BRADLEY S. PHILLIPS (State Bar No. 085263)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

ADELE M. EL-KHOURI (Admitted *pro hac vice*)
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW, 7th Floor
Washington, D.C. 20004
Telephone: (202) 220-1100
Facsimile: (202) 220-2300

Attorneys for Defendants
BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY; LESLIE WONG; MARY ANN BEGLEY; LUOLUO HONG; LAWRENCE BIRELLO; REGINALD PARSON; OSVALDO DEL VALLE; KENNETH MONTEIRO; BRIAN STUART; AND MARK JARAMILLA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACOB MANDEL, et al.

Plaintiffs,

vs.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, SAN FRANCISCO STATE UNIVERSITY, et al.,

Defendants.

CASE NO. 3:17-cv-03511-WHO

NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT OF DEFENDANTS BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY; LESLIE WONG; MARY ANN BEGLEY; LUOLUO HONG; LAWRENCE BIRELLO; REGINALD PARSON; OSVALDO DEL VALLE; KENNETH MONTEIRO; BRIAN STUART; AND MARK JARAMILLA

Judge: Hon. William Orrick III
Dept: Courtroom 2, 17th Floor
Date: July 18, 2018
Time: 2:00 p.m.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

CONSTITUTIONAL PROVISIONS

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on July 18, 2018 at 2:00 p.m., before the Honorable Williams Orrick III in Courtroom 2 on the 17th Floor of the above-entitled Court, Defendants Board of Trustees of the California State University ("the University" or "SFSU"),[1] Leslie Wong, Mary Ann Begley, Luoluo Hong, Lawrence Birello, Reginald Parson, Osvaldo Del Valle, Kenneth Monteiro, Brian Stuart, and Mark Jaramilla (collectively, "Defendants") will and hereby do move pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss all claims brought against them in Plaintiffs' Second Amended Complaint ("SAC"), filed March 29, 2018. This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Court's Order Granting Motions to Dismiss dated March 9, 2018, all pleadings and papers on file, and such other matters as may be presented to this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court dismissed Plaintiffs' First Amended Complaint ("FAC"), holding that "[t]he FAC is at once far too long, repetitive and full of barely relevant material, and yet so conclusory regarding the causes of action asserted that it does not state a plausible claim for relief against any defendant at this juncture." Dkt. 124 at 2. Plaintiffs' Second Amended Complaint ("SAC") cures none of the defects identified by the Court.

Indeed, Plaintiffs have made very few material changes from the dismissed FAC. They have eliminated many, although not all, of the FAC's irrelevant allegations concerning alleged historical anti-Semitism at SFSU. They have broken their claims about the Mayor Barkat event into two parts, one about the alleged "removal" of the event to a different campus location and another about the alleged "shut down" of the event. Plaintiffs have added a Title VI claim on behalf of what they characterize as the "Israeli Plaintiffs." And they have added a few conclusory allegations in a transparent effort to "paper over" the defects identified by the Court. Plaintiffs have not, however, added any factual allegations that would change the Court's prior conclusion

[1] Plaintiffs purport to name as a defendant "San Francisco State University," but that is not a legal entity separate from the Board of Trustees of California State University.

that they have failed to state any plausible claim for relief. The SAC should now be dismissed without leave to amend.

II. ARGUMENT

A. Plaintiffs' First Amendment Claims (1, 3, and 5) Should Be Dismissed

With respect to Plaintiffs' First Amendment claim concerning the Barkat event, this Court wrote:

> The key factual allegations regarding the right of association claim are that the Administration Defendants violated the Student and Community Plaintiffs' rights of association by consigning the Barkat event to a space far from the center of campus, charging Hillel a fee for that space, and then failing to enforce the SFSU Student Code of Conduct policies—namely no disruption of events and no use of amplified sound—and instructing the police to "stand down" and not remove the protestors. *This does not add up to a cognizable claim*.

Dkt. 124 at 17. The two First Amendment claims in the SAC concerning the Barkat event (Claims 1 and 3) are based on these same factual allegations. The only even arguable difference is that Plaintiffs now allege, in wholly conclusory fashion, that the Barkat event was moved pursuant to "an unwritten, unannounced, never-before-enforced and entirely discretionary, standardless policy of moving 'controversial speakers' away from CCSC and to a remote and poorly-known location." SAC ¶ 60. Plaintiffs allege no *facts* that suggest the existence of such a policy—other than the fact that the Barkat event itself was moved. If that were sufficient to allege a "policy," *every* claim against a state official based on a single incident could be supported by the existence of a purported "policy." In fact, however, the arithmetic does not change due to this conclusory allegation; Plaintiffs' factual allegations still do not add up to cognizable First Amendment claims.

