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14 CITY OF SANTA CRUZ, MARTIN BERNAL, TONY ELLIOT, and ANDREW MILLS

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 SANTA CRUZ HOMELESS UNION, on
19 behalf of itself and those it represents;
20 SANTA CRUZ FOOD NOT BOMBS;
21 ALICIA AVALOS, HANNAH HEGEL,
22 CHRIS INGERSOLL and RANDOLPH
23 TOLLEY, on behalf of themselves and
24 similarly situated homeless persons,

25 Plaintiffs,

26 vs.

27 CITY OF SANTA CRUZ; MARTIN
28 BERNAL, individually and in his official
capacity as City Manager for the City of Santa
Cruz; TONY ELLIOT, individually and in his
capacity as Director of Parks & Recreation for
the City of Santa Cruz; ANDREW MILLS,
individually and in his capacity as Chief of
Police for the City of Santa Cruz,

Defendants.

Case No. 5:20-cv-09425-SVK

**DEFENDANTS' FURTHER ARGUMENT IN
OPPOSITION TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Honorable Magistrate Judge Susan van Keulen

1 Defendants City of Santa Cruz, Martin Bernal, Tony Elliot, and Andrew Mills (collectively,
2 “Defendants”) hereby submit further argument in opposition to the Plaintiff’s request for a preliminary
3 injunction.

4 **I. Likelihood of Success on the Merits**

5 When deciding whether a defendant in a danger creation case acted with deliberate
6 indifference, a court must decide the related issues of whether the danger to which the
7 defendant exposed plaintiff was known or obvious, and whether [defendant] acted with
8 deliberate indifference to it. . . . Deliberate indifference is a stringent standard of fault,
9 requiring proof of 1) an unusually serious risk of harm, 2) defendant's actual knowledge of
10 (or, at least, willful blindness to) that elevated risk, and 3) defendant's failure to take
obvious steps to address that known, serious risk. . . . In addition, a plaintiff pursuing a
danger creation claim must establish that the defendant is the proximate cause of his or her
injuries. This so-called "foreseeability analysis" is widely accepted as the conventional
analysis for determinations of proximate cause.

11 *Sanchez v. City of Fresno*, No. 1:12-CV-00428-LJO-SKO 2014 U.S. Dist. LEXIS 67863, *31-32 (citations
12 omitted).

13 Here, Plaintiffs have not submitted evidence of any of these required elements. Of course,
14 COVID-19 is a dangerous, infectious disease. But, Plaintiffs cannot prove “an unusually serious risk of
15 harm” because (a) Plaintiffs can protect themselves from this disease by wearing a mask, avoiding crowds,
16 and keeping a safe social distance, and (b) Plaintiffs have presented no evidence that they would be at a
17 higher risk for contracting COVID-19 when they leave San Lorenzo Park. Indeed, evidence submitted by
18 the City suggests the opposite – that Plaintiffs at San Lorenzo Park appear to face a higher risk of
19 contracting COVID-19 due to the lack of social distancing and mask wearing within the encampment. *See*
20 Grodberg Decl., at ¶ 4; Grodberg Decl. Exhibit A-1 and A-2; Elliot Decl., at ¶ 14.

21 Furthermore, the City has engaged in moving along encampments (always for health and safety
22 reasons, including clearing out wildland areas during the County’s recent fires) during the COVID-19
23 pandemic and has seen no elevated incidence of COVID-19 in the outdoor homeless population as a result
24 of these movements. If needed or desired, the City could provide additional declarations attesting to these
25 facts, but it is worth noting that Plaintiff has the burden of proof, and has presented no evidence that
26 movement of homeless persons has ever resulted in a greater incidence of COVID-19 among those that
27 have been moved. “Without competent evidence, Plaintiffs' environmental exposure claim fails for lack
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1 of proof.” *Sanchez v. City of Fresno*, No. 1:12-CV-00428-LJO-SKO, 2014 U.S. Dist. LEXIS 67863, at
2 *41-42 (E.D. Cal. May 16, 2014).

3 Today, the City presents more evidence (including photographs) that occupants of San Lorenzo
4 Park are not abiding by basic COVID-19 safety guidelines. These people are gathering in mask-less groups
5 at the park. *See* Elliot and Grodberg Declarations, dated Jan 12, 2021; *see also* Exhibits A1, A2, A6. This
6 evidence firmly undercuts Plaintiffs’ arguments that San Lorenzo Park is a place where the risk of COVID-
7 19 is low, and Plaintiffs need to be able to stay in that location to avoid contracting COVID-19.

