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EUREKA POLICE DEPARTMENT and  
7 ANDREW MILLS, in his official capacity  
as Chief of Police  
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9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**  
11

12 STACY COBINE, NANETTE DEAN,  
CHRISTINA RUBLE, LLOYD  
13 PARKER, GERRIANNE SCHULZE,  
SARAH HOOD, AARON KANGAS,  
14 LYNETTE VERA, AUBREY SHORT,  
MARIE ANNTONETTE KINDER, and  
15 JOHN TRAVIS,

16 Plaintiffs,

17 v.

18 CITY OF EUREKA, EUREKA  
POLICE DEPARTMENT, and  
19 ANDREW MILLS in his official  
capacity as Chief of Police,  
20

21 Defendants.  
22

Case No. 16-cv-02239-JSW

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' *EX PARTE* MOTION  
FOR TEMPORARY RESTRAINING  
ORDER; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT**

Date: April 29, 2016  
Time: 2:00 p.m.  
Crtrm.: 5

The Hon. Jeffrey S. White

23 Defendants CITY OF EUREKA, EUREKA POLICE DEPARTMENT, and  
24 ANDREW MILLS in his official capacity as Chief of Police (collective "City of  
25 Eureka") hereby submit this Opposition to Plaintiff's *Ex Parte* Motion for  
26 Temporary Restraining Order. As set forth herein, defendants submit that plaintiffs  
27 have failed to carry their burden of proving that they are entitled to the  
28 "extraordinary and drastic" relief of an order granting an *ex parte* motion for a

1 temporary restraining order enjoining the enforcement of a municipal statute which  
2 has already been declared constitutional and, therefore, plaintiffs' motion should be  
3 denied.

4 DATED: April 27, 2016

CITY OF EUREKA  
OFFICE OF THE CITY ATTORNEY

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By:     /s/ Cyndy Day-Wilson      
Cyndy Day-Wilson, City Attorney

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Attorney for Defendants, CITY OF EUREKA,  
EUREKA POLICE DEPARTMENT, and  
ANDREW MILLS in his official capacity as  
Chief of Police

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**MEMORANDUM OF POINTS AND AUTHORITIES****1. INTRODUCTION**

This case arises out of defendants' attempt to remedy a chronic problem with homeless which has plagued the City of Eureka for years. At one time, as many as 300 homeless individuals were illegally residing in an Environmentally Sensitive Area which is immediately adjacent to the Humboldt Bay. Declaration of Andrew Mills ("Mills Dec.") at ¶ 6; Declaration of Miles Slattery ("Slattery Dec.") at ¶ 6; Declaration of Cyndy Day-Wilson ("Day-Wilson Dec.") at ¶ 2-7. The amount of trash, debris, discarded needles, and excrement which is damaging the sensitive habitat is cause for alarm. Slattery Dec. ¶ 7-10; Day-Wilson Dec. ¶ 23, 25.

The area commonly known as Palco Marsh – where these individuals are illegally squatting -- has recently become known as the "Devil's Playground" to local residents. Day-Wilson Dec. ¶ 25. It has become an area associated with the sales and use of narcotics, prostitution and other assorted crime. Mills Dec. ¶ 9-10; Day-Wilson Dec. ¶ 25. In addition, some residents have been found in possession of firearms and have threatened to use them against anyone who attempts to relocate them. Day-Wilson Dec. ¶ 25. Even worse, the presence of these individuals is jeopardizing a \$5.3 million public improvement project, funds that could be forfeited if the current situation is not resolved. Day- Wilson Dec. ¶ 26.

In an attempt to comply with prior other similar orders, the City of Eureka has gone through great lengths to assist in relocating the affected individuals and declare a shelter crisis. Day-Wilson Dec. ¶ 4-22. These efforts have been successful and the current census of residents in the Palco Marsh has fallen from 180 in September of 2015 to its current level of 113. Mills Dec. ¶ 24; Day-Wilson Dec. ¶ 22. This level is less than the City's current capacity to accommodate 130 additional individuals. Day-Wilson Dec. ¶ 22.

The simple fact is that plaintiffs do not have a right to cause significant environmental damage to a sensitive region. Their continued presence in the Palco

1 Marsh represents a significant threat to the health, public welfare and safety of the  
2 community. Slattery Dec. ¶ 2-6, Additionally, if they are allowed to continue to  
3 illegally reside in this area, the city is in danger of forfeiting approximately \$5.3 million  
4 in grant monies which were allocated to better the community as a whole. Day-Wilson  
5 Dec. ¶ 26.

