UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 17-0259-DOC (KESx) Date: February 24, 2017

Title: TAMMY SCHULER ET AL. V. COUNTY OF ORANGE

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Goltz	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING IN PART EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION [12]

Before the Court is Plaintiffs Tammy Schuler ("Schuler"), Gloria Shoemake ("Shoemake"), Melanie Payne ("Payne"), Sara Leanne Weaver ("Weaver"), and Nick Matrisciano's ("Matrisciano") (collectively, "Plaintiffs") Ex Parte Motion for Temporary Restraining Order ("Motion") (Dkt. 12). The Defendants have filed an Opposition to the Motion (Dkt. 16), to which Plaintiffs replied (Dkt. 18). Having considering the parties' arguments and the briefing, the Court GRANTS IN PART the Motion and ISSUES an Order to Show Cause why a preliminary injunction should not issue.

I. Factual Background

Plaintiffs are homeless, and currently reside in the Santa Ana River riverbed ("the Riverbed"). *See* Declaration of Tammy Schuler ("Schuler Decl.") (Dkt. 12-3) ¶ 4; Declaration of Gloria Shoemake ("Shoemake Decl.") (Dkt. 12-7) ¶ 2; Declaration of

Melanie Payne ("Payne Decl.") (Dkt. 12-6) ¶¶ 2, 5; Declaration of Sara Leanne Weaver ("Weaver Decl.") (Dkt. 12-8) ¶ 2; Declaration of Nick Matrisciano ("Matrisciano Decl.") (Dkt. 12-9) ¶¶ 2, 12. Defendant is the County of Orange ("the County" or "Defendant"). Complaint ("Compl.") (Dkt. 1) ¶ 37. This case arises out of the Defendant's alleged longstanding practice of throwing out the belongings of homeless persons living in the Riverbed.

Defendant states that the Riverbed is owned by the Orange County Flood Control District ("Flood Control"), an entity distinct from the County. Opp'n at 3. Defendants state that the channels of the Santa Ana River are primarily operated for flood protection, and the public is only allowed access for limited recreational purposes. Declaration of Shan Silsby ("Silsby Decl.") (Dkt. 16-4) ¶ 4. The Defendants also state that the act authorizing Flood Control's management of the area, the Orange County Flood Control Act (the "Act"), provides that OCFCD and its governing board, the Board of Supervisors, are to "permit recreational uses of the flood control district's properties upon a finding . . . that said use will not impair or diminish existing or probably future requirements for flood prevention and water conservation." *Id.* ¶¶ 3, 4.

Defendant states that Flood Control is in the process of stockpiling sand and large rocks to be used for flood control within the "Santa Ana River project area," a subsection of the Riverbed. Declaration of Artemio Jaime ("Jaime Decl.") (Dkt. 16-1) ¶ 4. This area is defined as "from Orangewood Avenue to just south of the Garden Grove Freeway (22), at levee slopes under the east and west sides of the Santa Ana Freeway (5) and under the east side of the Garden Grove Freeway (22)" ("Project Area"). Opp'n at 3; Silsby Decl. ¶ 5. Defendant states that the Project Area was chosen for its central location within the County which would allow for swift transport of the materials throughout the County. Jaime Decl. ¶ 6. In order to begin stockpiling the materials, Defendant states it needed to force the homeless persons that had been living within the Project Area to leave and remove their items. *Id.* ¶ 7.[1]

Plaintiffs allege that the practice of seizing and tossing homeless person's items has occurred both within and outside of the Project Area. Schuler states that on February 8, 2017, she was approached by two public works employees who gave her a one hour deadline to take down her tent, pack her belongings, and move to a different part of the Riverbed. Schuler Decl. ¶ 5. Schuler describes County employees looming over her while she attempted to pack up her belongings, and states that the County employees told her she did not need so much stuff—an attempt to pressure her to throw some of her items

[1] The Jaime Declaration has two sets of paragraphs numbered five and six. *See* Jamie Decl. at 2. The Court has renumbered the paragraphs following the first paragraphs numbered five and six.

out. *Id.* ¶ 7. Schuler states that she was unable to move some of her items in the time she was given, and that some of them were thrown out by the County. *Id.*¶ 9.

