 1950 (citation
 18 omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the mere
 19 possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is
 20 entitled to relief.’” *Id.* Moreover, “[f]or a complaint to be dismissed because the allegations give
 21 rise to an affirmative defense[,] the defense clearly must appear on the face of the pleading.”
 22 *McCalden v. Ca. Library Ass’n*, 955 F.2d 1214, 1219 (9th Cir. 1990) (internal quotation marks
 23 omitted).

24 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless the court
 25 determines that the allegation of other facts consistent with the challenged pleading could not
 26 possibly cure the deficiency.’” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.
 27 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.
 28 1986)). In other words, where leave to amend would be futile, the Court may deny leave to

1 amend. *See Desoto*, 957 F.2d at 658; *Schreiber*, 806 F.2d at 1401.

2 ANALYSIS

3 1. 42 U.S.C. § 1983

4 A. State Law Violations

5 Plaintiffs allege that MWD's policy violates Article 1, §§ 1 and 7 of the California
6 Constitution, as well as California's Sherman Law. (FAC, ¶ 51, ECF No. 14). Plaintiffs may not
7 base their § 1983 claim on these alleged violations, however, because § 1983 provides relief only
8 for violations of the federal Constitution and laws. *See Gabbert v. Conn*, 131 F.3d 793, 804 (9th
9 Cir. 1997), *rev'd on other grounds*, *Conn v. Gabbert*, 526 U.S. 286 (1999).

10 B. Federal Statutory Violations

11 Plaintiffs also allege that MWD's policy violates the FDCA and they seek to base their
12 § 1983 claim on this ground. (FAC, ¶ 51, ECF No. 14). As the Court determined in its Order
13 dismissing Plaintiffs' original complaint, Plaintiffs may not bring a § 1983 action to enforce the
14 provisions of the FDCA. (Order, ECF No. 13). The Ninth Circuit has held that the FDCA does
15 not provide for a private right of action, *see PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir.
16 2010) ("[T]he FDCA forbids private rights of action under that statute"), and Plaintiffs may not
17 use § 1983 to circumvent the FDCA's limitation on who may sue to enforce the statute.

18 C. Federal Constitutional Violations

19 Plaintiffs allege that MWD's policy violates the due process and equal protection clauses
20 of the U.S. Constitution's Fifth and Fourteenth Amendments, as well as unspecified rights under
21 the Ninth Amendment. (FAC, ¶¶ 51–54, ECF No. 14). Despite the FAC's allegations of forced
22 medication, (*id.* at ¶¶ 51–55), Plaintiffs apparently do not contend that MWD's policy infringes a
23 fundamental right or liberty interest or that the policy must be subjected to heightened scrutiny.
24 (Resp. in Opp'n, 2 n.2, ECF No. 18). Rather, as Plaintiffs explain in their opposition, their
25 argument is that MWD's use of an unapproved drug to fluoridate the public water supply violates
26 the FDCA and the Sherman Law and so is "evidence of . . . unlawful or arbitrary conduct." (*Id.*)
27 Consequently, Plaintiffs argue that MWD's policy fails even rational basis review and thus
28 violates their substantive due process rights. (*Id.* at 2). According to Plaintiffs, MWD's

1 fluoridation policy “must at least comply with the law” to survive even the least exacting form of
2 constitutional scrutiny. (*Id.*)

3 Although Plaintiffs allegations are characterized as constitutional due process and equal
4 protection arguments, they are in fact impermissible attempts to use § 1983 to enforce the
5 provisions of the FDCA and California’s Sherman Law. *See Mattoon v. City of Pittsfield*, 980
6 F.2d 1, 6 (1st Cir. 1992). Indeed, plaintiffs’ only support for the theory that MWD’s policy fails to
7 meet the low bar of rational basis review is that the policy fails to comply with those statutes. Yet
8 Plaintiffs may not use § 1983 to enforce the requirements of the FDCA simply by disguising
9 statutory rights as constitutional entitlements. *See id.* (holding that “[c]omprehensive federal
10 statutory schemes . . . preclude rights of action under section 1983 for alleged deprivations of
11 constitutional rights in the field occupied by the federal statutory scheme.”).

12 Similarly, Plaintiffs may not base their § 1983 claim on an alleged substantive due process
13 violation resting exclusively on a violation of the Sherman Law. Allegations of state law
14 violations, without more, do not necessarily rise to the level of a federal constitutional violation
15 that can be addressed under § 1983. *See Gabbert*, 131 F.3d at 804.

16 Moreover, Plaintiffs’ constitutional claims under § 1983 are foreclosed by the
17 comprehensive remedial scheme of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et*
18 *seq.* Although the SDWA does not explicitly bar private rights of action, as the FDCA does, the
19 statute “establishes an elaborate enforcement scheme which confers rights of action on both the
20 government and private citizens” and is “closely analogous to other enforcement schemes found
21 sufficiently comprehensive to evince a clear congressional intent to preempt relief under § 1983 . .
22 . .” *See Mattoon*, 980 F.2d at 6.

