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FILED  
ALAMEDA COUNTY

NOV 19 2018

CLERK OF THE SUPERIOR COURT  
By Ann Williams Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

KIMERLEE SANCHEZ, JEAMES LEONE,  
PATRICIA MOORE, on behalf of themselves  
and all others similarly situated, HOMELESS  
ACTION CENTER, WESTERN REGIONAL  
ADVOCACY PROJECT, SUSAN  
HALPERN, and NATALIE LEIMKUHLER,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
TRANSPORTATION, MALCOLM  
DOUGHERTY, and DOES 1-50, inclusive,

Defendants.

No. RG 16842117

ORDER AFTER HEARING ON  
DEFENDANTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS

Defendants California Department of Transportation ("Caltrans") and Malcolm Dougherty move for judgment on the pleadings. Plaintiffs Kimberlee Sanchez, James Leone, Patricia Moore, the Homeless Action Center, the Western Regional Advocacy Project, Susan Halpern, and Natalie Leimkuhler oppose.

For the reasons discussed below, the motion is **GRANTED WITHOUT LEAVE TO AMEND** as to the FAC's eighth cause of action (for negligent infliction of emotional distress) and otherwise **DENIED**.

1 **I. LEGAL STANDARDS**

2 A motion for judgment under Code of Civil Procedure (“CCP”) section 438(c)(1)(B)(ii)  
3 “performs the same function as a general demurrer[] and hence attacks only defects disclosed on  
4 the face of the pleadings or by matters that can be judicially noticed.” (*Burnett v. Chimney*  
5 *Sweep* (2004) 123 Cal.App.4th 1057, 1064; *see Fire Ins. Exchange v. Superior Court* (2004) 116  
6 Cal.App.4th 446, 452; *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th  
7 1761, 1767–1768.) Like a general demurrer, a motion for judgment on the pleadings does not lie  
8 to a portion of a cause of action, and if a cause of action is not properly pleaded, the motion must  
9 be denied. (*Fire Ins., supra*, 116 Cal. App. 4th at p.452; *see CCP § 438(c)(2)(A).*)

10 The Court may grant leave to amend to remedy any defects identified by a motion for  
11 judgment on the pleadings. (CCP § 438(h).) The Court may grant leave to amend to remedy any  
12 defects identified by a motion for judgment on the pleadings. (CCP § 438(h).) “Liberality in  
13 permitting amendment is the rule, if a fair opportunity to correct any defect has not been given.”  
14 (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) For the Court to grant leave to  
15 amend after a general demurrer or motion for judgment on the pleadings, however, the Plaintiff  
16 must “show a reasonable possibility of curing the defect in the complaint by amendment.”  
17 (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 994.) The Plaintiff  
18 bears “the burden of proving that an amendment would cure the defect.” (*Id.*)

19 **II. DISCUSSION**

20 A motion for judgment on the pleadings will not lie when the grounds for the motion  
21 have already been argued, and overruled, in an earlier demurrer unless there has been a material  
22 change in the law since the demurrer was overruled. (CCP § 438(g)(1).)

23 Caltrans cites case law to the contrary, all of which predates the adoption of Section 438  
24 in 1994. Those cases are abrogated by the statute.

1           **A.       PLAINTIFFS STATE A CLAIM FOR UNLAWFUL SEIZURE**

2           The Fourth Amendment to the United States Constitution guarantees that the “right of the  
3 people to be secure in their persons, houses, papers, and effects, against unreasonable searches  
4 and seizures, shall not be violated.” (U.S. Const., 4th Amend.) The California Constitution  
5 separately protects the “right of the people to be secure in their persons, houses, papers, and  
6 effects against unreasonable seizures and searches.” (Cal. Const. Art I, § 13; *see also* Cal. Const.  
7 art. I, § 24 [“Rights guaranteed by this Constitution are not dependent on those guaranteed by the  
8 United States Constitution”].)

9           Caltrans makes two separate arguments that the FAC’s allegations do not establish an  
10 unconstitutional seizure. First, Caltrans argues that its seizure of homeless Plaintiffs’ property  
11 was not unreasonable because its seizure and destruction was reasonably necessary for Caltrans  
12 to fulfill its important governmental duties to maintain the roads.