Matrisciano states that he was awoken by County employees on February 8 or 9, 2017, and informed that he had an hour to take down his tent and pack his belongings. Matrisciano Decl. ¶ 4. He felt pressured by County workers to throw his items away. *Id.* ¶ 5. During the course of moving his items, Matrisciano states that there were numerous instances where he had to retrieve his some his personal effects from the trash where the County workers had placed them and that he believes that County workers threw away some of his possessions without his consent. *Id.* ¶ 6. Further, Matrisciano states he did not see any vehicle that could potentially be used to collect materials for storage. *Id.* ¶ 8. Instead, he only saw a garbage truck. *Id.*

Other Plaintiffs report that the County has previously thrown out their personal items. On February 6, 2017, Weaver was taken to the hospital because she had a seizure. Weaver Decl. ¶ 4. While she was gone, her belongings, which were in the Riverbed outside of the Project Area, were taken. *See id*; Reply at 1–2. Her neighbors informed her that County workers had taken all of Weaver's belongings and put them in the trash. *Id.*

Shoemake states that she lived in an area of the Riverbed that was the subject of a maintenance project during the summer of 2016. Shoemake Decl. ¶ 3. She states that she was forced to move because of this maintenance project, and that although she was initially told that her items would be stored on site for a short time, she believes the County threw out her items. *Id.* ¶ 3. Again, in December of 2016, a number of Shoemake's belongings were taken while she was away. Her friend informed her that County workers had taken the items, and that the items were being stored in Lake Forest for a period of thirty days. *Id.* ¶ 5. This storage facility is located more than twenty miles from the area where the Plaintiffs reside and until recently was open only one hour per week, by appointment. Denges Decl. ¶ 9; Comp. ¶ 20; Jaime Decl. ¶ 10. Shoemake was ultimately unable to go retrieve her belongings from the Lake Forest facility. Shoemake Decl. ¶ 6–8.

Payne also says that the County has taken her personal property three times, mostly recently around Thanksgiving 2016. Payne Decl. ¶¶ 2, 3. She also states that although she was unaware of the Lake Forest storage facility, she would also have been unable to pick up her items there because she had no means of transit to that facility. *Id.* ¶ 5.

The Defendant's employees directly contradict the Plaintiffs' declarations and assert that they have not disposed of any homeless person's property without their

consent. Further, County employees states it has not impounded and stored of the property of any homeless person living in the Project Area. Jaime Decl. ¶ 12.

Plaintiffs claim they have lost essential items such as tents, tarps, blankets, clothes, phones, and documents because of the County's actions. Sommerville Decl. ¶ 9; Matrisciano ¶¶ 4–5. The County posted flyers in the Project Area, although not in other places, describing how individuals could recover any items placed in storage. Compl. ¶ 20. However, as mentioned above, the storage facility used by the County is twenty-two miles from the Riverbed. The trip to the facility requires a bus trip of more than two hours each way, three transfers, and a half-mile walk along a road. *See* Reply at 4; Declaration of Sarah Dawley (Dkt. 12-10) ¶¶ 7–14. Plaintiffs also allege that navigating the bus system with their items may be impossible because of restrictions on items that may be taken on public busses.

On February 13, 2017, Plaintiffs filed a Complaint against the County alleging violations of: (1) the Fourth, Fifth, and Fourteenth Amendments; (2) the California Constitution Article I, Sections 7 and 13; (3) Title II of the Americans with Disabilities Act; (4) Section 504 of the Rehabilitation Act of 1973; (5) California Government Code § 11135; (6) California Civil Code § 51 *et seq.*; and (6) California Civil Code § 2080 *et seq.*

II. Legal Standard

The standards for issuing a temporary restraining order ("TRO") and a preliminary injunction are "substantially identical." *Stuhlbarg Int'l Sales Co. v. John D. Brushy & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is an "extraordinary remedy." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). As explained by the Ninth Circuit in *Winter*, a plaintiff seeking preliminary injunctive relief "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Alternatively, "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (internal quotations marks omitted). A "serious question" is one on which the movant "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984).

