Robert A. Naeve (State Bar No. 106095)
rnaeve@jonesday.com
Richard J. Grabowski (State Bar No. 125666)
rgrabowski@jonesday.com
John A. Vogt (State Bar No. 198677)
javogt@jonesday.com
JONES DAY
3161 Michelson Drive, Suite 800
Irvine, CA 92612.4408
Telephone: +1.949.851.3939

Yaakov M. Roth (*pro hac vice*)
yroth@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: +1.202.879.3939

ATTORNEYS FOR DEFENDANT
City of San Clemente

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HOUSING IS A HUMAN RIGHT ORANGE COUNTY, et al.,

Plaintiffs,

v.

THE COUNTY OF ORANGE, et al.,

Defendants.

Case No. 8:19-cv-00388-PA
Honorable Percy Anderson

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF SAN CLEMENTE'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

On August 12, 2019, this Court dismissed all of Plaintiffs' claims against the City of San Clemente, but with leave to amend. *See* Dkt. 98 ("MTD Order"). Four of the original six Plaintiffs have now filed a Second Amended Complaint. *See* Dkt. 99 ("SAC"). But the new pleading is almost entirely a copy-and-paste job from the old version, including irrelevant allegations, material supporting claims over which the Court has declined supplemental jurisdiction, and facts about other cities that are no longer Defendants in this action. There are almost no new factual allegations. And the little that *is* new does absolutely nothing to cure the fatal legal deficiencies that the Court identified in its prior order. The Court should again dismiss all of Plaintiffs' claims against San Clemente—this time, with prejudice.

First, Plaintiffs advance Eighth Amendment and Due Process claims based on the City's alleged practice of threatening homeless persons with citation or arrest for sleeping in public. Insofar as Plaintiffs seek damages, however, the Court has already held that mere *threats* of citation or arrest do not state a claim. And the new pleading alleges nothing more. Insofar as Plaintiffs seek prospective relief, they admit that the City has, since May 2019, designated a site where homeless individuals may lawfully camp. That regime fully complies with the Constitution.

Second, Plaintiff Darren James reasserts his constitutional Due Process claim based on the alleged seizure of his personal property on one occasion. Yet he still has not adequately pleaded grounds for municipal liability. Indeed, he adds only one new sentence—on "information and belief"—that simply recites the conclusion that the City acted "pursuant to its policies and protocols." SAC ¶ 95. That is not nearly enough to state a claim under the legal standards this Court articulated.

Third, the Second Amended Complaint adds a new Fourth Amendment claim by James, again focused on the alleged seizure of his property. This claims fails for the same reason as the Due Process claim. It should also be stricken as unauthorized, as this Court instructed Plaintiffs *not* to add any new legal claims or theories.

SUMMARY OF COMPLAINT

The remaining Plaintiffs are two individuals and two advocacy groups.

Duane Nichols alleges that he is "homeless in San Clemente." SAC ¶ 68. He "used to sleep in the parking lot at the train station," where he would allegedly often be "awakened by sirens as deputies arrived and threatened him with arrest if he did not leave." SAC ¶ 71. Currently, he "stays at the San Clemente campsite location ... because he does not want to be arrested," and travels across the street to a public park when he needs drinking water. SAC ¶ 72. The reference is to the city-owned lot that San Clemente designated in an urgency ordinance in May 2019 as "the sole public area in the City available for camping purposes." MTD Order at 15.

Darren James first alleges that is he is "homeless, living in San Clemente," but then he admits that he was "placed in housing by the Friendship Shelter" this summer and thus is "no longer camping in San Clemente." SAC ¶¶ 73, 75. Before receiving housing, he alleges that he was "threatened for sleeping in public." SAC ¶ 75. James also alleges that, in February 2019, his personal belongings "were taken from the location where he left them daily" during the course of a city "maintenance operation," and that he was informed by an unidentified person that "the City did not retain the property." SAC ¶ 74.

Housing Is a Human Right Orange County ("HHROC") purports to be a group of "entities and individuals working together to achieve supportive, affordable, and permanent housing" for homeless people in Orange County. SAC ¶ 64. "Because of the lack of adequate shelter" for these homeless persons, HHROC alleges that it "is required to shift and expend resources to providing immediate direct services," like providing food, clothing, and transportation. SAC ¶¶ 64-65.

Emergency Shelter Coalition of San Clemente ("ESC") alleges that it seeks "to establish a year-round emergency shelter and resource center in San Clemente," and also claims that it "provides assistance" to homeless individuals in "almost every city in South County." SAC ¶ 66.

