

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

THE HAMLINE COMMUNITY GARDENS, )  
KAREN MCCREDDIN, and )  
ANN CHARLOTTE JOSEPH )  
  
Plaintiffs, )  
  
v. )  
  
THE CITY OF SAN JOSE, )  
  
Defendant. )

Case No.: 12-CV-000464-LHK  
  
ORDER DENYING *EX PARTE* MOTION  
FOR TEMPORARY RESTRAINING  
ORDER

Before the Court is Plaintiff the Hamline Community Gardens’, Karen McCreddin’s, and Ann Charlotte Joseph’s (collectively “Plaintiffs”) *ex parte* motion for a temporary restraining order (“TRO”) seeking to enjoin Defendant City of San Jose (the “City”) from “making any changes to the operations, rules or regulations governing the Hamline Community Garden for the garden year 2012 or until the court rules on” Plaintiffs’ request for injunctive relief. *Ex Parte* TRO Motion at 1, ECF No. 2. For the foregoing reasons, Plaintiffs’ *ex parte* motion for a TRO is DENIED.

**I. RELEVANT FACTUAL BACKGROUND**

Karen McCreddin and Ann Charlotte Joseph are gardeners at the Hamline Community Garden, a twenty six plot garden operated in agreement with City for the last thirty-one years. Compl. 1. Plaintiffs’ complaint arises out of the City’s decision on or about November 22, 2011, to implement new rules and regulations governing the garden. Compl. 6. According to Plaintiffs, the City seeks to “tak[e] over the garden, rais[e] fees by 42%, and oust[] one third of the community members in good standing.” Compl. 1.

1 Plaintiffs filed a complaint on January 30, 2012, seeking an order enjoining the City from  
2 assessing a fee and from evicting any of the present garden members. Compl. 10.<sup>1</sup> Plaintiffs seek  
3 relief under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution;  
4 the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*; and California Proposition 218.  
5 *Id.* at 4-6.

6 Plaintiffs allege that new rules and regulations governing the community gardens on  
7 February 1, 2012, will result in the eviction of eight of the twenty six gardeners. Mot. 1. Plaintiffs  
8 also allege that a 42% increase in fees will force a ninth gardener “to pull his plants and move to a  
9 smaller location as he will no longer be able to afford his plot . . . .” *Id.*

10 Plaintiffs allege that under the previous rules and regulations, a gardener in good standing  
11 was promised continued tenancy and “a gardener could only be evicted for poor stewardship of the  
12 land and or poor citizenship within the community.” *Id.* Plaintiffs allege that under the new rules,  
13 a gardener must agree that the city can evict the gardener “at any time without reason or repayment  
14 of fees or other expenses that the gardener may have incurred for their completely unprotected  
15 harvest.” *Id.* at 2.

16 Plaintiffs allege that the new rules and regulations “break the trust between the gardeners  
17 and the city,” and that this breach of trust has already resulted in fewer winter harvests. *Id.* at 1-2.

## 18 II. LEGAL STANDARD

19 The standard for issuing a TRO is identical to the standard for issuing a preliminary  
20 injunction. *Brown Jordan Int’l, Inc. v. Mind’s Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D.  
21 Haw. 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323  
22 (N.D. Cal. 1995). “A plaintiff seeking a preliminary injunction must establish that he is likely to  
23 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary  
24 relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”  
25 *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008). The party seeking the  
26 injunction bears the burden of proving these elements. *Klein v. City of San Clemente*, 584 F. 3d  
27

28 <sup>1</sup> This case was reassigned to the undersigned judge on February 3, 2012. ECF No. 7.

1 1196, 1201 (9th Cir. 2009). The issuance of a preliminary injunction is at the discretion of the  
2 district court. *Indep. Living Ctr. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009).

3 Federal Rule of Civil Procedure 65(b)(1) states that a court may issue a temporary  
4 restraining order without notice to the opposing party only if: “A) specific facts in an affidavit or a  
5 verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to  
6 the movant before the adverse party can be heard in opposition; and B) the movant’s attorney  
7 certifies in writing any efforts made to give notice and the reasons why it should not be required.”

8 Federal Rule of Civil Procedure 11 states that “every pleading, written motion, and other  
9 paper must be signed . . . by a party personally if the party is unrepresented. . . . The court must  
10 strike an unsigned paper unless the omission is promptly corrected after being called to the . . .  
11 party’s attention.”

