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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PAMELA KINCAID, DOUG DEATHERAGE,)
CHARLENE CLAY, CYNTHIA GREENE,)
JOANNA GARCIA, AND RANDY)
JOHNSON, INDIVIDUALLY ON BEHALF)
OF THEMSELVES AND ALL OTHERS)
SIMILARLY SITUATED,)

Plaintiffs,

v.

CITY OF FRESNO, CALIFORNIA)
DEPARTMENT OF TRANSPORTATION,)
ALAN AUTRY, JERRY DYER, GREG)
GARNER, REYNAUD WALLACE, JOHN)
ROGERS, PHILLIP WEATHERS AND)
WILL KEMPTON, INDIVIDUALLY AND)
IN THEIR OFFICIAL CAPACITIES;)
DOES 1-100, INCLUSIVE,)

Defendants.

1:06-cv-1445 OWW
STATEMENT OF DECISION AND
FINDINGS RE: PLAINTIFFS'
APPLICATION FOR TEMPORARY
RESTRAINING ORDER

Plaintiffs' application for Temporary Restraining Order came on for hearing on shortened time on October 19, 2006, in Courtroom 3 of the above-captioned Court, the Honorable Oliver W. Wanger presiding. Plaintiffs were represented by Heller Ehrman LLP by Paul Alexander, Esq.; Lawyers' Committee for Civil Rights by Oren Sellstrom, Esq.; and ACLU Foundation of Northern California by Michael T. Risher, Esq.

1 Defendant City of Fresno was represented by Betts & Wright
2 by James B. Betts, Esq., and James C. Sanchez, Esq., City
3 Attorney for the City of Fresno. The matter was submitted on
4 Plaintiffs' Motion, supporting and opposing Points and
5 Authorities, accompanying Declarations under Penalty of Perjury
6 for both sides as well as the oral arguments of counsel. After
7 considering all submissions in support of and opposition to the
8 motion and the arguments of counsel, the Court enters the
9 following Statement of Decision.

10
11 BACKGROUND

12 Between 4,400 to 8,800 of the City of Fresno's approximately
13 440,000 residents are homeless. Plaintiffs' exhibit A, pp. 10-
14 11. Services for low income people in need of shelter are
15 extremely scarce. "[O]nly 1.4% of the homeless population [is]
16 sheltered . . . leaving more than 98% of the homeless population
17 unsheltered and receiving no services. *Id.* at 13. Individuals
18 without residences have set up temporary shelters in the
19 southwestern area of the City of Fresno on property they do not
20 own and do not maintain. The City asserts such temporary
21 shelters and congregations of individuals create a risk to the
22 public health and safety and generate significant complaints from
23 surrounding residents, business and property owners.

24 The City of Fresno's response to the numerous complaints has
25 been to provide "advance oral and sometimes written notice,"
26 ranging from one to five days, to the homeless in the area, that
27 the residents of the temporary shelters must move, and that any
28 unclaimed property will be discarded. The exact timing, form,

1 and adequacy of the notice given is a materially contested fact,
2 particularly as to personal property of the homeless persons that
3 will be discarded or destroyed.

4 When the City removes a temporary settlement, a bulldozer,
5 City garbage truck, or other heavy equipment are employed to pick
6 up most of the Plaintiffs' possessions and dump them in a garbage
7 truck where the property is immediately crushed by compaction.

8 There have been approximately six of these sweeps in which
9 residents of temporary shelters were required to move with their
10 property and all their property that has not been carried away by
11 the individual owners, is loaded into garbage trucks and
12 destroyed on the spot.

13 Further dispute exists to when and to what extent Plaintiffs
14 are permitted to retrieve their possessions or save them from
15 destruction before and during the sweeps. Plaintiffs claim that
16 efforts to save their possessions have resulted in arrest
17 threats. The Fresno Police who execute the sweeps have announced
18 to individuals present that once the heavy equipment and garbage
19 trucks arrive, no one, including the owners, may interfere with
20 the seizure and destruction of the property due to safety
21 concerns.

22 The following events form the basis for the complaint:

23 1. May 3, 2006. Defendants confiscated and destroyed the
24 property of homeless persons living on the west side of "E"
25 Street, Broadway Street, and H Street, Van Ness Street and Los
26 Angeles Street, and Santa Fe Street and Ventura Street in Fresno,
27 California.

