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23 UNITED STATES DISTRICT COURT
24 FOR THE NORTHERN DISTRICT OF CALIFORNIA
25 SAN FRANCISCO – OAKLAND DIVISION

RS

CV 11 5498

26 TIMOTHY SCOTT CAMPBELL, KERIE) No.
27 CAMPBELL, MARCUS KRYSHKA, MARC)
28 MCKINNIE, MICHAEL SIEGEL, AMERICAN) **EX PARTE APPLICATION FOR**
29 CIVIL LIBERTIES UNION OF NORTHERN) **TEMPORARY RESTRAINING**
30 CALIFORNIA,) **ORDER AND ORDER TO SHOW**
31) **CAUSE**

32 Plaintiffs,)

33 v.)

34 CITY OF OAKLAND, INTERIM CHIEF OF)
35 POLICE HOWARD JORDAN,)

36 Defendants.)

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1 **EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER**
2 **TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

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4 Plaintiffs hereby request, pursuant to FRCP 65 and Civil Local Rules 7-10 and 65-1 that
5 the Court issues a temporary restraining order and an order to show cause why a preliminary
6 injunction should not issue.

7 **NEED FOR TEMPORARY RESTRAINING ORDER**

8 Plaintiffs seek a temporary restraining order to prevent the Oakland Police Department
9 from continuing to use excessive force on peaceful protesters, deploying tactics that violate
10 express prohibitions of Oakland Police Department's Crowd Management/Crowd Control
11 Policy. Further demonstrations and assemblies are more than likely to occur *later today* and
12 Court relief is necessary to prevent irreparable harm to constitutional rights to be free from
13 excessive force and to protest without fear of excessive force. As has been widely reported, the
14 City of Oakland this morning began to remove the Occupy Oakland encampment. The eviction
15 is sure to be a subject of intense public debate, including demonstrations and rallies by Occupy
16 supporters. In fact, Occupy has already publicly called for supporters to "reconvene" in
17 downtown Oakland at 4 pm today, presumably to march back to the Plaza area and demonstrate
18 in opposition to the City's action, as it did on October 25, 2011. The TRO and preliminary
19 injunction sought by Plaintiffs would not address whether the Occupy Oakland may evict the
20 encampment but does seek to prevent what happened on October 25 and again on the night of
21 November 2-3 – the indiscriminate and excessive use of police force against peaceful
22 demonstrators who choose to exercise their First Amendment rights to protest the City's actions.
23 Based on its past actions, the City must be ordered immediately by this Court to stop violating its
24 own Crowd Control Policy.

25 On two recent occasions, October 25, 2011 and November 2, 2011, Defendants City of
26 Oakland and Interim Chief of the Oakland Police Department ("OPD") Howard Jordan
27 spearheaded enforcement actions against Plaintiffs and other Occupy Oakland supporters in
28 which law enforcement attacked peaceful protesters participating in political demonstrations.

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2 Such conduct violates the Fourth Amendment by subjecting protesters, who posed no safety
3 concerns, to excessive force, and the First Amendment by interfering with their rights to
4 assemble and demonstrate peacefully. A Temporary Restraining Order is necessary because
5 another police encounter with Occupy Oakland is imminent, and absent relief from this Court,
6 OPD has shown that it will continue to violate protesters' constitutional rights.

7 OPD's recent conduct violated express prohibitions in OPD's own Crowd
8 Management/Crowd Control Policy, adopted in a settlement of litigation arising out of OPD's
9 prior mishandling of another large protest. Yet even though Defendants were aware of and
10 criticized for widespread violations of its own Crowd Control Policy during the October 25,
11 2011 action, it failed to take any measures to prevent a recurrence and instead, on November 2,
12 2011, it committed the same egregious violations of protesters' rights: Police fired flash bang
13 grenades, "bean bags" (actually filled with lead shot, not beans), other projectiles and copious
14 amounts of tear gas indiscriminately into crowds of peaceful protesters who were exercising their
15 First Amendment rights to assemble and demonstrate peacefully. Police also shot "bean bags" or
16 other projectiles at individuals who posed no risk of harm, but were clearly engaged in First
17 Amendment protected activity, such as filming the police at a demonstration.

18 Defendants' conduct in the last few weeks has shown that they are engaging in wholesale
19 violations of the Policy they agreed to follow in prior litigation, and the mere fact that this policy
20 is on the books is insufficient to protect political protesters from OPD's practice of using
21 excessive police force on crowds of demonstrators. Relief from this Court is necessary to ensure
22 that Defendants do not repeat their mistakes a third time.

23 A temporary restraining order is necessary to ensure that during OPD's next, imminent
24 encounter with Occupy Oakland supporters, it does not continue to violate their First and Fourth
25 Amendment rights by attacking peaceful protesters.

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GROUNDS FOR MOTION

This motion is made, pursuant to Federal Rules of Civil Procedure 65 and Civil Local Rules 7-10 and 65-1, on the ground that Plaintiffs have demonstrated they meet the requirements for a TRO: likelihood of success on the merits; likelihood of irreparable harm in the absence of preliminary relief; the balance of equities; and the injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

Plaintiffs have a likelihood of success on the merits of their constitutional and contractual claims. As evidenced by its conduct on October 25 and November 2, Defendants have a practice of meeting peaceful protesters with excessive force.

