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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

BRUCE BOYER , individually and on behalf of SONS OF LIBERTY LA , an unincorporated association,) Case No. CV 12-04005 GAF
	) (FFMx)
)
Plaintiff,	) MEMORANDUM OF POINTS AND
	) AUTHORITIES IN SUPPORT OF
vs.	) DEFENDANT'S MOTION TO
	) DISMISS PLAINTIFF'S
CITY OF LOS ANGELES,	) COMPLAINT PURSUANT TO
	) FEDERAL RULE OF CIVIL
Defendant.	) PROCEDURE 12(b)(6)
)
	) Date: August 27, 2012
	) Time: 9:30 a.m.
	) Ctrm: 740
	) Hon. Gary Allen Feess
)
) [Filed concurrently with Notice of Motion and Motion]

**TO THE HONORABLE COURT, ALL PARTIES, AND THEIR
COUNSEL OF RECORD:**

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INTRODUCTION

Plaintiff Bruce Boyer, individually and on behalf of the “Sons of Liberty LA,” (“Sons of Liberty”) brings an action against the City of Los Angeles (“the City”), alleging that the City has prevented him and other members of his organization from accessing its “Gun Buy Back” events. Despite its invocation of several state and federal laws, Plaintiff’s complaint contains a single cause of action and presents a single overriding legal issue: whether the City’s denial of Plaintiffs’ entry into areas used for Gun Buy Back events constitutes an unconstitutional violation of Plaintiffs’ free speech rights. This Court has already held in rejecting Plaintiffs’ application for a temporary restraining order (“TRO”) that preventing Plaintiffs’ access to Gun Buy Back surrender sites does not constitute a constitutional violation.

In this motion, the City will demonstrate that Plaintiffs have failed to state a claim upon which relief can be granted. Thus, the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

STATEMENT OF ALLEGED FACTS

Since 2009, the City through its police department, has conducted Gun Buy Back events. (Complaint, Docket No. 1, ¶ 4.) During these events, the City offers to take possession of guns, “no questions asked,” and rewards anyone who forfeits a gun with a grocery store gift card worth between \$100 and \$200. *Id.* As a matter of policy, Plaintiffs disagree with these events. *Id.* at ¶ 5. Since 2010, Plaintiffs have “appeared in the vicinity” of these events to “communicate an opposing viewpoint.” *Id.* at ¶ 6. In 2010, Mr. Boyer was arrested for entering the Gun Buy Back site on foot “to converse with participants.” *Id.*

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1 This year, Mr. Boyer and Sons of Liberty sought an order permitting
 2 them to attend the Gun Buy Back even scheduled for May 12, 2012 to
 3 “communicate with attendees,” “convey their point of view,” and “convey
 4 information concerning alternatives to . . . surrender.” *Id.* at ¶ 8. After
 5 making a request, Plaintiffs were allegedly denied access to this year’s
 6 surrender sites or “adjacent sidewalk areas” by Detective Tompkins, the
 7 officer in charge.¹ *Id.* Plaintiffs appear to believe that being denied access
 8 to the surrender site and adjacent property is a violation of their First
 9 Amendment rights of speech and association and have filed this action.

10 ARGUMENT

11 Plaintiffs have failed to state a claim upon which relief can be granted
 12 under Rule 12(b)(6). Plaintiffs’ primary claim, that they are entitled to relief
 13 under 42 U.S.C. § 1983 is not substantiated in their pleadings and has
 14 already been rejected by this Court. Plaintiffs’ subsidiary claims, that they
 15 are entitled to relief under the Declaratory Judgment Act and the Los
 16 Angeles Municipal Code are not substantiated in their pleadings beyond
 17 conclusory allegations of law.

18 A. Standard for Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6)

19 Rule 12(b)(6) empowers federal courts to dismiss a complaint for
 20 failure to state a claim upon which relief can be granted. “While a complaint
 21 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
 22 factual allegations, a plaintiff’s obligation to provide the grounds of his
 23 entitlement to relief requires more than labels and conclusions, and a
 24 formulaic recitation of the elements of a cause of action will not do.” *Bell*
 25 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Factual allegations must
 26

27
 28 ¹ This Court has already considered and credited evidence that “the City has communicated to Plaintiffs that they will have the opportunity to exercise their First Amendment rights on the public sidewalks or other public areas immediately adjacent to the gun buyback locations.” (Order: TRO, 7.)

1 be enough to raise a right to relief above the speculative level.” *Id.* Where,
 2 as here, the complaint fails to adequately state a claim, such deficiency
 3 should “be exposed at the point of minimum expenditure of time and money
 4 by the parties and the court.” *Id.* at 558. Such a dismissal “may be based
 5 on either (1) a lack of a cognizable legal theory, or (2) insufficient facts
 6 under a cognizable legal theory.” *Diaz v. BSI Fin. Servs.*, 2012 U.S. Dist.
 7 LEXIS 78798, 6 (C.D. Cal. June 5, 2012) (citing *SmileCare Dental Grp. v.*
 8 *Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996)).

