IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TABATHA MARTIN, et al.; Plaintiffs, vs. CITY AND COUNTY OF HONOLULU, a municipal corporation; et al.; Defendants.	Case No. CV 15-00363 HG-KSC MEMORANDUM IN SUPPORT OF MOTION

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I. INTRODUCTION

In denying Plaintiffs' TRO application, the Court relied on testimony from City officials: "Defendant City and County of Honolulu claims that it does not dispose of personal property when enforcing the ordinance." (Dkt. No. 22, 16.) The City's claims that it does not destroy personal property are demonstrably false. Thus, the factual dispute those false claims generated no longer exists. A preliminary injunction is warranted.

The following evidence verifies Plaintiffs' initial claims, and demonstrates the falsity of Defendant's claim not to destroy property:

- Chief among the evidence, and the most shocking, is Deposition testimony from the declarants (Ross Sasamura and Kenneth Shimizu) on whose erroneous testimony denying the destruction of property the Court relied. During deposition questioning these witnesses admitted that the City regularly trashes all kinds of property belonging to homeless individuals;
- Deposition testimony from a former City enforcement crew member, who not only testified that the City regularly disposes of items such as tents, bedding, clothing, and the like, but that there did not seem to be any reason why the City would dispose of (rather than store) certain items;
- Declarations, photographs, and videos, from three witnesses to past and current City sweeps (none of whom is homeless), testifying that the City regularly disposes of all manner of items;

- Declarations from putative class members that the City has destroyed their property without their consent and where the property was not too dangerous to store.
- An independent University of Hawai`i study, and the testimony of a professor who participated in it, which shows the City's practice of destroying the property of the homeless and the hardship it creates.

The overwhelming evidence is detailed below, and is now crystal clear. The City destroys tents, though its own ordinances require that tents be impounded and stored. *See* ROH § 29-16.3(b)(1) (SNO); ROH § 29-19.5 (SPO). The City destroys tarps. It destroys bedding. It destroys clothing. It destroys countless other items that its ordinances require it to store. The City did not admit, and affirmatively denied that it was immediately destroying any of these items when the Court heard the TRO application. The Court, moreover, accepted the City's story and cited the City's arguments and testimony repeatedly in its order denying the TRO. (Dkt. No. 22 at 7, 10, 16-17, 21, 22.)

The new evidence and admissions by the City's witnesses demonstrates that the fundamental underpinning of the Court's

order denying the TRO – that there is a live factual controversy as to whether the City immediately destroys Plaintiffs' personal property – was based on the City's false and misleading presentation to the Court. (*See* Dkt. No. 22 at 7, 10, 16-17, 21, 22.) At this point, the fact that the City destroys property is undeniable (or, at the very least, Plaintiffs have shown an overwhelming likelihood of success in proving that property is immediately destroyed). Thus the case is in a remarkably similar factual posture as *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012). The Court should grant the proposed injunction, which is substantially narrower than the injunction granted and affirmed in *Lavan*.

It is important to note what Plaintiffs are ***not*** requesting in their injunction. This is critical, because the City's opposition to the application for TRO included a number of red herrings and doom and gloom predictions of what would occur if an injunction is granted. Plaintiffs are ***not*** seeking in this motion to prevent the City from enforcing the SNO and SPO. Rather they are seeking to force the City to follow the Constitution (as well as its own ordinances) and to store rather than immediately destroy Plaintiffs' property. The City can still clear the sidewalks. All the trash and

the needles in the photographs the City submitted in opposing the TRO application can be thrown away (insofar as refuse and excrement are not "property" requiring storage under the SNO or SPO). To the extent that sidewalk obstructions and trash on the sidewalk is a "public nuisance," the requested injunction will not prevent the City from addressing it. What the City cannot do, however, is immediately destroy personal property, particularly indispensable items to the survival of homeless persons, such as tents, clothing, bedding, and tarps.

II. PROCEDURAL HISTORY

Plaintiffs filed the complaint on September 16, 2015. The Complaint indicated that Plaintiffs sought preliminary injunctive relief. (Dkt. No. 1 at 46.) Immediately after filing the Complaint, the City announced its intentions to escalate its SNO and SPO sweeps in the Kakaako area. Accordingly, Plaintiffs accelerated their plans and filed their Application for TRO and Motion for Preliminary Injunction on September 21, 2015. (Dkt. Nos. 12-13.) The City filed its opposition on September 22, 2015. (Dkt. No. 16.) The Court held a hearing on the TRO that day, just hours after the City filed its opposition. The Court denied the TRO orally at the

hearing and later in a written order on October 1, 2015. (Dkt. No. 22.) Central to the Court's reasoning at the hearing and in the written order was the City's categorical denial in its opposition that it was immediately destroying any personal property. (Kacprowski Ex. 5 (Hr'g Tran.) 9:10-14.)

Following the TRO hearing, the parties had a Rule 26(f) conference, a status conference before Magistrate Judge Chang, and they commenced discovery. (*see* Dkt. No. 20.) Plaintiffs deposed the City's two witnesses (Messrs. Sasamura and Shimizu) from its TRO opposition. Plaintiffs also deposed Lesliann Ponte, a former member of the enforcement crew.

In the meantime, the City completed its sweeps in Kakaako. Plaintiffs developed important photographic and video evidence of those sweeps. Plaintiffs also found additional photographic and video evidence of prior sweeps and located additional witnesses to sweeps occurring before and after the TRO Application. The vast evidence developed showing that the City does indeed destroy personal property compels Plaintiffs to bring this motion.

III. SUMMARY OF FACTS

The development of the record since the TRO hearing confirms that the City is destroying personal property. The evidence includes 1) the City's own witnesses, who now freely admit that the City does indeed destroy important items of personal property; 2) deposition testimony of another City employee who confirms the City's destruction of personal property; 3) a plethora of photographs showing the City destroying personal property; 4) the testimony of multiple homeless persons, including both the testimony submitted on the TRO and testimony of new witnesses; 5) the testimony of other witnesses who personally observed SNO and SPO sweeps; 6) a University of Hawaii study detailing the rampant destruction of homeless property in the conduct of City sweeps; and 7) the statistics from the recent Kakaako sweeps.

A. Deposition Testimony of the City's Own Witnesses Shows the City Falsely Claimed In Its TRO Opposition That It Did Not Destroy Property.

