

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PAMELA KINCAID, DOUG
DEATHERAGE, CHARLENE CLAY,
CYNTHIA GREENE, JOANNA GARCIA,
RANDY JOHNSON, individually on
behalf of themselves and all
others similarly situated,

Plaintiff,

v.

CITY OF FRESNO, CALIFORNIA
DEPARTMENT OF TRANSPORTATION,
ALAN AUTRY, JERRY DYER, GREG
GARNER, REYNAUD WALLACE, JOHN
ROGERS, PHILLIP WEATHERS, AND
WILL KEMPTON, individually and
in their official capacities;
DOES 1-100, inclusive,

Defendants.

1:06-CV-01445 OWW SMS

MEMORANDUM DECISION AND ORDER
GRANTING PLAINTIFFS' MOTION TO
CERTIFY CLASS

1. INTRODUCTION

This matter comes before the court on Plaintiffs' motion to certify a class pursuant to Fed. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(b). Plaintiffs argue that there are sufficient common questions of fact and law to warrant certification as a class action membership. Defendants oppose Plaintiffs' motion.

2. PROCEDURAL BACKGROUND

Plaintiffs filed their initial complaint on October 17, 2006. (Doc. 1, Complaint.) Plaintiffs filed a second amended complaint ("SAC") on March 1, 2007. (Doc. 113, SAC.) On June

1 15, 2007 Plaintiffs filed a motion to certify class. (Doc. 131,
2 Motion to Certify Class.) On July 2, 2007 Defendants opposed the
3 motion. (Doc. 135, Opposition.) On July 2, 2007 Defendant Will
4 Kempton joined in opposing Plaintiffs' motion. (Doc. 137,
5 Joinder by Will Kempton, July 2, 2007.) On July 11, 2007
6 Plaintiffs filed their reply. (Doc. 143, Reply.)

7 **3. FACTUAL BACKGROUND**

8 The facts of this case are sufficiently described in other
9 motions. Only a brief summary of the facts is necessary.

10 This case concerns a number of clean-up operations (sweeps)
11 conducted by Defendants. For more than a year, Defendants
12 implemented a policy of seizing and immediately destroying
13 personal property of homeless individuals in an effort to clean
14 up the City of Fresno. (Doc. 113, SAC, ¶ 38.) A number of these
15 clean up efforts occurred on property belonging to Caltrans,
16 including the raids on May 3, 2006, May 25, 2006, June 22, 2006,
17 and August 26, 2006.

18 In bringing this action Plaintiffs seek a permanent
19 injunction and declaration of illegality of Defendants' conduct.
20 Secondly, Plaintiffs seek damages for the losses suffered from
21 seizure and destruction of their property, much of which is
22 common. According to Plaintiffs, the overarching issue of
23 Defendants' liability will involve elements of common proof. The
24 common issues include:

- 25 1. whether Defendants' policies and practices in conducting the
26 sweeps at issue are unlawful, in that they result in
27 immediate destruction of property of the homeless;
28 2. whether Defendants' policies and practices in conducting the

sweeps at issue are unlawful in that they fail to provide adequate pre- or post-seizure notice and fail to provide any opportunity to recover seized property;

3. the nature of injunctive relief that should be ordered, including notice requirements, the amount of time allowed to move property, and what must be done with property that is removed; and

4. whether Defendants are liable for statutory and/or punitive damages and if so, how much. (Doc. 131, Motion to Certify Class, Filed June 15, 2007.)

Plaintiffs now seek certification of class members.

4. LAW AND ANALYSIS

A. General Standard for Class Certification

Class certification is governed by Federal Rule of Civil Procedure 23. "When a person sues or is sued as a representative of a class, the court must...determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(a)(1). To attain certification, a proposed class must satisfy four pre-requisites set forth in Rule 23(a): (1) the class must be "so numerous that joinder of all members is impracticable," (2) there must be "questions of law or fact common to the class," (3) the claims of the class representatives must be "typical of the claims... of the class," and (4) class representatives must "fairly and adequately protect the interests of the class."

If a proposed class satisfies all four prerequisites of rule 23(a), one of the three alternative requirements set forth in Rule 23(b) must be satisfied as well. Plaintiffs in this case seek certification under Rule 23(b)(2) and Rule 23(b)(3).

