SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

COUNTY OF ORANGE, et al., Plaintiff, v. CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, et al. Defendants.	Case No. 37-2018-00039176-CU-MC-CTL **STATEMENT OF DECISION** Hon. Joel R. Wohlfeil Dept. 73

The evidentiary hearing on the motion of Plaintiffs COUNTY OF ORANGE, ORANGE COUNTY FLOOD CONTROL DISTRICT, CITY OF COSTA MESA, CITY OF ORANGE and CITY OF ANAHEIM ("Plaintiffs") for a preliminary injunction to enjoin Defendants CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, KAREN L. SMITH, in her official capacity as Director and State Public Health Officer and ORANGE COUNTY NEEDLE EXCHANGE PROGRAM ("Defendants") from operating or funding the pending needle exchange program ("NEP") in the County of Orange came on regularly for hearing on November 14 and 15, 2018 before the Honorable Joel R. Wohlfeil, Judge presiding. The Court, after hearing testimony of witnesses (Dr. Kyle Barbour plus his declaration (ROA # 41), Carol Newark, Jemma Alarcon plus her declaration (ROA # 41), Alessandra Ross and Christine Lane plus her declaration (ROA # 45)), receiving exhibits into evidence (Ex. Nos. "1 – 16, 19, 20 and 22"), reading declarations (ROA # 15 – 22, 42, 24, 25, 30, 41 and 45) and trial briefs (ROA # 14, 29, 33, 41, 44, 46, 83 and 85), hearing

arguments of counsel, and good cause appearing therefore, hereby issues this Statement of Decision ("SOD").

Introduction

Defendant Orange County Needle Exchange Program ("OCNEP") is the inspiration of Dr. Barbour and Alarcon. Run by volunteers, the most sterling representative of whom is Newark, OCNEP exists to prevent the spread of HIV, hepatitis C and other infectious diseases, a noble goal with which reasonable people agree.

OCNEP represents itself to be a "harm reduction" program grounded on "evidence-based principles;" however, by their own definition, "harm reduction" is a "social justice movement built on a belief in, and in respect for, the people who use drugs." Exhs. "2 and 22." Like a social justice movement, evidence can be both broad ("sworn testimony, documents or anything else ...") and objective – on which reasonable minds may agree – or subjective – on which reasonable minds may disagree. CACI 106, 107, 219 and 223. Based on the Court's review of this record, the line between evidence- and values- based principles advocated by Plaintiffs and Defendants, is ambiguous.

The primary means by which OCNEP strives to accomplish its mission is the distribution of syringes or sharps to anonymous clients, the vast majority of whom are intravenous drug users, or homeless, or both drug users and homeless.

Since its 2016 inception, OCNEP has apparently distributed around 2.5 million syringes and collected around 2.25 million syringes, a discrepancy of 250,000 syringes. This discrepancy illustrates the nature of this conflict – syringe litter, which further underscores the competing health and safety policy considerations at issue.

Evidentiary Objections and Request for Judicial Notice

The Court GRANTS IN PART and DENIES IN PART Plaintiffs' Request (ROA # 26) for judicial notice. The Court takes judicial notice of Exhs. "A – C," and declines to take judicial notice of Exh. "D."

///

///

Defendants' evidentiary objections (ROA # 31) are SUSTAINED IN PART and OVERRULED IN PART. Nos. 15, 17, 26 – 81, 96, 97 and 99 are SUSTAINED. The balance of Defendants' objections is OVERRULED.

Plaintiffs' evidentiary objections (ROA # 32) are SUSTAINED IN PART and OVERRULED IN PART. Nos. 6, 8, 10, 12, 14 and 16 are SUSTAINED. The balance of Defendants' objections is OVERRULED.

Plaintiffs' evidentiary objections (ROA # 43) are SUSTAINED IN PART and OVERRULED IN PART. Nos. 10, 11, 18, 24 – 27 and 42 are SUSTAINED. The balance of Defendants' objections is OVERRULED.

The Court GRANTS IN PART and DENIES IN PART Plaintiff City of Costa Mesa's Request (ROA # 48) for judicial notice. The Court takes judicial notice of Exh. "A," and declines to take judicial notice of Exhs. "B – D."

During trial, the Court GRANTED Plaintiff City of Costa Mesa's Request to take judicial notice of Costa Mesa ordinance no. 18-08, a copy of which was presented to the Court at trial.