13           To show that it has a valid governmental interest in clearing the roadways, Caltrans cites  
14 statutes giving Caltrans the power and obligation to maintain the roads, remove encroachments,  
15 and keep highway facilities devoted exclusively to use as roadways. (Sts. & Hy. Code §§ 90, 91,  
16 91.6, 92, 137, 141, 660, 720; 23 C.F.R. §§ 1.23, 710.403(b).) The Court agrees that Caltrans has  
17 an interest in maintaining the highways under its jurisdiction and in keeping them unobstructed  
18 for traffic. Caltrans also cites statutes forbidding trespass and unauthorized trespass on public  
19 land to argue that the homeless are violating the law when camping on its land or depositing trash  
20 there. (Penal Code § 602; Sts. & Hy. Code § 670; Veh. Code § 23112.)

21           Whether the homeless are technically trespassing on Caltrans’s land is not a relevant  
22 consideration to the constitutional analysis. “Violation of a [statute] does not vitiate the Fourth  
23 Amendment’s protection of one’s property.” (*Lavan v. City of Los Angeles* (9th Cir. 2012)  
24 693 F.3d 1022, 1029.) “Were it otherwise, the government could seize and destroy any illegally  
25 parked car or unlawfully unattended dog without implicating the Fourth Amendment.” (*Ibid.*)  
26 “[B]y seizing and destroying [Plaintiffs’] unabandoned legal papers, shelters, and personal

1 effects, [Caltrans] meaningfully interfered with [Plaintiffs'] possessory interests in that property.”  
2 (*Id.* at p.1030.) “No more is necessary to trigger the Fourth Amendment's reasonableness  
3 requirement.” (*Ibid.*)

4 Since Caltrans has an interest in maintaining its roadways and preventing camps or other  
5 obstructions to the public right of way, to prove that its seizures were no more intrusive than  
6 necessary in service of that interest. Whether Caltrans's actions are “necessary” is a disputed  
7 conclusion of fact that cannot be determined on the pleadings alone. Furthermore, the plaintiffs  
8 have alleged facts that, construed in their favor, would tend to show that Caltrans's pursuit of its  
9 legitimate government interest goes beyond constitutional bounds. One plaintiff alleges that  
10 Caltrans seized and destroyed her personal property that had been moved onto a City-owned  
11 sidewalk near (but not on) Caltrans property without giving her an opportunity to move it further  
12 away. (FAC ¶ 16.) Another plaintiff alleges that an officer accompanying Caltrans officials  
13 threatened him with a Taser when he tried to remove his bicycle from a trash compactor. (FAC  
14 ¶ 18.) Another plaintiff alleges that Caltrans showed up before the noticed time for their sweeps  
15 and did not give plaintiffs time to move their belongings. (FAC ¶ 26.) Plaintiffs' allegations  
16 reasonably give rise to the inference that Caltrans's goal is not to clean or maintain its highways  
17 but rather to maliciously destroy plaintiffs' property. The FAC fairly alleges that Caltrans's  
18 seizures and destruction of Plaintiffs' property is “more intrusive than necessary.” (*See Ganwich*  
19 *v. Knapp* (9th Cir. 2003) 319 F.3d 1115, 1122.)

20 At hearing, Caltrans distinguished *Lavan* on the grounds that the property in *Lavan* was  
21 unabandoned when it was seized (*id.* at pp.1025-1026) whereas Plaintiffs in this case were given  
22 notice to remove their property. *Lavan* is not distinguishable on this point as the FAC alleges that  
23 Caltrans seized and destroyed property that it knew or should have known was unabandoned.  
24 Plaintiffs clearly allege that they were given defective or misleading advance notice of the  
25 sweeps, that they were present for the sweeps, had possession of their property, actively asserted  
26 that their property was theirs, and asked that it not be destroyed. (*See, e.g.,* FAC ¶¶ 16, 18, 26.)

1 Caltrans also argued that the homeless do not have a constitutional right to store their  
2 belongings on public land. (citing *Church v. City of Huntsville* (11th Cir. 1994) 30 F.3d 1332,  
3 1345 [“The Constitution does not confer the right to trespass on public lands. Nor is there any  
4 constitutional right to store one's personal belongings on public lands.”].) This point is not  
5 decisive. The Plaintiffs do not allege that Caltrans interfered with a constitutional right to store  
6 their property on Caltrans’s land. They assert that Caltrans interfered with their constitutional  
7 right not to have their property unreasonably seized, and they do not automatically surrender that  
8 right by trespassing onto public land. (*Lavan*, 693 F.3d at p.1030.).

9 Second, Caltrans also argues that homeless Plaintiffs’ property is not protected from  
10 unreasonable seizure because Plaintiffs, as trespassers, did not have a reasonable expectation of  
11 privacy. This argument conflates constitutional limits on search with those on seizure. When a  
12 government agent gathers information, that activity constitutes a “search” if a person has a  
13 “reasonable expectation of privacy” in the thing or place the government is inspecting. (*See, e.g.*,  
14 *Katz v. United States* (1967) 389 U.S. 347, .360-362 [Harlan, J., concurring].)