Rule 23(b) (2) requires a finding:

[T]hat the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief within respect to the class as a whole.

Rule 23(b) (3) requires a finding:

[T]hat the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

B. Rule 23(a) Analysis

i. Implied Threshold Requirements

In addition to the four requirements set forth explicitly in Rule 23(a), courts often imply two additional, threshold requirements: (a) that a "defined identifiable class exists" and (b) "that the class representatives must be members of the class." *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 509 (D. N.M. 2004). The proposed class satisfies these requirements. Plaintiffs define the proposed class to include,

"All persons in the City of Fresno who were, are, or will be homeless at any time after October 17, 2003, whose personal belongings have been or may in the future be taken or destroyed by one or more Defendants."

(Doc. 131, Motion for Class Certification, page 7.) All representative Plaintiffs are also members of the class in this case. Named Plaintiffs are individuals who reside in the City of Fresno, were homeless, and allege a loss of property as a result of the City of Fresno's pattern and practice of seizing and

1 immediately destroying homeless peoples' property. All
2 Plaintiffs claimed that they suffered harm during the relevant
3 period beginning on October 17, 2003. Further, all class
4 representatives have submitted declarations detailing the alleged
5 harm they suffered.¹
6

7 Defendants argue that Plaintiffs seek to certify a
8 substantially overbroad and undefined class. It is unclear from
9 Defendants pleadings whether they also argue that Plaintiffs do
10 not meet the threshold requirement that "a defined identifiable
11 class exist" and that "the class representatives must be members
12 of the class." Defendants argue that the term "homeless" used in
13 the definition of the class is ambiguous, making the designation
14 of the class overbroad.² In support, Defendants point to
15

16
17 ¹ (See, Doc. 113, Second Amended Complaint "SAC", ¶¶ 49-57,
18 Filed February 22, 2007; See also, Doc. 10, Kincaid Decl.; Doc.
19 6, Deatherage Decl.; Doc. 5, Clay Decl.; Doc. 8, Greene Decl.;
Doc. 7, Garcia Decl.; Doc. 9, Johnson Decl.; Doc. 48, Nelson
Decl.; Doc. 13, Williams Decl., all Filed on November 6, 2006.)

20 ² Defendants cite *Joyce v. City & County of San Francisco*,
21 846 F. Supp. 843, 851-852 (N.D. Cal. 1994) where the court
22 expressed concern of the vagueness of the term "homeless."
23 However, the concern was based on a definition used by the
24 parties in that case who sought to enjoin Defendants for
25 enforcing certain aspects of their "Matrix Program." *Id.* at 845.
26 The court reasoned that the proposed definition of "homeless"
27 would require "individualized determination whether that person
28 possessed a 'fixed, regular, and adequate nighttime residence.'" *Id.* at 851. Determining this would make enforcement of the proposed injunction impractical. See, *Id.* at 853. The concern over the ambiguousness of the proposed definition of "homeless" in *Joyce* and its relation to the enforcement of a proposed injunction is a different issue from the one presented here, which is whether "a defined, identifiable class exists."

1 testimony given by Ms. Liza Apper at the hearing on the
2 preliminary injunction. Defendants argue that Ms. Apper's
3 definition and the Housing and Urban Development's definition of
4 homeless individuals includes: (1) individuals who live in the
5 street; (2) episodic homeless; and (3) transitional homeless.
6 Defendants further argue that the named Plaintiffs each fall
7 within a small subset of homeless individuals and represent a
8 mere ten percent (10%) of the homeless individuals in Fresno
9 County.³

11 However, the definition of the class proposed by Plaintiffs
12 does not depend on the definition of the term "homeless" nor does
13 it seek to include all homeless people in Fresno. Rather, the
14 definition seeks to specifically define a class of homeless
15 individuals in Fresno "whose personal belongings have been or may
16 be in the future taken or destroyed by one or more of the
17 defendants." The proposed definition of the class also provides
18 a time frame to narrow and identify group members who claim to
19 have been harmed after October 17, 2003.
20
21

22
23 ³ Defendants also argue that there are "far more
24 individuals who are considered homeless because they are living
25 with family and friends than there are homeless living in the
26 street." In support of their argument, Defendants cite to the
27 Continuum of Care study which they argue reveals that only ten
28 percent (10%) of homeless individuals in the Central Valley
qualify as homeless. Even if this is true, ten percent (10%)
would still constitute a "defined identifiable class" of 800 out
of the 8,000 homeless people in Fresno. This is also sufficient
to establish numerosity under the first element of Rule 23(a).