28 2. May 25, 2006. Defendants confiscated and destroyed the

1 property of homeless persons living on the west side at "E"
2 Street in Fresno, California.

3 3. June 22, 2006. Defendants confiscated and destroyed
4 the possessions of the homeless on both sides of "E" Street and
5 Santa Clara Street in Fresno, California.

6 4. July 1, 2006. Defendants confiscated and destroyed the
7 property of homeless persons living on the west side of "E"
8 Street in Fresno, California.

9 5. August 26, 2006. Defendants confiscated and destroyed
10 the property of homeless persons living on both sides of "E"
11 Street in Fresno, California.

12 6. October 8, 2006. Fresno Police Officers came to an
13 area near "H" and San Benito Streets where several homeless
14 people were found. Some of these homeless people had shopping
15 carts that they claimed were their own property they used to move
16 personal property. Police dumped the possessions onto the
17 ground, confiscated all the shopping carts and removed them.

18 7. October 11, 2006. Fresno Police Officers confronted a
19 group of homeless people in the area of "H" and San Benito
20 Streets, ordered them to stand in lines for a period of time, and
21 gave the people a "formal warning" that the police intended to
22 return "very soon" (the police did not say when) to destroy
23 everything homeless people owned in the area.

24 The evidentiary submissions establish:

25 1. Defendants have conducted sweeps under color of law to
26 remove the temporary settlements and homeless persons from areas
27 in the southwestern area of the City of Fresno.

28 2. During the sweeps, Defendants confiscate and destroy

1 all personal property of the Plaintiffs and others as it is
2 found.

3 3. As a result of such destruction of property, Plaintiffs
4 and others have lost possessions that they own, including any
5 shelter, clothing, medication, identification documents and
6 important papers, radios, and other items of irreplaceable
7 personal value such as photographs of loved ones, a lock of
8 child's hair, and an urn containing the ashes of a close family
9 member.

10 4. The Notice and procedures utilized by the City of
11 Fresno and its Police Department have been inadequate to permit
12 Plaintiffs and others to recover and preserve their personal
13 property. No post-deprivation procedure was available to recover
14 such property.

15 5. Defendants have no apparent plan and make no effort to
16 retain or preserve any of the homeless persons' property found
17 during sweeps, which is immediately confiscated and destroyed.

18 6. During the sweeps and seizure and destruction of
19 personal property, Plaintiffs and others are not permitted to
20 retrieve personal possessions, once the heavy equipment has
21 arrived due to alleged safety concerns.

22 7. Plaintiffs are not cited for violation of any ordinance
23 or law of the City of Fresno or State of California in connection
24 with their presence or the destruction of their personal
25 property.

26 8. The sweeps are intended to "clean up" the area by
27 removing homeless persons and their personal property, in part to
28 respond to citizen and business complaints and to address reports

1 of and observed criminal activity.

2
3 II. PLAINTIFFS' CLAIMS

4 Plaintiffs claims include: violation of their rights under
5 the United States Constitution Fourth Amendment to be free from
6 unreasonable seizures and searches; the Fifth and Fourteenth
7 Amendments for deprivation and destruction of personal property
8 without due process of law without meaningful notice and the
9 opportunity to be heard at a meaningful time in a meaningful
10 manner; violation of the California Constitution Art. I, §§ 7 and
11 13, prohibiting unlawful searches and seizures of property and
12 deprivation and destruction without due processes of law;
13 violation of California Civil Code § 2080 et seq., protecting the
14 rights of owners of "found" property; and violation of California
15 Civil Code § 52.1 et seq., for alleged interference with rights
16 secured by the Constitution or laws of the United States or
17 rights secured by the Constitution and laws of the State of
18 California from infringement by threats, intimidation, or
19 coercion.

20
21 III. DEFENDANTS' DEFENSES

22 The Defendants assert that they do not have any policy or
23 practice in place or that has been implemented to seek out or
24 eliminate shelters of homeless individuals and cannot be liable
25 under *Monell* for abridgement of federal civil rights under color
26 of state law. When temporary shelters and homeless persons
27 trespass on the private property of others or provide the situs
28 for criminal activity, or lead to complaints from local

1 residents, citizens, business and property owners, the Fresno
2 Police Department responds to such calls for service.

