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9 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE COURTHOUSE | 280 S. 1ST STREET, SAN JOSE, CA 95113

11
12 LORI RODRIGUEZ, THE SECOND
AMENDMENT FOUNDATION,
13 INC., and THE CALGUNS
FOUNDATION, INC.,
14

15 Plaintiffs,

16 vs.

17 CITY OF SAN JOSE, CITY OF SAN
JOSE POLICE DEPARTMENT,
18 OFFICER STEVEN VALENTINE
and DOES 1 TO 20,
19

20 Defendants.
21
22

Case No.: 5:15-CV-03698

**REPLY RE:
PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT OR
PARTIAL SUMMARY
ADJUDICATION**

[Fed. R. Civ. P. 56]

Date: November 10, 2016

Time: 9:00 a.m.

Courtroom: 4

Judge: Hon. Edward J. Davila

23 Please take notice that at the place and time set forth above, Plaintiffs will
24 oppose Defendant's Motion for Summary Judgment or Partial Summary
25 Adjudication and will move the Court for affirmative relief (under Stand Order -
26 Civil Rule IV) in a Cross-Motion for Summary Judgment or Summary Adjudication.
27 The opposition and cross motion and this reply will be based in the material filed
28 concurrently with this pleading and the entire court file.

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18 Penal Code § 23635 4

19 Penal Code § 23645 4

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21 Penal Code § 33800 et seq *passim*

22 Welfare and Institutions Code § 8100 et seq. *passim*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case requires the Court to look to the past and present to resolve the
 4 controversies placed before it. Looking backward, this Court must assess what
 5 happened on the day the Defendants seized the Rodriguez firearms. The factual
 6 basis to make the legal ruling is presented by the parties on mostly undisputed
 7 facts. The only disputed fact being whether Officer Valentine took custody of the
 8 firearms with the consent, or over the objection of Lori Rodriguez. *Cf.*, Lori
 9 Rodriguez Declaration ¶¶ 3, 16 and Valentine Deposition 68:11-20 vs. the self-
 10 serving testimony of Officer Valentine.

11 However, when looking at present circumstances, to decide whether the firearms
 12 must be released to Lori or the City must pay just compensation for their taking of
 13 the weapons, the factual record is undisputed and it isn't even a close call:

- 14 1. Lori Rodriguez is the registered owner, having completed the transfers
 15 required by California law, of every firearm seized by the Defendants.
 16 [Lori's Declaration ¶¶ 9 and 10, Exhibits D and E attached thereto.]
- 17 2. Lori Rodriguez is eligible to acquire, own and possess firearms under
 18 federal and state law. [Lori's Declaration ¶8, Exhibit C attached.]
- 19 3. Lori Rodriguez owns and is in possession of the only keys and
 20 combination to the California approved gun safe in her home. [Lori's
 21 Declaration ¶¶ 4, 6, 7, Exhibits B and C attached.]
- 22 4. Lori Rodriguez understands and has articulated her duty to prevent
 23 unauthorized access to her firearms by anyone, including her husband
 24 Edward. [Lori's Declaration ¶¶ 4, 6, 7, Exhibits B and C attached.]
- 25 5. The California Department of Justice, the only government agency
 26 whose requirements she must satisfy under California Law, has
 27 approved the transfer and/or release of firearms to Lori Rodriguez by
 28 the San Jose Police Department, in accordance with California Penal

Code § 33800 et seq., as authorized by the Sixth District Court of Appeals in *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315. [Lori’s Declaration ¶¶ 9 and 10, Exhibits D and E attached thereto.]

6. In fact the Defendants have relied upon the undisputed fact that Lori Rodriguez can “own, possess, [and] acquire firearms” in their own statement of undisputed facts. [Defendants’ Fact #3.]

What the Defendants have failed to articulate is a justification for their continuing trespass against Lori’s personal property – property necessary for exercising a fundamental right – when California statutory law¹, the California Department of Justice², the Sixth District Court of Appeal³, and the Second, Fourth, Fifth and Fourteenth Amendments to the United States Constitution require that she be made whole by returning what was taken from her.