The Court dismissed Plaintiffs' First Amendment claims concerning the "Know Your Rights" Fair ("KYR Fair") because "[t]here are no facts alleged to support the assertion that the Administration Defendants *played any role* in the denial of Hillel's ability to participate in the KYR Fair" and because "[i]nvidious discrimination requires evidence of specific intent by each defendant, not just knowledge about someone else's actions," which Plaintiffs had failed to allege. Dkt. 124 at 20, 22 (emphasis in original). Again, there are no new factual allegations

supporting Claim 5 of the SAC that could justify changing these conclusions. Plaintiffs' addition of the conclusory assertion that "Defendants Begley and Monteiro consciously and intentionally knew of and permitted Hillel's exclusion," SAC ¶ 119, is insufficient to show either that they played a role in the decision or that they acted with specific intent of their own to discriminate against Plaintiffs based on their religion or national origin.

B. Plaintiffs' Equal Protection Claims (2, 4, and 6) Should Be Dismissed

With respect to Plaintiffs' equal protection claims concerning the Barkat event, the Court identified two fundamental defects:

> First, Student and Community Plaintiffs fail to allege any facts showing that in materially similar circumstances—*i.e.*, events where speakers would likely draw protests and scheduled when classes are ongoing—other groups who are not identified as Jewish (by race, ethnicity, or religion) were offered more centrally located or fee-free rooms. Second, plaintiffs fail to allege any facts that in materially similar circumstances—an open event where protestors had access, protestors started to disrupt the event, and protestors used prohibited amplification—the Administration Defendants present at the event acted differently.

Dkt. 124 at 24. The facts alleged in the SAC remain the same. Plaintiffs' only purported effort to address the defects identified by the Court are two conclusory allegations, made "[o]n information and belief," that "no other events were banished to for-fee locales on the outskirts of campus based on concerns about controversial speakers drawing protest activity" and that "'stand down' orders were not promulgated to the UPD for events where other viewpoints were expressed." SAC ¶¶ 154, 171. But, tellingly, Plaintiffs do *not* allege that there *were* any other specific events that were materially similar to the Barkat event and as to which Defendants acted differently. That omission is fatal to their equal protection claims 2 and 4.

The Court dismissed Plaintiffs' equal protection claim concerning the KYR Fair because "[w]hile there are general allegations that certain Administration Defendants had responsibility for 'student events,' the more specific allegations admit that it was the student organizers who accidentally invited and then prevented Hillel from participating." Dkt. 124 at 25. The Court emphasized that there were no alleged facts showing either that any of the Defendants had the power to "require the students to admit Hillel or force the student organizers to cancel the Fair" or

that they "acted with the specific intent to deprive the Student Plaintiffs of their equal protection rights because of their Jewish identity." Dkt. 124 at 25-26. This remains true of Plaintiffs' claim 6. Plaintiffs do now allege, in wholly conclusory fashion, that certain Defendants had the "authority" to compel the inclusion of Hillel in the KYR Fair. SAC ¶¶ 122, 127. But there is no allegation that those Defendants decided not to exercise that alleged authority specifically for the purpose of discriminating against Plaintiffs based on their Jewish identity. And there is no allegation that, when other student groups organized materially similar events, the Administration Defendants prohibited those private groups from deciding which other campus organizations to invite. At most, Plaintiffs have alleged that Defendants allowed the KYR Fair organizers to decide who would be invited. That does not suffice for an equal protection claim.

C. Plaintiffs' Title VI Claims (7 and 8) Should Be Dismissed

This Court dismissed Plaintiffs' Title VI claim for several reasons. First, the Court held that their "Title VI claim based on direct discrimination suffers from the same defects described [concerning the other claims] because the constitutional claims have not been adequately alleged." Dkt. 124 at 28. That remains true of the SAC: for the same reasons that Plaintiffs have failed to allege equal protection violations, they have failed to allege direct discrimination in violation of Title VI.