1 In balancing the concerns of both parties, including the
2 different categories of homeless individuals in the City of
3 Fresno, the definition of class members is hereby narrowed to
4 include:

5
6 "All persons in the City of Fresno who were or are
7 homeless, without residence, after October 17, 2003,
8 and whose personal belongings have been unlawfully
9 taken and destroyed a sweep, raid, or clean up by any
10 of the Defendants."

11 This definition establishes a defined identifiable class
12 representative of its members who allegedly suffered harm by
13 Defendants' sweeps in which the property of homeless individuals
14 was seized and destroyed.

15 **ii. Numerosity and Impracticability of Joinder**

16 A proposed class must be "so numerous that joinder of all
17 members is impracticable." Fed. R. Civ. P. 23(a)(1). The
18 numerosity requirement demands "examination of the specific facts
19 of each case and imposes no absolute limitations." *General Tel.*
20 *Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980).
21 Nevertheless, "Plaintiffs must show some evidence of or
22 reasonably estimate the number of class members. Mere
23 speculation as to satisfaction of this numerosity requirement
24 does not satisfy Rule 23(a)(1)." *Schwartz v. Upper Deck Co.*, 183
25 F.R.D. 672, 681 (S.D. Cal. 1999).
26

27 In this case, Plaintiffs estimate that over 8,000 residents
28 of Fresno are homeless. (See, SAC 8:2-14, citing "Fresno Madera

1 Continuum of Care Plan to End Homelessness" (CCP) at 10-11.)
2 Plaintiffs also estimate that at least 98% of this population is
3 unsheltered. Further, Defendants' policy has been implemented in
4 at least 25 sweeps per year since 2004, totaling at least 50
5 separate sweeps. (Doc. 91, Statement of Decision and Findings
6 Re: Pls.' Application for Prelim. Inj., 13:24-27).
7

8 Defendants argue that only 23 claims for damages have been
9 filed with the City by residents purportedly affected by the
10 City's conduct. Based on this evidence, Defendants argue that
11 "there is a substantial question concerning the number of
12 homeless individuals who are living in the street who fall within
13 the scope of the Plaintiffs' class." Defendants claim that
14 Plaintiffs provide no evidence to establish that the number of
15 homeless individuals who have lost their personal belongings is
16 so extensive that class treatment is required.
17

18 The findings issued on Plaintiffs' Application for
19 Preliminary Injunction, noted that although Specialist Reynaud
20 Wallace testified that he "did not keep count of all the carts
21 containing the property of the homeless that he has observed
22 being destroyed by the City pursuant to its policy, practice, and
23 pattern," he did estimate "that the number of such destroyed
24 carts containing such property was at least in the hundreds and
25 "countless" over the past two years in the southwest district of
26 the city alone." (Doc. 91, Statement of Decision and Findings
27
28

1 Re: Pls.' Application for Prelim. Inj., 27:66.) Even if only 23
2 claims for damages have been filed with the City, coupled with
3 direct evidence that seizure and destruction of property is part
4 of a sweep, the frequency of the sweeps conducted by the city,
5 and the number of homeless individuals who have been affected by
6 property seizures, Plaintiffs have satisfied the numerosity
7 requirement of 23(a)(2).
8

9 Plaintiffs have also established the impracticability of
10 joinder. A court should consider "not only the class size but
11 other factors as well, including the geographic diversity of
12 class members, the ability of individual members to institute
13 separate suits, and the nature of the underlying action and the
14 relief sought." See, *Nat'l Ass'n of Radiation Survivors v.*
15 *Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986). Given Plaintiffs'
16 homeless condition and lack of resources, it is unlikely that
17 they will be able to adjudicate their rights by filing separate
18 suits. Also, Plaintiff class are dispersed throughout the City
19 of Fresno, and many are without a fixed residence or moving
20 between shelters and streets. Identifying and locating
21 Plaintiffs also make joinder impractical. Defendants provide no
22 contrary evidence for impracticability. Given the large number
23 of potential class members, the inability of homeless individuals
24 to institute separate suits, and the potential burden individual
25 suits would place on the judicial system, Plaintiffs have
26
27
28

1 satisfied their burden to show numerosity and impracticability of
2 joinder.