The October 1, 2018 Hearing

In anticipation of the initial hearing on Plaintiffs' Motion (ROA # 14, 40), the Court published a tentative ruling (ROA # 53). At the initial hearing, the Court set an evidentiary hearing and directed the parties to present evidence on the subject of two issues:

a. Whether OCNEP has sufficient staff and capacity to provide required services pursuant to Health and Safety Code section 121349(c); and,

b. Whether OCNEP's program adequately provides for the safe recovery and disposal of used syringes and sharps waste from all of its participants pursuant to Health and Safety Code section 121349(d)(3)(C).

ROA # 60, 61.

The answers to these questions are, as discussed below, no.

Reasonable Probability of Prevailing on the Merits

As a general matter, the Court considers two interrelated questions in deciding whether to issue a preliminary injunction: (1) is Plaintiff likely to suffer greater injury from a denial of the

injunction than Defendant is likely to suffer from its grant; and (2) is there a reasonable probability that Plaintiff will prevail on the merits. Robbins v. Superior Court (1985) 38 Cal.3d 199, 206; (Code Civ. Proc. 526(a)). "A more deferential standard applies where a government entity seeking to enjoin the alleged violations of an ordinance which specifically provides for injunctive relief, establishes that it is reasonably probable that it will prevail on the merits. A rebuttable presumption [then] arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." IT Corp. v. County of Imperial (1989) 35 Cal.3d 63,72. Where Defendant has made such showing, an injunction is appropriate only after the consideration of both (1) the degree of certainty of the outcome on the merits, and (2) the consequences to each of the parties of granting or denying interim relief. Id. The burden is on the moving party to show all elements necessary to support issuance of a preliminary injunction. O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1481. When injunctive relief is sought, consideration of public policy is not only permissible but mandatory. Id. at 1471. Where Plaintiff seeks to enjoin public officers and agencies in the performance of their duties, the public interest must be considered. Id.

In their First Amended Complaint ("FAC"), Plaintiffs allege, in pertinent part, a claim for Public Nuisance (CCP 3479 & 3480) against Defendants.

Health & Safety Code 121349 states, in pertinent part:

> (b) In order to reduce the spread of HIV infection and blood borne hepatitis among the intravenous drug user population within California, the Legislature hereby authorizes a clean needle and syringe exchange project pursuant to this chapter in any city, county, or city and county upon the action of a county board of supervisors and the local health officer or health commission of that county, or upon the action of the city council, the mayor, and the local health officer of a city with a health department, or upon the action of the city council and the mayor of a city without a health department.

.....

(c) In order to reduce the spread of HIV infection, viral hepatitis, and other potentially deadly blood borne infections, the State Department of Public Health may ... authorize entities that provide services set forth in paragraph (1) of subdivision (d), and that have **sufficient staff and capacity to provide the services** described in Section 121349.1, as determined by the department, to apply for authorization under this chapter to provide hypodermic needle and syringe exchange services consistent with state standards in any location where the department determines that the conditions exist for the rapid spread of HIV, viral hepatitis, or any other potentially deadly or disabling infections that are spread through the sharing of used hypodermic needles and syringes.

.....

(d) In order for an entity to be authorized to conduct a project pursuant to this chapter, its application to the department shall demonstrate that the entity complies with all of the following minimum standards:

.....

(3) The entity has adequate funding to do all of the following at reasonably projected program participation levels:

.....

(C) **Provide for the safe recovery and disposal of used syringes and sharps waste from all of its participants.** (emphasis added by the Court)

Newark's testimony alone proves that OCNEP has the "staff and capacity" to provide the services described in Section 121349.1; namely, "the possession, furnishing or transfer of hypodermic needles or syringes or any materials ... to prevent the spread of communicable diseases, or to prevent drug overdose, injury, or disability." Indeed, the Court would be remiss if it did not express its admiration for the selfless devotion of OCNEP's volunteers to the program and

its clients; however, the Court's analysis is not limited to the volunteers' convictions but must, instead, focus on the sufficiency of OCNEP's staff and capacity.