II. RESOLUTION OF EVIDENTIARY ISSUES.

A. Defendant’s Objections.

Defendants lodge eight objections to evidence proffered by the Plaintiffs. The response to those objections is as follows:

1. Lori Rodriguez Declaration ¶ 4.

- a. Objection under FRE 408 - Lori’s statement in ¶ 4 of her declaration is not being offered to prove liability of, or amount of any claim. Nor is it being offered for impeachment purposes. The statement was offered to demonstrate Lori’s understanding and commitment to following the law in California regarding the transfer, storage and safe-keeping of

¹ California Penal Code ¶ 33800 et seq.

² Exhibit E attached to Declaration of Lori Rodriguez.

³ *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315.

1 firearms under her dominion and control. The objection should be
2 overruled.

3 b. Objection under FRE 704 - Lori's statement in ¶ 4 of her declaration,
4 as noted above, is being offered to show her own state of mind and
5 understanding of her legal duty to comply with California law from the
6 inception of this case. Neither is the statement of law by Lori
7 objectionable. Welfare and Institutions Code § 8100 *et seq*, imposes a
8 legal duty on persons with access to firearms to know and prevent
9 access by unauthorized persons under that code section. Lori can
10 hardly be excluded from testifying about the duties the law imposes on
11 her. The objection should be overruled.

12 2. Lori Rodriguez Exhibit A.

13 a. Objection under FRE 408. See above. Objection should be overruled.

14 b. Objection under FRE 704. See above. Objection should be overruled.

15 3. Lori Rodriguez Declaration ¶ 5, lines 26-28.

16 a. Objection under FRE 408. See above. Also, Lori had a duty to
17 mitigate her damages in this matter. As explained in the declaration,
18 she did not incur the unnecessary expense of seeking multiple and
19 successive Law Enforcement Gun Releases (which expire after 30 days)
20 without securing an agreement from the City or an order of the Court
21 for their return. Objection should be overruled.

22 b. Objection under 704. See above. Objection should be overruled.

23 4. Lori Rodriguez Declaration ¶ 6.

24 a. Objection as to Foundation. This is a rather silly objection. In the
25 state court trial the City stipulated that the gun safe owned by Lori
26 Rodriguez was California compliant. [See Exhibit D attached to
27 Declaration of Mark Vanni (Doc #23) for the state court hearing
28 transcripts at 9:26 -10:14] The foundation for why this evidence is

1 admissible is predicated on two points:

- 2 i. Lori has a duty to prevent unauthorized access to firearms
3 under her dominion and control.
4 ii. The state of California imposes criminal and Civil Penalties for
5 unsafe storage of firearms. California Penal Code § 23620-
6 23690. Objection should be overruled.

- 7 b. Objection under FRE 704. A witness' personal knowledge of a matter
8 may be shown by any admissible evidence, including the witness' own
9 testimony. FRE 602; *United States v. Lake* (3rd Cir. 1998) 150 F.3d
10 269, 273. To establish a proper foundation, the source of the witness'
11 personal knowledge may also be disclosed (e.g., personal observation, a
12 written directive, direct conversation, etc.). *Ward v. First Fed'l Savings*
13 *Bank* (7th Cir. 1999) 173 F.3d 611, 617-618. The safe belongs to Lori.
14 She is competent to testify about her own personal property and she is
15 certainly competent to testify about whether her property meets the
16 regulatory requirements required by law (Exhibit B attached to her
17 declaration.) This is no different than if she stated her automobile is
18 registered and insured. At best, the City has generated a dispute of
19 fact that would require the time and resources of a jury trial. The
20 objection should be overruled.

21 5. Lori Rodriguez Declaration ¶10.

- 22 a. Objection under FRE 704. I'm beginning to think the City does not
23 understand this rule. FRE 704 says: "Except as provided in
24 subdivision (b), testimony in the form of an opinion or inference
25 otherwise admissible **is not** objectionable because it embraces an
26 ultimate issue to be decided by the trier of fact." Subdivision (b) is not
27 applicable in this case. Yes, ¶ 10 is a statement on the ultimate issue
28 to be resolve by this court. Furthermore Lori's "opinion" is backed up

1 by the California Department of Justice's Law Enforcement Gun
2 Release letters that comprise Exhibit E attached to her declaration.
3 Furthermore Exhibit E is actually the City's own FRCP 26 disclosures,
4 bearing its own Bates stamp: SJ000055-SJ000078. The objection
5 should be overruled.

6 6. Lori Rodriguez Declaration ¶ 16.

7 a. Objection under FRE 704. See above. Objection should be overruled.

8 b. Objection under FRE 803. Several exceptions to the hearsay rule
9 make this part of Lori's Declaration admissible. Objection should be
10 overruled.