3 **iii. Commonality**
4

5 Rule 23(a) also demands that "there are questions of law or
6 fact common to the class." It does not require that all
7 questions of law or fact be common to every single member of the
8 class. To satisfy the commonality requirement, plaintiffs need
9 only point to a single issue common to the class. *Dukes v.*
10 *Walmart, Inc.*, 474 F.3d 1214, 1225 (9th Cir. 2007); *Slaven v. BP*
11 *Am., Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000). Here, common
12 questions of fact and law arise from Defendants' alleged
13 destruction of Plaintiffs' personal property without notice
14 pursuant to the duly adopted and regularly established practice
15 of the City.
16

17
18 Commonality is generally satisfied where, as in this case,
19 "the lawsuit challenges a system-wide practice or policy that
20 affects all of the putative class members." *Armstrong v. Davis*,
21 275 F.3d 849, 868 (9th Cir. 2001); *LaDuke v. Nelson*, 762 F.2d
22 1318, 1332 (9th Cir. 1985). Differences in the ways in which
23 these practices affect individual members of the class do not
24 undermine the finding of commonality. *Armstrong*, 275 F.3d at 868
25 (finding commonality requirement satisfied despite individual
26 class members having different disabilities, since all suffered
27
28

1 similar harm as a result of defendant's actions).

2 This action involves a challenge to the City of Fresno's
3 pattern and practice of conducting sweeps and allegedly seizing
4 and destroying the personal property of homeless individuals
5 without adequate notice or an opportunity to be heard and the
6 absence of effective pre- or post-deprivation remedies. (Doc.
7 113, Second Amended Complaint "SAC", ¶¶ 38-47; Prelim. Inj.
8 Findings, ¶¶ 32-40). Plaintiffs allege that the policy treats
9 all homeless persons and their property the same, and each raid
10 is conducted in a nearly identical fashion. Plaintiffs also
11 claim that the present case includes numerous common issues of
12 law and fact:
13
14

- 15 1. The nature of Defendants' policies, practices and
16 conduct in conducting these sweeps, including
17 whether Defendants provided adequate notice and
18 whether the sweeps were sufficiently justified;
19
- 20 2. Whether Defendants' policies, practices and
21 conduct violate Class members' state and federal
22 constitutional rights against unreasonable search
23 and seizure;
24
- 25 3. Whether Defendants' policies, practices and
26 conduct violate Class members' due process rights
27 under the California and United States
28

1 Constitutions;

2 4. Whether Defendants' conduct violates Class
3 members' rights under California Civil Code
4 Sections 52 and 52.1, California Civil Code
5 Section 2080, California Government Code Section
6 815.6 and common law tort of conversion;
7

8 5. Whether injunctive relief restraining further
9 unconstitutional and unlawful acts by Defendants
10 should be ordered by the court, and, if so, the
11 nature of that injunctive relief.
12

13 6. The manner in which Plaintiffs' personal property
14 is seized and destroyed.
15

16 Defendants do not dispute Plaintiffs' contentions. Instead
17 Defendants argue that Plaintiffs' fail to show how the majority
18 of homeless individuals, or "the remaining ninety percent (90%),"
19 have ever suffered any loss of personal property as part of one
20 of the City's sweeps or relocation efforts. However,
21 "homelessness" alone is not the defining class criterion to make
22 any individual part of the class.⁴ Nor do Plaintiffs' so argue.
23 Members of the class will include only homeless individuals
24 "without residence" in the City of Fresno who "at any time after
25 October 17, 2003, [had their] personal belongings... taken and
26

27 ⁴ The Status of Plaintiffs as homeless is a fact common to
28 the class." *Pottinger*, 720 F. Supp. at 958.