Although there is a mountain of evidence that the City destroys items of value such as tents, clothing, tarps, shelters, bedding, furniture, and coolers, the Court need look no further than the deposition testimony of the City's own witnesses to confirm that

destruction. One unfortunate fact is now clear: the City presented a wholly inaccurate and misleading picture of how it conducts SNO and SPO sweeps to the Court in its opposition to the TRO. The Court then cited and relied on the City's misstatements in denying the TRO Application.

1. The City Told The Court That It Only Stored And Did Not Destroy Personal Property And the Court Relied On And Cited Those Representations.

The City defended itself at the TRO hearing, in its papers, and in the declaration testimony it submitted by categorically and vigorously denying Plaintiffs' allegations that the City seizes and immediately destroys property of homeless individuals. The City's denial rested heavily on two paragraphs in the declaration testimony of its Director of Facilities Maintenance.

> 3. Under the terms of the SNO, "sidewalk-nuisances" are **stored** after they are removed. They are **not "destroyed."**
>
> 16. [O]ther than empty cups, plastic bottles and caps, used napkins, and empty packages and plastic bags, nothing is thrown away when DFM enforces SNO.

(Dkt. No. 16-1 (emphasis in original).) The City quoted or cited these paragraphs repeatedly in its opposition brief: "sidewalk nuisances are **stored** after they are removed. They are **not**

'destroyed,' as Plaintiffs would have the Court and the general public believe." (Dkt. No. 16 at 11.) Over and over again, the City denied destroying property. (Dkt. No. 16 at 11-12, 16-17, 21, 25.)

The City reiterated its denial at the TRO hearing. Counsel stated : "[…] I think it's set forth in Mr. Sasamura's and Mr. Shimizu's declaration which was submitted to the Court, ***that the City does not destroy personal property under the SNO***." (Kacprowski Ex. 5 (Hr'g Tran.) 6:18-25 (emphasis added).) Mr. Nomura further informed the Court that while enforcing the SNO the City only "remove[s] and discard[s] what is obviously trash." (*Id.* 7:1-3.)

The Court relied heavily on the City's denials and its declaration testimony in its TRO order. At the hearing, the Court described what it thought was a key factual dispute in light of the City's denials: "[t]he plaintiffs' claims are that personal property is being destroyed immediately by the City, and the City's position is, no, personal property is not being immediately destroyed; it is being stored and tagged and notice given." (*Id.* 9:10-14.) This understanding on the part of the Court carries through to its written order. In particular, the Court quoted or cited paragraph 3

or 16 of Mr. Sasamura's declaration repeatedly in the order. (Dkt. No. 22, at 16, 17, 18, 22.) The Court found that in light of the City's testimony and denials that it was destroying property, "Plaintiffs have not established a likelihood of success on the merits based on the evidence currently before the Court." (Dkt. No. 22 at 20.)

2. The Testimony The Court Relied On That The City Did Not Destroy Personal Property Was False and Misleading.

The two City declarants in opposition to the TRO testified specifically at their depositions that the City has seized the following items of personal property: tents; clothing; tarps; shelters; bedding; furniture; coolers. (Kacprowski Decl, Ex. 1 (Sasamura Tran.) 58:3-20; Ex. 2 (Shimizu Tran.) 130:13-131:7; 105:23-106:6). They testified that, after the items are seized, they are placed into City refuse trucks, hauled to a refuse collection site, and then transported to the H-Power plant and incinerated. (Kacprowski Decl, Ex. 1 at 188:14-193:6.) The only thing left of the property, as Mr. Sasamura explained, is "ash." (*Id.* at 191:9-192:1.) That testimony is somewhat shocking, because the City's TRO opposition papers and the declarations of those witnesses provide

absolutely no indication that the City had ever destroyed any of those items. This cannot be a simple oversight, since those are items that the Plaintiffs alleged the City destroyed. (Dkt. No. 1, Compl. ¶¶ 66-123.)

This is not, however, only a case of the City's briefing and declarations being misleading by omission (which they are). The City's statements in its opposition brief and declaration testimony directly contradicts the deposition admissions. Mr. Sasamura's declaration states that "'sidewalk-nuisances' are **stored** after they are removed.[1] They are **not "destroyed**." (Dkt. No. 16-1 ¶ 3 (emphasis in original).) He testified that "***[O]ther than*** empty cups, plastic bottles and caps, used napkins, and empty packages and plastic bags, ***nothing is thrown away*** when DFM enforces SNO. (*Id.* ¶ 16 (emphasis added).) In his deposition, however, it becomes clear that clothing, tarps, tents, and shelters have at times been thrown away and ***not*** stored. (Kacprowski Decl. Ex. 1 at 58:3-20.)

[1] The terms "sidewalk-nuisance" as defined in the ordinance explicitly lists (but is not limited to) structures, tents, furniture, and containers. ROH § 29-16.2.

Mr. Sasamura and his three lawyers at his deposition were offered the opportunity to correct his TRO declaration testimony. Yet although the witness testified that he read the Court's order on the TRO and realized that the Court cited to his declaration repeatedly, he still refused to correct it. (*Id.* 193:16-23; 198:12-22.) He stuck by his guns, refusing to admit that it was at all misleading to the Court to testify emphatically that sidewalk nuisances are "**not destroyed**," to list specific items and say that "other than [those items] nothing is thrown away," and then not mention for the Court that actually, there are times when the City destroys clothing, tarps, tents, and shelters.[2] The City's lawyers have, to date, taken no steps to address the inaccurate statements

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[2] The City's other TRO declarant, Kenneth Shimizu, omitted the destruction of these items in his TRO testimony and created the inaccurate impression that they are not destroyed. He testified in his declaration that "Personal property remaining on the sidewalk is inventoried on the SNO 'tags' and the items are stored in green bins." [Dkt. No. 16-2 ¶ 5.] Now it is obvious that not all personal property is stored; clothing, tarps, tents, shelters, coolers, and bedding is sometimes destroyed. The only items Mr. Shimuzu listed as being destroyed were things such as "syringes, garbage bags filled with trash, plastic bags filled with feces and urine…" [*Id.* ¶ 6.] Other than "bed bug ridden wet mattresses," there is no mention at all of destruction of tents, clothing, shelters, coolers, and bedding.

to the Court. *See, e.g.* Fed. R. Civ. P. 11(b); Hawai`i Rules of Professional Conduct 3.3(a)(4).

