

1 BRUCE A. BEHRENS, Chief Counsel
THOMAS C. FELLEZ, Deputy Chief Counsel
2 RONALD W. BEALS, Assistant Chief Counsel
CHERYL D. McNULTY
3 DAVID P. HARRIS (Bar No. 158511), MATTHEW B. GEORGE
Attorneys for Department of Transportation
4 1120 N Street (MS 57), P. O. Box 1438
Sacramento, California 95812-1438
5 Telephone: (916) 654-2630
Facsimile: (916) 654-6128
6
7 Attorneys for Defendant Will Kempton
8

9
10 **UNITED STATES DISTRICT**
EASTERN DISTRICT OF CALIFORNIA: FRESNO DIVISION

11 PAMELA KINCAID, etc., et al.,) CASE NO. 1:06-CV-01445-OWW-SMS
12 Plaintiffs,)
13 v.) NOTICE OF MOTION; MOTION TO
14 CITY OF FRESNO, et al.,) DISMISS FOR LACK OF SUBJECT MATTER
15 Defendants.) JURISDICTION, MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON
16) WHICH RELIEF CAN BE GRANTED,
MOTION TO STRIKE, AND MOTION FOR
17) MORE DEFINITE STATEMENT (FRCP
12(b)(6), 12(b)(1)(3), 12(f), and 12(e))
18)

Date: March 12, 2007
Time: 10:00 a.m.
Courtroom: 3
Judge: Oliver W. Wanger

19 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 Please take notice that on March 12, 2007 at 10:00 a.m., or as soon thereafter as the
21 matter may be heard in the above entitled court, located at United States Courthouse, 2500 Tulare
22 Street, Courtroom 3, Fresno, California 93721, Defendant Will Kempton ("Defendant") will move
23 this court to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(1)(3) and 12(b)(6),
24 will also move this court to strike Defendant from the complaint pursuant to Federal Rules of Civil
25 Procedure 12(f), and will also mover this court in the alternative for a more definite statement
26 pursuant to Federal Rules of Civil Procedure 12(e), based on the following grounds:

27 A. This court lacks subject matter jurisdiction because the Eleventh Amendment
28 bars a federal court action against Defendant.

1 B. Defendant should be dismissed from the complaint because there are no charging
2 allegations against the Defendant.

3 C. The allegations against the Defendant are immaterial and impertinent and should
4 be stricken from the First Amended Complaint.

5 D. In the alternative, the allegations in the First Amended Complaint as to the
6 Defendant are so vague and ambiguous, Defendant cannot reasonably be required to frame a
7 responsive pleading absent a more definite statement.

8 E. The Doctrine of Unclean Hands, namely their admitted trespass upon and littering
9 of State property, prevents plaintiffs from seeking either equitable or legal remedies against the
10 Defendant.

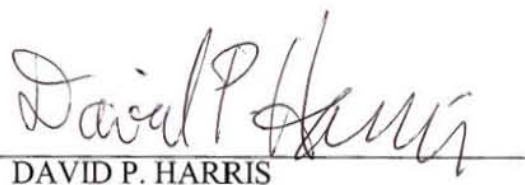
11 The motion will be based on this Notice of Motion, Memorandum of Points and
12 Authorities filed herewith, the Declaration of David P. Harris filed herewith, and the pleadings and
13 papers filed herein.

14 DATED: January 12, 2007

15
16 Respectfully submitted:

BRUCE A. BEHRENS, Chief Counsel
THOMAS C. FELLEENZ, Deputy Chief Counsel
RONALD W. BEALS, Assistant Chief Counsel
CHERYL D. McNULTY
DAVID P. HARRIS, MATTHEW B. GEORGE

17
18
19
20
21 By


DAVID P. HARRIS

22
23 Attorneys for Defendant Will Kempton
24
25
26
27
28

I. STATEMENT OF ISSUES

A. Does the Eleventh Amendment preclude this Court from exercising subject matter jurisdiction in this action?

B. Should Defendant Kempton be dismissed from this action because there are insufficient charging allegations against him?

C. Should Defendant Kempton be stricken from the complaint because he is immaterial and impertinent to this action?

D. In the alternative, should plaintiffs be required to file a more definite statement with regard to Defendant Kempton?

E. Should Defendant Kempton be dismissed due to the unclean hands of plaintiffs, namely their admitted trespass upon and littering of State property?

II. STATEMENT OF FACTS

On October 17, 2006, plaintiffs filed a complaint for declaratory and injunctive relief and for damages against the City of Fresno and several of its officials and employees. Plaintiffs also named the State of California, Department of Transportation ("Caltrans" or "the Department") and the Department's Director, Will Kempton, in both his official and individual capacities. Plaintiffs' complaint alleged that the defendants have unlawfully confiscated and destroyed the property of homeless people living in Fresno. The complaint asserted several causes of action under both state and federal law.

