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CITY AND COUNTY OF HONOLULU and LOUIS KEALOHA

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI'I

KIRK C. FISHER,	)	CIVIL NO. CV11 00589 ACK-BMK
	)	
Plaintiff,	)	DEFENDANTS CITY AND COUNTY
	)	OF HONOLULU AND LOUIS
vs.	)	KEALOHA'S SUPPLEMENTAL
	)	MEMORANDUM IN OPPOSITION
LOUIS KEALOHA, as an individual	)	TO PLAINTIFF'S MOTION FOR
and in his official capacity as Honolulu	)	PRELIMINARY INJUNCTION FILED
Chief of Police; PAUL PUTZULU, as	)	MARCH 19, 2012; CERTIFICATE OF
an individual and in his official capacity	)	SERVICE
as former Honolulu Acting Chief of	)	
Police; CITY AND COUNTY OF	)	<b>Hearing:</b>
HONOLULU; HONOLULU POLICE	)	Date: June 14, 2012
DEPARTMENT and DOE	)	Time: 10:00 a.m.
DEFENDANTS 1-50,	)	Judge: Honorable Alan C. Kay
	)	
Defendants.	)	Trial: November 14, 2012
	)	

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DEFENDANTS CITY AND COUNTY OF HONOLULU  
AND LOUIS KEALOHA'S SUPPLEMENTAL  
MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION  
FOR PRELIMINARY INJUNCTION FILED MARCH 19, 2012

COME NOW, Defendants CITY AND COUNTY OF HONOLULU and LOUIS KEALOHA (collectively hereinafter the "Defendants" or "City Defendants") by and through their attorneys, Robert Carson Godbey, Corporation Counsel, and D. Scott Dodd, Deputy Corporation Counsel, and hereby file their Supplemental Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction filed March 19, 2012 ("motion for preliminary injunction") (ECF Nos. 18, 18-1, 18-2), which was heard on June 14, 2012 at 10:00 a.m. before the Honorable Alan C. Kay, and taken under advisement. At said hearing, the Court instructed Plaintiff's counsel to submit additional information for the Court's consideration. Pursuant to the Court's EP dated June 14, 2012 (ECF No. 32), Plaintiff was ordered to submit the transcript from the family court hearings pertaining to the Plaintiff by Thursday, June 21, 2012. Further, Defendants were be given four business days from June 21, 2012 to respond to any transcript and/ or memorandum that the Plaintiff files.

## II. DISCUSSION

### A. The Transcript Does Not Establish That Plaintiff is Entitled to an Injunction

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In response to the Court's June 14, 2012 EP, on June 21, 2012, Plaintiff filed a supplemental memorandum in support of his motion for preliminary injunction ("supplemental memorandum")(ECF No. 33). The transcript Plaintiff submitted is that of the proceedings in Cr. No. 97-0-3233, before the Honorable Darryl Y.C. Choy (ECF No. 33-1). Although Plaintiff argues to the contrary, the transcript of the family court's order denying Plaintiff's motion to enforce the previous order simply does not make Plaintiff more likely to succeed on the merits of his action, does not establish that he is suffering irreparable harm, does not establish that the balance of the equities tips in Plaintiff's favor, and does not show that the requested injunction is in the public interest. The transcript indicates that Judge Choy believed that the previous family court order issued by Judge Kochi in 1998 was still enforceable, and that Plaintiff may have a claim against [the City]. This does not make Plaintiff likely to succeed on the merits of his present case under the Winter test.<sup>1</sup>

It must be remembered that injunctive relief is an *extraordinary* remedy. The Defendants have not had an opportunity to be heard or to assert their defenses

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<sup>1</sup> Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

in this case.<sup>2</sup> Defendants submit that it would be unfair for the Court to grant Plaintiff's requested preliminary injunction without giving the Defendants an opportunity to put on a defense to Plaintiff's allegations.