The City has instead decided to defend the prior declaration testimony by taking the position that although it does not "destroy" things like tents, it does "dispose" of them, and that means something different:

> Q. Okay. So, is it correct then that in any enforcement action the DFM has never destroyed a tent? Is that your testimony?
>
> A. To my knowledge, we don't destroy tents. We don't destroy items. And I believe my testimony was that we dispose of certain things.
>
> Q. Oh, I see. So you're drawing a distinction between the word destroy and dispose of. Is that what's going on here?
>
> A. That's been my testimony.

(*Id.* 189:13-22)

The City's defense of its prior testimony is, on its face, ridiculous. It is particularly unreasonable given what happens after something is "disposed of." As Mr. Sasamura testified, when the City disposes of an item in a SNO or SPO sweep, the item is literally incinerated. (*Id.* 191:9-192:1.) Yet, according to the City, that does not constitute "destruction" of the item:

Q. Okay. Would—when a tent is processed and turned into energy, is there anything left of the tent after that happens?

A. There is ash.

Q. Okay. So, taking a tent and turning it into ash, would you agree that that's—that would constitute destruction of the tent?

A. No I would not.

(*Id.* 191:23-192:5.) The City's other TRO declarant also denied that incinerating something would constitute "destroying" that object:

Q. What would you have to do to destroy an item?

A. What would I consider would be destroying an item? Breaking it apart in anger.

Q. Burning it up, would that be destroying it?

A. No.

Q. No. But when you put something in the refuse truck, that would be disposing of it?

A. Correct.

Q. Anything else other than breaking something apart in anger that would be destroying something?

A. Not in my definition.

(Kacprowski Decl. Ex. 2 at 153:7-17.)

In any event, whether the City wants to finally come clean now and correct its filed declarations, or continue defending them on the basis that throwing something in the trash for

incineration does not "destroy" it, one thing cannot be changed: the prior testimony creates the inaccurate impression that the City does not destroy the items Plaintiffs complain were destroyed, and the Court relied on that impression.

B. A New City Witness Also Confirms That The City Destroys Personal Property.

Plaintiffs also deposed former City contract employee Leslieann Ponte. Plaintiffs asked to depose the past and present members of the sweep crew, and Ms. Ponte was the first available.

Ms. Ponte worked for the City from July 2013 to June 30, 2015. (Kacprowski Decl. Ex. 3 (Ponte Tran.) 11:19-12:20.) She worked on the crew that conducts the City's homeless sweeps. (*Id.* 17:5-22; 22:5-15.) Ms. Ponte testified that before she or someone else on the crew trashed something, they needed approval from a supervisor. (*Id.* 54:13-55:9; 57:8-22; 59:13-22; 64:9-19; 109:13-19.) She testified that she sometimes destroyed items, like tents, at the behest of her supervisor, when she did not believe they were dangerous and she saw no reason not to store them. (*Id.* 101:5-106:9; 136:21-137:15.) Ms. Ponte testified specifically that the tent being destroyed in the photographs attached to the complaint was

something she would have stored, and she only trashed it under order from her supervisor. (*Id.*)[3]

Ms. Ponte testified about orders to destroy property from her supervisor that she found quite upsetting. Her testimony shows just how disturbing the City's practices are, ***even to members of the sweep crews themselves***. Ms. Ponte was shown a video of the sweep crew (herself included) destroying a tent and a chair looking to be in near-pristine condition. (*Id.* 111:10-116:8.) The video was taken during the November 13, 2014 Kakaako sweep, and has been submitted on a disk to the Court as Lodged Exhibit 24.[4] Ms. Ponte then testified as follows:

> Q. How did you feel about throwing the tent away?
>
> A. Not good.
>
> Q. Why?
>
> A. Not my tent.

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[3] Exhibits 6, 8, and 9 of Ms. Ponte's deposition were contained in the Complaint, and she verified that they depict her and other members of the crew. (Kacprowski Decl. Ex. 3 (Ponte Tran.) 101:24—103:17; Complaint (Dkt. No. 1) ¶ 44.)

[4] *See* File number 20141113_123947.

Q. To this day does this enforcement action make you sad?

A. Yes.

Q. Why?

A. There were quite a bit of children, their toys and stuff, and it just wasn't a good day.

Q. Did you throw kids' toys away?

A. Well, if the supervisor said so, yes.

Q. So do you remember, did you throw kids' toys away?

A. I remember some, yeah.

Q. And what did you think about that?

A. I didn't like it.

Q. Why not?

A. They're children.

Q. You felt like they should be allowed to keep their toys?

A. Yeah.

[***]

Q. What did you want to do instead?

A. Wanted to give it to them.

Q. But your supervisor said no?

A. It's his decision, so...

Q. Were there things that he was telling you to throw away that you thought there's no reason to throw this away?

A. Yeah.

Q. Like what?

A. Like the toys and books. Yeah, stuff like that.

Q. Tents?

A. Yeah, tents.

Q. Tarps?

A. Yeah.

Q. Clothes?

A. Clothes, too.

Q. All those sorts of things were thrown away?

A. Yes.

Q. And all those sorts of things, you thought you didn't see a reason to throw those away?

[objections]

A. Again, that was his decision. I just did what I was told.

Q. Well, I know. I'm just asking for what you thought. What did you think when you saw all the stuff go in the garbage that you thought you could have kept?

> A. They could have gave it to the kids, they could have allowed them to take it.
>
> Q. Were the kids asking to take their toys?
>
> A. They were crying.

(*Id.* 117:12-120:9.)

Ms. Ponte testified extensively about how participating in the sweeps made her feel bad. (*See e.g.* 19:15-25; 135:2-8.) She testified about how other sweeps included waking people up in the middle of the night, and destroying property they owned. (*Id.* at 138:22-141:22.) Feeling bad about participating in these sweeps was a reason why she decided to leave the job.[5] As she put it: "I just couldn't do it anymore." (*Id.* at 123:7-124:8; 124:25-125:15.)

