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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MIGUEL DELEON and ANNA RICHARDSON

Defendant.
_____/

No. CV162525
(Consolidated with CV162526)

RESPONSE TO PLAINTIFF'S TRIAL BRIEF

Next Court Date: TBD
Department: 3
Time: TBD

I. LEGAL ARGUMENT

The Plaintiff in this matter, citing from the California Civil Code §§ 3479 and 3480 as well as Santa Cruz Municipal Code § 4.01.101(16), argues that the conduct of Mr. Deleon and Ms. Richardson constitutes a public nuisance. In support of that argument, and without basis in fact, the Plaintiff argues that Mr. Deleon and Ms. Richardson's actions are; (1) injurious to health because of sanitation issues; (2) safety of others is impacted when the defendants sleep in doorways; (3) free use of property and comfortable enjoyment of life downtown is

interfered with when the defendant's "take over" parks and plaza's.

A. Factual Arguments

Simply put, the Plaintiff in this action seeks to exclude the undesirables from downtown Santa Cruz. The Plaintiff is trying to move this Court to exercise its powers of extraordinary relief against the Defendants for engaging in conduct that cannot be divorced from their status as homeless people. In addition, the averments by the Plaintiff are unsupported by the record. The Plaintiff makes general statements that do not have any specific connection to the Defendants in this case. Specifically, contending that homeless campsites might have sanitation issues, generally, does not mean that the times Mr. Deleon and Ms. Richardson were cited for camping necessarily any sanitation issues specific to them were involved. Point in fact, several of the citations issued to Mr. Deleon and Ms. Richardson were done at the one public bathrooms in downtown Santa Cruz, lending credence that sanitation is an issue that these two defendant's take seriously.

Further, the record does not support that Mr. DeLeon or Ms. Richardson are a concern to the "safety of others.". The only "confrontations" Ms. Richardson and Mr. Deleon have had with the community involves Protected First Amendment arguments with law enforcement officers and/or City employees regarding the legitimacy of the citations for violating the camping ordinance (SCMC 6.36.010(a)(1)) outside of the times and dates when it is supposed to be enforced. (See 6/29/09 citation at 1739 p.m.; 9/14/09 citation at 1140 a.m.; 11/4/09 citation at 0844 a.m.; ½6/10 citation at 1532 p.m.; 2/12/10 citation at 1401 p.m.; 1/9/10 citation at 1321 p.m.; ½6/10 citation at 1733 p.m.; 3/16/10 citation at 1054 a.m.; 3/9/10 citation at 0940 a.m.; 11/14/09 citation at 1200 p.m.; 11/4/09 citation at 0844 a.m.; 9/30/09 citation at 1211 p.m.; 6/4/09 citation at 1256 p.m.; 8/12/09 citation at 1215 p.m.; 6/29/09 citation at 1835 p.m.; 10/23/09 citation at 0847 a.m.) See Houston v. Hill (1987) 483 U.S. 1001; People v. Quiroga (1993) 16 Cal.App.4th 961. It is not difficult to see why Mr. Deleon and Ms. Richardson may have engaged in heated discourse (which has never escalated into violence) when local law enforcement continually cites them for behavior that is not illegal!

The final factual issue raised by the Plaintiff is that the defendant's "take over parks and plazas." As part of the discovery process here, the Plaintiff has turned over 64 pages of citations issued to the Defendants over the past several years. Not a single one of them indicates anywhere that there has been any "taking over" of parks or plazas. Rather, this is the type of activity generally engaged in by angry UC students as of late not homeless persons with no place to sleep.

B. A Permanent Injunction is Improper In This Case.

1. The Court Should Not Grant A Permanent Injunction Where the Plaintiff Has Failed to Allege that the Defendant's Conduct is Substantial and Unreasonable.

Supporting the factual leaps of faith required to come to these conclusions, the Plaintiff asks the Court to enter into another leap of faith, arguing that support for their position comes from the case of People ex re. Gallo v. Acuna (1997) 14 Cal.4th 1090 at 1120. The Plaintiff's reliance on Gallo illustrates an essential weakness in its argument: there is no case that supports the Plaintiff's basic proposition that a court can and should grant a permanent injunction on the facts presented here.

Before this Court is the question of whether a permanent injunction should issue. Injunctions under any form are "extraordinary relief that should be granted with great caution." Witkin 4th Ed § 355, p. 284-285. It is possible for extraordinary circumstances to warrant extraordinary measures–as in what occurred in Gallo cited by the Plaintiff.