The Amended Complaint asserts three counts. *First*, all Plaintiffs assert claims against San Clemente and Orange County under the Eighth Amendment and the Due Process Clause, premised on the allegation that Defendants threaten to cite or arrest homeless individuals for sleeping in public, despite inadequate shelters. SAC ¶¶ 86-90. *Second*, Plaintiff James asserts that San Clemente destroyed his property without due process. SAC ¶¶ 92-96. *Third*, James also asserts that the City's alleged seizure of his property violated the Fourth Amendment. SAC ¶¶ 98-100.[1]

LEGAL STANDARD

Under Federal Rule 12(b)(6), the Court should dismiss a claim if there is "either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 976 (C.D. Cal. 2013). In evaluating the sufficiency of the allegations, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and "labels and conclusions" are discounted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, a complaint can overcome a motion to dismiss only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level."); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1134, 1137 (C.D. Cal. 2010) (outlining *Iqbal* pleading standard); MTD Order at 11-12 (setting forth these standards).

Under Federal Rule 12(b)(1), the Court should dismiss a Plaintiff who lacks standing, because standing "pertain[s] to a federal court's subject-matter jurisdiction under Article III." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). To establish Article III standing, a plaintiff must show "an injury in fact" that is "fairly traceable

[1] Plaintiffs have abandoned their claims under the First Amendment and under the Americans with Disabilities Act, and all of their claims under California law, even those as to which this Court exercised supplemental jurisdiction. The dismissal of those claims should therefore now be with prejudice. *See* MTD Order at 22.

to the challenged conduct of the defendant" and "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To seek prospective relief, a plaintiff must demonstrate a "sufficiently imminent" threat of impending injury from the defendant. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). "The party asserting federal subject matter jurisdiction bears the burden of proving its existence." *Chandler v. State Farm Mut. Auto Ins. Co.*, 596 F. Supp. 2d 1314, 1322 (C.D. Cal. 2008). But this Court must "accept as true all material allegations in the complaint." *Id.*

ARGUMENT

I. PLAINTIFFS HAVE NOT CURED THE LEGAL DEFICIENCIES THAT DEFEAT THEIR CONSTITUTIONAL CLAIMS (FIRST CAUSE OF ACTION).

Plaintiffs' first cause of action appears to allege that the City has violated their constitutional rights by "threaten[ing] them with citation and arrest for sleeping and keeping their property in public places when there is inadequate shelter available." SAC ¶ 88. Plaintiffs assert that such "threats of citation for behavior such as sleeping in or keeping personal property on public space when there is inadequate shelter available violates the Eighth and Fourteenth Amendments." SAC ¶ 89.

A. To the extent that Plaintiffs seek money damages for past actions, the claims fail for the reason this Court has already recognized: "allegations of *threats* are insufficient to state a claim for damages." MTD Order at 16 (emphasis added); *see also Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (*per curiam*) (dismissing § 1983 damages claim because "a threat to do an act prohibited by the Constitution" is not "equivalent to doing the act itself"); *Corales v. Bennett*, 567 F.3d 554, 564 (9th Cir. 2009) (applying *Gaut*); *Butitta v. Garbajal*, 116 F.3d 1485 (9th Cir. 1997) (mem.) (dismissing where plaintiff alleged that officers had threatened warrantless arrest, but did not allege "actual deprivation of a protected right"); *Ramirez v. Holmes*, 921 F. Supp. 204, 210 (S.D.N.Y. 1996).

As before, neither Nichols nor James alleges that he was ever *actually* arrested, cited, or otherwise punished for sleeping in public. James does allege that the threats caused him emotional distress (*see* SAC ¶ 76), but a § 1983 claim lies only if there has been "deprivation" of the plaintiff's civil rights. 42 U.S.C. § 1983. That is what Plaintiffs still have not properly alleged. The Second Amended Complaint "fails to allege sufficient facts to support the individual plaintiffs' claims for damages," and those claims must accordingly be dismissed. MTD Order at 16.

B. To the extent that Plaintiffs seek prospective relief, such as an injunction or a declaratory judgment, only Nichols has standing to seek such relief.

James admits that he is no longer camping in San Clemente. SAC ¶ 75. He therefore cannot show any "sufficiently imminent" threat of impending injury from San Clemente's challenged practices. *Driehaus*, 134 S. Ct. at 2342.