1 destroyed by one or more Defendants." Such members of the class
2 share common questions of law and fact in the manner in which the
3 sweeps were carried out, the fact and content of any notice, the
4 seizure and destruction of personal property and whether any pre
5 or post deprivation remedy was afforded.
6

7 **iv. Typicality**

8 Rule 23(a) (3) demands that "the claims or defenses of the
9 representative parties are typical of the claims or defenses of
10 the class." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir.
11 2001). "Typicality... is said... to be satisfied when each class
12 member's claim arises from the same course of events, and each
13 class member makes similar legal arguments to prove the
14 defendant's liability." *Id.* Under the rule's "permissive
15 standards," representative claims are typical if they are
16 "reasonably co-extensive with those of absent class members; they
17 need to be substantially identical." *Hanlon v. Chrysler Corp.*,
18 150 F.3d 1011, 1020 (9th Cir. 1998).
19
20

21 Plaintiffs have sufficiently established typicality. The
22 named Plaintiffs have verified under penalty of perjury the truth
23 of the information in their declarations. The preliminary
24 injunction hearing testimony and declarations in the record
25 before the court establish that the named Plaintiffs each present
26 claims based on Defendants' policy of taking and destroying the
27 personal property of homeless individuals in the City of Fresno
28

1 without adequate notice or an opportunity to be heard or any
2 effective pre or post deposition remedy. Each named Plaintiff
3 and every member of the proposed class allege that they have
4 suffered the deprivation of his or her personal property as a
5 result of this policy and by virtue of their status as living in
6 the streets. The nature of the class and the types of property
7 lost in the raids are very similar and include personal property
8 such as tents, blankets, clothing, medicines and personal
9 effects. (Doc. 113, SAC, ¶1.) The class representatives also
10 claim to have suffered the same types of physical and emotional
11 harms that other class members have suffered. Lastly, Plaintiffs
12 claims are also typical with respect to individual defendants.⁵
13 Plaintiffs challenge a uniform policy implemented by the
14 concerted efforts of the City of Fresno and the other named
15 Defendants, including Caltrans employees or Caltrans real
16 property. Based on testimony and evidence in the record,
17 Plaintiffs have sufficiently established their claims are typical
18 of other class members.
19
20
21
22
23

24 ⁵ See *Easter v. Am. West Fin.*, 381 F.3d 948, 962 (9th Cir.
25 2004) (a plaintiff may be able to satisfy the class requirements
26 where all injuries are the result of a conspiracy or concerted
27 schemes between defendants); *In re Textainer P'ship Sec. Litig.*,
28 2005 U.S. Dist. LEXIS 40974, at *32 (N.D. Cal. 2005) (holding that
class certification appropriate where plaintiffs' claims were
based on "a method of dealing more or less common to all
defendants,")

1 **v. Adequacy of Representation**

2 The final Rule 23(a) prerequisite is satisfied if "the
3 representative parties will fairly and adequately protect the
4 interests of the class." Fed. R. Civ. P. 23(a)(4). "The proper
5 resolution of this issue requires that two questions be
6 addressed: (a) do the named plaintiffs and their counsel have any
7 conflicts of interest with other class members and (b) will the
8 named plaintiffs and their counsel prosecute the action
9 vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec.*
10 *Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).
11
12

13 Named Plaintiffs represent a diverse and typical cross-
14 section of homeless men and women in Fresno. Moreover, the
15 representative Plaintiffs have demonstrated by their attendance
16 at hearings, testimony, and continued participation in this
17 lawsuit that they will maintain a continuing interest in pursuing
18 the action aggressively and eliminating the oppressive policies
19 to ensure justice is served. *See, e.g. Walmart*, 474 F.3d at 1235
20 ("It is reasonable that plaintiffs who feel that their rights
21 have been violated by [defendant's] behavior would want that
22 behavior, and the injustice it perpetuates, to end.").
23 Plaintiffs have a continuing interest to pursue the action to the
24 fullest.
25
26

27 Plaintiffs' counsel are experienced in class action matters,
28 complex litigation, and the law in this area. They have the

1 resources necessary to prosecute this case. Plaintiffs' counsel
2 have represented the named Plaintiffs from the inception of this
3 case, have appeared before the Court in several proceedings, and
4 have demonstrated to the Court their ability to competently serve
5 as class counsel. Plaintiffs have made a sufficient showing that
6 the plaintiffs, as class representatives, will fairly and
7 adequately protect the interests of the class.⁶

9 **C. Rule 23(b) (2) Requirements**

10 Having satisfied the prerequisites set forth in Rule 23(a),
11 Plaintiffs must also satisfy one of the three provisions of Rule
12 23(b). Certification under Rule 23(b) (2) is appropriate when the
13 defendant "has acted or refused to act on grounds generally
14 applicable to the class, thereby making appropriate final
15 injunctive relief or corresponding declaratory relief with
16 respect to the class as a whole." Fed. R. Civ. P. 23(b) (2).
17

18
19 **i. Defendants Actions on Grounds Generally Applicable
20 to the Class**

21 Plaintiffs argue that Defendants' policies regarding their
22 treatment of the property of the homeless are generally
23 applicable to the entire class defined.

