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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

CITY OF COSTA MESA, AND
KATRINA FOLEY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES, THE
UNITED STATES DEPARTMENT OF
DEFENSE, THE UNITED STATES
AIR FORCE, THE CENTERS FOR
DISEASE CONTROL AND
PREVENTION, THE STATE OF
CALIFORNIA, FAIRVIEW
DEVELOPMENTAL CENTER
(FAIRVIEW), THE CALIFORNIA
GOVERNOR’S OFFICE OF
EMERGENCY SERVICES, and THE
CALIFORNIA DEPARTMENT OF
GENERAL SERVICES

Defendants.

Case No. 8:20-cv-368

**NOTICE OF AND *EX PARTE*
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE ISSUANCE OF
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS
AND AUTHORITIES**

[Supporting Documents Forthcoming]

1 Plaintiffs, the City of Costa Mesa (the “City”) and Katrina Foley, hereby
2 apply for a Temporary Restraining Order (“TRO”) and Order to Show Cause
3 (“OSC”) re Issuance of Preliminary Injunction, pursuant to Federal Rules of Civil
4 Procedure, Rule 65(b), temporarily restraining defendants, and their agents,
5 servants, employees and attorneys, and all those in active concert or participation
6 with defendant from: Transporting persons infected with or exposed to the
7 Coronavirus to any place within Costa Mesa, California until an adequate site
8 survey has been conducted, the designated site has been determined suitable for
9 this purpose, all necessary safeguards and precautions have been put in place, and
10 the public and local government have been informed of all efforts to mitigate risk
11 of transmission of the disease.

12 In the alternative, the Plaintiffs seek a stay of the order in the event the Court
13 does not grant the temporary restraining order.

14 This Application is made on the grounds that immediate and irreparable
15 injury will result to plaintiff unless the activities described above are restrained
16 pending hearing on Order to Show Cause why a preliminary injunction should not
17 issue.

18 The Application will be based on this Application, the accompanying
19 Memorandum of Points and Authorities, the declaration of Jennifer L. Keller, the
20 declaration of Nahal Kazemi, the Declaration of Kimberly Barlow, the Declaration
21 of Jason Dempsey and such other and further evidence as may be presented to the
22 Court at the time of hearing.

23 On February 21, 2020 at 3:19 p.m. counsel for the City provided notice to
24 counsel for Defendants by e-mail (*See* Kazemi Declaration Exhibits 1 and 2.)
25 informing them the Plaintiffs were filing this *ex parte* application and explaining
26 the basis for the application. Counsel for Defendants were informed of the
27
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1 anticipated date and time for hearing to be requested of the court and the nature of
2 the relief to be requested.

3
4 Dated: February 21, 2020

KELLER/ANDERLE LLP

5 By: /s/ Jennifer L. Keller

6 Jennifer L. Keller
7 Attorneys for Plaintiff,
8 City of Costa Mesa
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1 The City submits the following Memorandum of Points and Authorities in
2 Support of its Ex Parte Application for Temporary Restraining order and Order to
3 Show Cause Preliminary Injunctions:

4 **I. INTRODUCTION**

5 The Plaintiffs seek this temporary restraining order (TRO) under Fed. R. Civ. P.
6 65 against the United States of America, the Department of Health and Human
7 Services, the United States Department of Defense, the United States Air Force,
8 the Centers for Disease Control and Prevention, the State of California, Fairview
9 Developmental Center (Fairview), the California Governor's Office of Emergency
10 Services, and the California Department of General Services (the "Defendants") to
11 prevent the *immediate* transfer of individuals infected with COVID-19 (the
12 "Coronavirus") to the grounds of the former Fairview Development Center in the
13 City of Costa Mesa California.

14 This highly communicable and deadly disease has no known vaccination or
15 cure and has killed thousands. Its scope appears to be growing worldwide at an
16 alarming rate. U.S. Public Health Officials have sounded the alarm over a
17 potential global pandemic. The Plaintiffs now seeks to prevent Costa Mesa from
18 becoming ground zero to a state and potentially nation-wide public health crisis
19 caused because the state and federal governments have not sought to include local
20 officials and emergency personnel in the planning and execution of their efforts.

21 The relief sought by the Plaintiffs is modest. It seeks only to ensure that all
22 necessary steps are taken to protect public safety, that first responders and health
23 professionals receive the training they need to protect themselves and their
24 community, and that the state and federal government stop acting under the cover
25 of darkness, which would create greater panic and confusion among the
26 population.

II. JURISDICTION AND VENUE

Jurisdiction under 28 U.S.C. Section 1331 is proper as Plaintiffs' claims arise under the United States Constitution, 5 U.S.C. Section 701-06 (Administrative Procedure Act), and 42 U.S.C. Section 1983. Venue is proper in the Central District of California as Defendants include United States and California officers and agencies sued in their official capacities and a substantial portion of the events giving rise to the claims will occur in the City of Costa Mesa, within this federal district. One of the plaintiffs is an individual who resides within the District.

