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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Eugene Davidovich an individual, Davina Lynch, an individual, and John Kenney, an individual, Plaintiffs, v. CITY OF SAN DIEGO, Defendant.	Case No. 3:11-cv-02675-WQH-NLS **REPLY IN SUPPORT OF EX PARTE APPLICATION ON NOTICE FOR TEMPORARY RESTRAINING ORDER**

The City agrees in its opposition that section 54.0110 can only be enforced to prohibit permanent encroachment, and not for temporarily setting down personal objects or objects that facilitate free speech such as temporary literature tables. The City seems to be implying that overzealous enforcement of section 54.0110 is a necessary evil to prevent "encampments" from being set up, but at the same time denies taking such overzealous enforcement action.

The City again only provides the declaration of Captain Mark Jones to refute the four declarations (and eight previous declarations) submitted by Plaintiffs, and Cpt. Jones again qualifies everything with "to my knowledge." (*See* Jones Dec. ¶¶ 5-6.) "An affidavit made upon

1 information and belief is hearsay and not proof of the facts stated therein." (*Jeffers v. Screen*
2 *Extras Guild* (1955) 134 Cal. App. 2d 622.)
3 The City does not deny that any of the specific incidents outlined in Plaintiffs'
4 declarations occurred. The only time Cpt. Jones even comes close to describing the
5 circumstances of a specific incident, he said he reviewed a video taken by other police officers in
6 which he did not hear the officers telling people they could not set things down. (*See* Jones Dec.
7 ¶ 11.) This was to contradict the declaration of Byron Pepper, in which he heard the officers
8 telling people they could not set anything down. (*See* Pepper Dec. ¶ 2.) Instead of having Cpt.
9 Jones sign a declaration saying he reviewed a video in which he did not hear this being said, the
10 City could have submitted declarations from the actual officers involved.
11 The police report for John Kenney's arrest was the only instance in which the City
12 provided any statements directly from officers actually involved in the incidents described in
13 Plaintiffs' declarations. Amazingly, the report shows that Kenney was arrested under section
14 54.0110 for lying down and saying he wanted to sleep. Thus, the City has gone so far as to say
15 that it is not only unlawful to set down any object, but that one can also encroach in the public
16 square with one's body as well. As stated in his declaration, Mr. Kenney was not the owner of
17 the tarp, which was impounded as "found property" according to the police report. He offered to
18 move off the tarp, but was instead told he had to leave the area entirely. However, the City did
19 not charge Mr. Kenney with illegal lodging, probably because a settlement agreement in another
20 case requires the police to take certain steps before doing that, including making sure no beds are
21 available in homeless shelters. Instead, the police charged Mr. Kenney with violating section
22 54.0110, which bans placement of objects on city property, when it was only his body that was
23 on the public square. Under this extremely overbroad interpretation of section 54.0110, anyone
24 could be arrested for his or her shoes touching the ground.
25 The City does not specifically deny that Michael Garcia was arrested under section
26 54.0110 for sitting in a folding chair. The City does not specifically deny that Martha Sullivan
27 was told she could not set down a soapbox to stand on with the words "free speech" written on
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it—even though ironically she could do this on the *privately* owned part of the square *without the property owner's permission* because of an exemption to the trespass law for free speech in areas that are open to the public. The City does not specifically deny that Officer Kendricks made Byron Pepper pick up his handmade protest signs, and when Mr. Pepper set them down again temporarily, Officer Kendricks asked if he was a three year old and threatened to arrest him in five seconds if he did not pick the signs up, while standing very close to him and pointing his finger at Mr. Pepper's chest. Under the City's argument, each of these incidents are simply collateral damage that is acceptable in order to prevent "encampments" from reappearing.

Plaintiffs are not seeking to strike down section 54.0110 on its face in this motion. There may be some confusion on this point because Plaintiffs accidentally neglected to update the conclusion section of the present motion to refer to *limiting* enforcement rather than prohibiting any enforcement of section 54.0110. However, the ex parte notice and proposed order for the present motion both refer to seeking a TRO against enforcement of section 54.0110 only for "temporary placement of personal belongings, signs, folding tables, chairs, or other personal possessions not constituting permanent encroachment on city property."

If the City agrees the ordinance can only be applied to permanent encroachment, and Captain Jones believes his officers are not enforcing it against temporary placement of objects on the ground (to his knowledge), then there is no harm to the City in inssuing a temporary restraining order restricting enforcement of the ordinance to instances of permanent encroachment, which the City believes is and should be the status quo. Failing to do so leaves the door open to continued arbitrary and unconstitutional enforcement based on a literal reading of the ordinance, which this Court has already ruled fails to account for the context of seemingly overbroad words such as "place."

Dated: January 30, 2012

By: /s/ Bryan W. Pease
Bryan W. Pease
Attorney for Plaintiffs