On October 24, 2006, plaintiffs served the Department and Director Will Kempton in his official capacity. Director Kempton was never served in his individual capacity. Plaintiffs have pursued and obtained temporary injunctive relief with relation to the subject of this matter. The Department and Director Kempton were neither served nor participated in the temporary injunction proceedings.

On November 8, 2006, counsel for plaintiffs and counsel for the Department and Director Kempton in his official capacity entered into a stipulation for an extension of time for the Department to respond to the complaint. That stipulation was subsequently timely filed with the Court.

Pursuant to that stipulation, plaintiffs agreed that, no later than December 13, 2006, plaintiffs would either amend or dismiss the complaint with respect to the Department and Director Kempton in both his official and individual capacities.

Instead, on December 13, 2006, plaintiffs filed and served a first amended complaint for declaratory and injunctive relief and for damages ("FAC" or "First Amended Complaint"). The FAC removed the State as a defendant. It also expressly stated that Director Kempton "is sued only in his official capacity and only for violations of federal law." (FAC, p. 5, lines 9-10, paragraph 25.)

But the FAC also named two employees of Department, James Province and Daryl Glenn, as defendants, in both their individual and official capacities and for alleged violations of both state and federal law. At the time of this motion, neither Mr. Province nor Mr. Glenn has been served, and thus this motion is filed only on behalf of Director Will Kempton.

III. POINTS AND AUTHORITIES IN SUPPORT OF MOTION

A. The First Amended Complaint Must be Dismissed Because the Eleventh Amendment Bars any Federal District Court Action Against Defendant Kempton When Acting in his Official Capacity.

Plaintiff has commenced a federal court action against the Director of the California Department of Transportation in his official capacity.

The Eleventh Amendment of the United States Constitution provides in pertinent part as follows:

"The judicial power . . . shall not . . . extend to any suit in law or equity . . . against one of the United States by citizens of another state or by citizens or subjects of any foreign state."

United States Constitution, Amendment XI; See *Gilbreath v. Cutter Biological, Inc.* (9th Cir. 1991) 931 Fed. 2d 1320, 1327.

The Eleventh Amendment grants sovereign immunity to the states against suit in federal court. "[E]ach state is a sovereign entity in our federal system; and . . . it is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent." *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 54 116 S.Ct. 1114, 1122. California's sovereign immunity derives from the structure of the original constitution itself and extends beyond the literal terms of the Eleventh Amendment. *Alden v. Maine* (1999) 527 U.S. 706, 736, 119 S. Ct. 2240, 2257.

1 Even though the Eleventh Amendment does not expressly bar suits against the state by *its own*
 2 citizens, it has been so interpreted. “An unconsenting state is immune from suits brought in federal
 3 court by her own citizens as well as by citizens of another state.” *Pennhurst State School and*
 4 *Hospital v. Halderman* (1984) 465 U.S. 89, 100, 104 S.Ct. 900, 908; *Papasan v. Allain* (1986) 78
 5 U.S. 265, 276, 106 S.Ct. 2932, 2939.

6 The Eleventh Amendment immunity also bars suits against Defendant Kempton
 7 when acting in his official capacity because the Department is the “real, substantial party in interest.”
 8 (See *Pennhurst State School and Hospital, supra*, at page 101; *Demery v. Kupperman* (9th Cir.
 9 1984) 735 Fed. 2d, 1139, 1146.) As expressly stated by plaintiffs in their First Amended Complaint,
 10 Defendant Kempton is being sued solely in his official capacity as Director of the Department. (FAC,
 11 page 5, lines 1-3 and 8-10, paragraphs 22 and 25.)

12 The type of relief sought, whether injunctive or monetary, is irrelevant as to whether
 13 suit is barred by the Eleventh Amendment. (See *Seminole Tribe of Florida, supra*, at page 58.) In
 14 absence of consent, plaintiffs’ complaint against the Defendant is barred by the Eleventh
 15 Amendment. (*Pennhurst State School and Hospital, supra*, at page 100; *Regents of the University*
 16 *of California v. Doe* (1997) 519 U.S. 425, 429, 430, 117 S.Ct. 900, 904; *Belanger v. Madera Unified*
 17 *School District* (9th Cir. 1992) 963 Fed. 2d 238, 254.

18 Defendant Kempton is a State official because he is acting in his *official capacity*
 19 under State law; thus, he is immune from suit pursuant to the Eleventh Amendment. *Garcia v. City*
 20 *of Chicago, Illinois* (7th Cir. 1994) 24 Fed. 3d 966, 969.