C. A Substantial Amount Of Photographic And Video Evidence Shows The City Destroying Property.

Following the TRO hearing, Plaintiffs also collected vast photographic evidence of the City destroying property. This evidence comes from sweeps occurring both before and after the TRO hearing. Indeed, apparently emboldened by the Court's order,

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[5] Ms. Ponte testified similarly about other videos, also submitted on Lodged Exhibit 23 (file numbers MVI_7131 and MVI_7087.) *See* Kacprowski Decl. Ex. 3 (Ponte Tran.) 131:13-138:25.

the City summarily destroyed a large number of items during the Kakaako sweeps that concluded in October. The photographic evidence is substantial. Selected photographs are described in the declarations of Rex Moribe and Richard Sachar, the professionals who took the photos and videos. (Moribe Decl. ¶¶ 4-14; Sachar Decl. ¶¶ 6-14) Other photographs and videos are submitted on discs. (Moribe Decl. Ex. 22, Ex. 23; Sachar Decl. Ex. 1.) The photos and videos record the destruction of a large number of tents, bedding, clothing, tables, chairs, coolers, even children's toys and a basketball. (*Id.*) Many items look to be in perfectly fine condition, and as discussed below, eyewitness testimony confirms they did not appear hazardous. The photos directly contradict the City's assertions in the TRO opposition and supporting declarations that it does not destroy – and instead stores – such property.

D. The Testimony Of Numerous Homeless Individuals Confirms That The City Destroys Property.

The declarations submitted with the TRO Application show that the City destroys personal property during homeless sweeps. (Dkt. Nos. 12-10; 12-11; 12-12; 12-16.) Although the Court declined to grant the TRO based on those declarations, it did

consider them. (*See* Dkt. No. 22 at 15-16.) Those declarations should be considered again, along with the vast body of additional evidence described in this motion.

Plaintiffs also submit new testimony from witnesses Amber Coiley and Anthony Garo, Jr. Ms. Coiley was homeless and living in Kakaako on October 8, 2015. She lost clean clothing, clean bedding, and a tent in the sweep. (Coiley Decl. ¶¶ 2-5.) Mr. Garo was homeless and living in Kakaako during the November 13, 2014 sweep. He was prohibited from taking any papers from inside his tent by a policeman. (Garo Decl. ¶¶ 3-4.) He had a clean tent taken from him, various forms of identification, and cash. (*Id.* ¶¶ 5-7.) After the City took his identification, Mr. Garo was unable to travel to the Big Island in time to see his ailing father, who died within a week of the sweep. (*Id.* ¶ 9.)

E. The Testimony Of Other Witnesses Demonstrates the City Destroys Property

Plaintiffs also submit testimony of other witnesses who are not homeless that confirms that the City destroys valuable property that appears to be in fine condition.

Rex Moribe is an IT professional and the owner of an independent media company. Independent of this case, he observed, photographed, and video recorded homeless sweeps in Kakaako on September 3 and November 13, 2014, and other dates. (Moribe Decl. ¶ 4-13.) Plaintiffs' counsel retained him to photograph and video record the Kakaako sweeps in September and October 2015. (*Id.* ¶ 3.) Mr. Moribe personally saw so many tents, items of clothing, tarps, coolers and other items immediately destroyed, that he lost count. (*Id.* ¶ 4.) He estimates seeing at least 19 tents destroyed. (*Id.*) The declaration contains estimated counts of other items destroyed. None of them appeared to be hazardous, dirty, or perishable. (*Id.*)

Richard Sachar, another eyewitness, is a professional visual effects compositor. (Sachar Decl. ¶ 3.) He witnessed and made photos and videos of the sweeps in Kakaako on October 1, 8, and 14, 2015. (*Id.* ¶ 5.) He estimates personally seeing the City destroy 20 tents, 17 tarps, 23 furniture items, 16 bedding items, 13 coolers, and various other things, none of which appeared hazardous, dirty, or perishable. (*Id.* ¶ 6.)

Raina Whiting is a public school teacher and formerly the director of a homeless outreach group. (Whiting Decl. ¶ 3.) In 2014, she spent 48 hours living on the street in Honolulu in an effort to document what it is like to be homeless. (*Id.*) Her declaration describes the City's shocking conduct that she personally witnessed. For example, the City took bedding, a cart, and a backpack containing heart medication from a 75-year-old man. (*Id.* ¶ 6.) The the City refused to allow him to keep it. (*Id.*) She observed the City throwing away bedding, clothing, toys, tarps, and other items. (*Id.* ¶ 12-13.) The City threw away items when people were not present (and therefore could not have consented to their destruction). (*Id.*) During one sweep conducted at 3:00 a.m., City officials ordered her (and many homeless individuals) ***not*** to take any property, but rather to leave the property so that the City could seize all of it. (*Id.* ¶ 11.)

F. Data Compiled For A Recent University of Hawaii Study On SNO And SPO Sweeps Further Demonstrates That The City Destroys Property.

The Department of Urban and Regional Planning of the University of Hawai`i at Manoa recently published a study. A number of faculty members and Ph.Ds with the University

participated in and advised on the study. (Jennifer Darrah-Okike Decl. ¶¶ 11-14, Ex. 1 at 1.) The study contains survey data of 70 homeless individuals in three different locations in Honolulu in early 2015. (Darrah-Okike Decl. Ex. 1 at 12.) Only 13% of those surveyed had never experienced a sweep. (*Id.* at 17.) Forty percent of the individuals had experienced multiple sweeps. (*Id.*)

The amount of personal property lost during the sweeps can only be described as shocking. Over 50% of those surveyed had lost identification during sweeps. (*Id.* at 22.) Only 16% of those who had lost identification were able to retrieve it. (*Id.* at 23.) Nearly half reported that their identifications were thrown away. (*Id.*) The individuals surveyed lost other critical items as well: 43% lost clothing during sweeps, and 40% lost tents. (*Id.* at 22.)

The data from the University of Hawai`i survey was developed completely independently from (and prior to) this litigation. It confirms precisely what Plaintiffs allege in the Complaint about the City's policy and practice of destroying homeless people's property.