6 Plaintiffs have had ample notice of the upcoming relocation since as early as  
7 September of 2015. Mills Dec. ¶ 7-9; In response, many have accepted the assistance  
8 of the City and other organizations and voluntarily relocated. Mills Dec. ¶ 24; Day-  
9 Wilson Dec. ¶ 22. However, plaintiffs have chosen to reject the alternative  
10 arrangements which have been made available free of charge and do nothing *until* their  
11 eviction was imminent – at which point they filed an *Ex Parte* Motion for Temporary  
12 Restraining Order. This tactic deprives the City of the ability to marshal the  
13 information necessary to oppose it in such a limited time.

14 This Court should see this *Ex Parte* for what it is - A bad faith litigation tactic  
15 designed to attempt to prevent the City from enforcing a local ordinance which has  
16 already been found to be constitutional by the California State Courts and for which  
17 ample notice was provided to the affected individuals. Mills Dec. ¶ 24; Day-Wilson  
18 Dec. ¶ 3, 22; *Exhibit "H"*. Given that plaintiffs have failed to demonstrate the requisite  
19 good cause to justify such extraordinary relief, the *ex parte* application should be  
20 denied.

21  
22 **2. PLAINTIFFS HAVE FAILED TO DEMONSTRATE GOOD CAUSE FOR**  
23 **THIS COURT TO STAY THE ENFORCEMENT OF A STATUTE**  
24 **WHICH HAS ALREADY BEEN UPHeld AS CONSTITUTIONAL**

25 **A. Applicable Law**

26 A temporary restraining order is available when an applicant may suffer  
27 irreparable injury before the court can hear the application for a preliminary injunction.  
28 See Fed.R.Civ.P. 65(b). Requests for temporary restraining orders are governed by the

1 same general standards that govern the issuance of a preliminary injunction. *New*  
2 *Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347, n. 2 (1977); *Los Angeles*  
3 *Unified Sch. Dist. v. United States Dist. Court*, 650 F.2d 1004, 1008 (9th Cir. 1981).

4 A preliminary injunction is an "extraordinary and drastic remedy" that is never  
5 awarded as a matter of right. *Munaf v. Geren*, 553 U.S. 674, 688-690 (2008). Instead,  
6 in every case, the court "must balance the competing claims of injury and must consider  
7 the effect on each party of the granting or withholding of the requested relief." *Winter*  
8 *v. Natural Resources Defense Council*, 555 U.S. 7, 17 (2008). The instant motion  
9 requires the Court to determine whether plaintiffs have established the following: (1)  
10 the likelihood of success on the merits; (2) likelihood of irreparable harm in the absence  
11 of preliminary relief; (3) balancing of the equities; and (4) whether an injunction is in  
12 the public interest. *Id.* at 17.

13 Before *Winter*, courts in the Ninth Circuit applied an alternative "sliding-scale"  
14 test for issuing a preliminary injunction that allowed the movant to offset the weakness  
15 of a showing on one factor with the strength of another. See *Alliance for Wild Rockies*  
16 *v. Cottrell*, 632 F.3d 1045, 1049–50 (9th Cir. 2010); see also *Beardslee v. Woodford*,  
17 395 F.3d 1064, 1067 (9th Cir. 2005). In *Winter*, the Supreme Court did not directly  
18 address the continued validity of the Ninth Circuit's sliding-scale approach to  
19 preliminary injunctions. See *Winter*, 555 U.S. 7 at 51 (Ginsburg, J., dissenting)  
20 ("[C]ourts have evaluated claims for equitable relief on a 'sliding scale,' sometimes  
21 awarding relief based on a lower likelihood of harm when the likelihood of success is  
22 very high ... This Court has never rejected that formulation, and I do not believe it does  
23 so today."); see also *Alliance*, 632 F.3d. at 1131. In light of the *Winter* decision,  
24 however, the Ninth Circuit determined that the Circuit's sliding-scale approach, or  
25 "serious questions" test "survives ... when applied as part of the four-element *Winter*  
26 test." *Alliance*, 632 F.3d. at 1131–32. "In other words, 'serious questions going to the  
27 merits' and a hardship balance that tips sharply toward the plaintiff can support issuance  
28 of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.*

1 The portion of the sliding-scale test that allowed injunctive relief upon the possibility,  
2 as opposed to the likelihood, of irreparable injury to the plaintiff, was expressly  
3 overruled by *Winter. Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

4 Finally, an even more stringent standard is applied where mandatory, as opposed  
5 to prohibitory preliminary relief is sought. The Ninth Circuit has noted that although  
6 the same general principles inform the court's analysis, “[w]here a party seeks  
7 mandatory preliminary relief that goes well beyond maintaining the status quo pendente  
8 lite, courts should be extremely cautious about issuing a preliminary injunction.”  
9 *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984). Thus,  
10 an award of mandatory preliminary relief is not to be granted unless both the facts and  
11 the law clearly favor the moving party and extreme or very serious damage will result.  
12 See *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979). “[I]n doubtful  
13 cases” a mandatory injunction will not issue. *Id.*