24 Defendants rejoin that the over-breadth of the term
25 "homeless" as used in the proposed definition for the class
26

27 ⁶ Defendants do not dispute that Plaintiffs have met the
28 adequate representation requirement.

1 "defeats any contention that the City has acted in a manner
2 applicable to the class generally." According to defendants
3 ninety percent (90%) of the potential class members do not live
4 on the streets and are not at risk of having their property
5 affected. The City further points to their efforts over the past
6 seven months to "acknowledge and respect the personal property
7 rights of the homeless."⁷ As a result of these efforts, the City
8 maintains that no injunctive relief will be awarded.
9

10 However, the definition proposed for the class is not
11 focused on the term "homeless," meaning individuals without
12 residence. The focus is on those "without residence" whose
13 personal belongings have been or may be in the future taken or
14 destroyed by one or more of the defendants... after October 17,
15
16

17 ⁷ These efforts include:

- 18 1. removing garbage from homeless encampments,
- 19 2. installing and servicing toilets and garbage bins,
- 20 3. assigning full time security to ensure access to
the public toilets,
- 21 4. drafting a proposed City policy to be implemented
to ensure that the City's future conduct in
22 collecting refuse and relocating homeless
encampments will protect the constitutional rights
23 of the homeless,
- 24 5. and creating a dedicated facility within the City
of Fresno to allow homeless individuals living in
25 the street to obtain shelter in a relatively
unstructured environment... with access to social
26 services, toilets, water and garbage removal.

27 (Doc. 135, Opposition, p. 4; see also, Doc. 136, Declaration
of K. Trost, ¶ 3) The City also represented at the hearing that
28 it is complying in every respect with the preliminary injunction.

1 2003." Even assuming arguendo that ninety percent (90%) of the
2 potential class members do not live on the street, ten percent
3 (10%) of 8000 equals 800 and constitutes a significant population
4 of class members that could potentially qualify as members of the
5 proposed class.
6

7 Plaintiffs have sufficiently established that Defendants'
8 alleged actions in conducting the raids and their treatment of
9 the property of the Plaintiffs are generally applicable to the
10 proposed class.
11

12 **ii. Adequacy of Final Injunctive Relief**

13 "Class actions certified under Rule 23(b) (2) are not limited
14 to actions requesting only injunctive or declaratory relief, but
15 may include cases that also seek monetary damages." *Molski v.*
16 *Gleich*, 318 F.3d 937, 947 (9th Cir. 2003). "In other words, in
17 order to permit certification under this rule, the claim for
18 monetary damages must be secondary to the primary claim for
19 injunctive relief." *Id.* To determine whether money damages
20 predominate, the court should examine the specific facts and
21 circumstances of each case, focusing predominantly on the
22 plaintiffs' intent in bringing the suit." *Walmart*, 474 F.3d at
23 1234.
24
25

26 In bringing this case, Plaintiffs argue that their motive
27 was to seek injunctive relief against Defendants with respect to
28

1 the class as a whole. Plaintiffs claim that the primary goal of
2 bringing this litigation was to enjoin the Defendants from
3 conducting raids on the City's homeless that resulted in the
4 immediate loss and destruction of their property without notice
5 or an opportunity to be heard.
6

7 Defendants do not dispute this. Instead, Defendants argue
8 the injunctive relief will vary between individuals because only
9 ten percent (10%) of the class members are actually homeless.
10 This is not the case since, as previously mentioned, the focus of
11 identifying the class is not whether class members are homeless
12 or how they are individually impacted, but rather that all
13 members who are homeless have suffered confiscation of their
14 property as a result of an unconstitutional pattern or practice
15 by Defendants. Defendants also argue that it is unlikely that
16 Plaintiffs will qualify for a permanent injunction given the
17 City's efforts, over the last several months, to address and
18 resolve the concerns relating to homeless who live on the street.
19 Defendants also point out that Plaintiffs are pursuing recovery
20 for punitive damages, aside from injunctive relief.
21
22

