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15 *Additional Counsel Appear on Signature Page*

16
17 **UNITED STATES DISTRICT COURT**
18
19 **NORTHERN DISTRICT OF CALIFORNIA**
20
21 **OAKLAND DIVISION**

22 COALITION ON HOMELESSNESS, et al.,

23 Plaintiffs,

24 v.

25 CITY AND COUNTY OF SAN FRANCISCO,
26 et al.,

27 Defendants.

CASE NO. 4:22-cv-05502-DMR

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' ADMINISTRATIVE
MOTION FOR CLARIFICATION OF
PRELIMINARY INJUNCTION ORDER,
AND IN THE ALTERNATIVE FOR
EXPEDITED BRIEFING**

Judge: The Hon. Donna M. Ryu

1 **I. INTRODUCTION**

2 The Court’s Preliminary Injunction Order needs no clarification. It unambiguously
3 determined that homeless individuals in San Francisco are involuntarily homeless because the
4 shelter system is short thousands of beds, essentially full, and effectively closed. These individuals
5 have no practical access to appropriate shelter, and accordingly, the injunction protects them from
6 enforcement and threats of enforcement for sitting, lying, and sleeping in public.

7 Defendants’ “administrative” motion for clarification (Dkt. No. 70) is just an improper
8 motion for reconsideration of the merits. But Defendants cannot show any new or materially
9 different facts or law since the Court’s decision. They were aware of the *Hastings* injunction at
10 the time of the Preliminary Injunction briefing but chose not to raise any alleged conflict.

11 In any event, the stipulated injunction in *Hastings* presents no conflict with the Court’s
12 Order. It only requires the City to “make all reasonable efforts” towards a “goal” of “reducing the
13 number of tents” in the Tenderloin. Aspirational “reasonable efforts” do not include violating the
14 Constitution or a Court order. The *Hastings* stipulation only suggests that the City pursue
15 enforcement measures against individuals who refuse COVID-19 specific shelter “if necessary to
16 comply with this stipulated injunction,” without requiring enforcement of the specific laws that
17 this Court has prohibited. Nor can the City show that doing so would be “necessary” to fulfill the
18 stipulated injunction. For instance, under the Court’s Order, the City may still enforce health and
19 safety laws and provide services to promote street access.

20 Defendants also concede that they already “briefed and argued a narrower interpretation of
21 *Martin and Johnson*” on which their motion relies. Mot. at 5. That is dispositive. The Court heard
22 and rejected Defendants’ position. The Court found that homeless San Franciscans do not have
23 practical access to appropriate shelter other than through enforcement—and often not even then.
24 Nothing has changed that fact as Defendants have not taken steps to provide voluntary access to
25 the City’s shelters and have continued their sweep operations notwithstanding the preliminary
26 injunction. *See* Dkt. No. 76. Their motion should be denied.

27 **II. ARGUMENT**

28 **A. Defendants’ Motion Is An Improper Motion For Reconsideration.**

1 The Court should deny Defendants’ request for clarification or expedited briefing, as both
 2 are procedurally defective and wrong on the merits. As a threshold matter, because the motion
 3 seeks “substantive, rather than administrative, relief” it is not a proper motion under Civil L. R. 7-
 4 11. *See Affonso v. Metropolitan Life Ins. Co.*, 2011 WL 4101264, at *1 (N.D. Cal. Sept. 8, 2011).

5 More fundamentally, the Court’s Order needs no clarification. It clearly prohibits
 6 Defendants “from enforcing or threatening to enforce [the enumerated] laws and ordinances to
 7 prohibit involuntarily homeless individuals from sitting, lying, or sleeping on public property.”
 8 Dkt. No. 65 at 50. The only qualification is that this prohibition is in effect “as long as there are
 9 more homeless individuals in San Francisco than there are shelter beds available.” *Id.* There are
 10 otherwise no exceptions. Indeed, Defendants acknowledged that they would comply with this
 11 reading of the Court’s injunction unless the Court provides otherwise. Lee Decl. ¶ 3.