3 The temporary shelters are sites of substance abuse,
4 prostitution, assault, and child endangerment. Public
5 accommodations for sewage and refuse at the sites are nonexistent
6 and the temporary shelter areas present a threat to public health
7 and safety.

8 The City alleges that it does not conduct unannounced sweeps
9 or raids of such sites. Rather, each and every enforcement
10 action is preceded by the organized distribution of oral and
11 written notice to the inhabitants of temporary shelters that a
12 clean-up of the area will be conducted and that all trash,
13 including unattended property found without the owner to claim
14 it, will be removed. These notices are given at least 24 hours
15 in advance and are both oral and written. Frequently, notices
16 are given three to five days in advance of the need to relocate
17 and move personal property.

18 The City claims it only refuses to honor requests to remove
19 personal effects from temporary shelter areas once heavy
20 equipment, which poses an unreasonable risk of harm, has moved
21 into a sweep area.

22 As to shopping carts which accumulate around the homeless
23 shelter areas, the City has adopted a shopping cart ordinance,
24 under which it collects branded shopping carts and turns them
25 over to a private contractor for return to private business or
26 sale. Plaintiffs maintain they and others at the site own
27 unbranded shopping carts.

28 Defendants object that the City has not been properly

1 served, however, Court-required notice of the hearing on
2 application for temporary restraining order was provided to
3 counsel for the City, in accordance with the Court's directions
4 and the City filed a substantial opposition, including a
5 Memorandum of Points and Authorities, numerous opposing
6 Declarations, and presented vigorous and informed oral argument
7 in opposition to the request for Temporary Injunctive Relief.
8

9 IV. THE LAW

10 Injunctive relief is an equitable remedy that considers the
11 likelihood of success on the merits and the nature of harm caused
12 by challenged conduct. *Clear Channel Outdoor, Inc. v. City of*
13 *Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). Under the
14 traditional test, a plaintiff must show the following for
15 injunctive relief:

- 16 1. A strong likelihood of success on the merits;
 - 17 2. The possibility of irreparable harm to the Plaintiff if
18 injunctive relief is not granted;
 - 19 3. A balance of hardships favoring the public; and
 - 20 4. Advancement of the public interest in certain cases.
- 21 *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir.
22 2005). In the alternative, a court may grant injunctive relief
23 if Plaintiff "demonstrates either a combination of probable
24 success on the merits and the possibility of irreparable injury
25 or that serious questions are raised and the balance of hardships
26 tips sharply in his favor." 408 F.3d 1120. The standard for
27 granting a temporary restraining order is the same as for
28 granting a preliminary injunction. *Stuhlberg Int'l Sales Co. v.*

1 *John D. Brush & Co.*, 240 F.3d 382, 389, n.7 (9th Cir. 2001).

2 A mandatory injunction, one that compels action, (rather
3 than a prohibitory injunction, which forbids action) goes beyond
4 simply maintaining the status quo and is disfavored. *LGS*
5 *Architects, Inc. v. Condordia Homes*, 434 F.3d 1150, 1158 (9th
6 Cir. 2006). The purpose of a temporary restraining order is to
7 maintain the relative positions of the parties until a trial on
8 the merits is held.

9 Due to the threat on October 10, 2006, of a new sweep, the
10 need for relief is urgent and immediate. Here, the Court will
11 not grant mandatory injunctive relief. It is the City, not the
12 Court, that must establish policy, allocate resources, enforce
13 the law and determine how to address the problem of its homeless
14 population. The Court has no legislative function and is only
15 authorized to protect the legal rights of the parties, not to
16 enforce or execute the laws, which must be left to the City and
17 its Police Department. Equity also abhors the Court's need for
18 supervision of an injunction, a further reason for injunctive
19 relief to be specific, prohibitory, and self-executing.