23 However, "Plaintiffs seek preliminary and permanent
24 injunctive relief on behalf of themselves and other homeless
25 persons similarly situated to enjoin defendants from taking and
26 destroying their personal property in violation of their
27 constitutional, statutory and common law rights." (Doc. 113,
28

1 SAC, Nature of Case, ¶4.) To meet the requirements of Rule
2 23(b) (2) it is not necessary that Plaintiffs qualify for a
3 permanent injunction. It is sufficient that Plaintiffs establish
4 that the primary claim for relief is injunctive relief.
5 Plaintiffs have met this burden under Rule 23(b) (2)
6

7 **D. Rule 23(b) (3) Requirements**

8 Plaintiffs also seek certification pursuant to the
9 superiority provision of Rule 23(b) (3), which requires:
10

11 That the questions of law or fact common to the members
12 of the class predominate over any questions affecting
13 only individual members, and that a class action is
14 superior to other available methods for the fair and
15 efficient adjudication of the controversy.

16 **i. Predominance**

17 The Rule 23(b) (3) predominance inquiry tests "whether
18 proposed classes are sufficiently cohesive to warrant
19 adjudication by representation." *Amchem Prods., Inc. v. Windsor*,
20 521 U.S. 591, 623 (1997) (citation omitted).

21 Rule 23(b) (3) focuses on the relationship between the
22 common and individual issues. When common questions
23 present a significant aspect of the case and they can
24 be resolved for all members of the class in a single
25 adjudication, there is clear justification for handling
26 the dispute on a representative rather than on an
27 individual basis.

28 *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las
Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001).

1 There are numerous common issues that predominate in this
2 case. The dominant common issues in this case relate to the
3 nature of Defendants' policies and practices and the nature and
4 extent of their liability. Specifically, Plaintiffs will
5 establish by common evidence:
6

7 (a) The nature of Defendants' policies and practices toward
8 the homeless, including:

- 9
- 10 1. the nature, timing, and extent of their "sweeps"
11 or "raids" upon the homeless, the immediate
12 seizure and
 - 13 2. destruction of the property of the homeless,
 - 14 3. the absence of meaningful notice or opportunity
 - 15 4. to get out of the way of Defendants' destructive
16 raids,
 - 17 5. the failure to store any of the seized property,
 - 18 6. the cost and feasibility of that storage and
 - 19 7. the inability to retrieve or recover any of the
20 seized personal property

21 (b) That Defendants' policies, which result in the irrevocable
22 destruction of Plaintiffs' property, are without probable
23 cause and violate Plaintiffs' constitutional rights against
24 unreasonable search and seizure under the Fourth Amendment
25 to the United States Constitution and Article 1, § 13 of the
26 California Constitution;

27 (c) That Defendants' policies fail to give adequate notice or an
28 opportunity to retrieve property once it has been taken and
29 violate Plaintiffs constitutional rights to Due Process of

1 Law under the Fourteenth Amendment of the United States
2 Constitution and Article 1, § 7(A) of the California
3 Constitution;

4
5 (d) That Defendants' policies are intended to single out
6 homeless people, have the purpose and effect of depriving
7 homeless people of their property and driving homeless
8 people from the city of Fresno and are based on Defendants'
9 animus towards this disfavored group and lack a rational
10 relationship to any legitimate government interest and
11 therefore violate Plaintiffs constitutional rights to Equal
12 Protection of the Laws under the Fourteenth Amendment of the
13 United States Constitution and United States Code, Section
14 1983 and under Article 1, Section 7(A) of the California
15 Constitution;

16
17 (e) That Defendants' policies violate California Civil Code
18 Section 2080 *et seq.* in that, among other things, Defendants
19 have failed to safeguard the personal property of Plaintiffs
20 and members of the plaintiff class found on public land,
21 failed to inform the owners of the personal property within
22 a reasonable time of finding this property, failed to
23 document the property found, and failed to make restitution
24 of the property to its owners or to make arrangements to
25 permit them to retrieve it;
26
27
28