G. The Statistics From The Recent Kakaako Sweeps Also Indicate Rampant City Destruction Of Property

The sheer amount of property the City trashed during the Kakaako sweeps shows a practice of destroying rather than storing most property it encounters. An independent witness counted 300 people living in Kakaako. (Beatriz Cantelmo Decl. ¶¶ 2-6.) That witness also counted 157 tents as of October 4, 2015. (*Id.* ¶ 2.) With all these people and tents, one would expect that the City would store a substantial amount of property. But it did not. It only stored ***eight*** bins of items between September 8 and October 9, 2015. (Kacprowski Decl. Ex. 1, 146:22-147:1.) The City trashed 52 ***tons*** of material. (*Id.* 146:12-21.) It strains credibility that the City would only store eight bins if it was following the SNO's dictate regarding the storage of sidewalk-nuisances

IV. STANDARD FOR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF

To obtain a preliminary injunction, a plaintiff "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." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012) (quoting *Winter v. Natural Res.*, 555 U.S. 7, 20 (2008)).

Irreparable harm is that which "can seldom be adequately remedied by money damages and is permanent or at least of long duration[.]" *Amoco Production Co. v. Gambell*, 480 U.S 531, 545 (1987). Where serious questions going to the merits are raised, but the balance of the hardships "tips sharply" in plaintiffs' favor, district courts can issue an injunction to preserve the status quo "where difficult legal questions require more deliberate investigation," so long as the other *Winter* factors are met. *Lavan v. City of Los Angeles*, 797 F.Supp.2d 1005, 1009-10 (C.D. Cal. 2011) (internal citations omitted), *aff'd* 693 F.3d 1022 (9th Cir. 2012); *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

V. ARGUMENT

A. Plaintiffs Are Likely To Succeed On The Merits.

Plaintiffs are highly likely to succeed on showing that 1) the City immediately destroys property during its homeless sweeps; and 2) the destruction violates the Fourth and Fourteenth Amendments to the U.S. Constitution.

Other than falsely claiming it did not destroy property, so far the City's main defense on the merits has been that it provides "ample" notice before sweeps "on a practical as applied matter." (Dkt. No. 16 at 22.) That position strains credulity. Many sweeps are conducted without any notice, as ***the City's own deposition testimony*** now confirms. (Kacprowski Decl. Ex. 1, 82:12-15.) Perhaps more importantly, the Ninth Circuit and district courts following Ninth Circuit case law have specifically held that notice regimes far more robust than those the City occasionally provides are constitutionally inadequate.

1. Plaintiffs Are Likely To Succeed In Proving The City Violates The Constitution By Immediately Destroying Property.

To succeed on their constitutional claims, Plaintiffs must show that as a factual matter the City immediately destroys property, and as a legal matter that the destruction violates the Fourth or Fourteenth Amendment. Neither can now seriously be disputed.

a. Plaintiffs Are Likely To Prevail On Any Factual Disputes.

The substantial evidence described above should put to rest the City's earlier claim that it does not destroy property. (*See* Dkt. No. 16 at 11-12, 16-17, 21, 25.) If the City continues asserting this patently false claim, the Court can and should rule that Plaintiffs are likely to succeed in proving their case. The Court may grant preliminary injunctions where the parties dispute the facts if the movant is likely to prevail. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 671 (2004) (affirming preliminary injunction even though there were "substantial factual disputes remaining" for trial).

The *Lavan* record, for example, shows that the facts were vigorously disputed before the district court, and the court still granted a preliminary injunction. *Lavan v. City of Los Angeles*, 797 F. Supp. 2d at 1013 (describing facts in dispute), *aff'd*, 693 F.3d 1022. Indeed, in *Lavan*, the City of Los Angeles filed a five-page, single-spaced document that it titled "***Chart of Disputed Facts***" with its opposition to the preliminary injunction. (Kacprowski Decl. Ex. 6.) The *Lavan* district court weighed the facts and determined

Plaintiffs were likely to succeed on the merits. The Ninth Circuit even noted that "while the City challenged many facts before the district court, it does not challenge ***the district court's factual findings*** in this appeal." *Lavan*, 693 F.3d at 1024 n.2 (internal quotations omitted and emphasis added). This Court is similarly empowered to weigh factual disputes on this motion and determine who is likely to prevail.

b. Plaintiffs Are Likely To Prevail On The Claim That the Immediate Destruction Of Their Property Violates The Fourth Amendment.

The seizure and immediate destruction of personal property of the homeless violates the Fourth Amendment. *Lavan*, 693 F.3d at 1030. "The Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *United States v. Place*, 462 U.S. 696, 700 (1983). A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 61 (1992); *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994) ("The destruction of property is 'meaningful interference'

constituting a seizure under the Fourth Amendment . . . . "), *overruled on other grounds, Robinson v. Solano Cnty.*, 278 F.3d 1007 (9th Cir. 2002).

These core protections extend to tents, shelters and similar temporary structures on public property, ***even if their location on a City sidewalk violates a municipal ordinance***. *Lavan*, 693 F.3d 1022, 1029-1030; *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993) (citing, *inter alia*, *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D. Fla. 1992). "[A]n officer who happens to come across an individual's property in a public area could seize it only if Fourth Amendment standards are satisfied – for example, if the items are evidence of a crime or contraband." *Soldal*, 506 U.S. at 68; *see also San Jose Charter of the Hells Angels Motorcycle Club*, 402 F.3d at 975 ("[T]he destruction of property by state officials poses as much of a threat, if not more, to people's right to be 'secure . . . in their effects as does the physical taking of them.") (citation omitted).

In *Lavan*, the city swept Skid Row, seizing and summarily destroying the personal possessions of plaintiff homeless persons who had stepped away from their belongings. 693 F.3d at

1025. The district court granted an application for a temporary restraining order and issued a preliminary injunction, which the Ninth Circuit upheld. *Lavan*, 797 F.Supp.2d at 1020. The Ninth Circuit affirmed that the unattended property of homeless persons is protected by the Fourth and Fourteenth Amendments, and that a city may not "seize and destroy with impunity the worldly possessions of a vulnerable group in our society." 693 F.3d at 1033.

As in *Lavan*, Honolulu has no legitimate interest in the immediate disposal of Plaintiffs' property. 693 F.3d at 1030 ("even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable.") Absent a legitimate governmental interest that somehow outweighs Plaintiffs' fundamental constitutional rights to be free from government seizure and destruction of their private property, the Fourth Amendment is violated. *Soldal*, 506 U.S. at 68-69; *Miranda v City of Cornelius*, 429 F.3d 858, 862-63 (9th Cir. 2005).

c. Plaintiffs Are Likely To Prevail On Their Claim That The Immediate Destruction Of Their Property Violates The Fourteenth Amendment.