As for the organizational plaintiffs, this Court previously recognized that they had not pleaded sufficient facts to confer Article III standing. *See* MTD Order at 21. An organization suing on its own behalf can establish an injury, sufficient for Article III purposes, only if it has suffered "both a diversion of its resources and a frustration of its mission" as a result of the defendant's challenged conduct. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). But ESC had not offered "well-pleaded allegations explaining how San Clemente's actions and omissions have caused a drain on [its] resources." MTD Order at 21. And, while HHROC alleged that the lack of adequate shelters was forcing it to spend money helping the homeless, it failed to allege any "causal connection" between that alleged diversion of resources and San Clemente's challenged actions. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The Second Amended Complaint does not cure these defects; indeed, it contains no new allegations that bear on HHROC's or ESC's standing. As before, the organizational plaintiffs must be dismissed "for lack of standing." *Id.*

C. That leaves Plaintiff Nichols, who alleges that he is homeless and lives in San Clemente. SAC ¶ 68. But his claim for prospective relief fails as a matter of law, because San Clemente's current ordinances *authorize* camping in public and are constitutional. Indeed, Nichols admits that he "stays at the San Clemente campsite location ... because he does not want to be arrested." SAC ¶ 72. That admission—that Nichols has a place to sleep and faces no threat of arrest—defeats his claim.

The critical precedent on this issue is the Ninth Circuit's recent decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). *Martin* involved a Boise ordinance that prohibited using the streets, sidewalks, parks, or other public places for sleeping "at any time." *Id.* at 603 (quoting Boise City Code § 9-10-02). The Ninth Circuit invalidated the ordinance, reasoning that the Eighth Amendment forbids the state to criminalize conduct that a person "is powerless to change." *Id.* at 616 (quoting *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting)). "[T]he Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006)).

Importantly, *Martin* did not hold that cities must "allow anyone who wishes to sit, lie, or sleep on the streets ... *at any time and at any place*." *Id.* at 617 (emphasis added) (quoting *Jones*, 444 F.3d at 1138). Rather, only enforcement of anti-camping laws "at all times and places" raises constitutional problems, because that categorical prohibition punishes the homeless for "involuntary," "unavoidable" behavior. *Jones*, 444 F.3d at 1138. "As long as the homeless plaintiffs do not have *a single place where they can lawfully be*, the challenged ordinances ... punish them for something for which they may not be convicted under the Eighth Amendment." *Martin*, 920 F.3d at 617 (emphasis added & alterations omitted) (quoting *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)). Accordingly, "an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible." *Id.* at 617 n.8.

As this Court has previously recounted, San Clemente enacted in May 2019 an "urgency ordinance" that calls for enforcement of the City's anti-camping ordinance, subject to the exception that a designated site will be "made available as the sole public area in the City available for camping purposes by those persons experiencing homelessness or otherwise unable to obtain shelter." MTD Order at 15 (quoting Dkt. 72-2, Ex. 3). "Through the urgency ordinance, the City designated an approximately 0.31 acre portion of vacant lot ... as a 'temporary campground' at which unhoused individuals could camp without risk of violating the anti-camping ordinance." *Id.*

Because homeless persons in San Clemente—including Nichols—now have a readily available place to lawfully camp and sleep on public property, there is no violation of anyone's Eighth Amendment rights. Under the current regime, camping on public land in San Clemente is not forbidden "at all times and places," *Jones*, 444 F.3d at 1138, or "in *all* public spaces," *Martin*, 920 F.3d at 589, and therefore does not leave homeless individuals without "a single place where they can lawfully be," *Pottinger*, 810 F. Supp. at 1565. To the contrary, the ordinance designates an area of property on which the homeless *may lawfully camp*, forbidding camping only "in particular locations." *Martin*, 920 F.3d at 617 n.8. There is thus no longer any threat of punishing "involuntary" or "unavoidable" conduct. *Id.* at 616.

One paragraph in the Second Amended Complaint makes allegations about the designated campsite. *See* SAC ¶ 72. It objects that the campsite lacks shade and that Nichols must travel to a park across the street to obtain drinking water. Even if that is true, it has nothing to do with *Martin* or the Eighth Amendment.[2]

[2] Nor does it state a claim under the Due Process Clause. SAC ¶ 88. As this Court explained, that clause "generally does not confer any affirmative right to governmental aid," with an exception if "the state affirmatively places the plaintiff in danger." MTD Order at 18 (quoting *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971-72 (9th Cir. 2011)). Just as the First Amended Complaint did not contain "sufficient well-pleaded allegations against San Clemente on Plaintiffs' state-created danger theory" (*id.*), neither does the Second Amended Complaint. It continues to be true that "the difficulties the homeless individuals camping at the temporary campground may face," like lack of shade and drinking water, "are largely identical to those they would face while camping elsewhere in the City." *Id.*; *see also Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 433 (N.D. Cal. 2017).

