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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

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

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Having failed to add new factual allegations to address the legal deficiencies that caused this Court to dismiss the First Amended Complaint, Plaintiffs now resort to seeking reconsideration of the Court's legal rulings and pleading for yet another opportunity to articulate their claims. Both requests are improper. There is no basis to reconsider this Court's prior order, which correctly held that the organizational Plaintiffs lacked standing, that the individual Plaintiffs cannot seek damages for mere threats, and that Plaintiff James did not properly plead a municipal policy or custom. The new Complaint must be dismissed for the same reasons. And Plaintiffs offer no explanation for why they should be allowed a *fourth* bite at the apple after repeatedly failing to articulate any viable constitutional claims—and, indeed, after *abandoning* the very claim that they now seek to reassert. Any further amendment would also be futile. The Court should dismiss with prejudice all claims against San Clemente.

I. PLAINTIFFS HAVE NOT STATED A VIABLE CONSTITUTIONAL CLAIM FOR DAMAGES (FIRST CAUSE OF ACTION).

Although the Second Amended Complaint purports to seek declaratory relief against unspecified "policies, practices and conduct" (SAC at p.29), Plaintiffs now clarify that they seek only monetary damages. Dkt. 102 ("Opp.") at 1. But, as this Court has explained, § 1983 provides a cause of action only for damages caused by a "deprivation" of one's constitutional rights. 42 U.S.C. § 1983; Dkt. 98 ("MTD Order") at 15-16. A mere *threat* to violate the Constitution is not a deprivation and so is "insufficient to state a claim for damages." MTD Order at 16; *see Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (*per curiam*). And, as in the prior iterations of the Complaint, threats are all that Plaintiffs allege. *See* SAC ¶¶ 69, 71, 73, 75.

Plaintiffs recognize that their damages claims are barred by this Court's ruling on the prior motion to dismiss, but they ask the Court to "reconsider its finding" that a § 1983 damages claim cannot be founded on mere threats to take unconstitutional action. Opp. at 5. That request is both procedurally improper and substantively meritless.

Procedurally, the means of asking a Court to "reconsider" its legal ruling is a motion for reconsideration. *See* L.R. 7-18. If Plaintiffs believed the dismissal of the First Amended Complaint warranted reconsideration, they should have filed such a motion—not a Second Amended Complaint that is plainly insufficient under the legal standards that this Court set forth. Of course, Plaintiffs could not satisfy the standard for reconsideration. *See id.* And they do not dispute that this Court's prior rulings compel dismissal once again of their damages claims.

Substantively, and in any event, there is no basis for reconsideration. The law of this Circuit is clear: *Threatening* to take unconstitutional action is not equivalent to *taking* unconstitutional action, and therefore does not give rise to a § 1983 claim for damages. *Gaut*, 810 F.3d at 925; *see*, *e.g.*, *Corales v. Bennett*, 567 F.3d 554, 564 (9th Cir. 2009); *Butitta v. Garbajal*, 116 F.3d 1485 (9th Cir. 1987) (mem.). It might give rise to a claim for *prospective* relief, to enjoin the threatened unconstitutional action, but Plaintiffs no longer seek any such relief, effectively conceding that San Clemente's current regime is entirely lawful (which it is).

Plaintiffs emphasize that sleep disturbance constitutes injury, but that misses the point: Unless the sleep disturbance *violated the Constitution*, there is no § 1983 claim. Not all injuries are of constitutional magnitude. And there is no serious argument that waking someone who is sleeping on public property is itself "cruel and unusual punishment" under the Eighth Amendment. In *Martin v. City of Boise*, the Ninth Circuit held that "the Eighth Amendment prohibits the *imposition of criminal penalties* for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." 920 F.3d 584, 616 (9th Cir. 2019) (emphasis added). If there are no criminal penalties imposed, there has been no violation of the Eighth Amendment. And Plaintiffs do not allege any criminal penalties.[1]

[1] The result is not any different under the First or Fourth Amendments, which Plaintiffs seek leave to "substitute" as the basis for their claims. MTD Opp. at 6-7. This request is also improper, since Plaintiffs were previously given leave to amend their First and Fourth Amendment claims (*see* MTD Order at 17), but instead chose to abandon them. *See also* Part III, *infra*.