9 In ruling on a Rule 12(b)(6) motion, a court should not accept legal
 10 conclusions cast in the form of factual allegations if those conclusions
 11 cannot reasonably be drawn from the facts alleged. *Clegg v. Cult*
 12 *Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994); *United States ex*
 13 *rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.), *cert. denied*, 479
 14 U.S. 1009 (1986); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th
 15 Cir.), *cert. denied*, 454 U.S. 1031 (1981). Moreover, “conclusory allegations
 16 of law and unwarranted inferences are not sufficient to defeat a [Rule
 17 12(b)(6)] motion to dismiss.” *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.
 18 1998).

19 **B. Plaintiffs have failed to state a claim under 42 U.S.C. § 1983.**

20 This Court has already found that Plaintiffs were not deprived of a
 21 constitutional right when they were restricted from entering gun buyback
 22 program zones. Because this alleged violation of First Amendment rights
 23 as incorporated through the Fourteenth Amendment is the only federal
 24 question before this Court, Petitioners have failed to state a claim under 42
 25 U.S.C. § 1983 and their case should be dismissed.

26 **1. Standard for Stating a Claim Under 42 U.S.C. § 1983**

27 Plaintiffs claim to present federal claims for relief under 42 U.S.C.
 28 § 1983. (Compl. ¶ 1.) “A local government entity is liable under § 1983

1 when 'action pursuant to official municipal policy of some nature causes a
2 constitutional tort." *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir.
3 2001). To prove this, a plaintiff must demonstrate

4 (1) that he possessed a constitutional right of which he was deprived;
5 (2) that the municipality had a policy; (3) that this policy "amounts to
6 deliberate indifference" to the plaintiff's constitutional right; and (4)
7 that the policy is the "moving force behind the constitutional violation."
8 *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (quoting *City of*
9 *Canton v. Harris*, 489 U.S. 378 (1989)). "The critical inquiry in a § 1983
10 action is whether the plaintiff has been deprived of a right secured by the
11 Constitution and laws." *Allen v. City of Portland*, 73 F.3d 232, 235 (9th Cir.
12 1995).

13 **2. Plaintiff has failed to demonstrate that he possessed a**
14 **constitutional right of which he was deprived.**

15 This Court has already concluded that "Plaintiffs cannot establish a
16 likelihood of success on the merits." (Order: Temporary Restraining Order,
17 Docket No. 11, 5.) That conclusion was based on proper application of
18 "forum analysis." *Id.* Here, as there, Plaintiffs have not demonstrated
19 denial of a constitutional right.

20 "The [Supreme] Court has adopted a forum analysis as a means of
21 determining when the Government's interest in limiting the use of its
22 property to its intended purpose outweighs the interest of those wishing to
23 use the property for other purposes. *Cornelius v. NAACP Legal Defense*
24 *and Educational Fund, Inc.*, 472 U.S. 788, 800 (1985). This analysis
25 categorizes government-owned property "as either a traditional public
26 forum, a designated public forum, or a nonpublic forum." *International*
27 *Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694 (1992).
28 ///

1 Traditional public forums exist when “public property which [has] as a
 2 principal purpose the free exchange of ideas,” as “evidenced by a long-
 3 standing historical practice of permitting speech.” *Krishna Consciousness*,
 4 505 U.S. at 694. (internal citations and quotation marks omitted).
 5 Designated public forums “consist of property which the government
 6 intends to open for public discourse.” *Id.* “All other types of property are . . .
 7 nonpublic forums . . . and government imposed restrictions of speech in
 8 these places will be upheld so long as reasonable and viewpoint neutral.”
 9 *Id.* “The State, no less than a private owner of property, has power to
 10 preserve the property under its control for the use to which it is lawfully
 11 dedicated.” *United States Postal Service v. Council of Greenburgh Civic*
 12 *Associations*, 453 U.S. 114, 129-130 (1981).

13 Here, “Plaintiffs have presented no evidence that any of the six
 14 locations being used for gun buyback events have ever had their ‘principle
 15 purpose the free exchange of ideas,’ or that the government intends to
 16 open any of these forums for public discourse.” (Order: TRO, 6.) The only
 17 expressed purpose of gun buyback programs is for the City to receive
 18 voluntarily surrendered firearms in exchange for a gift card. Consequently,
 19 the areas used for the gun buyback programs are non-public forums.² The
 20 only remaining question, then, is whether the exclusion of Plaintiffs was
 21 reasonable and viewpoint neutral.