Plaintiffs are likely to prevail on their Fourteenth Amendment claim, because the City destroys property with little or no notice, and does not provide any opportunity to be heard.

The Due Process Clause requires both notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 339-343 (1976). The hearing must be "'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)). The government must provide notice and an opportunity to be heard ***before*** seizing any private property absent "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (citations omitted). This is required even for property of limited value. *See Fuentes v. Shevin*, 407 U.S. 67 at 84-87 (1972) (prior notice required before temporary seizure of household goods); *Propert v. District of Columbia*, 948 F.2d 1327, 1334 (D.C. Cir. 1991) (pre-seizure notice required for parked "junk" cars). Here, the City

has provided no mechanism for homeless individuals to argue against the City's actions prior to the destruction of their most important possessions.

Even if the City can show that the hearing procedure for ***impounded*** property under the SNO and SPO satisfies due process, it cannot show that it is constitutional to ***destroy*** property without a hearing. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) ("[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.") As with the "sweep of derelict vehicles" in *Wong v. City and County of Honolulu,* 333 F.Supp. 2d 942 (D. Haw. 2004), no reasonable City officer could believe that the immediate destruction of Plaintiffs' items here comports with due process. *Id.* at 955-956.

Lavan once again provides clear guidance on this question. *Lavan* held that "because homeless persons' unabandoned possessions are 'property' within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment's due process clause if it wishes to take and destroy them." *Lavan*, 693 F.3d at 1032.

Lavan holds that even if maintaining property on public space violates a city ordinance, the existence of the ordinance is not sufficient notice justifying a permanent destruction of the property under the Fourteenth Amendment:

> The City demonstrates that it completely misunderstands the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected property interest in their possessions by leaving them momentarily unattended in violation of a municipal ordinance. As the district court recognized, the logic of the City's suggestion would also allow it to seize and destroy cars parked in no-parking zones left momentarily unattended.

Id.

The notice the City provides before destroying property is woefully inadequate. The SNO does not require prior notice before property is seized for ***impoundment***. ROH § 29-16.3(b). The head of the City's sweep crew has admitted that some sweeps where property is ***disposed of*** are conducted without prior notice. (Kacprowski Decl. Ex. 2, 156:8-17.) Destruction of property in those sweeps necessarily violates the Fourteenth Amendment. *Lavan*, 693 F.3d at 1032. The City has described various forms of notice it sometimes provides. For example, in Paragraph 16 of his

TRO declaration (the same paragraph demonstrated above to be false), Mr. Sasamura testified that prior to SNO sweeps, affected individuals are given "a courtesy fifteen (15) minutes to gather their belongings." (Dkt. No. 16-1 at ¶ 16.) The City also claimed in its TRO opposition brief, without citing to any evidence, that "on a practical, 'as applied' matter, before SNO enforcement actually takes place, the City provided notice that SNO and SPO enforcement would take place on dates certain." (Dkt. No. 16 at 22.) Before the recent Kakaako sweeps, the City also posted a notice that stated an enforcement action was commencing that "will occur over the course of several weeks or months." (Kacprowski Decl. Ex. 7.)

The City's purported sporadic notice has been specifically rejected by courts that have addressed similar forms of notice provided prior to the destruction of property. In *Lavan*, the City posted a sign in the area that notified that sweeps would occur during certain hours. *Lavan*, 797 F. Supp. 2d at 1017. The district court rejected that notice as insufficient to overcome a due process violation, both because the notice was inadequate and because even if notice was adequate, there was no opportunity to be heard prior

to the property destruction. *Id.* The ***dissent*** argued that this notice was sufficient, and the majority opinion rejected that argument. *Lavan*, 693 F.3d at 1034. In *Kincaid v. City of Fresno*, the city put forth evidence that it provided one to five days notice before sweeps in which it immediately destroyed property. 2006 WL 3542732 at *1. It provided notice both orally and in writing. *Id.* at *3, *14-16. The Court still granted a preliminary injunction, holding that despite the notice, the plaintiffs were likely to prevail on the due process claim. *Id.* at *37-38.

This precedent demonstrates that the City's notice is inadequate to cure a due process violation in the immediate destruction of property. First, no matter what notice is given, there is still a due process violation, because there is no opportunity to be heard before the deprivation. Second, the City admits that some sweeps are conducted with no prior notice. Third, the notice the City describes is obviously inadequate under the Fourteenth Amendment caselaw. An oral statement to the effect of "you have 15 minutes to physically carry away everything you own otherwise we will destroy it" cannot possibly pass constitutional muster. Ms. Ponte also testified specifically that she thought this notice was

inadequate, and she saw that it did not give people enough time to gather all their things. (Kacprowski Decl. Ex. 3, 162:24-164:7.)

2. The City Has No Constitutionally Legitimate Basis For Immediately Destroying Property.

The City's original defense to this case was to deny that it destroyed property. Now that the City's denial is proven untrue, the City will likely defend its destruction of items like tents, tarps, furniture, bedding, clothing, and children's toys in the manner its witnesses did in depositions. For example, Mr. Shimizu, the sweep crew supervisor, freely admitted that the City destroyed such items, but claimed that it only did so in two circumstances: first, if the owner gave explicit consent to have the item destroyed, second, if the item is "contaminated" or hazardous. (Kacprowski Decl. Ex. 2, 67:6-69:6.) Presumably the City's new story will be that it only trashes property without the consent of the owner is when it is hazardous. To be clear, Plaintiffs are ***not*** seeking to prevent the City from destroying truly hazardous materials. Rather, Plaintiffs seek to end the City's practice of destroying property being used on a daily basis by families and children and then, after the fact, arguing that the property was somehow too dangerous to store.