11 i. FRE 801(d)(1)(B). Prior Consistent Statement.

12 ii. FRE 803(3). Then existing mental, emotional, or physical
13 condition.

14 iii. FRE 803(8). Public Records and Reports.

15 iv. FRE 807. Residual Exception.

16 7. Lori Rodriguez Declaration ¶ 18.

17 a. Objection as to Foundation. See above. An element of damages for
18 conversation and/or trespass to chattel is the value of the item or
19 chattel converted. Objection should be overruled.

20 b. Objection under FRE 704. See above. This paragraph is being offered
21 to show her own state of mind and understanding of her legal duty to
22 comply with California law from the inception of this case. Neither is
23 the statement of law by Lori objectionable. Welfare and Institutions
24 Code § 8100 *et seq*, imposes a legal duty on persons with access to
25 firearms to prevent access by unauthorized persons. Lori must be
26 permitted to testify about the extent of and the knowledge she has
27 about the duties the law imposes on her. The objection should be
28 overruled.

1 8. Lori Rodriguez Declaration ¶ 19.

2 a. Objection under FRE 403. This may be the only good faith evidentiary
3 objection made by the City, however this statement by Lori goes to her
4 duty to mitigate damages and injury to her caused by the wrongful
5 conduct of the Defendants. is being offered to show her own state of
6 mind and understanding of her legal duty to comply with California
7 law from the inception of this case. Neither is the statement of law by
8 Lori objectionable. Welfare and Institutions Code (WIC) § 8100 *et seq*,
9 imposed a legal duty on persons with access to firearms prevent access
10 by unauthorized persons. The objection should be overruled.

11 b. Objection under FRE 408. Lori's statement in ¶ 19 of her declaration
12 is not being offered to prove liability of, or amount of any claim. Nor is
13 it being offered for impeachment purposes. The statement was offered
14 to demonstrate Lori's understanding and commitment to following the
15 law in California regarding the transfer, storage and safe-keeping of
16 firearms under her dominion and control. Furthermore, this statment
17 is being offered to show her own state of mind and understanding of
18 her legal duty to comply with California law from the inception of this
19 case. The objection should be overruled.

20
21 B. Defendants' Additional Facts

22 Defendants submitted an initial 21 "Facts" to support their motion for summary
23 judgment. They have apparently added "Facts" 22-29. Addressing each of
24 Defendants "Additional Facts":

25 22. Officer Valentine's testimony regarding Edward's access to firearms
26 after the WIC § 5150 hold is inconclusive and/or it raises a contested
27 issue of fact on the point Defendants are trying to make.

28 A. Moreover, this "fact" is only marginally relevant on the issue of

1 the initial seizure of firearms. Therefore **Objection FRE 403.**

2 B. It is completely irrelevant on the issue of whether the firearms
3 should be returned today. Today Lori is the owner of the
4 firearms in question and she has the only key to the safe and is
5 the only person with the combination to the gun safe. [See
6 Declaration of Lori Rodriguez. See also Lori Dep. 45:20-46:21,
7 48:3-25, 50:8-15, 58:2-60:18] **Objection FRE 403.**

8 23. The status of the combination lock key and the combination itself are
9 again only marginally relevant to the issue of the initial seizure of the
10 firearms and still only manages to create a contested issue of fact that
11 will required a trial. The status of the combination lock key and the
12 combination itself is an uncontested fact as of today and bears on the
13 issue of whether Lori has complied with her duties under California’s
14 safe storage laws and WIC § 8100*et seq.* **Objection FRE 403.**

15 24. Whether Officer Valentine harmed Lori is not disputed. He didn’t.
16 Whether he threatened or coerced Lori is a separate issue. Again the
17 City is creating triable issues with these additional facts. What this
18 issue turns on is whether Officer Valentine told Lori that he had a
19 duty, as a police officer, to confiscate the firearms. Those facts are
20 undisputed. See Plaintiffs’ Additional Facts T, U, V, W, AA, Valentine
21 Depo: 18:16-22, 28:11-24, 38:6 - 43:6, 46:12-15, 46:23 - 48:18, 58:20 -
22 59:1, 60:10-15, 62:24 -63:15, 67:13-21.