### 12 **III. DISCUSSION**

13 Plaintiffs filed the instant *ex parte* motion for a Temporary Restraining Order on January  
14 30, 2012. ECF No. 2. Plaintiffs filed a proof of service on February 2, 2012, stating that John H.P.  
15 Mawsley “personally present[ed] to Rebecca Hall, in the San Jose City attorney’s office a copy of  
16 this complaint, TRO and argument for the TRO.” ECF No. 6. Thus, Plaintiffs have complied with  
17 the notice requirements of Federal Rule of Civil Procedure 65(b)(1)(B). However, Plaintiffs did  
18 not sign their motion. *See* ECF No. 2. Accordingly, pursuant to Federal Rule of Civil Procedure  
19 11, the Court must strike the motion unless Plaintiffs take corrective action promptly.

#### 20 **B. Merits of the TRO**

21 Moreover, even if Plaintiffs had complied with Rule 11, Plaintiffs have failed to establish  
22 that they are likely to succeed on the merits, and Plaintiffs have not shown in an affidavit or  
23 verified complaint that immediate and irreparable injury, loss, or damage will result to them before  
24 the City can be heard in opposition, as required under Federal Rule of Civil Procedure 65(b)(1)(A).

25 As an initial matter, the Court notes that Plaintiffs’ *ex parte* motion for a TRO failed to cite  
26 any legal authorities to support the argument that Plaintiffs are likely to succeed on the merits of  
27 the claims alleged in the FAC. Civil Local Rule 65-1 requires that an *ex parte* TRO application be  
28

1 accompanied by “a memorandum of points and *authorities*” in support of the motion (emphasis  
2 added). Thus, at this point, Plaintiffs have not shown a likelihood of success on the merits.

3 Plaintiffs’ factual allegations are not set forth in in an affidavit or a verified complaint, as  
4 required by Federal Rule of Civil Procedure 65(b)(1)(A). The Complaint is neither signed nor  
5 verified, and the new factual allegations from the arguments supporting Plaintiffs’ motion are not  
6 set forth in an affidavit.

7 If Plaintiffs had complied with the procedural requirements, however, the irreparable harm  
8 factor would be a closer question. Plaintiffs do allege that they will suffer irreparable harm in the  
9 form of “loss of community,” “emotional loss,” and “loss of investment” of time and money.  
10 Compl. Ex. F. at 3; *cf. New York City Environmental Justice Alliance v. Giuliani*, 50 F. Supp. 2d  
11 250 (S.D.N.Y 1999) (finding irreparable harm in the context of a motion seeking to preliminarily  
12 enjoin the City of New York from selling or destroying parcels of land comprising community  
13 gardens). Specifically, Plaintiffs state that the gardeners facing eviction “have nowhere else to  
14 move their perennial plants like asparagus, strawberries, artichokes, etc.” *Id.* However, it is not  
15 clear from Plaintiffs’ complaint when the eight gardeners are to be evicted. *See* Compl. 5  
16 (suggesting that gardeners received 70 days notice of eviction); *but see id.* Ex. E (suggesting that  
17 gardeners receive 30 days notice of eviction). Thus, Plaintiffs have failed to “clearly show that  
18 immediate and irreparable injury, loss, or damage will result to the movant *before the adverse*  
19 *party can be heard in opposition*,” as required for issuance of an *ex parte* TRO. Fed. R. Civ. P.  
20 65(b)(1) (emphasis added).

21 Accordingly, for the reasons discussed above, Plaintiffs’ *ex parte* motion for a TRO is  
22 DENIED. However, if Plaintiffs cure their failure to sign their complaint and motion and their  
23 failure to state their facts in an affidavit or verified complaint, the Court will consider a fully  
24 briefed motion for a TRO.

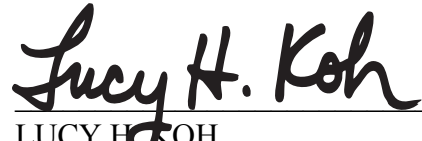
25 The Court hereby orders Plaintiffs to file a corrected motion on February 8, 2012, and the  
26 City to file an opposition, if any, by February 13, 2012. Plaintiffs may file a reply on or before  
27 February 16, 2012. Plaintiffs’ motion for a TRO will be heard on March 1, 2012, at 1:30 p.m. The  
28 Court will attempt to determine the motion without oral argument pursuant to Civil Local Rule 7-

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1(a). In the meantime, the Court strongly encourages the parties to attempt to resolve this dispute without the assistance of the Court.

**IT IS SO ORDERED.**

Dated: February 6, 2012

  
\_\_\_\_\_  
LUCY H. KOH  
United States District Judge