23 As in *Mattoon v. City of Pittsfield*, Plaintiffs attempt to base their § 1983 claim on an
24 alleged constitutional right that falls within the field occupied by the SDWA’s comprehensive
25 statutory scheme. *See id.* Although Plaintiffs deny that they are attempting to enforce the
26 SDWA’s provisions, (Resp. in Opp’n, 4–5, ECF No. 18), Plaintiffs’ main constitutional complaint
27 is that MWD fluoridates the water supply with a substance, HFSA, that has not been approved by
28 the FDA as safe and effective for that purpose. (FAC, ¶¶ 29, 32, ECF No. 14). Thus, the

1 constitutional right that Plaintiffs allege here is analogous to the “‘constitutional right’ to safe
2 drinking water” that was precluded in *Mattoon*. See *Mattoon*, 980 F.2d at 6.

3 Finally, Plaintiffs’ constitutional arguments also fail because MWD’s policy of using
4 HFSA to fluoridate the public water supply clearly survives rational basis review. To establish a
5 violation of substantive due process, Plaintiffs are required to show that MWD’s policy is “clearly
6 arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or
7 general welfare.” *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) (internal
8 quotations omitted). Because Plaintiffs do not argue that MWD’s policy “impinge[s] on
9 fundamental rights or employ[s] suspect classifications,” the policy is presumed valid, and this
10 presumption is “overcome only by a clear showing of arbitrariness and irrationality.” *Id.* (internal
11 quotations omitted).

12 MWD’s choice of HFSA as a fluoridation agent is not irrational or arbitrary because it is a
13 reasonable means of advancing the legitimate governmental objective of protecting dental health
14 through the fluoridation of drinking water. See *Coshow v. City of Escondido*, 34 Cal.Rptr.3d 19,
15 33 (Cal. Ct. App. 2005). Under the comprehensive regulatory scheme of the SDWA, “the type and
16 amount of any chemical” used for fluoridation must be approved by the California Department of
17 Public Health (“DPH”) and must meet “exacting standards and specifications.” *Id.* Here, MWD’s
18 fluoridation plan has been licensed by DPH and is consistent with the requirements of the federal
19 and state SDWA. (See Request for Judicial Notice, Exhibit A., ECF No. 16). Plaintiffs’
20 disagreement with MWD’s choice of HFSA as a fluoridation agent “does not render that choice
21 constitutionally defective.” See *Coshow*, 34 Cal.Rptr.3d at 33.

22 **2. 42 U.S.C. § 1981**

23 Although Plaintiffs conceded the 42 U.S.C. § 1981 claim in their original complaint, they
24 include it again in their FAC. (FAC, ¶¶ 56–58, ECF No. 14). Insofar as Plaintiffs’ § 1981 claim is
25 based on the same allegations of federal constitutional and statutory violations as their § 1983
26 claim, it must also fail.

27 **3. State Law Claims**

28 Plaintiffs’ FAC also includes claims for declaratory relief pursuant to California Code of

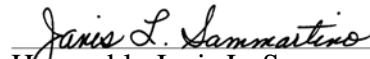
1 Civil Procedure § 1060, for relief from unlawful, unfair, and deceptive business practices under
2 California Business & Professions Code § 17200, *et seq.*, California's Unfair Competition Law,
3 and for a writ of mandamus pursuant to California Code of Civil Procedure § 1085. Although the
4 Court ruled on Plaintiffs' state law claims in its prior order dismissing the original complaint,
5 Plaintiffs' FAC includes new allegations of violations of California's Sherman Law that require a
6 more thorough engagement with provisions of state law. (*See, e.g.*, FAC, ¶ 64, ECF No. 14). For
7 this reason, the Court exercises its discretion under 28 U.S.C. § 1367(c) to decline supplemental
8 jurisdiction over Plaintiffs' state law claims.

9 CONCLUSION

10 For the reasons stated above, Defendants' motion to dismiss Plaintiffs' complaint is
11 **GRANTED**. Plaintiffs' federal claims under 42 U.S.C. § 1983 and § 1981 are **DISMISSED**
12 **WITH PREJUDICE**. Pursuant to 28 U.S.C. § 1367(c), the Court declines to exercise
13 supplemental jurisdiction over Plaintiffs' state law claims. Accordingly, those claims are
14 **DISMISSED WITHOUT PREJUDICE**. This order concludes the litigation in this matter. The
15 clerk shall close the file.

16 **IT IS SO ORDERED.**

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18 DATED: January 25, 2013

19 
20 Honorable Janis L. Sammartino
21 United States District Judge
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