23 25. Here, again the City is generating triable issues of fact on the causes of
24 action arising out of the day of the seizure. This “Additional Fact” has
25 nothing to do with return of the firearms today. Furthermore, the
26 testimony cited by the City (Valentine Dep. 63:20-64:5) is incomplete
27 and taken out of context. The full context of that testimony starts at
28 62:24 and extends to 70:2.

- 1 26. Officer Valentines state of mind is irrelevant to whether Lori
2 consented or was coerced. **Objection FRE 403.** Again this
3 “Additional Fact” only creates a triable issue of fact.
- 4 27. Whether the Rodriguez firearms were visible after the safe was open is
5 irrelevant. **Objection FRE 403.** They could have gone back to being
6 invisible if they were put back in the safe.
- 7 28. This is another triable issue of fact injected into an otherwise clean set
8 of facts for Cross-Motions. How long a WIC § 5150 hold last is
9 irrelevant to the status of the guns today. It is only marginally
10 relevant to issue of whether the initial seizure was justified.
11 **Objection FRE 403.**
- 12 29. Judge Kirwan’s order makes no such pronouncements about the
13 adequacy of “Lori’s plan for storage of the firearms [...]” (Doc #40, page
14 2, lines 2-3). The order attached as Exhibit E to Mr. Vanni’s
15 Declaration (Doc #23) speaks for itself. Moreover, Judge Kirwan’s
16 order is irrelevant to the disposition of the firearms after the Sixth
17 District Court of Appeal authorized return of the firearms once Lori
18 completed the Law Enforcement Gun Release procedures under
19 California Penal Code § 33850 *et seq.* See: *City of San Jose v.*
20 *Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315.⁴

21 None of the “Additional Facts” support Defendant’s Motion for Summary
22 Judgment and/or Summary adjudication. They only generate triable issues of fact
23 on some of the claims. The gravamen of this case is recovery of the firearms that
24 belong to Lori Rodriguez and injunctive relieve to stop further constitutional
25 violations by the Defendants.

26

27 ⁴ “Moreover, we believe that the record on appeal shows that the procedure
28 provided by section 33850 *et seq.* for return of firearms in the possession of law
 enforcement remains available to Lori.” *Id.*, at *25.

III. REPLY

A. Article III Standing

1
2
3 The Defendants do not appear to challenge Lori's individual standing to bring
4 this action and instead focus on the institutional/organizational plaintiffs. What
5 the City has failed to refute, are the facts that the Second Amendment Foundation
6 and the Calguns Foundation have many members who reside in California and
7 therefore easily meet the requirements for associational standing: (1) their
8 members would otherwise have standing to sue in their own right; (2) the interests
9 the associations seek to protect are germane to their organizational purposes; and
10 (3) neither the claim asserted nor the relief requested requires the participation of
11 individual association members in the lawsuit. See *United Food & Commercial*
12 *Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 553, 116 S. Ct. 1529, 134
13 L. Ed. 2d 758 (1996); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343,
14 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); *Disability Rights Wis. v. Walworth Cnty. Bd.*
15 *of Supervisors*, 522 F.3d 796, 801-02 (7th Cir. 2008); *Ezell v. City of Chicago*, 651
16 F.3d 684, 969 (7th Cir. 2001).

B. Constitutional Violation - Second Amendment

17
18 The Defendants miss the point about whether their policies mirror WIC § 8102.
19 Lori Rodriguez is not subject to that, or any other law addressing the constitutional
20 rights of persons detained for mental health observation. She was not investigated,
21 suspected, detained, observed or adjudicated with any mental health issues. Nor
22 does the fact that she still enjoys an abstract "right to keep and bear arms" have
23 any bearing on whether she gets to "keep and bear" the arms she already owns.

24 The Supreme Court made abundantly clear in *District of Columbia v. Heller*, 554
25 U.S. 570 (2008), that the Second Amendment is a personal right, not a floating
26 abstraction. She should never have had her personal firearm taken by Officer
27 Valentine, even assuming *arguendo* that seizure of firearms that were unregistered
28 or registered to Edward was justified. And even if the seizure of her personal

1 firearm on that day can be justified, there is no justification for not returning all of
 2 the firearms now that they are now owned, registered and cleared for release to Lori
 3 by the California Department of Justice.