12 Given the clarity of the Court’s Order, Defendants’ motion can only be seen as a request
 13 for reconsideration. But they have not sought leave to do so, nor can they establish the required
 14 new, material difference in fact or law that would justify reconsideration. *See* L.R. 7-9. There is
 15 no question Defendants knew of the *Hastings* injunction—cited on the very first page of their
 16 opposition to the preliminary injunction—and cannot now justify reconsideration based on it. Dkt.
 17 No. 45 at 1. Nor do Defendants point to any new controlling law; they concede that they already
 18 argued for a “narrower interpretation of *Martin* and *Johnson*” in their opposition.¹ Mot. at 5. They
 19 also concede that the Court specifically considered their arguments and still entered its Order.

21 ¹ Defendants again point to the order in *Fund for Empowerment v. City of Phoenix*, No. 22-cv-
 22 02041 (D. Ariz. Dec. 16, 2022), but the Court already rejected Defendants’ attempt to rely on it.
 23 Dkt. No. 65 at 41. Regardless, that order undermines Defendants’ position as it similarly enjoins
 24 enforcement of the enumerated laws “as long as there are more unsheltered individuals in Phoenix
 25 than there are shelter beds available” because “there is not enough shelter space for every
 26 unsheltered person to choose whether to sleep or camp outside.” Dkt. No. 57-1 at 15, 19. This
 27 decision and the Court’s Order are consistent with other courts. *See, e.g., Warren v. City of Chico*,
 28 2021 WL 2894648, at *2 (E.D. Cal. July 8, 2021) (“This Circuit has previously held that
 ordinances such as this are not enforceable, unless there is enough practically available shelter
 within the City for all unhoused individuals.”); *Blake v. City of Grants Pass*, 2020 WL 4209227,
 at *7 (D. Or. July 22, 2020) (municipalities cannot punish protecting oneself “from the elements”
 where it “has far more homeless people than ‘practically available’ shelter beds”), *aff’d in part*,
vacated in part, remanded sub nom. Johnson v. City of Grants Pass, 50 F.4th 787, 797 (9th Cir.
 2022) (affirming in relevant part the district court’s injunction).

1 Mot. at 5; Dkt. No. 65 at 41-42. In sum, Defendants offer no basis for a motion for reconsideration.

2 **B. No Conflict Exists With The *Hastings* Stipulated Injunction.**

3 Defendants' request for "clarification" is procedurally defective and unnecessary, and the
4 inquiry should end there. But Defendants' motion also fails on its merits. There is no need to
5 clarify the Court's Order to reconcile it with the *Hastings* stipulation, as no conflict between the
6 two "make[s] compliance with both an impossibility." *See Nat'l Union Fire. Ins. Co. of*
7 *Pittsburgh, PA. v. Payless Shoesource, Inc.*, 2012 WL 3277222, at *9 n.4 (N.D. Cal. Aug. 9, 2012).

8 Under the *Hastings* stipulation, "[d]uring the COVID-19 emergency, the City will reduce
9 the number of tents and other encamping materials . . . in the Tenderloin." Dkt. No. 70-2 at 2.
10 Additionally, "the City will make all *reasonable* efforts to achieve the shared goal of *permanently*
11 *reducing* the number of tents." *Id.* at 3 (emphasis added). First, it is unclear whether the cited
12 *Hastings* provisions are still in effect, because the "COVID-19 emergency" has abated. The City
13 appears to have ended COVID-19 hotel and alternative sleeping site programs which are predicates
14 to enforcement under *Hastings*. Dkt. No. 45 at 4. Second, Defendants' sweeps do not result in a
15 permanent reduction in tents as unhoused individuals are simply displaced, not provided
16 permanent shelter. Finally, there are myriad ways to reduce tents in the Tenderloin that do not
17 involve violating the Constitution or this Court's Order (which would not be "reasonable efforts").
18 In fact, consistent with this Court's Order, the *Hastings* stipulation mandates that "[a]ll parties
19 shall respect the legal rights of the unhoused of the Tenderloin in all manners, including in relation
20 to relocating and removing the unhoused." Dkt. No. 70-2 at 3.