15 But the unreasonable seizure clauses of the United States and California Constitutions  
16 protect “property as well as privacy.” (*Soldal v. Cook County, Ill.* (1992) 506 U.S. 56, 62.) If, on  
17 the other hand, the government interferes with the right to possession of personal property, that  
18 interference is a seizure. (*See People v. Gallegos* (2002) 96 Cal.App.4th 612, 628 fn.13 [“A  
19 seizure occurs when ‘there is some meaningful interference with an individual's possessory  
20 interests’ in the property seized.”]; *see also ibid.* [“As our Supreme Court has recently reiterated,  
21 ‘[d]ifferent interests are implicated by a search than by a seizure [citation], and a seizure is  
22 “generally less intrusive” than a search.’” [citing *In re Randy G.* (2001) 26 Cal.4th 556, 567]].)  
23 Whether the “seizure” is also a “search” on account of a reasonable expectation of privacy is  
24 analytically irrelevant. Plaintiffs have alleged that Caltrans seized their personal property, and  
25 they have alleged that the seizure was more intrusive than necessary. That is enough to survive a  
26 facial attack on the pleadings.

1 Caltrans's motion for judgment on the pleadings as to the FAC's first cause of action is  
2 therefore **DENIED**.

3 **B. PLAINTIFFS STATE A CLAIM FOR DENIAL OF RIGHT TO**  
4 **PROPERTY WITHOUT DUE PROCESS**

5 The United States Constitution and California Constitution both provide that the state  
6 may not deprive a person of their property without due process of law. (U.S. Const., 14th  
7 Amend.; Cal Const. art. I, §§ 7, 15.) Caltrans raises two arguments regarding homeless  
8 Plaintiffs' claims under the due process clauses of the United States Constitution and the  
9 California Constitution.

10 First, Caltrans argues that homeless Plaintiffs did not have a constitutionally protected  
11 property right because they did not allege an unconstitutional seizure. As discussed above, that  
12 argument is incorrect. Caltrans does not otherwise dispute that Plaintiffs have adequately  
13 pleaded a property interest in their belongings that were allegedly seized and destroyed.

14 The question then comes to whether that deprivation was without due process. Plaintiffs  
15 allege that they filed claims with Caltrans that received no response. Plaintiffs allege that they  
16 were given phone numbers to call to recover their property, but that those numbers were never  
17 answered and their phone calls were not returned. Plaintiffs allege that their property was thrown  
18 directly into trash compactor trucks, from which one might reasonably infer it was immediately  
19 crushed and taken to a dump.

20 Caltrans expresses some frustration at the lack of binding authority regarding what  
21 constitutes "due process" for homeless encampment sweeps and asks that this Court pronounce a  
22 definitive standard. The parties have not briefed the point, and the Court declines to decide a  
23 blackletter standard at this time, other than to hold that the process alleged in the FAC and  
24 described above is not sufficient.

25 Caltrans's motion for judgment on the pleadings as to the FAC's second cause of action  
26 is therefore **DENIED**.

1           **C.     PLAINTIFFS DO NOT ALLEGE A FACIAL CHALLENGE TO**  
2                           **CALTRANS’S POLICY ON HOMELESS ENCAMPMENT SWEEPS**

3           Caltrans argues that Plaintiffs cannot state a claim based on Caltrans’s alleged systematic  
4 practice of disregarding its own written policies regarding abandoned property and homeless  
5 encampments. (FAC ¶¶ 54-57, 68-71.)

6           Before the Court can decide whether a complaint states a cause of action, it must first  
7 read and construe the complaint in a light most favorable to the plaintiffs, drawing all reasonable  
8 inferences in their favor. The FAC alleges that Defendants have a policy in place regarding  
9 sweeps and it describes the broad terms of that policy. (FAC ¶¶ 54-57.) The FAC alleges that  
10 Caltrans engages in widespread violations of that policy in Berkeley, Emeryville, Oakland, and  
11 other cities around the state. (FAC ¶¶ 58-70.) The FAC does not contain any allegations to the  
12 effect that the terms of the policy itself violate the California Constitution or the United States  
13 Constitution. The FAC also does not allege that Caltrans violated either constitution when it  
14 adopted the policy.