20
21 A. PROBABILITY OF SUCCESS ON THE MERITS

22 The Fourth Amendment to the United States Constitution
23 protects against unreasonable seizures and searches. *Menotti v.*
24 *City of Seattle*, 409 F.3d 1113, 1152 (9th Cir. 2005). A seizure
25 occurs when there is some meaningful interference with an
26 individual's possessory interests in property. *Soldal v. Cook*
27 *County, Ill.*, 506 U.S. 56, 63 (1992). A seizure becomes unlawful
28 when it is "more intrusive than necessary." *San Jose Charter of*

1 *the Hell's Angels Motorcycle Club v. City of San Jose*, 402 F.3d
2 962, 975 (9th Cir. 2005). An officer who comes across an
3 individual's property in a public area may seize it only if
4 Fourth Amendment standards are satisfied - for example, if the
5 items are evidence of a crime or contraband. *Soldal*, 506 U.S. at
6 68; *San Jose Chapter of the Hell's Angels*, 402 F.3d at 975
7 ("[t]he destruction of property by State officials poses as much
8 of a threat, if not more, to people's right to be 'secure . . .
9 in their effects' as does the physical taking of them").

10
11 B. SEIZURE OF THE PROPERTY OF THE HOMELESS

12 *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1556 (S.D.
13 Fla. 1992) cited with approval in *U.S. v. Gooch*, 6 F.3d 673, 677
14 (9th Cir. 1993), found Fourth Amendment and Due Process
15 violations where City of Miami employees routinely seized and
16 destroyed the possessions of the homeless in addressing its
17 "homeless problem," where such property included personal
18 identification, medicine, clothing, and a Bible, by use of front-
19 end loaders and dump trucks to destroy the property of the
20 homeless, and threatened with arrest those who attempted to
21 retrieve belongings. Although the City has an interest in
22 keeping areas sanitary, orderly, and law-abiding, such interests
23 did not outweigh or justify violations of fundamental
24 constitutional rights under the Fourth, Fifth and Fourteenth
25 Amendments to the United States Constitution. The Court observed
26 that the value of personal property of the homeless "is in the
27 eye of the beholder, as one man's junk is another man's
28 treasure." *Id.* at 1556. Injunctive relief was issued against

1 the City of Miami.

2 In *Justin v. City of Los Angeles*, CV012352 LGB AIJX, 2000 WL
3 1808426 (C.D. Cal. Dec. 5, 2000), the Plaintiffs who were
4 homeless individuals, charged the Los Angeles Police Department
5 and other City officials with unlawful searches and seizures,
6 including the destruction of the homeless persons' personal
7 property. In rejecting the City's argument that it had the right
8 to keep its streets safe and clean, the *Justin* court held:

9 Here, Defendants may be slowed in their efforts to keep
10 the City, and especially the downtown area, clean and
11 safe. This injunction may disturb their new initiative
12 to revitalize and uplift communities, to improve the
13 streets and sidewalks, and to diminish the crime rate.
14 Plaintiffs, however, risk a greater harm if the
15 injunction is not granted. The violation of their
16 First, Fourth, and Fourteenth Amendment rights. *Id.* at
17 *11.

18 In this case, the balance of hardships of the Plaintiffs'
19 interest in protecting against immediate, irrevocable destruction
20 of their personal property, some of which is so unique and of
21 such sentimental value as not to be replaceable by money, against
22 the City's need to destroy that property as part of its law
23 enforcement efforts, weighs heavily in favor of Plaintiffs. The
24 City can enforce the laws, remove the homeless from private
25 property or other areas where they unlawfully congregate, and
26 otherwise enforce public health and safety laws, including
27 criminal laws necessary to protect the public, if there is
28 probable cause to believe such laws are violated. The immediate
and permanent destruction of personal property without a method
to reclaim or to assert the owner's right, title and interest to
recover such personal property, in a pre- or post-seizure
hearing, without any showing that there is no feasible

1 alternative; and without probable cause for seizure and immediate
2 destruction of such property, violates the Fourth, Fifth and
3 Fourteenth Amendments to the United States Constitution in Art.
4 I, §§ 13 and 7(A) of the California Constitution.

5 The public interest is served in the interim by issuance of
6 injunctive relief to maintain the status quo, by requiring the
7 City to take custody of and maintain homeless persons' property
8 it seizes, pending a full evidentiary hearing in this matter. If
9 the City needs to conduct sweeps or take other law enforcement
10 action against homeless individuals in the interim period, the
11 City will suffer negligible hardship in having to store property
12 seized, as opposed to the irrevocable destruction of the
13 Constitutional rights and property of affected homeless
14 individuals.