Consider this factual recitation taken directly from Gallo as comparison to the issues and facts in this case:

> The 48 declarations submitted by the City in support of its plea for injunctive relief paint a graphic portrait of life in the community of Rocksprings. Rocksprings is an urban war zone. The four-square-block neighborhood, claimed as the turf of a gang variously known as Varrio Sureo Town, Varrio Sureo Treces (VST), or Varrio Sureo Locos (VSL), is an occupied territory. Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency--openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of

> gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti.
>
> The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden.
>
> Among other allegations, the City's complaint asserted that the named defendants and others "[f]or more than 12 months precedent to the date of [the] complaint, continuing up to the present time . . . [have] occupied [and] used the area commonly known as 'Rocksprings' . . . in such a manner so as to constitute a public nuisance . . . injurious to the health, indecent or offensive to the senses, [and] an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by those persons living in the . . . neighborhood."

Gallo v. Acuna 14 Cal.4th at 1101.

Consider the crimes evidence that the Gallo court was attempting to contain; murder, attempted murder, drive by shootings, arson, theft, vandalism and battery. The Gallo court noted that to even consider taking an action as extraordinary as a permanent injunction, the action sought to be enjoined must be both *(a) substantial and (b) unreasonable*. Id at 1105. The ongoing activity by the defendants must effect an entire community or neighborhood or a considerable number of persons. Id at 1104 citing from People ex rel. Busch v. Projection Room Theater (1976) 17 Cal.App.3d 42.

First and foremost, the actions of Ms. Richardson and Mr. Deleon are not substantial under any measure. To the contrary, the acts of the Defendants are *de minimus* and cannot be separated from their status as homeless people. The actions of cleaning ones hands, sleeping, laying ones belongings down are acts that homeless persons must engage in public because

they lack the means to obtain privacy in which to do them. More importantly, the Defendant's actions cannot be considered as even in the same category as those presented in Gallo.

The Plaintiff in this matter seeks to erroneously convince this Court that the Defendant's actions are substantial because Mr. Deleon and Ms. Richardson are scofflaws who have amassed over 60 citations over the past several years. A brief review of the citations given to the Defendants in this matter show that the vast majority of them are spurious affronts to both the conscience of the individuals involved and to the court.

In terms of true criminal matters, a review of Open Access shows Mr. Deleon and Ms. Richardson to be fairly low on the criminal totem pole in the county. Taken in tandem, Open Access shows convictions in 2008 (for disturbing the peace under Penal Code § 415) and two in 2007 -well over three years ago- for Health & Safety 11357–less than an ounce of marijuana and failure to stop at a stop sign. This is not "substantial" activity which would support the extraordinary measures being requested by the Plaintiff: a permanent, lifetime ban from downtown.

Illustrative of this was the Plaintiff's attempt to hold the Defendant's in contempt on March 19, 2010 before the Honorable Timothy Volkmann. On that date, the Plaintiff's attempted to have the court issue a contempt order based on the Defendant's actions under the preliminary injunction. The factual basis for that request were three camping ordinance violations alleged against the defendants. The Court found that none of them constituted a violation of the camping ordinance and refused to issue a contempt citation. The Plaintiffs had their day in court to prove their best of of these "over 60 violations" and were unable to do so. The record speaks for itself in terms of the "substantial" number and nature of the violations. Further, it cannot even begin to be equated to the number and nature of the Rocksprings events that lead the Santa Clara Court to issue its temporary injunction. Moreover, the existence of citations is not proof of the underlying action, since the offenses of which he has not been actually convicted he must be presumed to be innocent. *Stephens v. Secombe* (1930) 1032 Cal.App. 306, 311.

Furthermore, the Defendant's actions are not unreasonable per Gallo. As previously established in this matter, the City of Santa Cruz has not provided for a growing homeless population, despite being told by its own task force that it had to do so more than a decade ago. Instead, this glaring failure is the most unreasonable issue before this court. The reasonableness is best addressed in the necessity argument under (E.) below. Essentially, the Plaintiff seeks to categorize the Defendant's status/actions as unreasonable when it is the City that has failed to provide reasonable accommodations/resources for homeless persons per its own task force mandate.

Like Gallo, the Plaintiff erroneously relies on People v. McDonald (2006) 137 Cal.App.4th 521 in support of the proposition that actions do not necessarily have to be violent to be a public nuisance. No argument need be made to this statement since it's irrelevant (and simply quotes from Gallo anyway.) No one here is stating that public urination, for example, in a certain setting might be construed as a public nuisance. But the issue in this case is whether the Plaintiff can prove that: 1) these specific Defendant's committed a public nuisance; and 2) whether a permanent injunction should issue. McDonald is silent on that issue and does not touch the basic analysis for determination as laid out in Gallo.