In their Motion (ROA # 14), Plaintiffs argue, at pages 10 - 12:

> "A public nuisance is one that affects at the same time an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals may be unequal. (Civ. Code, § 3480.) A nuisance includes anything which is injurious to health. (Civ. Code, § 3479.) The term 'public nuisance' comprehends an act or omission that interferes with the interests of the community or the health, comfort, and convenience of the general public. (Venuto v. Owens-Corning Fiberglass Cor. (1971) 22 Cal. App. 3d 116, 123.) A preliminary injunction will not issue on mere allegations of irreparable injury; rather, facts must be stated from which the court itself may see that irreparable injury will follow unless commission thereof is restrained. (Martin v. Danziger (1913) 21 Cal. App. 563.) If the conditions fall within the definition of a nuisance and / or a public nuisance as defined in Civil Code sections 3479 and 3480, then section 731 of the Code of Civil Procedure specifically provides that under these circumstances a county may bring an action to abate the nuisance. (People v. Wheeler (1973) 30 Cal. App. 3d 282, 294.)
>
> The conditions here fall within the definition of a public nuisance under the Civil Code. OCNEP acknowledges that the AIDS virus, Hepatitis C and other infectious disease are spread through dirty needles. (See RJN, Exh. A.) Indeed, the public health risk of dirty needles has been formally acknowledged by the State Legislature. For example, in enacting the Safe Needle Disposal Act of 2004, the Legislature's findings included the following:
>
> (a) Every year more than 2 billion needles and syringes are used outside of healthcare settings.
>
> (b) Most of these needles are improperly stored and then are placed into either municipal trash or

recycling containers, thereby posing serious health risks to children, workers and the general public ...

(Stats. 2004, c. 157 (S.B. 1362, § 1.) [emphasis added].)

Similarly, in amending the MWMA, the Legislature found:

1) This bill closes a loophole in current law which allows millions of home-generated needles to be legally placed in solid waste and recycling containers. Each year, more than two billion needles and syringes are used nationwide outside of healthcare settings. Most of these needles are improperly stored and then placed in either municipal trash or recycling containers or may be flushed down toilets where they present substantial risks to children, workers and the general public.

* * *

6) The presence of millions of needles in the recycling and solid waste stream presents a serious health threat to workers who collect and sort waste. Solid waste is manipulated in various manners. It is compacted by trucks and other heavy equipment that crush and puncture containers exposing hazardous contents, including sharps. Waste is sorted by hand to recover recyclables. Landfill workers are exposed when they work the active face of a landfill. These workers are exposed to the danger of being stabbed by needles that poke through clothing, including heavy gloves and boots. This could result in serious injury, including infection by pathogens either from the needle user, or by pathogens that adhere to a needle. (Assem. Com., Off. Of Assem. Floor Analysis, Rep. on Senate. Bill No. 1305 (2005-2006 Reg. Sess.) June 16, 2006 [emphasis added].)

OCNEP even acknowledges the public health risk inherent in the spread of dirty infected needles by including in its application a 'Needlestick Protcol,' which contains instructions on handling needle stick injuries of staff and volunteers. (RJN, Exh. A, Appendix B, pp. 11-12.) Among other things, it is recommended that injured persons report to the

> emergency room or a private physician, preferably within three hours. (Id. at p. 12.) They are also requested to gather information about their exposure, such as depth of the stick, age of the syringe, HIV / HCV status of previous users of the syringe, and when they were last tested for HIV / HCV. (Ibid.) Of course, a majority of these questions cannot be answered by volunteers who happen to be stuck by needles, let alone by members of the public who happen upon a dirty needle, due to the fact that the IDUs are anonymous, and there is notably no provision or plan by OCNEP to track the needles distributed, or provide any sort of accountability for distribution. Yet, it is recommended that injured persons be offered 'counseling and testing for HIV, Hepatitis B and C, and other blood-borne pathogens.' (Ibid.)
>
> Accordingly, because State Respondents did not comply with California Health and Safety Code requirements prior to approving OCNEP's application, the NEP authorized to commence on August 6, 2018, creates serious risk of the spread of dirty, infected needles, which can only be prevented by injunctive relief."

In their opposition (ROA # 29), Defendants California Department of Public Health and Karen L. Smith, Director of the California Department of Public Health state, at page 13:

> "The fourth cause of action for public nuisance (see FAC 58 - 61) will fail as a matter of law because, '[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance.' (Civ. Code 3482.) Here, petitioners are complaining of the Department's issuance of an authorization to OCNEP to operate an SEP, yet this authorization was done under the express authority of Health and Safety Code section 121349. The cause of action will therefore fail."

Defendant OCNEP joined in the opposition of Defendants California Department of Public Health and Karen L. Smith, Director of the California Department of Public Health. ROA # 41 at page 13.