22 This Court properly held that these restrictions are reasonable. *Id.* at
 23 7. The exclusion is reasonable, because access to gun surrender sites is
 24 restricted “in order to ensure the safety of the citizens participating in the
 25 gun buyback program and the City employees and officials staffing the
 26 event.” (Declaration of Richard Tompkins, Docket No. 10-1, ¶ 9.) Securing
 27

28 ² Private property used for the sole purpose of receiving surrendered weapons is by definition a non-public forum.

1 the area also helps in “limiting its potential liability for any injuries to
2 persons it invites onto the properties.” *Id.* at ¶ 8.

3 This Court also properly held that the restrictions were viewpoint
4 neutral. (Order: TRO, 7.) The only distinction between those allowed into
5 the area and those prevented from entering is “whether or not a person
6 plans to participate in the exchange program.” *Id.* That objective
7 classification is viewpoint neutral because it has been and will continue to
8 be “objectively and evenhandedly applied.” *Perry Educ. Ass’n v. Perry*
9 *Local Educators’ Ass’n*, 460 U.S. 37, 61 (1983) (quoting *Greer v. Spock*,
10 424 U.S. 828, 839 (1976)).

11 Plaintiffs Section 1983 claim based on the First Amendment should
12 be dismissed under Rule 12(b)(6) because it is not supported by sufficient
13 facts.

14 **C. Plaintiffs’ other miscellaneous legal allegations do not**
15 **constitute a claim that can survive *Twombly* analysis.**

16 Aside from their Section 1983 claim, Petitioners allege that they are
17 entitled to relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 and
18 miscellaneous provisions of the Los Angeles Municipal Code (“LAMC”)
19 dealing with “surplus City property. (Compl. ¶¶ 1, 9.) These claims amount
20 to nothing more than “conclusory allegations of law and unwarranted
21 inferences.” *Pareto*, 139 F.3d at 699.

22 Plaintiffs’ pray for a judgment “declaring the rights of plaintiffs and
23 others similarly situation to be granted access to and meaningful
24 participation in current and future Gun Buy Back events for purposes of
25 expressing their views.” (Compl. ¶¶ 1, 9.) For the reasons set forth above,
26 Plaintiffs have failed to establish such rights with respect to Gun Buy Back
27 event sites.

28 ///

1 Plaintiffs' LAMC claim is also unsubstantiated. Plaintiffs reference
2 the disposal of surrendered firearms "only in the manner authorized by the
3 [LAMC] for the disposition of 'surplus City property,'" but never identify any
4 applicable LAMC section. (Compl. ¶ 9.) Plaintiffs' claim that the City has
5 failed to meet its obligations under the LAMC is a baseless "conclusory
6 allegation of law." Moreover, this theory of liability does not allege facts
7 demonstrating that a right secured to him by the Constitution or laws of the
8 United States was or is being violated. *Allen*, 73 F.3d at 235. To the extent
9 that Plaintiffs seek relief under Section 1983 based on the LAMC, this claim
10 is clearly deficient.

11 Finally, Plaintiffs seek injunctive relief "(4) to determine whether any
12 surrendered firearms may be evidence of a criminal act and to submit such
13 evidence to the appropriate prosecutorial authority for a determination
14 whether a prosecution should be pursued, and (5) to permit plaintiffs
15 access to press conferences and other media opportunities relating to Gun
16 Buy Back events on a par with that access provided to other members of
17 the public and press." These completely undeveloped theories of liability
18 are facially deficient and should be dismissed under Rule 12(b)(6). Plaintiffs
19 fail to articulate a cognizable legal theory to support such relief or assert
20 factual grounds of entitlement to relief. *Diaz* 2012 U.S. Dist. LEXIS 78798
21 at 6. Furthermore, as with the claim based on alleged violation of the
22 LAMC, Plaintiffs have no basis for relief under Section 1983 because they
23 allege no facts demonstrating violation of a right under the United States
24 Constitution.

25 **D. Conclusion**

26 Even under the easier pre-*Twombly* standard, Plaintiffs would have
27 failed to state a claim upon which relief can be granted and their claim should be
28 dismissed in accordance with Rule 12(b)(6). Plaintiffs have not stated a

1 claim under Section 1983, because they have not been deprived of any
2 recognized constitutional right. To the extent Plaintiffs' other claims are
3 based on some other theory of liability, they amount to nothing more than
4 conclusory allegations of law and unwarranted inferences. This Court
5 should dismiss Plaintiffs' claims for substantially the same reasons it
6 denied their TRO application.

7
8 DATE: July 26, 2012 Respectfully submitted,

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11
12 By: /s/ Heather Aubry
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