III. STATEMENT OF FACTS

Defendants intend to relocate from 35-50 patients already diagnosed with the Coronavirus from a secure location on Travis Air Force Base, where they are isolated from population centers, to Costa Mesa, a densely populated city within a county of over 3 million. (Dempsey Decl. ¶¶ 2, 6-7). And they plan to do so without first determining the suitability of the facility where these individuals will be housed. The Defendants' plan was announced at the eleventh hour, with no efforts to include local government leaders or local public health officials. (*Id.*). Indeed, State officials demanded to know why local emergency personnel notified City leaders *at all* of the plan to introduce people with a deadly and highly communicable disease into the community.

Fairview was previously used as a residential facility for individuals with disabilities that prevented them from living independently. (Dempsey Decl. ¶ 3). Fairview is a dilapidated complex surrounded by residential neighborhoods, busy thoroughfares, and popular recreation facilities. (*Id.*). It was not intended to house individuals infected with a highly contagious and deadly disease. (*Id.*). The California State Department of General Services recently performed a site survey of Fairview and deemed it unsuitable for use as an emergency shelter, as it would

1 require two years and \$25 million in renovations to make it properly habitable.
2 (Barlow Declaration at ¶3). Fairview is an inappropriate location for a quarantine,
3 as there is no way to restrict access to or from the facility; it is in some places
4 about two hundred yards from residential neighborhoods, and there are no security
5 measures in place to keep the quarantined individuals isolated from each other and
6 from the residents of Costa Mesa, a city of over 113,000 people, with a population
7 density of over 7,100 people per square mile. (Dempsey Decl. ¶¶ 3-5).

8 Orange County, California is the sixth largest county in America, with one
9 of the highest population densities. Costa Mesa is a dense commercial and cultural
10 center, with major gathering places such as the Segerstrom Center for the Arts, the
11 Repertory Theater, and one of the world's highest grossing shopping center, South
12 Coast Plaza. (South Coast Plaza is something of a tourist destination for
13 international high-end shoppers.) The coronavirus has already brought China's
14 massive economy to a halt. Introducing the virus to Costa Mesa without taking the
15 necessary precautions to ensure it is not spread, and without informing the public
16 of the efforts undertaken to protect their health and safety will wreak havoc on the
17 local economy, endangering local businesses and starving local governments of tax
18 revenues.

19 Coronavirus is highly contagious, may be spread by asymptomatic
20 individuals. It appears to have been transmitted in Hong Kong through ventilation
21 and/or plumbing systems between isolated units in an apartment building. Experts
22 disagree about the incubation period and appropriate quarantine period, and the
23 CDC itself objected to returning many of these infected people to the United States
24 out of fears of transmission. (Kazemi Decl., Ex. 12, "Coronavirus-infected
25 Americans flown home against CDC's advice," The Washington Post, Feb. 20,
26 2020 [https://www.washingtonpost.com/health/coronavirus-diamond-princess-
27 cruise-americans/2020/02/20/b6f54cae-5279-11ea-b119-4faabac6674f_story.html](https://www.washingtonpost.com/health/coronavirus-diamond-princess-cruise-americans/2020/02/20/b6f54cae-5279-11ea-b119-4faabac6674f_story.html);
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1 *see also, e.g.*, Kazemi Decl. Exs. 11, 16, 17). The Defendants’ plan to move these
2 patients without a proper assessment of the Fairview facility and without informing
3 local government and public health officials of what will be done to protect the
4 residents of Costa Mesa and to maintain the quarantine poses an imminent danger
5 to the community and to the individuals it intends to subject to the quarantine.

6 There is significant controversy over the incubation and quarantine periods
7 for the disease, insufficient knowledge about how it spreads, and few treatments
8 that appear successful. (Kazemi Decl., Ex. 10, “The largest study of coronavirus
9 patients so far suggests it could take up to 24 days after exposure for symptoms to
10 show.” Business Insider, Feb. 13, 2020, [https://www.businessinsider.com/wuhan-](https://www.businessinsider.com/wuhan-coronavirus-symptoms-24-days-after-infection-2020-2)
11 [coronavirus-symptoms-24-days-after-infection-2020-2](https://www.businessinsider.com/wuhan-coronavirus-symptoms-24-days-after-infection-2020-2)). One federal official
12 called the sudden jump in the number of cases in the U.S. caused by repatriating
13 the individuals intended to be housed at Fairview as “a tremendous public health
14 threat.” (Kazemi Decl., Ex. 15, “Coronavirus Cases in the United States Reach 34,
15 and More Are Expected.” The New York Times, Feb. 21, 2020,
16 [https://www.nytimes.com/2020/02/21/health/coronavirus-cases-](https://www.nytimes.com/2020/02/21/health/coronavirus-cases-usa.html?action=click&module=Alert&pgtype=Homepage)
17 [usa.html?action=click&module=Alert&pgtype=Homepage](https://www.nytimes.com/2020/02/21/health/coronavirus-cases-usa.html?action=click&module=Alert&pgtype=Homepage).)