#### 14 **B. Factual Analysis**

15 In this case, *all* of the factors articulated in *Winters* support the denial of a  
16 temporary restraining order. First, plaintiffs have not – and cannot – demonstrate the  
17 likelihood of success on the merits. Contrary to plaintiffs' assertions, individuals do not  
18 have a right to damage environmentally sensitive public lands, engage in criminal  
19 activity thereon, create a significant public health issue, and jeopardize the public's  
20 right to grant money. This is especially true given that other available options have  
21 been presented by the City, including providing for housing, the storage of personal  
22 property and the care for any animals present. Mills Dec. ¶ 23; Day-Wilson Dec. ¶ 22,  
23 27.

24 Plaintiffs likewise cannot demonstrate the likelihood of irreparable harm. While  
25 it is true that plaintiffs would be relocated, such harm is not *irreparable*. Their  
26 belongings and even their animals will be provided for and, indeed, plaintiffs are being  
27 offered accommodations *free of charge*. Mills Dec. ¶ 23; Day-Wilson Dec. ¶ 22, 27.  
28 Under these facts, it is difficult to envision how homeless individuals who are doing

1 damage to public land would be "injured" based on their temporary relocation to a  
2 shelter.

3 Third, balancing the equities in this case militates in favor of a denial of the  
4 injunction. Here, the continued presence of the plaintiffs represents an ongoing injury  
5 to the sensitive ecosystem that is the Humboldt Bay, a threat to the health and public  
6 safety of both the community at large and the plaintiffs themselves, and a possible loss  
7 of \$5.3 million in much needed grant money. Slattery Dec. ¶ 6; Day-Wilson Dec. ¶ 23-  
8 26. These important societal interests outweigh the plaintiffs' interest in rejected  
9 governmental assistance and free housing.

10 Finally, as discussed above, denial of the temporary restraining order is in the  
11 public interest. In this case, there have been numerous complaints related to the  
12 environmental damage caused by the illegal encampments from residents, non-profits,  
13 regulatory agencies, the Department of Fish and Wildlife, the Humboldt County  
14 Environmental Services, the Coastal Commission and the North Coast Regional Water  
15 Quality Control Board. Slattery Dec. ¶ 21; Day-Wilson Dec. ¶ 24. Moreover, the City  
16 has been placed on notice of a potential Notice of Violation from both the Department  
17 of Fish and Wildlife and the North Coast Regional Water Quality Board. Slattery Dec.  
18 ¶ 21; Day-Wilson Dec. ¶ 24. Thus, not only would the benefits of denying relief  
19 outweigh the burdens, the fact is that society as a whole has an interest in maintaining  
20 public confidence in the rule of law. Plaintiffs' refusal to relocate from the Palco Marsh  
21 results in an ongoing erosion of confidence in the City and the Eureka Police  
22 Department.

23 In sum, the City has done everything within its ability to transition plaintiffs and  
24 the other individuals illegally residing in these sensitive public lands to other available  
25 housing options. These efforts have been repeatedly rejected. Plaintiffs should not  
26 now be allowed to delay action until the last moment and then seek *ex parte* relief for  
27 an alleged emergency situation which was entirely of their own making. Given that they  
28 have failed to make a sufficient showing to justify such an "extraordinary and drastic

1 remedy" as an order preventing the enforcement of a valid statute, the *ex parte* motion  
2 should be denied. *Munaf*, 553 U.S. at 688-690.

3

4 **3. CONCLUSION**

5 For all these reasons, defendants request that plaintiffs' *Ex Parte* Motion for  
6 Temporary Restraining Order be denied. Moreover, in the event that this Court  
7 concludes that temporary relief be granted, defendants request that it be for no more  
8 than 14 days to allow the parties an opportunity to present further briefing on a  
9 regularly noticed motion for preliminary injunction.

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11 DATED: April 27, 2016

CITY OF EUREKA  
OFFICE OF THE CITY ATTORNEY

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By:     /s/ Cyndy Day-Wilson  
Cyndy Day-Wilson, City Attorney

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Attorney for Defendants, CITY OF EUREKA,  
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**CERTIFICATE OF SERVICE**

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court, Northern District of California by using the CM/ECF system on April 28, 2016. I further certify that all of the participants in the case are registered CM/ECF users.

Dated: April 28, 2016

By: /s/ Cyndy Day Wilson

Cyndy Day-Wilson