III. Analysis

Plaintiff seeks a temporary restraining order that: (1) enjoins the County, its agents, and employees from seizing property in the Santa Ana River riverbed absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; (2) absent an immediate threat to public safety, requiring the County to store any property they do seize along the Riverbed for a period of not less than ninety days; and (3) requiring that essential items—such as tents, tarp, blanket, sleeping bags, identification and medical papers—be stored within a fifteen-minute walk of the place from which they are taken, and be made available for retrieval during regular business hours on a daily basis without prior appointment. *See* Proposed Order (Dkt. 12-19) at 9.

At the outset, the Court notes that there is a settlement agreement ("the Agreement") in another case before this Court that may partially resolve some of the issues Plaintiffs have identified. *See Michael Diehl v. County of Orange et al.*, 8:17-00246-DOC-KES (Dkt. 18) (C.D.C.A, February 21, 2017). Under that Agreement, the County has agreed to impound and hold for ninety days items of personal property the County encounters in the Project Area. Agreement at 2–3. In order to facilitate retrieval of seized items, the County has also agreed to provide free bus passes or other transportation to and from the storage facility to another destination in Orange County, but not to the Riverbed. *Id.* Accordingly, the County has already agreed that it will not throw out homeless person's personal items that it seizes within the Project Area.[2]

The County contends that the Agreement moots Plaintiffs' claims here. Opp'n at 9. The Court disagrees. Even in light of the Agreement, there are several aspects of the relief that the Plaintiffs seek left unresolved: Plaintiffs seek an order prohibiting the county from seizing property along the Riverbed at all, and requiring the County to store any items they do seize near the area from which the items are confiscated. Further, the Agreement only covers the Project Area and does not address what happens in other portions of the Riverbed. Accordingly, the Court will analyze whether Plaintiff has made the requisite showing for a temporary restraining order regarding these issues.

A. Likelihood of Success on the Merits

The parties dispute the facts here. Defendant argues it has not seized or destroyed any property, while each Plaintiff has described in detail at least one occasion where the County destroyed their personal items. At this juncture, on balance, the Court is inclined

[2] Of note, under the Agreement the County is still allowed to discard temporary structures it encounters in the Project Area. Agreement at 2.

to accept the factual declarations of Plaintiffs, as Plaintiffs have provided detailed accounts of the occasions where the County discarded their items. Further, it is not truly possible for any individual County employee to be sure that no other County employee threw out any of the Plaintiffs' property. This assessment may well be affected by additional declarations or testimony at the anticipated preliminary injunction hearing.

Plaintiffs argue they are likely to succeed on the merits of their Fourth and Fourteenth Amendment claims.

The Fourth Amendment, which applies to the states via the Fourteenth Amendment, protects "persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Here Plaintiffs are challenging seizures of property, rather than searches. Whether a seizure is reasonable depends on the facts and circumstances of that seizure. *James v. City & Cty. of Honolulu*, 125 F. Supp. 3d 1080, 1092 (D. Haw. 2015). In order to asses reasonableness in this context, a district court "balance[s] the invasion of [a plaintiff's] possessory interests in their personal belongings against the [government's] reasons for taking the property." *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012).

Under the Fourteenth Amendment, "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Where a protected interest is implicated, the relevant question is "what procedures constitute 'due process of law.' " *Lavan*, 693 F.3d at 1031 (quoting *Ingraham v. Wright*, 430 U.S. 651, 672, (1977)). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "This inquiry [ ] examine[s] the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Zinermon v. Burch*, 494 U.S. 113 (1990). Determining what process is due is a fact-specific inquiry requiring consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requiremen t would entail.

Mathews, 424 U.S. at 335.

In *Lavan*, the City of Los Angeles had an admitted policy and practice of seizing and disposing of the unattended property of homeless persons living on Skid Row. *Id.* at 1025. The city argued it was entitled to throw out homeless persons' property because Los Angeles Municipal Code § 56.11 provided that "[n]o person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk." *Id.* at 1026.

The Ninth Circuit disagreed. The panel held that it was a violation of the homeless persons' Fourth Amendment rights to both seize and *destroy* their property, even if the property was left out in violation of a local ordinance. *Id.* at 1029. The panel affirmed the district court's finding that even if the initial seizure been reasonable, the fact that the City destroyed the property rendered the City's actions a Fourth Amendment violation. *Id.* at 1030.