Second, the Court held that Plaintiffs had failed to allege a "hostile environment." Dkt. 124 at 28-30. The Court found that "the only *current* allegations of peer-to-peer harassment that might support a hostile environment claim are [the Barkat event and the KYR Fair event]." Dkt. 124 at 28. But, as the Court held, "[t]hose two claims—standing alone—do not show that Jewish students at SFSU suffered such severe, pervasive, and objectively offensive discrimination to be actionable under Title VI, especially when … the alleged incidents of discrimination have not been shown to have emanated from affirmative acts by the Administration Defendants." Dkt. 124 at 28-29. The Court further rejected Plaintiffs' reliance on "other current events that in plaintiffs' view set a tone that SFSU tolerates, if not promotes, anti-Semitism," because "[t]here are no details with respect to time, frequency of occurrence, who was involved, and in some instances

whether the acts were aimed at Student Plaintiffs or otherwise known to Student Plaintiffs." Dkt. 124 at 29.

Third, the Court ruled that Plaintiffs had "fail[ed] to allege facts that plausibly show that SFSU made "an official decision not to remedy [any] violation" and that its responses [were] clearly unreasonable," and they had therefore failed to allege deliberate indifference. Dkt. 124 at 30-32. The Court emphasized both that Plaintiffs admitted "that SFSU *has* taken steps in response to both the Barkat and [KYR] Fair events" and that the University did not have the authority to prohibit or punish others' exercise of their First Amendment rights. *Id*. at 31. Indeed, the Court held that "the facts actually alleged appear to show the Entity Defendants' responses were objectively reasonable." Dkt. 124 at 32.

Finally, the Court held that Plaintiffs had "fail[ed] to allege facts showing they were denied educational benefits." *Id*. "[T]he frustration of the Student Plaintiffs' asserted rights to hear Mayor Barkat and right to represent Hillel at the KYR Fair do not, standing alone, equate to an actionable deprivation of educational opportunities." *Id*. Further, individual Plaintiffs had not pleaded sufficient details about their experiences "to plausibly show a concrete, negative effect on [their] education." *Id*. at 33.

None of Plaintiffs' additions to the SAC, singly or together, remedy these defects. Indeed, one addition further bolsters this Court's conclusion that Defendants were not deliberately indifferent to the alleged exclusion of Hillel from the KYR Fair. Plaintiffs now allege that the result of SFSU's internal investigation of the incident was the conclusion "that SFSU Hillel was improperly excluded from the Know Your Rights Fair based on assumed status as Zionists and in retaliation for their decision to invite Mayor Barkat to campus." SAC ¶ 135. This hardly constitutes deliberate indifference.

Plaintiffs now rely extensively on allegations about the "BDS movement" and a "policy of anti-normalization" at SFSU." *E.g.*, SAC ¶¶ 37-39, 120. But there are no factual allegations showing that any of the Administrator Defendants, as opposed to Professor Abdulhadi, subscribed to such a movement or policy. In any event, the SAC on its face shows that the "BDS movement" and "anti-normalization" are political viewpoints entitled to First Amendment

protection, which SFSU could not have suppressed regardless of its own viewpoint. *See* SAC ¶ 36 (describing the "BDS" movement as "call[ing] for the boycott, divestment, and sanctions against Israel, and for targeted economic discrimination against Israeli Jews, aiming to isolate, delegitimize and ultimately bankrupt the Jewish state and economically marginalize Jewish people"; and describing the movement's "anti-normalization" mandate as "require[ing] that activists disrupt, isolate, and silence all opposing viewpoints, even moderate opinions such as those acknowledging Israel's actual existence, right to existence, or advocating for a peaceful two-state solution to the Arab/Israeli conflict"). While these viewpoints may be extreme and offensive in the eyes of many, they are nonetheless fully protected by the First Amendment and may not be used as the basis for a Title VI claim. *See Felber v. Yudof*, 851 F. Supp. 2d 1182, 1188 (N.D. Cal. 2011) (reasoning, in rejecting Title VI claim, that " a very substantial portion of the conduct to which plaintiffs object represents pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the First Amendment").

Plaintiffs have also added allegations concerning Plaintiff Ben-David's concerns about threatening social media postings in 2013 by Mohammad Hammad, the then-President of GUPS. SAC ¶¶ 44-49. Even assuming that any of Hammad's postings were sufficiently threatening to specific individuals to fall within the "true threat" exception to the usual First Amendment protection for political speech (they were not), the allegations do not support a Title VI claim. Plaintiffs affirmatively allege that Defendants were *not* deliberately indifferent to Ben-David's concerns: they allege that she was allowed to take her final exam in a separate room, away from Hammad, and that she was offered a psychological referral and a campus security escort. SAC ¶ ¶ 47, 48. While this may not be the response that Plaintiffs preferred, it does not support an inference that Defendants made "an official decision not to remedy the violation" or that their decision was "clearly unreasonable." Nor does Ben-David adequately allege any concrete, negative effect on her education; to the contrary, she alleges that she graduated from SFSU in three years. SAC ¶ 14.