18 Moreover, the CDC’s own website gives detailed instructions of the
19 complex steps health care professionals must follow in order to properly quarantine
20 infected individuals, including systems that the City fears Fairview does not have
21 and cannot accommodate, such as negative air pressure circulation systems, HEPA
22 air filtration, and specific air circulation protocols. (Kazemi Decl., Ex. 7,
23 <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control.html>.) The
24 CDC also has detailed clinical care guidance for the disease, although much
25 remains unknown about its incubation period, modes of transmission, and potential
26 treatment protocols. (Kazemi Decl., Ex. 8, [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html)
27 [ncov/hcp/clinical-guidance-management-patients.html](https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html).)
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1 The City's emergency services personnel have received no training on these
 2 procedures even though, according to the California Office of Emergency Services,
 3 **Defendants are depending on local ambulance services to transport infected**
 4 **individuals in need of hospitalization to local hospitals.** (Dempsey Decl. Ex.,
 5 Jim Acosta 2/20/20 email). There is a significant risk first responders and health
 6 officials asked to care for patients who become seriously ill could themselves
 7 become infected and transmit the disease throughout the broader community.
 8 Even basic caregivers and providers of food and beverages could be exposed, and
 9 in turn expose their own families when they go home from their shifts. Defendants
 10 have provided no information to the City about how healthcare workers coming to
 11 Fairview to care for the patients will be housed and supported and what
 12 precautions will be taken to prevent further transmission of the disease.

13 **IV. TEMPORARY RESTRAINING ORDER IN GENERAL**

14 In the Ninth Circuit, a party seeking a temporary restraining order must
 15 generally show either (i) a combination of probable success on the merits and the
 16 possibility of irreparable injury if relief is not granted, or (2) the existence of
 17 serious questions governing the merits and that the balance of hardships tips in its
 18 favor. (See, *International Jensen, Inc. vs. MetroSound U.S.A., Inc.* (C.A. 9, Cal.
 19 1993) 4 F3d 819, 822.)

20 The likelihood of success on the merits and the nature of the irreparable
 21 harm "represent two points on a sliding scale in which the required degree of
 22 irreparable harm increases as the probability of success decreases." *Dept. Parks &*
 23 *Rec. of Calif. v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1123 (9th Cir. 2006)
 24 (citations omitted).

25 A TRO may issue in extreme emergencies such as this, even without a
 26 formal complaint having first been filed. *NORML v. Mullen*, 608 F. Supp. 945,
 27 950 fn. 5 (N.D. Cal. 1985). The Plaintiffs intend to file a formal complaint as soon
 28

1 as practicable, but seek emergency relief as the City was told only late in the
 2 evening of Thursday, February 20, 2020, that these individuals (approximately 50)
 3 would be transferred to Fairview on Sunday, February 23, 2020. (cite to Decl).
 4 No less extraordinary method of relief is available to Plaintiffs to prevent a grave
 5 risk of serious and irreparable harm, including the exposure of its residents to a
 6 dangerous, debilitating, and potentially deadly disease. Plaintiffs' failure to file a
 7 tort claim with the government is excused by the extraordinary nature of the
 8 potential harm and the need for immediate relief.

9 Plaintiffs are working to notify the Defendants of this application. (Kazemi
 10 Decl., Exs. 1 and 2). Given the extraordinary nature of this emergency, counsel for
 11 the Plaintiffs has informed both the U.S. Attorney's Office for the Central District
 12 of California and the California State Attorney General's Office of this application
 13 by email. As of the time of this filing, the Plaintiffs have not received a response
 14 from either office. Federal Rule of Civil Procedure 65(b) provides that a court may
 15 issue a TRO without notice to the adverse party in limited circumstances where
 16 "specific facts in an affidavit or a verified complaint clearly show that immediate
 17 and irreparable injury, loss, or damage will result to the movant...." Fed. R. Civ. P.
 18 65(b)(1)(A). The movant must also certify in writing any efforts made to give
 19 notice and the reasons why it should not be required. Fed. R. Civ. P. 65(b)(1)(B).

20 **V. ARGUMENT**

21 **1. The City Will Be Irreparably Harmed if the Court Does not Issue the** 22 **Temporary Restraining Order**

23 Defendants' intended course of conduct will introduce an extraordinary
 24 public health risk to the City of Costa Mesa and all of Southern California – one of
 25 the most densely populated regions of the country. It will expose Cost Mesa's
 26 employees and residents, as well as untrained and ill-equipped personnel in local
 27 hospitals to a disease that continues to spread rapidly and has killed thousands.