21 The *Hastings* stipulation also requires the City to offer unhoused people relocation to hotel
22 rooms, safe sleeping placements, and certain off-street sites, but does not mandate enforcement
23 against homeless individuals with nowhere else to go. *Id.* at 2. The *Hastings* stipulation only
24 states that "*if necessary to comply with this stipulated injunction* the City will employ enforcement
25 measures for those who do not accept an offer of shelter or safe sleeping sites to prevent re-
26 encampment." *Id.* at 3 (emphasis added). Defendants do not explain how "enforcement" or
27 violating this Court's Order is necessary to comply with the *Hastings* stipulation. This Court's
28 Order only enjoins enforcement of five specific statutes and ordinances: California Penal Code

1 sections 647(e), 370, and 372; and San Francisco Police Code sections 168 and 169. The Order
 2 does not mandate that Defendants refrain from enforcing other laws. Nor does the *Hastings*
 3 stipulation specifically require the City to enforce the particular ordinances the Court has enjoined
 4 here. It strains credulity to think that—without briefing on *Martin*—the *Hastings* court would have
 5 entered an injunction that so limited law enforcement’s discretion. Under any interpretation of
 6 this Court’s Order, the City is not required to violate the stipulated injunction in *Hastings*.²

7 **C. Defendants Purposefully Misinterpret the Order to Justify Their Conduct.**

8 Defendants’ real goal is clear: To get this Court to revisit the scope of its Order to allow
 9 Defendants to continue their unconstitutional practices.³ In other words, Defendants wish to
 10 continue the enforcement-first approach that was the very subject of Plaintiffs’ preliminary
 11 injunction motion. Dkt. No. 9 at 18-20. Defendants try to justify this by arguing that the definition
 12 of an “involuntarily homeless individual” in the Court’s Order should exclude any individuals that
 13 have access to adequate temporary shelter and “choose not to use it.” Dkt. No. 70 at 4-5. But this
 14 is entirely incompatible with the Court’s Order and reality of this case. As the Court thoroughly
 15 discussed, *unhoused* San Franciscans have no practically available access to appropriate shelter
 16 anywhere in the City, so they are involuntarily homeless. Perversely, the only real way an
 17 unhoused person can even hope to receive a shelter bed is *after* Defendants begin to
 18 unconstitutionally displace them. *See* Dkt. No. 65 at 41 (“[i]t is beyond dispute that homeless San
 19 Franciscans have no voluntary ‘option of sleeping indoors,’ and as a practical matter ‘cannot obtain
 20 shelter’”); *id.* at 42 (“at this time, a homeless San Franciscan who wants a shelter bed has no avenue
 21 to ask for one, much less get one”); 12/22/2022 Mot. Hr’g Tr. at 43:23-44:10 (“there’s no way for
 22

23 ² Given that the Court’s Order bars unconstitutional conduct, conflict could only arise between the
 24 Court’s Order and the *Hastings* stipulation if the latter were unconstitutional, and the Court is
 25 under no obligation to permit the City to continue unconstitutional conduct merely because of a
 26 prior injunction. *See Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) (“the government suffers no
 27 harm from an injunction that merely ends unconstitutional practices and/or ensures that
 28 constitutional standards are implemented.”).

³ During meet and confer, Defendants indicated that even if no conflict existed between the
Hastings stipulation and the Court’s Order, they would still request the broad relief sought in this
 motion. Lee Decl. ¶ 4.

1 a person to voluntarily try to access a bed at this point in San Francisco”).⁴ Indeed, there is no
 2 evidence that unhoused individuals turn down firm offers for shelter—the real issue is that offers,
 3 even in the context of enforcement, are inadequate or not followed through on. *See* Dkt. No. 65 at
 4 15, 17-20, 22-23, 28.