The district court cases that Plaintiffs cite (Opp. at 6) are not to the contrary. In both, the defendants' conduct *itself* violated the Eighth Amendment and was thus actionable. In *Lopez v. Bollweg*, the prison officials allegedly refused to provide the defendant with medical treatment unless he confessed to a disciplinary violation. No. CV-13-00691, No. CV-13-691, 2017 WL 4679409, at *1, *4 (D. Ariz. Aug. 1, 2017). The court held that this conduct itself "would rise to the level of cruel and unusual [punishment]." *Id.* at *4 (citing *Wesley v. Davis*, 333 F. Supp. 2d 888, 893-94 (C.D. Cal. 2004)). In *Parker v. Asher*, likewise, the court held that the prisoner had stated "a cognizable claim of cruel and unusual punishment" by alleging that the guard had committed assault by aiming a loaded taser gun at him "for the malicious purpose of inflicting gratuitous fear." 701 F. Supp. 192, 194-95 (D. Nev. 1988). Notably, since both cases involved alleged mistreatment *during incarceration*, the defendants' conduct necessarily constituted state-imposed punishment. By contrast, the only conduct Plaintiffs allege here is being roused from slumber on public property. Even if that causes harm, it does not constitute "punishment" and thus does not violate the Eighth Amendment. The Ninth Circuit's rule—that mere threats of unconstitutional action do not give rise to § 1983 damages claims—therefore applies with full force.

The damages claims of the organizational plaintiffs fail for the same reason: Without a constitutional *violation*, there is no right to recover damages under § 1983. Moreover, these plaintiffs lack standing. Again, that conclusion is compelled by this Court's prior order, which held that the organizations had not alleged facts sufficient to confer Article III standing. MTD Order at 21. The Second Amended Complaint includes no new factual allegations that go to standing, and Plaintiffs just ignore this Court's prior ruling in their brief. *See* Opp. at 3-5. It remains true that ESC makes no allegations of resource diversion, while HHROC does not causally tie its alleged resource diversion (*viz.*, "providing food and tending to the daily needs of homeless individuals," Opp. at 4) to San Clemente's challenged conduct (*viz.*, threatening to arrest homeless individuals for sleeping in public).

II. JAMES HAS NOT STATED A VIABLE CLAIM FOR MUNICIPAL LIABILITY (SECOND AND THIRD CAUSES OF ACTION).

Seeking damages for the alleged destruction of his personal property, Plaintiff James argues at length that he has plausibly alleged that his property was taken by a City employee. *See* Opp. at 8-9. But the City did not argue otherwise in its current motion. The City argued that, even if so, James had not pleaded facts sufficient to establish municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). As this Court explained in dismissing James' claims last time, a municipality is liable only for acts by its employees that are taken pursuant to an official "policy or custom." MTD Order at 19. And the Second Amended Complaint is no better than the First in plausibly alleging a "policy or custom."

In response, James argues that, this time, he has sufficiently alleged a "policy, practice, or custom of seizing and destroying the property of unhoused individuals, such as himself, without proper pre- and post- deprivation notice." Opp. at 10. But the cited paragraphs of the Second Amended Complaint (SAC ¶¶ 74, 79-80, 93-95, 98-99) do no such thing. For the most part, those paragraphs simply recite James' account of how his property was taken by a City employee on a single occasion. SAC ¶¶ 74, 79-80, 93-94, 98. That does not establish a custom or policy; to the contrary, it establishes "only an isolated event," which does not suffice. MTD Order at 20.

The only relevant change from the prior Complaint is that two paragraphs now assert, on "information and belief," that this alleged seizure of property was pursuant to "policies and protocols regarding cleaning up property left in public." SAC ¶¶ 95, 99. But, as the City has explained, its ordinances—of which this Court has taken judicial notice—say exactly the opposite. *See* MTD Order at 20. And "information and belief" pleading does not turn conclusory speculation into an actionable claim unless the information is exclusively within the defendant's control or there is some well-pleaded, plausible factual basis for the belief. *See Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017). Neither is true here. If the City was routinely seizing

property of homeless individuals, the homeless community and its advocates would know about it, and could plead specific facts. James does not. Nor does he give any factual basis for his belief that there is a widespread policy of seizing property in violation of San Clemente's ordinances. *See Brown v. Cty. of Mariposa*, No. 1:18-cv-1541, 2019 WL 4956142, at *4 (E.D. Cal. Oct. 8, 2019) ("a *Monell* claim must consist of more than mere formulaic recitations of the existence of an unlawful policy"). Information-and-belief pleading "does not permit a party to create facts which he or she hopes will later be substantiated by future discovery." *Henry v. Black*, No. 2:11-CV-129, 2011 WL 2938450, at *2 (D. Utah July 19, 2011).