A mountain of evidence contradicts any claim that the City only throws away property that is hazardous. The evidence instead shows that the City destroys property that is perfectly fine. First, declarations submitted with this motion from homeless individuals establish that they have lost clean, non-hazardous property. (Josephson Supp. Decl. ¶ 2; Anthony Garo Decl. ¶ 6; Coiley Dec. ¶ 3; Tanako Yug Suppl. Decl. ¶ 2; Gabriel Yug Suppl. Decl. ¶ 2.) Second, eye witnesses to the sweeps testify that they have watched the City destroy many valuable items that appeared to pose no hazard. (Whiting Decl. ¶¶ 12-19; Moribe Decl. ¶¶ 4-13; Sachar Decl. ¶¶ 6-14.) Third, the photographs of items destroyed show a large number of items that appear to be perfectly fine going into the trash. (Moribe Decl. Exs. 4-13; Sachar Decl Exs. 2-5.) Finally, and perhaps the most convincing, is Ms. Ponte's testimony. She testified that when she was on the sweep crew she often threw away items that looked fine to her because her supervisor ordered her to, and that she would have stored the items or let the owners keep them if she had that authority. (Kacprowski Decl. Ex. 3, 117:12-120:9).

The City's "process" for determining whether something is hazardous is also overbroad, inconsistent, and unconstitutional. It all comes down to the unfettered discretion of two individuals: supervisor Mr. Shimizu, or Allan Sato, the assistant supervisor. (Kacprowski Decl. Ex. 2, 69:7-22; 76:7-17; Ex. 1, 112:12-113:2.) As for written guidelines to follow, "No, there's nothing like that." (*Id.* (Shimizu) 75:24-76:22; (Sasamura) 112:1-113:5.) Crew members do not participate in the decision–they simply await Mr. Shimizu's orders over whether to throw something away or store it. (Kacprowski Decl. Ex. 3, 54:13-55:9, 57:8-22, 59:13-22, 64:9-19; 109:13-19.) Moreover, other than reading the ordinance, Mr. Shimizu received absolutely no training on how to decide whether a person's property should be trashed or stored. (Kacprowski Decl. Ex. 2, 109:1-13.)

The City also has an extraordinarily broad definition of when property is too hazardous to be stored. For example, Mr. Shimizu testified that he trashes property as hazardous if the property is wet or damp. (*Id.* 67:13-69:2.)

B. Plaintiffs Are Likely To Suffer Irreparable Harm In The Absence of Preliminary Relief.

There should be no legitimate dispute that the loss of Plaintiffs' personal property causes them irreparable harm.

As an initial matter, no particularized showing of irreparable harm is even necessary here: when a person's constitutional rights are violated, there is a presumption of irreparable harm. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001).

In any event, Plaintiffs have demonstrated actual irreparable harm. Several courts have held in granting preliminary injunctions that the homeless suffer irreparable harm when their property is lost. *Lavan*, 797 F. Supp.2d at 1019; *Kincaid*, 2006 WL 3542732 at *40. *See also Pottinger*, 810 F. Supp. at 1559 ("For many of us, the loss of our personal effects may pose a minor inconvenience. However… the loss can be devastating for the homeless"); *Russell v. City and Cnty of Honolulu*, 2013 WL 6222714, *16-17, No. CIV. 13-00475 LEK (D. Haw. Nov. 29, 2013) *reconsideration denied*, 2014 WL 356627, (D. Haw. Jan. 30, 2014) (imminent seizure of property from a (De)Occupy Honolulu

encampment deemed a sidewalk nuisance constituted irreparable harm). Professor Darrah-Okike's testimony and the University of Hawai`i homeless study further demonstrates the irreparable harm the destruction of property causes. (Darrah-Okike Decl. ¶¶ 15-31.)

These rulings make perfect sense. When government sweeps destroy tents, tarps, and building materials, homeless individuals are also deprived of shelter and what may be their only protection from the elements. Individuals have been deprived of their clothing, leaving them nothing but the shirts on their backs. (Josephson Decl. ¶ 9, Dkt. No. 12 at 136.) Indeed, the only basis for the Court's finding on the TRO motion that irreparable harm was not shown was the City's denial that it was destroying property. (Dkt. No. 22 at 21-22.) Now that the City's destruction of property has been clearly established, Plaintiffs have shown irreparable harm.

Without an injunction, Plaintiffs face a very real threat of harm in future sweeps. The City has a full-time crew of six members that conducts sweeps most days each week. (Kacprowski Decl. Ex. 2, 17:9-18:5; 31:18-32:6.) Plaintiffs are all either homeless or likely to be homeless again in the future. Many of

them have been the victim of multiple sweeps. (Tabatha Martin Decl. ¶¶ 9-19, Dkt. No. 12 at 139-140.) The University of Hawaii's study of the City's homeless policy also shows that over 40% of the homeless individuals surveyed for the study had experienced multiple sweeps. (Darrah-Okike Decl. Ex. 1 at 17.)

C. The Balance of the Equities Tips In Favor of Plaintiffs.

The balance of equities tips sharply in Plaintiffs' favor. As the Court has noted, "Plaintiffs have a strong interest in the continued ownership of their personal property, especially given that the property impounded by the ordinances may be everything that a homeless person owns." (Dkt. No. 22 at 22 (citing *Lavan*, 693 F. 3d at 1031-32)).

The Court earlier found that the balance of equities weighed in favor of denying the TRO, but the new evidence submitted with this motion more than adequately addresses the Court's concerns and show that the balance of equities favors an injunction. The Court earlier noted that "individuals have a responsibility to remove their personal property from public property after they are given notice that they are in violation of the

City's ordinances." (Dkt. No. 22 at 23.) First, even if they are given notice, Professor Darrah-Okike's testimony shows just how hard it is for homeless persons to simply move all their belongings. (Darrah-Okike Decl. ¶¶ 17-20.) Second, Messrs. Sasamura and Shimizu have admitted that generally SNO enforcement actions are conducted ***without any prior notice***. (Kacprowski Decl. Ex. 1, 82:12-15; Ex. 2, 151:16-152:14; 156:8-17.)

The general existence of a statute prohibiting sidewalk-nuisances is not adequate notice that would prohibit an injunction. In *Lavan*, the dissent made the argument that an injunction should not issue where a sign posted in the area clearly stated that maintaining property in public parks violated city ordinance and that any property was subject to destruction.[6] 693 F.3d at 1034. The majority opinion rejected that argument. Moreover, the SNO

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[6] The sign stated "Please take notice that Los Angeles Municipal Code section 56.11 prohibits leaving any merchandise, baggage or personal property on a public sidewalk. The City of Los Angeles has a regular clean-up of this area scheduled for Monday through Friday between 8:00 and 11:00 am. Any property left at or near this location at the time of this clean-up is subject to disposal by the City of Los Angeles." *Id.* at 1034.

and SPO do not provide notice that Plaintiffs' property will be ***destroyed*** if they leave it on the sidewalk. Any Plaintiff reading the laws would be led to believe that if she left property on the sidewalk it would be impounded and there would be an opportunity to reclaim it.