21 In summary, plaintiffs’ First Amended Complaint should be dismissed as to
 22 Defendant Kempton as this court lacks subject matter jurisdiction because the Eleventh Amendment
 23 bars federal lawsuits against the State and its officers acting within their official capacities.

24 **B. Plaintiffs’ First Amended Complaint Should be Dismissed for Failure to**
 25 **State a Claim Upon Which Relief Can be Granted as to Defendant Kempton.**

26 Federal Rule of Civil Procedure 12(b)(6) provides that dismissal of an action is
 27 proper where there is either a “lack of cognizable legal theory” or “the absence of sufficient facts
 28 alleged under a cognizable legal theory”. *Balistreri v. Pacifica Police Department* (9th Cir. 1990)

901 Fed. 2d 696, 699. *Graehling v. Village of Lombard, Illinois* (7th Cir. 1995) 58 Fed. 3d 295, 297. A careful reading of the plaintiff's FAC clearly establishes that there are no charging allegations against Defendant Kempton. His name only appears on page 5, lines 1 through 3 and 8 through 10.

The test for determining whether a complaint has pled a "claim for relief" is to determine if the complaint sets forth sufficient facts, which, if established, give rise to one or more enforceable legal rights. *Goldstein v. North Jersey Trust Co.* (SD NY 1966) 39 FRD 363, 366; In re *Baker* (B K D NV 1986) 66 BR 652, 653. Although federal pleading requirements are liberal in order to minimize disputes over pleading technicalities, (*Conley v. Gibson* (1957) 355 US 41, 47-48, 78 S.Ct. 99, 103), plaintiffs are still required to plead a "simple, concise and direct" allegation in its complaint (FRCP 8(e)(1)).

Plaintiffs have failed to allege any facts against Defendant Kempton that his conduct was improper. The FAC merely alleges that an alleged wrong has been (apparently) committed by the Department, but demands relief from Defendant Kempton. The underlying requirement in federal pleadings is to give "fair notice" of its claim being asserted on the "ground upon which it rests." *Conley, supra*, at page 47, 48 and *Yamaguchi v. United States Department of Air Force* (9th Cir. 1997) 109 Fed 3d 1475, 1481. Plaintiffs have failed to give fair notice of its claims against the Director Kempton and further failed to assert any grounds for the alleged wrong. Therefore, plaintiffs' FAC should be dismissed without leave to amend as to Director Kempton.

C. Defendant Kempton Should Be Stricken From the First Amended Complaint Because He Is An Immaterial And Impertinent Party To This Action.

A motion to strike may be granted where "it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *LeDuc v. Kentucky Central Life Insurance Company* (ND CA 1992) 814 Fed. Supp. 820, 830.

First, it is most telling that plaintiffs did not involve Director Kempton or any officials or employees of the Department in their proceedings to seek a temporary restraining order or preliminary injunction. The omission of Defendant Kempton from those proceedings is a tacit admission by plaintiffs that Defendant Kempton has no involvement in the matters at issue here.

Defendant Kempton has been sued in his official capacity as the Director of the Department. He has no personal liability in this lawsuit. Moreover, plaintiff has made no charging allegations against Defendant Kempton and therefore he is immaterial and impertinent as to the issues involved in this action. *Fantasy Inc. v. Fogarty* (9th Cir. 1993) 984 Fed. 2D, 1524, 1527.

Defendant Kempton should be stricken from the complaint.

D. In the Alternative, the Allegations in the First Amended Complaint as to Defendant Kempton Are so Vague and Ambiguous that Defendant Cannot Reasonably be Required to Frame a Responsive Pleading Absent a More Definite Statement.

“If a pleading to which a responsive pleading is permitted is so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.” Federal Rule of Civil Procedure 12(e).

While a motion for a more definite statement is generally disfavored, in cases involving civil rights claims against public officials, a 12(e) motion is appropriate.

To relieve public officials of the burdens of discovery and trial, a rule 12(e) motion is appropriate to compel plaintiffs to allege “specific nonconclusory factual allegations”. *Crawford-El v. Britton* (1998) 523 U.S. 574, 597-598.

As stated above, the allegations against Defendant Kempton are so vague and ambiguous that he cannot reasonably be required to frame a responsive pleading absent a more definite statement of the allegations against him. Therefore, at a minimum, plaintiffs should be required to provide a more definite statement of their allegations against Defendant Kempton.

E. The Doctrine of Unclean Hands, Namely Their Admitted Trespass Upon And Littering Of State Property, Prevents Plaintiffs From Seeking Either Equitable Or Legal Remedies Against Defendant Kempton.

