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In Pro Per



United States District Court
Central District of California

Charles Nichols,

PLAINTIFF,

vs.

KAMALA D. HARRIS, Attorney
General, in her official capacity as
Attorney General of California, CITY
OF REDONDO BEACH, and DOES 1
to 10,

Defendants.

Case No.: CV-11-9916 SJO (SS)

(Honorable S. James Otero)

**PLAINTIFF'S REPLY TO
DEFENDANT CITY OF REDONDO
BEACH'S EVIDENTIARY
OBJECTIONS TO PLAINTIFF'S
DECLARATION SUBMITTED IN
OPPOSITION TO MOTION TO
DISMISS
[Dckt. No. 99]**

Date: Vacated

Time: N/A

Courtroom: 23

Magistrate: Hon. Suzanne H. Segal

Trial Date: Not Set

Action Filed: Nov. 30, 2011

Plaintiff Charles Nichols, In Pro Per, submits this response to DEFENDANT CITY OF REDONDO BEACH'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S DECLARATION SUBMITTED IN OPPOSITION TO MOTION TO DISMISS [Dckt. No. 99].

DEFENDANT CITY OF REDONDO BEACH (CITY) failed to object to any and all of the 34 numbered paragraphs in Plaintiff's Declaration dated April 29, 2013. Having failed to give a specific objection to any particular paragraph in

1 Plaintiff's Declaration and by not challenging any of the facts in Plaintiff's
 2 Declaration then to the extent Plaintiff's Second Amended Complaint must rely
 3 upon the Declaration the court must consider Plaintiff's Declaration.

4 "This case comes to us on a motion to dismiss under Federal Rule of Civil
 5 Procedure 12(b)(6). At this stage of the litigation, we would usually be confined to
 6 reviewing the body of Sams' complaint, which did not include copies of the two
 7 subpoenas. See *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)
 8 (citation omitted). However, we are permitted to consider documents that were not
 9 physically attached to the complaint where the documents' authenticity is not
 10 contested, and the plaintiff's complaint necessarily relies on them. *Id.* at 688-89
 11 (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998)). Because the
 12 subpoenas are critical to Sams' lawsuit, and there is no factual dispute as to their
 13 contents, we may properly consider the appearance and content of the subpoenas at
 14 this stage in the litigation." *Sams v. YAHOO! INC.*, Court of Appeals, 9th Circuit
 15 2013 Case no. 11-16938, Filed April 15, 2013, Slip. Op. at pgs., 6-7.

16 "A complaint should not be dismissed under Rule 12(b)(6) "unless it appears
 17 beyond doubt that the plaintiff can prove no set of facts in support of his claim
 18 which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct.
 19 99, 101-02, 2 L.Ed.2d 80 (1957)." *Balistreri v. Pacifica Police Dept.*, 901 F. 2d
 20 696 - Court of Appeals, 9th Circuit 1990 at 699.

21 "A district court abuses its discretion by denying leave to amend unless
 22 amendment would be futile or the plaintiff has failed to cure the complaint's
 23 deficiencies despite repeated opportunities." *AE ex rel. Hernandez v. County of*
 24 *Tulare*, 666 F. 3d 631 - Court of Appeals, 9th Circuit 2012 at 636.

25 Plaintiff was never formally arrested nor was he cited. Defendant CITY
 26 police officers admitted they had no search warrant and were neither arresting nor
 27 citing Plaintiff and yet they deprived him of his Constitutional Rights on May 21,
 28 2012. Similarly, they deprived him of his Constitutional Rights on August 7, 2010.

1 Given that there was no arrest of Plaintiff, lawful or otherwise, CITY is not
 2 immune from liability even if Plaintiff had been arrested.

3 “Under Heck, Smith would be allowed to bring a § 1983 action, however, if
 4 the use of excessive force occurred subsequent to the conduct on which his
 5 conviction was based. Specifically, Smith would be entitled to proceed below if his
 6 conviction were based on unlawful behavior that took place while he stood alone
 7 and untouched on his porch — that is, if his unlawful conduct occurred while the
 8 officers were attempting to investigate his wife's complaint. In such case, a
 9 judgment in Smith's favor would not necessarily conflict with his conviction
 10 because his acts of resistance, delay, or obstruction would have occurred while the
 11 officers were engaged in the lawful performance of their investigative duties, not
 12 while they were engaged in effecting an arrest by the use of excessive force.”
 13 *Smith v. City of Hemet*, 394 F. 3d 689 - Court of Appeals, 9th Circuit 2005 at 698.

14 The original criminal complaint was filed on July 13, 2012 after CITY
 15 falsely claimed there were ongoing criminal proceedings. The criminal complaint
 16 was amended on May 10, 2013. On May 13, 2013 a Los Angeles Superior Court
 17 judge issued a court order demanding that CITY return Plaintiff's property “to wit”
 18 (see Exhibit 1). Plaintiff went to CITY'S police department, presented the court
 19 order and demanded the return of his property the same day. CITY refused to
 20 release Plaintiff's property. It would not be futile for Plaintiff to amend.

21 Dated: May 13, 2013

22 Respectfully submitted,

23 

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FILED
LOS ANGELES SUPERIOR COURT

MAY 13 2013

JOHN A. CLARKE, CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA BY M. MILLIGAN, DEPUTY
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

Charles Nichols

Defendant.

Case No. 25405163ORDER FOR RETURN
OF PROPERTY

TO Jos. Leonardi, CHIEF, Redondo Beach POLICE / SHERIFF'S
DEPARTMENT; AND/OR THEIR REPRESENTATIVES:

GOOD CAUSE HAVING BEEN SHOWN, you are hereby ordered to return the property
of Charles Nichols taken on or about May 21, 2012,
under reference number 12 3245 to wit:

- 1) Single shot Harrington & Richardson shotgun
- 2) Hard-sided carrying case
- 3) Long gun sling
- 4) Padlock & key

Dated this 13th day of May, 2013



JUDGE OF THE SUPERIOR COURT

CHET L. TAYLOR

EXHIBIT 1

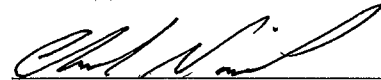
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **PLAINTIFF'S REPLY TO DEFENDANT CITY OF REDONDO BEACH'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S DECLARATION SUBMITTED IN OPPOSITION TO MOTION TO DISMISS [Dckt. No. 99]** was served via United States Mail, postage prepaid, on this 14, day of May, 2013; on the following:

KAMALA D. HARRIS
Attorney General of California
PETER K. SOUTHWORTH
Supervising Deputy Attorney General
JONATHAN M. EISENBERG
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State Bar No. 184162
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Attorneys for Defendant California Attorney General Kamala Harris

AND

T. PETER PIERCE
LISA BOND
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Attorney for Defendants:
CITY OF REDONDO BEACH and DOES 1 to 10



Charles Nichols
Plaintiff, In Pro Per
Case No. CV-11-9916 SJO (SS)