15 Absent further evidentiary showing, the City has not
16 established that its seizures and destruction of the property
17 here complained of are lawful and not more intrusive than
18 necessary. *San Jose Chapter of the Hell's Angels Motorcycle*
19 *Club*, 402 F.3d at 975. Temporary injunctive relief will in no
20 way hinder the City's necessary law enforcement efforts in
21 addressing any violations of City ordinances, local, or State law
22 by the homeless. Even actual violations of ordinances, local, or
23 State laws, do not per se, justify the immediate wholesale
24 destruction of Plaintiffs' personal property, which is not
25 contraband.

26
27 C. DUE PROCESS VIOLATIONS

28 Before the government seizes an individuals' property, even

1 temporarily, it must provide notice and an opportunity to be
2 heard prior to the seizure, except in "extraordinary situations
3 where some valid governmental interest is at stake, that
4 justifies the postponing of the hearing until after the event."
5 *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53
6 (1993). Pre-seizure notice is not dependent upon the value of
7 the property. *Fuentes v. Shevin*, 407 U.S. 67, 84-87 (1972);
8 *Property v. District of Columbia*, 948 F.2d 1327, 1334 (D.C. Cir.
9 1991) (government must provide adequate notice to owners of
10 parked cars before it tows them as "junk").

11 The notice must be meaningful. Where personal property
12 destroyed includes the necessities of life, identification
13 documents, shelter, medicine and clothing, and personal effects
14 of unique and sentimental value, a means to provide an
15 opportunity to be heard either before or after the seizure of the
16 property is an irreducible right that is being violated. *Logan*
17 *v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); see also, *Wong*
18 *v. City & County of Honolulu*, 333 F.Supp.2d 942, 945 (D. Hawaii
19 2004); *Schneider v. County of San Diego*, 28 F.3d 89, 93 (9th Cir.
20 1994) (notice insufficient).

21 22 V. CONCLUSION

23 The peremptory destruction of all personal property of
24 homeless persons during law enforcement sweeps to remove homeless
25 persons' temporary shelters and homeless persons from areas in
26 the southwest City of Fresno in the manner proved, violates the
27 Fourth, Fifth and Fourteenth Amendments of the United States
28 Constitution, California Constitution, Article 1, Section 13

1 (unlawful searches and seizures), and California Constitution,
2 Article 1, Section 7(A) (due process).

3
4 A. RELIEF

5 Pending development of a full evidentiary record at a
6 hearing on motion for preliminary injunction, the City of Fresno,
7 and its Police Department, and all those acting for, under and/or
8 in concert with them or who have actual notice of this order, are
9 temporarily restrained and enjoined from immediately destroying
10 the property of homeless persons during protective sweeps,
11 activities to remove homeless persons from temporary shelter
12 sites, or other activities to seize the personal property of
13 homeless persons, without providing constitutionally adequate
14 notice and meaningful opportunity to be heard concerning the
15 seizure and destruction of such personal property.

16
17 B. DURATION OF ORDER

18 This Order shall remain in effect through November 7, 2006,
19 for good cause due to unavailability of counsel and need to
20 prepare for a hearing on November 7, 2006, or further order of
21 this Court. The Defendant City may, on two days notice, move for
22 the dissolution or modification of this Temporary Restraining
23 Order.

24
25 C. BOND

26 Because the Plaintiffs are indigent, their attorneys are
27 acting pro bono, and they are without financial or other
28 resources which would permit them to post a bond, the requirement

1 of a monetary undertaking is waived. *Jorgensen v. Cassidy*, 320
2 F.3d 906, 919 (9th Cir. 2003). There appears to be no realistic
3 likelihood of compensable harm to Defendants during the term of
4 this temporary restraining order.

5
6 D. HEARING ON PRELIMINARY INJUNCTION

7 A hearing on Plaintiffs' Application for a Preliminary
8 Injunction shall be held on November 7, 2006, at 9:00 a.m. in
9 Courtroom 3 of the above-captioned court.

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11 Dated: October 23, 2006 at 4:33 p.m.

12
13 /s/ OLIVER W. WANGER

14 United States District Judge
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