A fundamental principle in equity is the maxim that he who comes in equity must do so with clean hands. See e.g., *Bennett v. Lew* (1984) 151 Cal. App.3d 1177; *De Garmo v. Goldman* (1942) 19 Cal.2d 755.

Furthermore, the unclean hands doctrine is not confined to equitable actions, but is also available in legal actions. *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, as modified on denial of reh'g. Here, the FAC seeks both declaratory and injunctive relief and damages.

By plaintiffs' own admission as set forth in the FAC and elsewhere, plaintiffs openly acknowledge their trespass upon and littering of State property. In fact, one of the very few substantive allegations that allegedly subjects any State actors to liability is that some of the removal activities of homeless individuals were conducted on property belonging to the State of California. (See e.g., FAC, page 11, lines 14-21, para. 43.) Additionally, the FAC expressly alleges that the State of California owns other property in the City of Fresno on which homeless people live and/or keep their belongings. (FAC, page 12, lines 12-13, para. 44.)

The relief sought by plaintiffs would strip the State of its ability to safely manage state highways and adjoining rights-of-way. The State must be able to maintain its property in a manner that insures safety for the homeless, motorists, and its own employees. The State has explicit statutory authority to support its position. California Vehicle Code section 23113, for example, (1) permits the State to remove litter from highways and rights-of-way, (2) allows the State to recover the costs of that removal from the responsible party and (3) provides immunity to the State for any alleged damages related to the removal of that property.

To permit the relief sought by plaintiffs would cede the State's authority to maintain its rights-of-way to trespassers.

Due to the unclean hands of plaintiff with regard to the activities alleged in the FAC, Defendant Kempton should be dismissed from the FAC.

IV. CONCLUSION

The Eleventh Amendment bars any action against the State of California Department of Transportation or, as is the case here, an individual State official acting in his official capacity.

Also, the doctrine of unclean hands defeats plaintiffs' claims.

1 In addition, Plaintiff has not pled sufficient facts to constitute an action against
2 Defendant Kempton because there are no charging allegations against him, nor is there a concise
3 statement of facts that duly notifies Defendant Kempton of the action against him.

4 Further, Defendant Kempton should be stricken from the complaint as he was acting
5 within the course and scope of his employment as an official representative of the Department and
6 State and not in any other capacity.

7 Moreover, in the alternative, Defendant Kempton is entitle to a more definite
8 statement before being required to file a responsive pleading.

9 For any and all of the foregoing reasons, this motion should be granted.

10 DATED: January 12, 2007.

11
12 Respectfully submitted:

BRUCE A. BEHRENS, Chief Counsel
THOMAS C. FELLEENZ, Deputy Chief Counsel
RONALD W. BEALS, Assistant Chief Counsel
CHERYL D. McNULTY
DAVID P. HARRIS, MATTHEW B. GEORGE

13
14
15
16
17 By 
18 DAVID P. HARRIS

19 Attorneys for Defendant Will Kempton
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, the undersigned, say: I am, and was at all times herein mentioned, a citizen of the United States and employed in the County of Sacramento, State of California, over the age of 18 years and not a party to the within action or proceeding; that my business address is 1120 N Street, Sacramento, California; that on January 12, 2007, I enclosed a true copy of the attached **NOTICE OF MOTION; MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, MOTION TO STRIKE, AND MOTION FOR MORE DEFINITE STATEMENT (FRCP 12(b)(6), 12(b)(1)(3), 12(f), and 12(e)); DECLARATION OF DAVID P. HARRIS IN SUPPORT THEREOF, PROPOSED ORDER** in a separate envelope for each of the persons named below, addressed as set forth immediately below the respective names, as follows:

HELLER EHRMAN LLP
PAUL ALEXANDER
275 Middlefield Road
Menlo Park, CA 94025-3506
Facsimile: (650) 324-0638

JAMES B. BETTS
BETTS & WRIGHT, A Professional Corp.
Attorneys at Law
P. O. Box 28550
Fresno, CA 93729-8550
Facsimile: (559) 438-6959

The following is the procedure by which service of this document was effected:

<u>X</u>	U. S. Postal Service (by placing such envelope(s), with postage thereon fully prepaid as first-class mail, and depositing the same on the aforesaid date in a mailing facility regularly maintained by the United States Postal Service for the mailing of letters at Sacramento, California)
—	Federal Express
—	DHL
—	U.S. Postal Service Express Mail
<u>X</u>	FAX
—	Personal Service

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2007, at Sacramento, California.



Declarant

PROOF OF SERVICE (C.C.P. 1013A AND C.C.P. 2015)