///

In Varjabedian v. City of Madera (1977) 20 Cal. 3rd 285, 292, 293, the Court stated:

> "... Civil Code section 3482 provides that 'Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance,' and the construction of sewage treatment plants by cities such as Madera is admittedly authorized by statute. (See Gov. Code, §§ 39040,5 40404, 43601, 43602, 54301, 54309, 54309.1, and 54341.)
>
> However, the exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. In Hassell v. San Francisco (1938) 11 Cal. 2d 168, 171 [78 P.2d 1021], we said: 'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' This interpretation was reiterated in Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 938 [101 Cal.Rptr. 568, 496 P.2d 480], and we adhere to it in the case at bar. A requirement of 'express' authorization embodied in the statute itself insures that an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result were every generally worded statute a source of undetermined immunity from nuisance liability.
>
> Applying the foregoing standard, we reject defendant's theory that the general authorization of municipal construction of sewage plants 'expressly' sanctions the production of any particular level of odors within the meaning of section 3482. None of the Government Code statutes under which the city claims to act mentions the possibility of noxious emanations from such facilities. Nor can we find that such odors were authorized by the 'plainest and most necessary implication' from the general powers there conferred, or that it can be fairly said that the Legislature contemplated, to any extent, the creation of a malodorous nuisance when it

> authorized sewage plant construction. Indeed, one object of such plants is to remove harmful and obnoxious effluents from the environment."

Likewise, neither the statutes relied on by Defendants, nor Defendants' authorization of OCNEP's needle exchange program, "expressly" sanctions syringe litter within the meaning of section 3482. Indeed, Health & Safety Code 121349 plainly and necessarily directs Defendants to do just the opposite ... "Provide for the safe recovery and disposal of used syringes and sharps waste from all of its participants." Accordingly, the Court finds that, based on this record, Defendants have failed to show that Defendants are immune from Plaintiffs' claim that the needle exchange program may constitute a public nuisance.

The Court makes the following interim findings on Plaintiffs' claim for public nuisance under CACI 2020:

1. Defendants, by acting or failing to act, created the "syringe litter" condition that is harmful to health, or is indecent or offensive to the senses. Plaintiffs have carried their burden that syringe litter was created by OCNEP's distribution of the exchange needles. See, for example, ROA # 11 – 14 and 16 – 19. Defendants argue that the syringe litter pre-existed OCNEP's operations. The Court agrees that the evidence, in part, supports this assertion. See, for example, declarations of Lew, at par. 39, and Dr. Barbour, at par. 3; however, the collection of "149 syringes" compared to the combination of the overall quantity of needles which Defendants themselves acknowledge is unaccounted for (approximately 250,000) and Plaintiffs' collection of 14,000 needles, is de minimis. The risk of harm, including but not limited to needle stick injuries, from syringe litter is substantial. Not lost on the Court is the irony of the precautions OCNEP takes in admonishing its volunteers not to handle the needles and the hazards of needle stick injuries (see, for example, Exhs. "2 – 4 and 22") on the one hand and Defendants' desire to minimize the harm to Plaintiffs' residents, including but not limited to children, who inadvertently encounter syringe litter. See, for example, the declarations of Leo Beletsky in contrast to the declarations of Theodore Luckham, Milly Lugo-Rios, Julian Harvey and Katie Angel. Finally, the nature, scope and

effectiveness, if at all, of OCNEP's "area sweeps" (see, for example, Exh. "20" at page 2) is difficult to interpret but, in the final analysis, does little to mitigate the syringe litter complained of by Plaintiffs.

2. The syringe litter condition affected a substantial number of people at the same time. See, for example, ROA # 16 – 19 and 22.