The *Lavan* panel also found that the district court was right to find that the plaintiffs were likely to succeed on their Fourteenth Amendment claims against the City. The panel noted that "due process requires law enforcement 'to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.'" *Id.* at 1032 (citing *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999)). The panel approvingly cited the district court's finding that the City's "practice of on-the-spot destruction of seized property . . . presents an enormous risk of erroneous deprivation, which could likely be mitigated by certain safeguards such as adequate notice and a meaningful opportunity to be heard." *Id.* at 1032–33.

The County argues that *Lavan* is distinguishable from the present circumstances, and instead cites *Acosta v. City of Salinas*, No. 15-CV-05415 NC, 2016 WL 1446781 (N.D. Cal. Apr. 13, 2016), and *James* as the more relevant cases.

In *Acosta*, the court denied a request for a temporary restraining order after the plaintiffs failed to show that they had been deprived of any property by the defendant. *Id.* at *5–8. On the contrary in this case, Plaintiffs have provided declarations in which they state that they were deprived of their property.

The *Acosta* court also noted that the defendant had provided notice to the homeless persons whose property was in the area the defendant was seeking to clear, and that the City also offered storage to the homeless person. *Id.* at *8. Here, while the County gave notice before clearing the Project Area (as defined above, *supra* page 2), no notice was given before the items of Plaintiffs living outside the Project Area were discarded. Further, while the County has offered storage in Lake Forest for items cleared from the Project Area, this storage has not been used to take any belongings from the

Project Area, and is so remote as to be essentially inaccessible for homeless persons living the Riverbed, especially those with disabilities. Therefore, *Acosta* is distinguishable.

In *James*, the district court granted summary judgment to the city and county of Honolulu in the face of Fourth and Fourteenth Amendment claims against the city. *James*, 125 F. Supp. 3d at 1094–95. There, the plaintiff placed signs on city property protesting the fact the property had been taken from her by eminent domain to be made into a fire station. *Id.* at 1088. The City affixed notices to the signs saying they would be removed after twenty four hours and then removed the signs after the plaintiff did not take them down herself. *Id.*

The district court found that in light of the "[c]ity's strong possessory interest in the subject property and given that the [c]ity provided advance notice and an opportunity to retrieve the property" the city was entitled to summary judgment on the Fourth Amendment claims. *Id.* at 1093. As to the plaintiff's Fourteenth Amendment claims, the court noted that the plaintiff's interest in her signs was considerably weaker than a homeless individual's interest in their property and determined the plaintiff had had adequate opportunities to prevent permanent deprivation of her property. *Id.* at 1094. Here, only some of the Plaintiffs received advance notice of the seizures, and their possessory interest is much stronger in their items than the plaintiff's was in *James* because Plaintiffs' property being seized are their basic necessities, while the James plaintiff was having her protest signs disposed of. *See id.*

The Court finds that *Acosta* and *James* ultimately weigh in favor of Plaintiffs' argument that they will prevail on the merits. Plaintiffs have offered evidence that the County has taken their property, sometimes without notice, and destroyed the property. Further, Plaintiffs have explained that because of the remoteness of the storage facility, the storage the County currently offers is unlikely to truly mitigate against a due process violation. The Court is especially concerned about this deprivation when it comes to the items that Plaintiffs have the strongest possessory interest in, such as shelter and bedding items and personal documents. Accordingly, the Court is convinced that the Plaintiffs have shown a likelihood of success on the merits.[3]

[3] The Plaintiffs also make an argument that the Defendant's action pose a state-created danger. Mot. at 16–19. However, because the Court grants Plaintiffs the same relief it would grant if it found a state-created danger, the Court does not reach this issue.

B. Irreparable Harm

The Ninth Circuit has found "that an alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (quoting *Associated General Contractors v. Coalition For Economic Equity*, 950 F.2d, 1401, 1412 (9th Cir. 1991)). Further, as the panel noted in *Lavan*, homeless persons are particularly vulnerable and the loss of personal items can be "devastating" for them. *Lavan*, 693 F.3d at 1032 (citing *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 (S.D.Fla.1992)).Accordingly, where homeless persons assert an unconstitutional taking of their property, as in this case, the Court is satisfied that there is a showing of irreparable harm.