1 (f) That Defendants' policies violate California Civil Code
2 Section 52.1 because they constitute interference, and
3 attempted interference, by threats, intimidation, and
4 coercion, with Plaintiffs' exercise and enjoyment of rights
5 secured by the Constitutions and laws of the United States
6 and California, in violation of California Civil Code §
7 52.1, and that as a result of such violations, Defendants
8 are liable to Class Members for statutory damages
9

10 (g) Whether and to what extent certain Defendants are liable to
11 the Class for punitive damages, and the amount of punitive
12 damages to which the plaintiff Class is entitled; and
13

14 (h) That Defendants' policies constitute an unlawful conversion
15 of Plaintiffs' property by denying Plaintiffs the possession
16 of their property when Plaintiffs were at all relevant times
17 the owners of personal property confiscated and destroyed by
18 defendants and remain entitled to the possession of their
19 personal property.
20

21 In contrast to these numerous common issues of fact and of
22 law, individualized issues in this case are limited: whether each
23 plaintiff did, in fact, have property destroyed by the defendants
24 and, if so, calculation of the appropriate compensatory damages.
25 These types of individualized issues - which are present in
26 nearly all class actions - do not defeat class certification
27 under Rule 23(b) (3). *See Mendoza v. Zirkle Fruit Co.*, 222 F.R.D.
28

1 439, 447-48 (E.D. Wash. 2004). And, since the majority of items
2 taken (e.g., tents, bedding, clothes, personal effects) were
3 common to most, if not all, class members, common evidence may be
4 offered to establish the value of such items. Individual
5 calculation of specific damages can be accomplished by special
6 master. See *Local Joint Exec. Bd.*, 244 F.3d at 1163.

8 **a. Individualized Damages**

9
10 While individualized proof might be necessary in some
11 exceptional cases, "[c]ourts routinely find Rule 23(b)(3)'s
12 predominance requirement satisfied despite the need for
13 individualized damage determinations when the fact of injury is
14 common." *Lockwood Motors*, 162 F.R.D. at 582; see also *Blackie v.*
15 *Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of
16 damages is invariably an individual question and does not defeat
17 class action treatment.") (citation omitted); *Local Joint Exec.*
18 *Bd.*, 244 F.3d at 1163 (holding that some "variation among
19 individual [plaintiffs], as well as some potential difficulty of
20 proof" was no bar to certification under 23(b)(3) "given the
21 number and importance of common issues").

23
24 Here, Plaintiffs have sufficiently established that there
25 are a large number of common questions of fact and law which are
26 a significant aspect of the liability case, which can be resolved
27 for all members of the class in a single adjudication.

ii. Superiority of Class Action

To determine whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," Fed. R. Civ. P. 23(b)(3), a district court should consider:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

Id.

Given Plaintiffs' lack of education, resources, and social acceptance, class members are unlikely to institute separate suits. Since the City started its unlawful sweeps there has been no separate lawsuit filed against the City by a homeless individual other than this case. Homeless individuals are also typically unfamiliar with the federal court system and lack the knowledge and ability to pursue individual separate lawsuits.

The primary relief sought is injunctive relief. To require individual class members to sue separately would be impractical, and an undue burden on the courts. Individual results would result in duplicative, redundant discovery and require multiple

1 courts to analyze the same evidence or the same legal issues.
2 Given the potential size of the class, approximated at 800
3 individuals on the high end and 40 on the low end, and the
4 relatively minimal compensatory damages, the cost of proving
5 nominal damages in separate trials would outweigh the potential
6 recovery and make individual actions unfeasible.
7

8 **5. CONCLUSION**

9
10 Based on the totality of all factors considered. Plaintiffs
11 have established the requisites of Fed. R. Civ. P. §§ 23(a)(1)-
12 (4), 23(b)(2) and (b)(3) and shown that certification of the
13 class is superior to all other methods of adjudication.

14 Plaintiffs' motion to certify class is **GRANTED**. The
15 following class definition shall apply:
16

17 "All persons in the City of Fresno who were or are
18 homeless, without residence, after October 17, 2003,
19 and whose personal belongings have been unlawfully
20 taken and destroyed in a sweep, raid, or clean up by
21 any of the Defendants."
22

23 IT IS SO ORDERED.

24 Dated: August 14, 2007

25 /s/ Oliver W. Wanger
26 UNITED STATES DISTRICT JUDGE
27
28