5 It is for precisely this reason that it is immaterial whose interpretation of *Martin* is correct.
 6 Dkt. No. 65 at 37-42 (“The Court need not decide whether Defendants’ reading of *Martin* and
 7 *Johnson* is correct, because their position lacks factual support.”).⁵ The Court made clear that no
 8 homeless San Franciscan has voluntary, practical access to shelter prior to a sweep or displacement
 9 operation. *Id.* As such, Defendants’ operations categorically violate the Court’s Order.

10 The Court’s Order does not leave Defendants without options. The *Hastings* stipulation
 11 provides some: ensure tents do not block traffic or doorways or make streets impassable. Dkt. No.
 12 70-2 at 4. The City could also fill empty housing or hotel opportunities and open the shelter system
 13 to ensure people have meaningful access to it. Contrary to the myth that unhoused people do not
 14 want services, there are already more than a thousand people on a waitlist and people who have
 15 waited in line daily for a bed. Dkt. No. 65 at 5. But Defendants refuse to open the shelter system
 16 to voluntary access likely because it will lay bare just how many unhoused individuals in San
 17 Francisco want and need shelter but are having their access barred—effectively leading to the
 18 result that this Court has already reached: Defendants’ punishment scheme is unconstitutional.

19 **III. CONCLUSION**

20 The Court should deny Defendants’ request to clarify its Order and for additional briefing.

21 _____
 22 ⁴ At the preliminary injunction hearing, the Court explicitly rejected Defendants’ attempts to argue
 23 that belated offers of shelter incident to enforcement—when individuals had no genuine access to
 24 shelter anywhere before being subject to an encampment closure—could be constitutional. *Id.* at
 32:13-33:13 (“I think the City concedes this and, in fact, relied on this; that at this point . . . there’s
 no voluntary avenue to accessing a bed, that the only way to access a bed is if there’s an
 enforcement process where one is offered, if available.”).

25 ⁵ Defendants argue that *Johnson* supports their position because it allows for a “determin[ation] at
 26 the enforcement stage that a homeless individual has access to shelter,” but they are wrong. At
 27 most, *Johnson* simply notes that police should verify the status of an individual before
 28 enforcement. *Johnson*, 50 F. 4th at 805 n.23. It does not mean that the government is free to try
 and manufacture a change in an individual’s involuntary status under threat of enforcement.
 Regardless, there is ample evidence that shelter offers are illusory and never actually materialize
 even after sweep operations. Dkt. No. 65 at 38-40.

1 Dated: January 9, 2023

Respectfully submitted,

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3 By: /s/ Alfred C. Pfeiffer, Jr.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

COALITION ON HOMELESSNESS, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,
et al.,

Defendants.

CASE NO. 4:22-cv-05502-DMR

**DECLARATION OF JOSEPH H. LEE IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
ADMINISTRATIVE MOTION FOR
CLARIFICATION OF PRELIMINARY
INJUNCTION ORDER, AND IN THE
ALTERNATIVE FOR EXPEDITED
BRIEFING**

Judge: The Hon. Donna M. Ryu

DECLARATION OF JOSEPH H. LEE

I, Joseph H. Lee, hereby declare as follows:

1. I am an attorney at the law firm of Latham & Watkins LLP, and admitted to practice law in the State of California. I am an attorney of record for the Plaintiffs Coalition on Homelessness, Toro Castaño, Sarah Cronk, Joshua Donohoe, Moliqye Frank, David Martinez, Teresa Sandoval, and Nathaniel Vaughn in the above-captioned action. I submit this Declaration in support of Plaintiffs’ Opposition to Defendants’ Administrative Motion for Clarification of Preliminary Injunction Order, and in the Alternative for Expedited Briefing. I have personal knowledge of the facts set forth herein, and if called as a witness, could and would testify competently to them.

2. On December 29, 2022, the parties met and conferred regarding Defendants’ interpretation of and compliance with the Court’s Preliminary Injunction Order and administrative motion for clarification.