15           Based upon the FAC, and Plaintiffs’ counsel’s repeated statements at oral argument that  
16 the policy is but one factor supporting their claims and their claims are based upon a ‘totality of  
17 the circumstances,’ Plaintiffs have not alleged a facial challenge to Caltrans’s policy. The  
18 Court’s rulings on these motions and therefore based on the totality of the allegations set forth in  
19 the FAC and not based on a facial challenge to the policy.

20           **D.     PLAINTIFFS STATE A BANE ACT CLAIM**

21           The Bane Act forbids any person from “interfer[ing] by threat, intimidation, or coercion,  
22 or attempt[ing] to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by  
23 any individual or individuals of rights secured by the Constitution or laws of the United States, or  
24 of the rights secured by the Constitution or laws of this state . . . .” (Civ. Code § 52.1(a).)  
25 Individual victims also have a private right of action under the Bane Act to seek damages or  
26

1 equitable relief, including injunctive relief, to protect the enjoyment of their rights. (Civ. Code  
2 § 52.1(b).)

3 Caltrans argues that it has not threatened or interfered with Plaintiffs' rights because they  
4 were trespassing on its land. Plaintiffs point out that Caltrans raised its argument against Bane  
5 Act liability in substantially the same terms in its first demurrer, which was overruled on this  
6 point. (See Mem. Opp. MJOP at p.10, lns.10-21.) Caltrans has cited to no change in the law or  
7 facts requiring the Court to revisit its earlier demurrer. (See CCP § 438(g)(1); *Thomson v.*  
8 *Canyon* (2011) 198 Cal.App.4th 595, 602-603; see also CCP § 1008 [governing motions for  
9 reconsideration].)

10 The Court also adequately explained its reasoning in its ruling on Caltrans's demurrer.  
11 Caltrans's motion for judgment on the pleadings as to the FAC's fifth cause of action is therefore  
12 **DENIED.**

13 **E. PLAINTIFFS HAVE NOT STATED A CLAIM FOR NEGLIGENT**  
14 **INFLECTION OF EMOTIONAL DISTRESS**

15 Negligent infliction of emotional distress is a species of negligence. (*Barker v. Fox &*  
16 *Associates* (2015) 240 Cal.App.4th 333, 356 [“The negligent causing of emotional distress is not  
17 an independent tort but the tort of negligence, involving the usual duty and causation issues.”].)  
18 To state a cause of action for negligence, a plaintiff must plead facts showing that ““defendant  
19 had a duty to use due care, that he [or she] breached that duty, and that the breach was the  
20 proximate or legal cause of the resulting injury.”” (*Vasquez v. Residential Investments, Inc.*  
21 (2004) 118 Cal.App.4th 269, 278.)

22 Caltrans argues that it is statutorily immune from negligence liability because its liability  
23 depends on discretionary acts of its employees. This issue is discussed below.

24 To be compensable as damages, a plaintiff's resulting emotional distress must either (1)  
25 be a result of the breach of a duty in which the plaintiff's emotional condition is the object, (2)  
26 arise out of the breach of some other legal duty and be proximately caused by that breach.



1 (*Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 473–474, citing *Potter v.*  
2 *Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 985.) In the latter circumstance, to provide a  
3 basis for emotional distress damages, the breach of duty generally must threaten a physical  
4 injury, not merely damage to the plaintiff’s property or financial interests. (*Id.* at p. 474.)

5 In other words, the negligent conduct must either “(a) place[] the [plaintiff] in danger of  
6 immediate bodily harm and the emotional harm results from the danger; or (b) occur[] in the  
7 course of specified categories of activities, undertakings, or relationships in which negligent  
8 conduct is especially likely to cause serious emotional harm.” (Restatement (Third) of Torts § 47  
9 (2012).) “Typically, the undertaking or relationship is one in which serious emotional harm is  
10 likely or where one person is in a position of power or authority over the other and therefore has  
11 greater potential to inflict emotional harm.” (*Id.* cmt. h.) Instead of relying on foreseeability to  
12 identify appropriate cases for recovery, the policy issues surrounding specific categories of  
13 undertakings, activities, and relationships must be examined to determine whether they merit  
14 inclusion among the exceptions to the general rule of no liability. (*Id.* cmt. i.) “Recovery for  
15 emotional harm resulting from negligently caused harm to personal property is not permitted  
16 . . . .” (*Id.* cmt. m.; *see ibid.* [“Although harm to pets (and chattels with sentimental value) can  
17 cause real and serious emotional harm in some cases, lines—arbitrary at times—that limit  
18 recovery for emotional harm are necessary.”].)