The Court also noted in denying a TRO that "[i]f the Court grants the temporary restraining order, the City and County of Honolulu will not be able to enforce its own ordinances, and the sidewalks and public spaces in the community can be obstructed" and a TRO "would also prevent the City and County of Honolulu from removing hazards that may pose health and safety risks to the public." (Dkt. No. 22 at 23.) This is concern is no longer an issue, because the injunction requested here would ***not*** bar the City from enforcing the SNO or SPO. It would ***not*** bar the City from disposing of materials that actually are hazardous. In fact, the injunction requests only that the City act consistently with its ordinances and store personal property rather than destroying it.

Courts have enjoined City ordinances where there actually has been evidence that doing so would affect public sanitation, which is not the case here. In *Pottinger*, the court held

that the City of Miami's conduct in destroying homeless persons' property violated both the Fourth and Fourteenth Amendments. 810 F.Supp. at 1571. The court rejected Miami's argument that its interests in sanitation and order trumped any interest of the homeless in keeping their belongings. *Id.* at 1570-73. While the City claimed the belongings lacked value, the court observed that property value "is in the eyes of the beholder, as one man's junk is another man's treasure." *Id.* at 1556. The court held that "the City's interest in having clean parks is outweighed by the more immediate interests of the plaintiffs in not having their personal belongings destroyed." *Id.* at 1573.

Similarly, in *Justin v. City of Los Angeles*, 2000 WL 1808426 (C.D. Cal. Dec. 5, 2000), where a temporary restraining order was granted, the court explained that:

> Here, Defendants may be slowed in their efforts to keep the City, and especially the downtown area, clean and safe. This injunction may disturb their new initiative to revitalize and uplift communities, to improve the streets and sidewalks, and to diminish the crime rate. Plaintiffs, however, risk a greater harm if the injunction is not granted: the violation of their First, Fourth and Fourteenth Amendment rights.

Id. at *11. *See also Kincaid*, 2006 WL 3542732 at *40.

The concerns addressed in *Kincaid*, *Pottinger*, and *Justin* are not even present here. The requested injunction does not prevent the City from clearing sidewalks and disposing of hazardous materials. *See Kincaid*, 2006 WL 3542732 at *40 ("the City can keep its streets clean without the wholesale immediate destruction of the personal property of homeless people").

D. An Injunction Is In the Public Interest.

Prohibiting the unconstitutional destruction of property is in the public interest. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("it is always in the public interest to prevent the violation of a party's constitutional rights."). Nothing about the proposed injunction is not in the public interest, given that it would still allow the City to clear sidewalks and dispose of hazardous material. One again, *Lavan* is instructive:

> The City will still be able to lawfully seize and detain property, as well as remove hazardous debris and other trash; issuance of the injunction would merely prevent it from *unlawfully* seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard. This not only benefits the Plaintiffs, but the general public as well.

797 F. Supp. 2d at 1019-20 (emphasis in original).

The proposed injunction is also in the public interest because the destruction of the property of homeless individuals exacerbates the homeless problem in the community. Virtually every expert, from progressive advocacy groups to George W. Bush's homeless czar, agrees that practices like Honolulu's toward homeless encampments sets homeless individuals back.[7] The U.S. Government has stated that "the forced dispersal of encampments is not an appropriate solution and can make it more difficult to achieve lasting housing and service outcomes to its inhabitants."[8] Professor Darrah-Okike's testimony illustrates this point. (Darrah-Okike Decl. ¶¶ 21-32.) The City's policies ironically lead to a larger

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[7] *See No Safe Place The Criminalization of Homelessness in U.S. Cities,* A Report from the National Law Center on Homelessness & Poverty, at 26, *available at* http://www.nlchp.org/documents/No_Safe_Place; *U.S. Task Force Warns Cities On Efforts Against Homeless Camps,* Los Angeles Times, September 6, 2015, *available at* http://www.latimes.com/local/california/la-me-homeless-doj-20150907-story.html.

[8] *Effective Community-Based Solutions to Encampments*, United States Interagency Council on Homelessness, *available at* http://usich.gov/issue/human-rights/effective-community-based-solutions-to-encampments.

homeless population, and therefore to greater issues with sidewalk obstruction and trash in the street. Even the City does not go so far as to claim that the SNO or SPO alleviate the homeless problem.[9] (Kacprowski Decl. Ex. 1, 148:8-14.) In fact, Honolulu's millions of dollars in funding from the U.S. Department of Housing and Urban Development may be in jeopardy due to the City's aggressive anti-homeless ordinances. *See Will the Sit-Lie Ban Cost Agencies Trying to Help Honolulu's Homeless*, Civil Beat, October 8, 2015, *available at* http://www.civilbeat.com/2015/10/hud-funding/.

E. <u>The Bond Requirement Should Be Waived.</u>

Waiver or imposition of a minimal bond is appropriate under Fed. R. Civ. P. 65(c) where, as here, a public interest organization is enforcing public rights on behalf of individual plaintiffs. *See Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2004) (recognizing the court's "long-standing

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[9] A recent City Council Resolution, No. 15-285, notes that "It was the Council's intent in enacting the sidewalk nuisance law not to cure homelessness, but to address specific issues relating to the public's use of sidewalks." *Available at* http://www4.honolulu.gov/docushare/dsweb/Get/Document-169250/dspage05773393471213320018.pdf.

precedent that requiring nominal bonds is perfectly proper in public interest litigation"); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (district courts have discretion to waive Rule 65(c)'s bond requirement). A bond is unnecessary "when [the district court] concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen v. Cassiday,* 320 F.3d 906, 919 (9th Cir. 2003); *see also Barahona-Gomez v. Reno*, 167 F.3d at 1237.

VI. CONCLUSION.

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a preliminary injunction.

DATED: Honolulu, Hawai`i, November 3, 2015.

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