8 Moreover, succeeding on a deliberate indifference case also requires the Plaintiff to prove that (2)
9 the City knew about, or was willfully blind to this unusually serious risk, and (3) the City failed to take
10 obvious steps to prevent that risk. These elements have not been made out by Plaintiffs. As discussed
11 above, there is no obvious risk that the City is being willfully blind to. Plaintiffs can wear a mask, avoid
12 crowds, and keep a safe distance to avoid COVID-19, and there is no data that has been presented to show
13 that moving homeless persons results in increased incidence COVID-19 amongst those people. Nor has
14 the City failed to take obvious steps to prevent certain risks. ***Instead, in light of grave concerns about***
15 ***health, safety, property, welfare, and the environment, the City is simply making the best decisions that***
16 ***it can, with limited resources.*** *See* Declarations of Bernal, Elliot, Mills, Hajduk, Butler. ***There is no***
17 ***obvious solution to the multiple crises that the City faces***, and thus, it cannot be said that the City failed
18 to take “obvious” steps in relation to the encampment at San Lorenzo Park. If there is an obvious solution
19 here, that also addresses the major health, safety, and nuisance concerns at San Lorenzo Park, we welcome
20 Plaintiffs or the Court to tell the City what that solution is, because the City wants nothing more than to
21 implement that solution.

22 As for Plaintiffs’ claim that moving from the San Lorenzo Park encampment puts them at an
23 increased risk of sexual assault or other bodily harm, the plaintiffs in *Sanchez* put forward nearly same
24 argument: “fear that the removal of their shelters left them more vulnerable to physical violence at the
25 hands of others.” *Sanchez v. City of Fresno*, No. 1:12-CV-00428-LJO-SKO, 2014 U.S. Dist. LEXIS
26 67863, at *32 (E.D. Cal. May 16, 2014). The *Sanchez* court acknowledged that it is “undisputed that the
27 Area was a dangerous place. One of the stated reasons for the cleanups was to address the ‘significant
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1 criminal activity in and around the homeless encampments, including violent crime.’ Plaintiffs [] believed
2 that some form of shelter provided them with additional protection against the threat of physical violence.”
3 *Id.* at 32-33. The court held that “Plaintiffs cannot maintain a Section 1983 danger creation claim based
4 upon their theory that they were ‘threatened with a substantially greater risk of assault and loss of life.’”
5 *Id.* at 33. “[T]he Court has exhaustively examined the body of precedent from within and without this
6 Circuit and has been unable to locate a single example of a court imposing danger creation liability based
7 upon anything other than actual, serious bodily injury. *Id.* at 33-34. (emphasis in original).

8 Additionally, as stated in *Sanchez*, “a plaintiff pursuing a danger creation claim must establish that
9 the defendant is the proximate cause”. As stated in the Defendants’ first brief, the City did not cause the
10 multiple crises that it now finds itself addressing: COVID-19, homelessness, drug addiction, untreated
11 mental illness, and a financial crisis. These are crises that have impacted the entire Country. The City
12 simply finds itself trying to make the right decisions to best protect human life, property, public welfare,
13 and the environment, in consideration of inadequate resources. Assuming *arguendo* that one or more
14 plaintiffs was injured in some way after he or she left San Lorenzo Park, there is no legal precedent to
15 suggest that the City would be the legal, proximate cause of that injury simply by temporarily closing its
16 public park.

17 **II. Irreparable Harm, Balancing of Equities, Public Interest**

18 The impacts of continuing to allow encampments to remain at San Lorenzo Park have already been
19 seen. The encampments appear to already be growing (*see* Grodberg Decl., at ¶ 2), and the City Manager
20 has a realistic fear that, if prompt action is not taken, then encampments will continue to grow, and we
21 will see conditions deteriorate even further to resemble what was observed in the City at Ross Camp in
22 2019. *See* Bernal Declaration.

23 Additionally, in just the last few days, chop shop activities have been observed, the park has been
24 vandalized, City equipment has been vandalized and stolen, a motorcycle was recently observed on a
25 pedestrian path, the ducks are swimming with trash, and City employees have been physically assaulted.
26 *See* Declarations of Grodberg and Elliot (dated 1/12/2021). The City can no longer tolerate these
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