C. Balance of the Equities and the Public Interest

A court considering an application for a preliminary injunction must identify the harm that an injunction might cause a defendant and weigh it against the injury to a plaintiff. *Justin*, 2000 WL 1808426, at *11 (citing *Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996)). As to the deprivation of property, the injury Plaintiffs face is a permanent deprivation of vital items of personal property. By contrast, the burden the County would face if they were required to provide notice before seizing property and store the items in accessible place, potentially by organizing the items in a nearby shipping container or other mobile unit, is minor.

Accordingly, the four factors weigh in favor of a temporary restraining order requiring the Defendant to provide notice before impounding items and to store, rather than discard, impounded items nearby.

However, the Court will not accept Plaintiffs' invitation to find that the County is not permitted to remove homeless persons and their items from the Riverbed at all. Unlike the plaintiffs in *Lavan*, who were entitled to be on Skid Row, it appears Plaintiffs here are not entitled to be in the Riverbed. *See* 693 F.3d at 1024–25. Further, as in *James*, where the City had a strong interest in the property because they intended to build a firehouse on the land, Flood Control appears to have a strong possessory interest in the Riverbed and preserving public safety through regulation of the Riverbed. *See* 125 F. Supp. 3d at 1093. Accordingly, the factors do not weigh in favor of a blanket prohibition on impounding or seizing items in the Riverbed.

D. Bond Requirement

Although a bond is typically required upon issuance of a temporary restraining order in federal court, courts in the Ninth Circuit have dispensed with the requirement where there is little or no harm to the party enjoined and where plaintiffs are unable to afford such a bond. *See, e.g.*, *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) ("We have recognized that Rule 65(c) invests the district court with discretion as to the amount of security required, if any.") (quotation marks and emphasis omitted); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir.1999) (waiving bond where vast majority of plaintiffs were "very poor"). The Court exercises its discretion to forego the bond requirement in light of the fact that Plaintiffs are homeless and that there is no real harm to the County caused by issuing this temporary restraining order.

IV. Disposition

Federal Rule of Civil Procedure 65(d) requires that "[e]very order granting and in junction and every restraining order must: (A) state the reason why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Thus, the Court will clearly state the specific terms of the TRO in order to "prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidr v. Lessard*, 414 U.S. 473, 476 (1974). The Court finds that the below language satisfactorily complied with Rule 65's requirements.

Pending a hearing on a preliminary injunction, Defendant County, its agents, and its employees are hereby ORDERED as follows:

1. Absent an objectively reasonable belief that the property presents an immediate threat to public health or safety, or is evidence of a crime, or contraband, the County must provide notice to homeless persons in the Santa Ana River riverbed informing such persons that they need to move their personal property or the County will impound it. This notice must be provided **at least twenty-four hours** before seizing homeless persons' property from any portion of the Riverbed.

2. As to any property seized in the Santa Ana River riverbed—absent an objectively reasonable belief that the property is abandoned or presents an immediate threat to public health or safety, or is evidence of a crime, or

contraband—the County must maintain seized property in a secure location for a period of not less than 90 days before destruction of the property. The property must be available for retrieval during regular business hours on a daily basis without prior appointment. The County must provide transit to the location where property is stored if the location is not within **one mile** of the place the items were taken from. All items must be stored in an organized fashion.

3. Essential items including tents, tarps, blankets, sleeping bags, identification and medical papers must be stored within **one mile** of the place where they were seized, and be available for retrieval by its rightful owner during regular business hours on a daily basis without prior appointment.

The Court notes that the County has already given notice that it will impound items left in the Project Area, so this temporary restraining order will not prevent the impoundment of property in that area.

A hearing on the Order to Show Cause why a preliminary injunction should not issue is set for **March 6, 2017 at 1:30 a.m.** Any additional briefing by the Defendant is to be filed **no later than March 1, 2017**. Any responsive briefing by the Plaintiffs is to be filed **no later than March 3, 2017**.

As explained above, the Court GRANTS IN PART Plaintiffs' Ex Parte Application for a Temporary Restraining Order and Orders Defendant to Show Cause why Issuance of a Preliminary Injunction is not appropriate in this case.

The Clerk shall serve this minute order on the parties.