3. At the December 29, 2022 meet and confer session, Defendants agreed that the injunction could be reasonably read as prohibiting enforcing or threatening to enforce the enumerated laws to prohibit involuntarily homeless individuals from sitting, lying, or sleeping on public property until the number of unhoused individuals living in San Francisco no longer exceeded the number of shelter beds. The Defendants further represented that they intended to comply with this interpretation of the Court’s Order unless the Court provides otherwise.

4. At the December 29, 2022 meet and confer session, Defendants also indicated that even if their concerns regarding the potential conflict between the *Hastings* injunction and the Court’s Order could be resolved in a narrowly tailored way, they would still seek the broader relief sought by the instant Administrative Motion for Clarification.

5. Attached hereto as **Exhibit 1** is a true and accurate copy of correspondence between the parties on December 29th and 30th, 2022, which includes memorialization of our meet and confer session, including discussion regarding Defendants’ interpretation of and compliance with the Preliminary Injunction and the instant Administrative Motion for Clarification, and Defendants’ response. Defendants did not dispute that memorialization in its response.

1 I declare under penalty of perjury that the foregoing is true and correct.

2

3 Executed on January 9, 2023, in Irvine, California.

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/s/ Joseph H. Lee
Joseph H. Lee

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*Attorney for Plaintiffs
Coalition on Homelessness, Toro Castaño,
Sarah Cronk, Joshua Donohoe, Moliue Frank,
David Martinez, Teresa Sandoval, Nathaniel
Vaughn*

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ATTESTATION

I, Alfred C. Pfeiffer, Jr., am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(h)(3), I attest that all signatories to this document have concurred in this filing.

Dated: January 9, 2023

/s/ Alfred C. Pfeiffer, Jr.
Alfred C. Pfeiffer, Jr.

EXHIBIT 1

From: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>
Sent: Friday, December 30, 2022 6:47 AM
To: 'John Do'; Wang, Edmund (CAT)
Cc: Lee, Joseph (OC); Pfeiffer, Al (Bay Area); Zal Shroff
Subject: RE: COH v SF: m/c on ongoing productions and a motion for clarification

Hi John,



Thank you for your email. I wanted to promptly clarify the City's situation regarding scheduling the settlement conference. What I meant to convey yesterday is that I have confirmation from all 4 City depts (DEM, SFPD, DPW, and HSH) that a representative can be available to participate in the settlement conf on Jan 25. I have not confirmed availability on the other dates, but if necessary I can try to make the other dates work.

Jim Emery
Deputy City Attorney
Office of City Attorney David Chiu
(415) 554-4628 Direct
www.sfcityattorney.org

From: John Do <JDo@aclunc.org>
Sent: Thursday, December 29, 2022 5:37 PM
To: Emery, Jim (CAT) <Jim.Emery@sfcityatty.org>; Wang, Edmund (CAT) <Edmund.Wang@sfcityatty.org>
Cc: Joseph.Lee@lw.com; Al.Pfeiffer@lw.com; Zal Shroff <zshroff@lccrsf.org>
Subject: RE: COH v SF: m/c on ongoing productions and a motion for clarification

Hi Jim,

Thank you for the meet-and-confer today. We write to memorialize our discussions and identify any follow-up.

- **Settlement:** We understand that Defendants are available on any of the dates offered by Judge Cisneros, but would prefer January 25. As we discussed on the call, we will discuss with our clients and get back to you regarding availability. We understand that Defendants intend to have representatives from DEM, DPW, SFPD, and HSH present at the settlement conference. While Plaintiffs expect to have a Coalition representative at the settlement conference, we may not have all individual plaintiffs present, but we will be prepared to negotiate on their behalf, to which we understand Defendants have no objections.
- **Scope of Preliminary Injunction:** We understand that Defendants intend to treat the preliminary injunction as prohibiting enforcing or threatening to enforce the laws identified in the Court's preliminary injunction order against any unhoused individual regardless of whether that individual has a firm and adequate offer of shelter, unless and until contrary guidance is provided by the Court. We further understand that Defendants contend that the preliminary injunction is susceptible to different interpretations regarding whether the prohibitions on enforcement and threat of enforcement apply to such individuals, and that it intends to seek clarification from the Court regarding the scope of the preliminary injunction. You further stated that under Defendants' current treatment of the preliminary injunction, Defendants contend there is a potential conflict between the Defendants' obligations under it and the City's obligations under the stipulated injunction in *Hastings College of the Law v. City & County of San Francisco*, Case No. 3:20-cv-03033-JST (N.D. Cal., filed May 4, 2020). But we understand that Defendants do not believe their concerns regarding the scope of the preliminary injunction would be resolved by addressing them in a limited fashion (e.g., by limiting any