In short, nothing in the Eighth Amendment or *Martin* entitles the homeless to sleep *anywhere they want*; it merely requires that a lawful alternative be available. As the Second Amended Complaint confirms, San Clemente's ordinance provides that lawful alternative. Accordingly, there is no basis for prospective relief against San Clemente, and the first cause of action must be dismissed.

II. DARREN JAMES HAS NOT CURED THE LEGAL DEFICIENCY THAT DEFEATS HIS PROPERTY CLAIMS (SECOND AND THIRD CAUSES OF ACTION).

In the Second Amended Complaint's other causes of action, Plaintiff Darren James seeks damages for the alleged destruction of his personal property on one occasion in February 2019. James alleges that the seizure occurred at the hands of a City employee and occurred "with no notice." SAC ¶ 93. He alleges that this violated both his Due Process rights and his Fourth Amendment rights.

A. This Court previously recognized that a city "may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." MTD Order at 19 (quoting *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). "[A]n official policy or custom cannot be established by random acts or isolated events." *Id.* (citing *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443-44 (9th Cir. 1989)).

Applying that standard, this Court held that James' allegations did not state a claim. The First Amended Complaint did "not allege any well-pleaded facts that San Clemente maintains an unconstitutional policy or custom." MTD Order at 20. In fact, the Court took judicial notice of San Clemente's ordinance allowing the City to "impound property that is left unattended for more than 24 hours" and allowing the owner "to recover it thereafter." *Id.*; *see also* SCMC § 8.86.020. Thus, "at most, James alleges that, on a single occasion, San Clemente took his belongings"—and that fails to state a "viable" claim under *Monell*. MTD Order at 20.

In the Second Amended Complaint, James adds only a single sentence relative to this issue: "On information and belief, [San Clemente] and Does 1-4 executed this procedure pursuant to its policies and protocols regarding property left in public." SAC ¶ 95. That is not nearly enough to cure the legal deficiency. As explained, San Clemente's official "policies and protocols" allow impoundment only under certain conditions, and guarantee the owner's right to recover the property. So the alleged misconduct could not have been "pursuant to" those policies. If James is alleging, meanwhile, that San Clemente operates a secret, unwritten policy that contradicts its official one, he has alleged only the bare conclusion—not facts that make it plausible. *See Iqbal*, 556 U.S. at 679 (directing courts to disregard allegations that are "no more than conclusions"). Moreover, after *Iqbal*, a plaintiff may plead on "information and belief" only "where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017) (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)). Here, if San Clemente destroys property pursuant to an unwritten custom that is "of sufficient duration, frequency and consistency" as to have "become a traditional method of carrying out policy," *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996), that fact would not be peculiarly within the possession or control of the City. And James has not pleaded any facts to make his conclusory allegation plausible.

B. The same defect plagues the Second Amended Complaint's third cause of action, which likewise seeks money damages from the City based on the alleged seizure of James' property—this time, asserting a violation of his *Fourth* Amendment rights. *See* SAC ¶¶ 98-100. The *Monell* rule for municipal liability applies to all constitutional claims for damages, including those invoking the Fourth Amendment. *See, e.g.*, *Lowry v. City of San Diego*, 858 F.3d 1248, 1255 (9th Cir. 2017) (en banc). Again, because James has alleged only a single, isolated seizure of his property, he has not stated a viable claim against San Clemente.

In addition, this claim should be stricken because it was unauthorized. When this Court granted leave to amend, it specifically warned Plaintiffs not to "include any new or different defendants, claims, causes of action, or legal theories other than those specifically authorized in this Order." MTD Order at 22. The First Amended Complaint, however, included no Fourth Amendment claim based on the alleged seizure of James' property; that aspect of the pleading was limited to Due Process. *See* Dkt. 17, ¶¶ 140-145. Accordingly, and in the alternative, the Court should strike the third cause of action from the Second Amended Complaint.

CONCLUSION

For these reasons, the Court should dismiss—with prejudice—all of Plaintiffs' claims against the City of San Clemente.

Dated: September 27, 2019

JONES DAY

By: */s/ John A. Vogt*
John A. Vogt

Attorney for City of San Clemente