Additionally, Judge Choy's opinion on whether the City [through HPD] has taken "action against [Plaintiff's] civil rights" is irrelevant. Judge Choy was not being asked to make any determination on a potential civil rights action against the City or members of the police department, so his comments have no precedential weight. It is also unclear why Judge Choy denied Plaintiff's motion and chose not to enforce the previous order, if he believed that the previous 1998<sup>3</sup> order was still enforceable. Further, there is no evidence before this Court that Plaintiff chose to seek reconsideration of Judge Choy's denial of his motion to enforce the previous order, or whether Plaintiff appealed Judge Choy's order denying his motion. Even if Plaintiff's instant lawsuit is not completely barred by *res judicata*, without clarification of whether Plaintiff took appropriate steps to enforce his rights in State court, it appears Plaintiff's instant lawsuit may not be ripe.

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<sup>2</sup> At the hearing on Plaintiff's motion for preliminary injunction on June 14, 2012, Judge Kay asked Defendants' counsel if the Defendants had asserted *res judicata* as an affirmative defense. At the hearing counsel for the Defendants could not represent whether or not the Defendants had asserted *res judicata* as an affirmative defense. At the present time, the Defendants have not filed an answer to Plaintiff's Complaint (the Defendants filed motions to dismiss), and are in the process of filing an answer to Plaintiff's First Amended Complaint. The answer to the First Amended Complaint shall include the defense of *res judicata*.

<sup>3</sup> The transcript apparently mistakenly refers to a "1990" order.

In open argument, in response to the Court's question, Plaintiff's counsel admitted that the weapons in question are presently registered to Plaintiff's wife. So it must be anticipated that Plaintiff still has access to the firearms, making a "defense of the home" argument not persuasive. Because it is reasonable to assume that Plaintiff still has access to the firearms, the only "harm" Plaintiff is suffering is the *presumed* harm of not being able to legally own and possess the weapons himself.

The type of harm Plaintiff alleges (violation of a constitutional right) is not the type of harm appropriately remedied under a preliminary motion. As argued previously, Plaintiff fails to mention any individual harm other than the "infringement" of his liberty. Such harm is speculative and does not meet the standard of the *Winter* test. *Manago v. Williams*, unreported, 2008 WL 2388652 (E.D.Cal. 2008) (*citing* *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.1988) *and* *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir.1984)). The Court should find, accordingly, that Plaintiff has failed to prove that he will suffer irreparable harm if injunctive relief is denied.

B. *Res Judicata*

Although Defendants have not had an opportunity to assert affirmative defenses, Defendants posit that the Court should consider whether the doctrine of *res judicata* bars Plaintiff's instant suit, in part or in total. First, there is already an

order from a court returning the firearms to him. His present lawsuit seeks at least one element of which Plaintiff has already litigated – his request that he be permitted to own and possess the firearms. Plaintiff should be barred from seeking the same relief in the present lawsuit which was previously litigated in State court.

In his supplemental memorandum, Plaintiff confirms that one of his requests for relief is that he is indeed seeking an order compelling Defendants to issue a permit to him to acquire firearms. *See*, ECF No. 33 at page 6. This is in essence the same relief Plaintiff sought when he moved for an order returning the firearms to him at the conclusion of his criminal case. As Plaintiff is seeking the same relief in the present case which was litigated in the previous criminal matter, that claim should be barred.

### **III. CONCLUSION**

Plaintiff has not demonstrated irreparable harm, has not shown that he is likely to prevail on the merits of his case, and has not shown that his requested injunction is in the public good. Therefore, based upon these reasons, and because

the requested injunction could harm the public interest, Defendants respectfully assert that the instant motion for a preliminary injunction should be denied.

DATED: Honolulu, Hawai‘i, Wednesday, June 27, 2012.

ROBERT CARSON GODBEY  
Corporation Counsel

By: /s/ D. Scott Dodd  
D. SCOTT DODD  
Deputy Corporation Counsel

Attorney for Defendants  
CITY AND COUNTY OF HONOLULU and  
LOUIS KEALOHA

**11-07807/232267**