19 Because Plaintiffs’ emotional distress is entirely derivative of the harm to their personal  
20 property, there is no remedy at law to the degree that emotional distress is the result of  
21 negligence rather than an intentional tort. (*Accord Gonzales, supra*, (1997) 56 Cal.App.4th 464,  
22 474–475 [“Thus, were Gonzales’s claims solely for negligence, we would be inclined to agree  
23 with Personal Storage that she cannot recover damages for her emotional distress.”].)

24 At hearing, Plaintiffs informed the Court that they had made the tactical choice not to  
25 request leave to amend to remedy defects in pleading this cause of action. Caltrans’s motion for  
26

1 judgment on the pleadings is therefore **GRANTED WITHOUT LEAVE TO AMEND** as to the  
2 FAC's eighth cause of action.

3 **F. DISCRETIONARY ACT IMMUNITY DOES NOT BAR PLAINTIFFS'**  
4 **COMMON LAW CLAIMS**

5 The parties dispute whether Caltrans's second demurrer was overruled on the basis of  
6 discretionary act immunity. The Court originally sustained that demurrer on the grounds that the  
7 acts alleged in the FAC were "discretionary in nature . . . and thus falling within the scope of  
8 [Gov. Code section] 820.2." (Order of August 3, 2017.) Plaintiffs sought review of this holding  
9 by writ of mandate, which issued an alternative writ ordering this Court to reverse that holding or  
10 file a return. The Court held a hearing and heard argument on this point on January 10, 2018.  
11 The Court vacated the prior order sustaining the demurrer and issued a new order overruling it.

12 After reviewing the papers for Caltrans's demurrer to the FAC and the orders of this Court  
13 and the Court of Appeal, the Court finds that Caltrans' demurrer on the basis of discretionary act  
14 immunity was overruled. The issue accordingly may not be reargued on a motion for judgment  
15 on the pleadings. (*See* CCP § 438(g)(1).)

16 Caltrans's motion for judgment on the pleadings as to the FAC's sixth causes of action is  
17 therefore **DENIED**.

18 **G. THE COMPLAINT ADEQUATELY PLEADS ILLEGALITY FOR**  
19 **PURPOSES OF TAXPAYER INJUNCTIVE RELIEF**

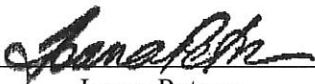
20 A taxpayer may bring an action to enjoin a public entity from "any illegal expenditure of,  
21 waste of, or injury to, [its] estate, funds, or other property." (CCP § 526a.) An injunction will  
22 not issue under section 526a to control a matter within the public entity's discretion or is the  
23 subject of a political, rather than legal, dispute. (*See Harman v. City and County of San*  
24 *Francisco* (1972) 7 Cal.3d 150, 160-161; *Coshov v. City of Escondido* (2005) 132 Cal.App.4th  
25 687, 714.) The FAC alleges that Caltrans has been expending public funds on "sweeps" to seize  
26 and destroy the property of homeless persons like Plaintiffs.

1 Caltrans argues that Plaintiffs' other legal theories fail to state a cause of action and its  
2 cause of action for taxpayer injunction therefore fails because the FAC does not allege illegal  
3 conduct. For the reasons stated above, Plaintiffs have not failed to state a cause of action, and the  
4 FAC does allege that Caltrans has expended taxpayer funds on sweeps that are illegal because  
5 they exceed the bounds of Caltrans's authority under the constitutions of California and United  
6 States. Caltrans's motion for judgment on the pleadings is therefore **DENIED** as to the FAC's  
7 ninth cause of action.

8 **III. ORDER**

9 Caltrans's motion for judgment on the pleadings is **GRANTED WITHOUT LEAVE**  
10 **TO AMEND** as to the sixth cause of action and otherwise **DENIED**.

11 Dated: November 19, 2018

12   
13 \_\_\_\_\_  
14 Ioana Petrou  
15 Judge of the Superior Court

CLERK'S CERTIFICATE OF SERVICE BY MAIL  
CCP 1013a(3)

CASE NAME: SANCHEZ v. CALIFORNIA DEPARTMENT OF TRANSPORTATION  
ACTION NO.: RG16-842117

I certify that the following is true and correct: I am the clerk in **Dept. 17** of the Superior Court of California, County of Alameda **ORDER AFTER HEARING ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** by email and by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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I declare under penalty of perjury that the following is true and correct  
Executed on November 19, 2018 at Oakland, California.

Chad Finke  
Executive Officer/Clerk of the Superior Court

by   
Pam Williams - Deputy Clerk