In a last bid to avoid dismissal, James argues that "whether the City has a widespread pattern and practice of immediately seizing and destroying the property of unhoused individuals, contrary to its written policy," is a "factual dispute[]" that warrants discovery. Opp. at 11. Not so. A plaintiff "either possesses enough facts to plausibly allege a *Monell* claim, or he does not. If he does not, then his *Monell* claim is implausible and discovery will not go forward." *Alcay v. City of Visalia*, No. 1:12-cv-1643, 2013 WL 3244812, at *4 (E.D. Cal. June 26, 2013); *see also Mejica v. Montgomery Cty.*, No. 8:12-cv-823, 2013 WL 326734, at *3 (D. Md. Jan. 28, 2013) ("Plaintiff blithely states that discovery may unearth evidence sufficient to state a *Monell* claim. Rarely, if ever, is such speculation sufficient ... where … the plaintiff's allegations do not create a plausible inference that such a policy exists ..."). As explained, the Second Amended Complaint does not plead any plausible basis for *Monell* liability—only a single, isolated incident, and conclusory speculation dressed up as "information and belief," which (contrary to Plaintiffs' apparent view) is not "a license to undertake a fishing expedition," *Verfuerth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 647 (E.D. Wis. 2014). James' claims must be dismissed.[2]

[2] James does not dispute that, if his Due Process claim fails on *Monell* grounds, his Fourth Amendment claim fails on the same grounds. And while he insists that his new Fourth Amendment claim was not "unauthorized" (Opp. at 12), he does not try to square that claim with this Court's directive that Plaintiffs not "include any new or different ... claims, causes of action, or legal theories other than those specifically authorized in this Order." MTD Order at 22.

III. THE COURT SHOULD NOT GRANT ANY FURTHER LEAVE TO AMEND.

Plaintiffs also ask for "leave to amend to include a Fourteenth Amendment claim" based on their supposed due-process "right to loiter." Opp. at 12. Plaintiffs do not even cite—let alone attempt to satisfy—the "five factors" courts must apply "in assessing the propriety of leave to amend"—namely, "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). Those factors—which are left to this Court's "particularly broad" discretion since Plaintiffs have already amended their complaint twice—weigh decisively against letting them do so again. *See Cafasso v. Gen. Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011).

To start, Plaintiffs *abandoned* this claim—which is reason enough to deny leave to amend. In the First Amended Complaint, Plaintiffs' third cause of action challenged unidentified "loitering ordinances" under the Fourteenth Amendment's Due Process Clause. *See* FAC ¶¶ 116-21. After this Court dismissed that count with leave to amend (*see* MTD Order at 17-18), Plaintiffs abandoned the claim by not repleading it in the Second Amended Complaint. *See Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 973 n.14 (9th Cir. 2013) (if a plaintiff does not "voluntarily renew" claims dismissed with leave to amend, they are "effectively abandoned" and thereby waived); *Morris v. SPSSM Investment 8, LP*, No. CV-14-1305, 2014 WL 12573964, at *3 n.17 (C.D. Cal. Oct. 14, 2014) ("Where leave to amend has been granted . . . and the plaintiff fails to replead the claim, it is appropriate to deem it abandoned"). Because Plaintiffs previously abandoned their Fourteenth Amendment claim, they should not be granted leave to reassert it. *See K.J.P. v. Cty. of San Diego*, No. 3:15-cv-2692, 2016 WL 7385594, at *2 (S.D. Cal. Oct. 11, 2016) ("Because Plaintiffs previously abandoned these negligence claims, the five factors weigh against Plaintiffs reviving them now in their second amended complaint.").

In any event, amendment would be an "exercise in futility," because Plaintiffs' due-process theory articulates no cognizable claim for relief and "would also be subject to dismissal." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998); *see*, *e.g.*, *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend"). As this Court has already held, Plaintiffs cannot seek damages for *threatened* constitutional violations. MTD Order at 16 n.2. Yet, as Plaintiffs themselves admit, that is all their proposed due process claim would allege: that James and Nichols were "threatened with arrest for sleeping in public." Opp. at 12.

Nor do Plaintiffs' two Supreme Court cases make their proposed Fourteenth Amendment claim viable. Those cases invalidated ordinances under the Due Process Clause because they were too vague. *City of Chicago v. Morales*, 527 U.S. 41, 55-57 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Plaintiffs do not identify any San Clemente ordinance that they would challenge, let alone any facts suggesting that this hypothetical ordinance is unconstitutionally vague.

CONCLUSION

Enough is enough. The Court should dismiss, with prejudice, all of Plaintiffs' claims against the City of San Clemente.[3]

Dated: October 11, 2019

JONES DAY

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

Attorney for City of San Clemente

[3] In a footnote, Plaintiffs suggest that James would proceed against the "Doe" Defendants if this Court dismisses the claims against San Clemente. Opp. at 11 n.1. Courts have held, however, that it violates due process to allow litigation to proceed when unnamed defendants "are the sole remaining defendants" and "have not been identified, been served with the Complaint, appeared before the Court, or otherwise argued their case through motions." *Chrisco v. Goodrick*, No. 17-cv-73, 2018 WL 4242921, at *5 (D. Colo. Sept. 6, 2018); *see also Bey v. City of Phila.*, 6 F. Supp. 2d 422, 424 (E.D. Pa. 1998) ("Allowing the Doe defendants to continue in this action would offend basic notions of due process, and the claim against them is dismissed."). The Court may wish to consider dismissal *sua sponte* on that basis.