modification of the preliminary injunction to the Tenderloin neighborhood that is the subject of the Hastings settlement). We further understand that Defendants expect to file an administrative motion regarding clarification by early next week. As discussed, Plaintiffs have followed up separately regarding our position on Defendants' motion.

- **Current Operations:** We understand that Defendants maintain that they are complying with the preliminary injunction by not currently enforcing sit/lie/sleep laws against unhoused individuals because the number of unhoused individuals living in San Francisco exceeds the number of shelter beds. To the extent you have provided us with additional information regarding Defendants' current operations, we have summarized it below. However, to a large extent, we understand Defendants' stated position regarding its operations amounts to a restatement of the preliminary injunction order and does not explain what, if any, changes have been made to Defendants' current operations to ensure compliance with the preliminary injunction or how Defendants are interpreting the preliminary injunction. We understand that at least part of the lack of additional information is due to your lack of knowledge regarding what specific instructions and guidance has been provided to the individuals carrying out Defendants' policies. Accordingly, as discussed on the call, we request that you investigate and provide more information as outlined below.

- **Training:** You explained that SFPD police officers have been instructed as to the scope of the preliminary injunction, but that you were not aware of what the format was and whether there has been an official police bulletin. We ask that you follow up with the individuals responsible for providing instructions and training regarding the scope of the preliminary injunction and provide us with copies of any guidelines provided to them, including any police bulletins. We ask for the same for HOT and DPW.
- **Requests to Move:** You explained that as of this moment, only HOT employees were requesting individuals to move from encampment resolutions, and that SFPD police officers were not making the same asks. At the same time, you indicated SFPD being present or making the same requests would not be threatened enforcement in your view. You also explained that you did not know whether any indication was given that requests to move were temporary or voluntary since you did not know specifically what was communicated to unhoused individuals. It is your belief that the unhoused people understood the requests to be temporary. You also explained to us that any requests to move continued to occur prior to the actual confirmation of whether the City had shelter beds available. What guidance, if any, has been provided to Defendants' employees regarding what they can and cannot ask individuals to do (e.g., are employees required to explain that any request is only temporary and need not be complied with)? In addition, what guidance has been provided to employees regarding what constitutes an actual firm offer of appropriate shelter?
- **Nuisance:** You explained that the recent operations were aimed at abating a nuisance. You indicated that the 9/27 locations had been determined to be a nuisance but could not say how and when that determination was made. You could not confirm whether such nuisance determinations occur for all HSOC operations or not.

More generally, we requested certain disclosures to aid in monitoring compliance. You requested we send you a list via email, so that was sent separately along with our position on the motion for reconsideration. If you have any questions regarding our requests or the follow-up identified above, we would be happy to discuss.

Regards,



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CASE NO. 4:22-cv-05502-DMR

**[PROPOSED] ORDER DENYING
DEFENDANTS' ADMINISTRATIVE
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Judge: The Hon. Donna M. Ryu

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[PROPOSED] ORDER

This matter comes before the Court on Defendants’ Administrative Motion for Clarification of Preliminary Injunction Order, and in the Alternative for Expedited Briefing. Having carefully considered the motion and the papers submitted, and for good cause shown, Defendants’ Administrative Motion for Clarification of Preliminary Injunction Order, and in the Alternative for Expedited Briefing is hereby DENIED.

IT IS SO ORDERED.

Dated: _____

HONORABLE DONNA M. RYU
UNITED STATES MAGISTRATE JUDGE