3. An ordinary person would be reasonably annoyed or disturbed by the condition. See, for example, ROA # 18 and 22.

4. The seriousness of the harm outweighs the social utility of Defendant's conduct. This is the most difficult element to evaluate. Defendants have presented substantial evidence to support the social utility of OCNEP's program. Indeed, as indicated above, who can reasonably disagree with the prevention of the spread of HIV, hepatitis C and other infectious diseases? See, for example, ROA # 30 and 41 in addition to the trial testimony of Dr. Barbour, Newark, Alarcon and Ross. However, the program's public health objective is no more important than the public safety objective advocated by Plaintiffs. From Plaintiffs' perspective, the inadequacy of OCNEP's staff to safely recover and dispose of used syringes and sharps waste from all of its participants as well as the corresponding harm to the communities in which OCNEP distributes the exchange needles undermines public safety, a goal with which reasonable people agree. See, for example, ROA 16 – 19, 21 and 22. Again, the Court is struck by the irony of the precautions OCNEP takes in admonishing its volunteers not to handle the needles and the hazards of needle stick injuries (see, for example, Exhs. "2 – 4 and 22") on the one hand and Defendants' desire to minimize the harm to Plaintiffs' residents, including but not limited to children, who inadvertently encounter syringe litter. See, for example, the declarations of Leo Beletsky in contrast to the declarations of Theodore Luckham, Milly Lugo-Rios, Julian Harvey and Katie Angel. Finally, the Court is impressed that Plaintiffs' action to enjoin the program occurred only after allowing the program to pursue its mission for approximately two years. Two years strikes the Court as a reasonable amount of time for Plaintiffs to have observed the consequences of the program in their communities, before seeking the judicial relief herein.

///

5. Plaintiffs did not consent to Defendant's conduct. During the public comment period, Plaintiffs registered their concerns with Defendant Department of Public Health (see Exh. "L" to the declaration of Lew), and, after observing the consequences of the program in their communities, sought judicial relief. In its totality, this does not strike the Court as consent by Plaintiffs for OCNEP to operate this program in their communities.

6. Plaintiffs suffered harm that was different from the type of harm suffered by the general public. In People v. Oliver (1948) 86 Cal. App. 2nd 885, 889, the Court stated: "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated. (People v. Foerst 10 Cal. App. 2d 274; People v. United Capital Corp. 26 Cal. App. 2d 297.) A nuisance is defined in section 3479 of the Civil Code as 'Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property ...' Section 3480 of the Civil Code provides that 'A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.'" Like the fire hazard in Oliver, the harm from the syringe litter is different from the type of harm suffered by the general public.

7. Defendant's conduct was a substantial factor in causing Plaintiff's harm. As mentioned above, Plaintiffs have carried their burden that syringe litter exits in the communities in which OCNEP distributes the exchange needles. See, for example, ROA # 11 – 14 and 16 – 19. Defendants argue that the syringe litter pre-existed OCNEP's operations. The Court agrees that the evidence, in part, supports this assertion. See, for example, declarations of Lew, at par. 39, and Dr. Barbour, at par. 3; however, the collection of "149 syringes" compared to the combination of the overall quantity of needles which that Defendants themselves acknowledge is unaccounted for (approximately 250,000) and Plaintiffs' collection of 14,000 needles, is de minimis. The risk of harm, including but not limited to needle stick injuries, from syringe litter is substantial. CACI 430.

///

///

Conclusion

The Court, based on the above findings, GRANTS IN PART ad DENIES IN PART Plaintiffs' Motion. Plaintiffs' Motion to enjoin Defendants from "operating" the needle exchange program in the County of Orange is GRANTED. Plaintiffs' Motion to enjoin Defendants from "funding" the needle exchange program in the County of Orange is DENIED. The Court is not persuaded that Plaintiffs have carried their burden that "funding" the program has caused the condition complained of and therefore should be enjoined. Plaintiffs are directed to prepare an Order consistent with the Court's findings and orders herein.

IT IS SO ORDERED.

Dated: 11-21-18

JOEL R. WOHLFEIL
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: County of Orange vs California Department of Public Health [IMAGED]

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2018-00039176-CU-MC-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the Statement of Decision dated 11/27/18 was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 11/27/2018.

Clerk of the Court, by: Andrea Taylor A. Taylor, Deputy

CHARA L CRANE
300 S SPRING STREET # 1702
LOS ANGELES, CA 90013

REBECCA S LEEDS
333 W SANTA ANA BOULEVARD # 407
SANTA ANA, CA 92701

ROBERT A SOLOMON
UNIVERSITY OF CALIFORNIA IRVINE
401 PELTASON DRIVE
IRVINE, CA 92697-8000

KRISTA M JEE
GARY KRANKER, ESQ.
3777 N HARBOR BOULEVARD
FULLERTON, CA 92835

WAYNE WINTHERS
CITY OF ORANGE COUNTY
300 E. CHAPMAN AVENUE
ORANGE, CA 92866

GREGG AUDET
ANAHEIM CITY ATTORNEY'S OFFICE
200 S. ANAHEIM BOULEVARD
ANAHEIM, CA 92805

☐ Additional names and address attached.