2. The Court Cannot Abate Actions That Are Not Ongoing

In a series of cases, beginning with Gilbert v. Peck (1912) 162 Cal. 54 121 and including People v. Goddard (1920) 47 Cal.App. 730 and Stephens v. Seccombe (1930) 103 Cal.App. 306, the California Supreme Court laid down the basic legal principal that no injunction shall be issued to abate a nuisance that is no longer continuing. "[W]here a nuisance to abate which an action has been commenced has been abated or suppressed by the parties themselves charged with maintaining the nuisance or otherwise prior to the commencement of the action, the further prosecution of the action cannot be maintained, and the action should be dismissed...." People v. Goddard 47 Cal.App. At 740.

The only issue that the court granted a preliminary injunction was for the camping ban per SCMC 6.36.010. The City moved to hold the Defendants in contempt and was unable to

establish that the Defendants violated the camping ban despite the testimony from the citing officers. Excluding these citations, the Defendants have not been accused, much less convicted of violating the camping ban for over a year. Contrary to the Plaintiff's assertion that the Court, "is not required to accept a guilty party's statement that he or she no longer intends to commit transgressions," the Defendant's in the instant case have not spoken but rather, their actions have. Furthermore, if the Court were to follow the Plaintiff's assertions that the Defendant's "retain the means of continuing transgressions," then in order to not retain the means, the Defendant's would have to cease to exist. Therefore, there is no nuisances caused by the Defendant's to enjoin. Consequently the prosecution of this injunction must fail.

3. Plaintiff Cannot Establish that it is More Probable Than Not That a Normal Person in the Community Would Be Substantially Annoyed By These Particular Defendants' Behaviors Looking at the Whole Situation Impartially and Objectively Pursuant to Gallo (1997) 14 Cal.4th 1090, 1105.

In Gallo , the California Supreme Court ruled that in order for an injunction to be issued the petitioner must show,

> A significant harm, defined as a real and appreciable invasion of the Plaintiff's interests, one that is definitely offensive, seriously annoying or intolerable. ... The question is not whether the particular Plaintiff found the invasion unreasonable but whether persons generally, *looking at the whole situation*, *impartially and objectively*, would consider it unreasonable." Id.

This Court should also consider historically Plaintiff's unprecedented and extraordinary request that does not preserve the status quo but changes it to assesses more severe punishment for acts that are already sanctioned by the criminal laws.

> It is an extraordinary power, and is to be exercised always with great caution and in those cases only where it fairly appears "upon all the papers presented, before such injunction is granted, that the Plaintiff will suffer irreparable injury if it be not issued, or that it is necessary to preserve the estates of the parties, or some sufficient cause showing that need of hasty action exists." Joyce on Injunctions, § 109.

Further, as noted above, the majority of the offenses for which the defendants were cited occurred outside of the times allocated as violations under the Municipal Code. The camping ordinance covers the time period between 11:00 p.m. and 8:30 a.m. Only a very select few, and only the very oldest of the citations, noted by the Plaintiff, even fall within that category.

A cursory review of the citations provided by the Plaintiff shows only one violation which occurred during those time periods.

Defendants also assert that these declarations and expected testimony are merely accusations from plaintiffs employees and interested parties. No normal impartial person in Santa Cruz would think that getting one citation for having an open container or one citation for noise would warrant the court's use of its extraordinary equitable powers. Neither would an impartial person believe that the court should enjoin, over and above criminal sanctions, sleeping in public where shelter space is inaccessible and there is no evidence to show that the sleeping is occurring during business hours.

4. Per the March 30, 2009 Hearing, the Court in this Matter Has Held that the Standard for Issuing the Permanent Injunction is a Balancing Test Between Whether the Harm to the Defendant's Outweighs Any Alleged Harm to Plaintiff.

A. Plaintiff's Harm

The harm to the Plaintiff that it can actually prove to be caused by the Defendants is superficial at best and goes to the aesthetic of order and tidiness more than to the health and public safety.

B. Defendant's Harm

The Defendants in this case do not deny that due to the lack of resources available to them and due to their economic circumstances they are forced to live outside the strictures of the municipal codes raised by the Plaintiff such as sleeping outside, lying in public places or being in possession of large amounts of personal items.

If this injunction were granted Defendants could face jail for merely sleeping. Defendant would not be able to possess their personal items even though they are not allowed to use public city lockers to store their items. Defendants would also have to secret themselves in places that are not safe.