This practice violates the Fourth Amendment because it is not reasonable to use “inherently dangerous” weapons such as flash-bang grenades, *Boyd v. Benton County*, 374 F.3d 773, 779 (9th Cir. 2004), against peaceful protesters who do not themselves pose an “immediate threat to the safety of the officers or others.” *Mattos v. Agarano*, --- F.3d ----, 2011 WL 4908374, at *13, *14 (9th Cir. Oct. 17, 2011) (en banc) (citation omitted). Defendants cannot complain that the force was reasonable when the OPD’s actions systematically violated key prohibitions in its own Crowd Control Policy – which necessarily reflects the agency’s own view of what constitutes reasonable force in responding to crowds. *See Glenn v. Washington County*, --- F.3d ----, 2011 WL 5248242, at *9 (9th Cir. Nov. 4, 2011) (looking to department’s “own guidelines” in assessing reasonableness of force).

It also violates the First Amendment. Courts have repeatedly found First Amendment violations where, as here, the government used excessive force to break-up protests. *See, e.g., Keating v. City of Miami*, 598 F.3d 753, 767 (11th Cir. 2010); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1292 (10th Cir. 2008); *Jones v. Parmley*, 465 F.3d 46, 53, 60 (2d Cir. 2006); *Jennings*, 2009 WL 413110, at *13; *Houser v. Hill*, 278 F.Supp. 920, 926 (D. Ala. 1968); *Cottonreader v. Johnson*, 252 F.Supp. 492, 496, 497 (D. Ala. 1966).

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2 The Policy was also part of a settlement and thus contractually enforceable by Plaintiffs
3 as third-party beneficiaries. *See Jeff D. v. Andrus*, 899 F.2d 753, 759-60 (9th Cir. 1989);
4 Cal.Civ.Code § 1559; *SEIU Local 99 v. Options*, --- Cal.Rptr.3d ----, 2011 WL 5387275 at *4-*8
5 (Cal.App.Nov. 9, 2011). Defendants’ conduct also violates Due Process because the force
6 inflicted on peaceful protesters was far beyond what was required by legitimate law enforcement
7 objectives. *See Porter v. Osborn*, 546 F.3d 1131, 1140-41 (9th Cir. 2008). Indeed, the Policy
8 was necessarily designed to meet such objectives. Applications of force in violation of the
9 Policy as occurred here serve no legitimate law enforcement need.

10 Plaintiffs will also suffer irreparable harm absent relief from this Court. OPD’s
11 indiscriminate use of projectiles and rampant use of tear gas against peaceful protesters would
12 chill a person of ordinary firmness from exercising his rights to assemble and speak out – few of
13 us would be willing to risk being shot at a demonstration. “The loss of First Amendment
14 freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury” as a
15 matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Klein v. City of San Clemente*, 584
16 F.3d 1196, 1207-08 (9th Cir. 2009).

17 When an injunction is sought against the government, the last two prongs “are largely the
18 same” and can be considered together. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010).
19 There is a strong public interest in upholding the constitution. *See e.g., Klein v. City of San*
20 *Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). The government has no legitimate interest in
21 continuing to violate the First or Fourth Amendments, the Due Process Clause, or its contractual
22 obligations. Nor can Defendants complain that a TRO prohibiting it from violating its Policy
23 would interfere with legitimate safety concerns, because it adopted the Policy to deal with this
24 precise situation – crowd management and control.

25 **RELIEF SOUGHT**

26 Plaintiffs therefore respectfully request that the Court grant the *ex parte* application as
27 follows:

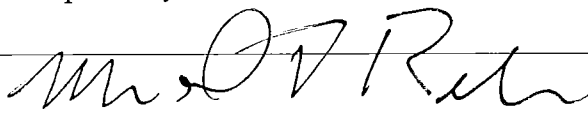
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2 First, Plaintiffs request that the Court issues an immediate Temporary Restraining Order,
3 ordering , Defendants CITY OF OAKLAND and HOWARD JORDAN, Interim Chief of Police
4 for the City of Oakland, and their officers, agents, servants, employees, and attorneys, and upon
5 those persons in active concert or participation with them, pending a ruling by this Court on
6 whether a preliminary injunction should issue, to cease and desist from violating the OPD Crowd
7 Management/Crowd Control Policy, as incorporated in this Court's December 24, 2004, order
8 approving the partial settlement agreement in *Local 10, International Longshore and Warehouse*
9 *Union v. City of Oakland*, No.C03-2961 (TEH) and *Coles v. City of Oakland*, No. C03-2961
10 (TEH).

11 Second, Plaintiffs request that the Court issue an Order to Show Cause setting a schedule
12 for briefing and a hearing on a preliminary injunction.

13 This motion is based on this *Ex Parte* Motion; the Complaint for Injunctive and
14 Declaratory Relief; the accompanying Memorandum of Points and Authorities in Support of
15 Motion for Temporary Restraining Order and Preliminary Injunction; the accompanying
16 declarations of Marcus Kryshka, Scott Whitacre, T. Scott Campbell, Dath Roth, Eric Post, Kerie
17 Campbell, Morgan Ress, Aashka Desai, Michael Chase, Heather Freinkel and Marc McKinnie;
18 the accompanying declaration of Alan Schlosser re: Notice and in Support of Temporary
19 Restraining Order; the accompanying [*Proposed*] *Temporary Restraining Order and Order to*
20 *Show Cause re: Preliminary Injunction*; the complete files and records of this action; and such
21 other and further matters as this Court may properly consider.

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23 Dated: November 14, 2011

Respectfully submitted,

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25 Attorneys for Plaintiffs
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