1 Instead of taking measures to prevent the entry and spread of communicable
2 diseases from foreign countries into the United States in accordance with the
3 Public Health Service Act, the CDC – which initially **opposed the entry** of
4 infected people into the country even though they were being directed to a tightly
5 guarded Air Force base isolated from population centers – now seeks to put them
6 in the middle of a densely populated residential area.

7 The plan violates the Administrative Procedure Act due to the federal
8 Defendants’ failure to consult with and incorporate local government in the
9 planning and implementation process, and risks imposing a serious burden on the
10 City’s emergency services. This plan also violates the citizens of Costa Mesa’s
11 (including Plaintiff Foley’s) civil rights, and both procedural and substantive due
12 process rights, exposing them to significant risk of disease and even death. Of
13 course, the risks extend beyond the City to Southern California and the United
14 States as a whole, especially given Costa Mesa’s proximity to major transit arteries
15 and a large adjacent airport.

16 2. The Plaintiffs’ Requested Relief Maintains the Status Quo

17 The Plaintiffs are seeking an injunction until a proper site survey can be
18 completed to determine if Fairview can be made into a suitable facility for this
19 purpose, and if so, until adequate resources in terms of public health and medical
20 officials and first responders can be marshalled, and security measures necessary to
21 enforce a quarantine implemented. As the federal government is already able to
22 house, care for, and quarantine the infected people at Travis Air Force Base and
23 can rely upon the resources of its own public health officials to maintain their care,
24 it is most appropriate for the federal government to continue bearing the burden of
25 this quarantine in a safe location, such as Travis Air Force Base, until the adequate
26 precautions can be taken to transfer them to a non-military facility.

1 Additionally, because of the unknown incubation period of the disease, the
2 fact those previously released from quarantine have later tested positive, and the
3 extreme risk the disease poses, any plan to house individuals who have been
4 exposed to the virus but have not tested positive is also a serious and imminent risk
5 to the City and its residents and visitors. With Costa Mesa being adjacent to a
6 major airport and just 40 miles from a huge international airport, transmission of
7 the virus to the community could spark a nation-wide epidemic.

8 3. The Plaintiffs Are Likely to Prevail on the Merits

9 If the Defendants are not enjoined from introducing people infected with a
10 deadly disease into the community without taking adequate steps to prevent
11 transmission of that disease, the federal government will have violated Plaintiff
12 Foley and other individuals' substantive and procedural due process rights and
13 their civil rights.

14 The Defendants' conduct, introducing with virtually no warning a highly
15 contagious and deadly disease into a populated area without first taking appropriate
16 precautions to ensure the safety of the population and inform the public of efforts
17 to reduce risk and proper precautions they themselves should take, violates the
18 CDC's and HHS's internal regulations relating to quarantine procedures. The
19 guidance the CDC is publishing on its own website regarding how to prevent the
20 transmission of the disease strongly suggests it is violating its own procedures.

21 4. The Nature of the Harm Justifies a Temporary Restraining Order Even
22 if Questions Remain Regarding of Plaintiffs' Likelihood of Success
23 on the Merits

24 A party seeking a preliminary injunction in the Ninth Circuit must meet one
25 of two variants of the same standard. First, a party can show that he or she is likely
26 to succeed on the merits, that he or she is likely to suffer irreparable harm in the
27 absence of preliminary relief, that the balance of equities tips in his or her favor,
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1 and that an injunction is in the public interest. *Alliance For The Wild Rockies v.*
2 *Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017). Alternatively, under the sliding scale
3 variant of the standard, if a plaintiff can only show that there are serious questions
4 going to the merits—a lesser showing than likelihood of success on the merits—
5 then a preliminary injunction may still issue if the balance of hardships tips sharply
6 in the plaintiff’s favor, and the other two factors are satisfied. *Alliance For The*
7 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

8 **VI. CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully request the Court
10 temporarily restrain Defendants, and their agents, servants, employees and
11 attorneys, and all those in active concert or participation with defendant from:
12 Transporting persons infected with or exposed to the Coronavirus to any place
13 within Costa Mesa, California until an adequate site survey has been conducted,
14 the designated site has been determined suitable for this purpose, all necessary
15 safeguards and precautions have been put in place, and the public and local
16 government have been informed of all efforts to mitigate risk of transmission of the
17 disease.

18
19 Dated: February 21, 2020

KELLER/ANDERLE LLP

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21 By: /s/ Jennifer L. Keller

22 Jennifer L. Keller
23 Attorneys for Plaintiff,
24 City of Costa Mesa
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