In other words, the Defendants would not practically be allowed to exist as homeless downtown without the threat of immediate incarceration. The punishment for their same act would go from a city ordinance infraction to a state misdemeanor, Penal Code § 166(a) without

an act from the legislature changing the punishment of the act.

Unless released on their own recognizance, any ordinance violation downtown would result in incarceration until the case was concluded. The sentence could be very severe. Moreover, a civil contempt could potentially result in indeterminate incarceration for acts necessary for survival.

C. Plaintiff's Will Not Be Able To Overcome Affirmative Defense Available to the Defendants

1. Necessity Defense

In Re Eichorn (1998) 69 Cal.App.4th 382, cited by Plaintiffs and Defendants, clearly establishes that under the circumstances, Defendants can make a necessity defense. In Eichorn, the court analyzed all these factors under the same circumstance as Defendants', namely the enforcement of a camping ban. The court held that, "Sleep is a psychological need, not an option for humans." Id. at 390.

2. Cruel and Unusual Punishment

Defendants assert that enforcement of the camping ban under the circumstances is a violation of the Eighth Amendment to the United States Constitution. See section 5b, Defendant's Harm.

D. Defendants Inability to Comply with the Ordinances in Question Provides a Complete Defense to the Citations at Issue.

The City requests the Court declare homeless persons, the Defendant's, acts of mere survival to be considered a public nuisance. The City offers no other viable option, particularly between March 15 and November 15. Over 90% of the citations issued in this case and relied on are for some violation of the camping ban. Most are issued improperly, when the Armory shelter is closed or full. More importantly, they are issued during times when the Camping Ordinance is not in effect. The Court has already expressed serious doubt in this matter over whether the Defendant's, due to their homelessness, could comply with the injunction.

E. <u>The City Cannot Request an Injunction with Unclean Hands.</u>

In Mendoza v. Ruezga (2008) 190 Cal.App.4th 270, 279, the Court held,

> The doctrine of unclean hands requires unconscionable, bad faith, or inequitable conduct by the plaintiff in connection with the matter in controversy. [Citations.] Unclean hands applies when it would be inequitable to provide the plaintiff any relief, and *provides a complete defense to both legal and equitable causes of action.*

For more than a decade, the City has been aware of an acute shortage of resources, particularly shelter space, available to homeless persons in Santa Cruz. A 2000 Report released by the Plaintiff's own Homeless Issues Task Force specifically addressed the issues now faced by the Court: "Driven by humanitarian and moral concerns, without waiting for the final report," the task force urged as priority number one that, "We recommend repeal of the camping ordinance since the City does not have adequate indoor shelter for all its residents." Moreover, to alleviate the problem, the City's Homeless Issues Task Force also recommended the establishment of a safe outdoor sleeping zone in city parks, a safe legal vehicular sleeping provision, extension of armory dates and other recommendations. The City failed to enact any of these recommendations over the unanimous support of the eight Homeless Issues Task force members. The situation has only gotten worse since that time because of the Plaintiffs' failure to act.

The City now comes before this Court and asks for a quick fix to a problem that it allowed to fester and worsen for over a decade. The Court should not grant a permanent injunction under such circumstances. Lastly, although the Plaintiff seeks to enjoin the Defendant's from performing basic human functions in downtown, the fact of the matter remains that the Municipal Code is enforceable throughout the city. Therefore, the notion that the Defendant's can sleep elsewhere in the city, just not in downtown, is accepting a violation of the Municipal Code nonetheless.

F. Conclusion

For the reasons submitted above the Defendants respectfully request this court to deny the request for a permanent injunction and dismiss this matter forthwith.

Dated: June 11th, 2010

Respectfully Submitted,

_____
Mark Briscoe
Attorney for Miguel Deleon

Jonathan Che Gettleman
Attorney for Anna Richards

PROOF OF SERVICE

I, Jonathan Che Gettleman, do hereby declare that I am of the age of 18, not a party to this action and my business address is 223 River Street, Suite D Santa Cruz, CA 95060. On the date shown below, I served the within **PLAINTIFF'S RESPONSE TO PLAINTIFF'S TRIAL BRIEF** to the following parties hereinafter named by hand delivery:

Susan Barisone
ATCHINSON, BARISONE, CONDOTTI & KOVACEVICH
333 Church Street
Santa Cruz, CA 95060

I declare under penalty of perjury of the laws of California the foregoing is true and correct. Executed this 14th day of June, 2010 at Santa Cruz, California.

Sincerely,

_____

JONATHAN CHE GETTLEMAN