Plaintiffs have added vague allegations about Mandel's and Volk's reactions to being "scowled" or "stared" at by members of GUPS. SAC ¶¶ 89, 90. Even assuming that "scowls" and "stares" were not protected by the First Amendment (they are), and that allegations about a Plaintiff's subjective interpretation of the import of other students' facial expressions could support a Title VI claim, Plaintiffs do not allege that they reported these "scowling" and "staring" incidents to Defendants in sufficient detail to allow Defendants to do anything about them; Plaintiffs do not, for example, allege that they told anyone at SFSU the identity of any allegedly "scowling" or "staring" GUPS member.

Plaintiffs have further added allegations concerning President Wong's alleged "refus[al] to affirm that Zionists were welcome at SFSU." SAC ¶¶ 111, 129. Plaintiffs' lengthy, single-spaced quotations from letters drafted by Jewish Studies professors and Jewish students, containing vague and general accusations against President Wong and SFSU, are immaterial. *Id.* ¶¶ 129, 130. But Plaintiffs do allege, correctly, that President Wong did precisely what the Jewish professors had asked that he do, which was to retract his comment about Zionists. *Id.* ¶¶ 129, 130. Moreover, Plaintiffs allege that, after Professor Abdulhadi posted a message on Facebook attacking President Wong for this retraction and his welcoming of Zionists to campus—which she characterized as a "racist, Islamophobic, and colonialist statement"—SFSU "asked that [her] post be removed to ensure there can be no implication that the views expressed are those of the University," and President Wong issued a statement that, "[w]hile [Abdulhadi] is entitled to voice her own opinion, it cannot be done in a way that implies university endorsement or association." *Id.* ¶ 130. While Plaintiffs allege that "the post remains on the AMED Facebook page" and that Abdulhadi remains a tenured professor at SFSU, they do not (and could not) allege that Defendants had the ability either to remove the post themselves or to strip Abdulhadi of her tenure based on the post, which was undoubtedly an expression of her viewpoint that is protected by the First Amendment. Yet again, while Plaintiffs might have wanted SFSU to do something different, its actions certainly did not constitute "deliberate indifference" for purposes of Title VI.

In sum, Plaintiffs' additions to the SAC do not change the fact that they have not plausibly alleged direct discrimination by Defendants, a pervasively hostile environment, deliberate indifference by Defendants, and concrete negative effects on their education. Their Title VI claim therefore still fails.

D. Plaintiffs' Claims for Declaratory and Injunctive Relief Should Be Dismissed

Plaintiffs have again requested relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq*, (Claim 9) and injunctive relief based on their § 1983 and Title IX claims. SAC ¶¶ 233-36, Request for Relief ¶¶ a, b. Plaintiffs are not entitled to these remedies, as their substantive claims fail as a matter of law for the reasons stated above.

Additionally, Plaintiffs Mandel and Ben-David lack standing to seek declaratory and injunctive relief. "It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000). Because Plaintiffs Mandel and Ben-David have graduated from SFSU, SAC ¶¶ 10, 14, they do not have standing to seek declaratory or injunctive relief with respect to the school's actions or policies. Moreover, Plaintiff Volk lacks standing to seek such relief because he is no longer a student at SFSU, SAC ¶ 11, and does not allege that he is even a member of the local Jewish community.

III. Conclusion

For the foregoing reasons, Defendants respectfully request that the Court dismiss all of Plaintiffs' claims without leave to amend.

DATED: April 27, 2018

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP
BRADLEY S. PHILLIPS
ADELE M. EL-KHOURI

By: /s/ *Bradley S. Phillips*
BRADLEY S. PHILLIPS

Attorneys for Defendants
BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY; LESLIE WONG; MARY ANN BEGLEY; LUOLUO HONG; LAWRENCE BIRELLO; REGINALD PARSON; OSVALDO DEL VALLE; KENNETH MONTEIRO; BRIAN STUART; and MARK JARAMILLA

38500628.1