4 In fact the City’s contention that Lori still enjoys some kind of abstract right cuts
 5 against their pretext for keeping the firearms under a public safety justification. If
 6 Lori Rodriguez is qualified to “keep and bear” any new firearms she can go out and
 7 buy tomorrow, why isn’t she qualified to “keep and bear” the firearms she already
 8 owns? The City has failed to identify a single attribute of any of the firearms that
 9 were released to Lori by the California Department of Justice [See Exhibit E
 10 attached to Declaration of Lori Rodriguez.] that would make those weapons more
 11 dangerous than any hypothetical new weapon.

12 The City’s mantra-like citations to mental health cases like *City of San Diego v.*
 13 *Bogges*, 216 Cal.App.4th 1494 (2013) are of no avail to them. Lori is not subject to
 14 mental health hold laws. She was never detained. Lori is eligible under state and
 15 federal law to exercise her own Second Amendment rights with her own firearms.
 16 The Court should enter Summary Judgment for her on that issue and order the
 17 return of her firearms forthwith.⁵

18 C. Constitutional Violation - Fourth Amendment

19 Plaintiffs theory of the Fourth Amendment violation is predicated on a wrongful
 20 taking and wrongful retention. As noted above, all the City has done with the
 21 recitation of its “Additional Facts” is create a trial issue of fact surrounding the
 22 issue of consent. Lori says she was coerced by Officer Valentine’s statement that he
 23 had a legal duty to seize the firearms. Officer Valentine claims that Lori’s
 24 production of the safe combination and key (after he had informed her of his official
 25 duties) constitutes consent. If the matter must be tried to a jury on this discreet
 26 issue – so be it.

27
 28 ⁵ Or as soon as she can complete the Law Enforcement Gun Release
 Application process again under Penal Code § 33850.

1 But the City’s “Additional Facts” do not help them with regard to the wrongful
2 and continuing seizure of the Rodriguez firearms. Forfeiture, which is the practical
3 effect of an adverse ruling against Lori, is covered by the Fourth Amendment.

4 It is without controversy that “To have standing to challenge a forfeiture, a
5 claimant must allege that he has an ownership or other interest in the forfeited
6 property.” *U.S. v. Real Property Known As 22249 Dolorosa Street, Woodland Hills,*
7 *Cal.*, 167 F.3d 509, 512 (9th Cir. 1999). Lori has so alleged and the California
8 Department of Justice confirms her ownership interest and therefor her standing to
9 recovery her property. [Lori’s Declaration ¶¶ 9 and 10, Exhibits D and E.]

10 The Supreme Court has noted that “[I]t would be difficult to reject the
11 constitutional claim of an owner who proved not only that he was uninvolved in and
12 unaware of the wrongful activity, but also that he had done all that reasonably
13 could be expected to prevent the proscribed use of his property.” *Calero- Toledo v.*
14 *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689, 94 S. Ct. 2080, 40 L. Ed. 2d 452, 1974
15 A.M.C. 1895 (1974). And while neither Lori or her husband stand accused of
16 wrongful activities, it is undisputed that Lori is ready, willing and able to prevent
17 the proscribed use of her property via the only means the State of California
18 requires – a gun safe.

19 The Court should enter Summary Judgment on the Fourth Amendment
20 “wrongful retention” claim and order the return of Lori’s property forthwith, and set
21 the “wrongful seizure” claim for trial.

22 D. Constitutional Violation - Fifth Amendment

23 The City’s circular arguments about wrongfully taken vs. lawfully seized are not
24 availing. Its obtuse reading of *Horne v. Dep’t of Agriculture*, ___U.S.___, 133 S.Ct.
25 2053 (2015) and *Henderson v. United States*, ___U.S.___, 135 S.Ct. 1780 (2015), is
26 also too convenient. Taken together both cases stand for the proposition that
27 compensable property rights attach to firearms precisely because they are personal
28 property. And that this right endures even if the original owner is disqualified from

1 possession, as long as steps are taken to prevent unauthorized access.

2 E. Constitutional Violation - Fourteenth Amendment

3 The essential claim raised under procedural due process is the post-Appellate
4 decision refusal of the City to return the firearms. The Sixth District found that
5 “the procedure provided by section 33850 *et seq.* for return of firearms in the
6 possession of law enforcement remains available to Lori.” *City of San Jose v.*
7 *Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315 at *25. By failing to return Lori’s
8 property to her after she had complied with the administrative procedures required
9 by law and the Court of Appeals, the City has denied Lori the procedural due
10 process necessary before taking (or wrongfully retaining) her property.

11 “Due process requires the government to afford an owner notice and an
12 opportunity to be heard before civilly forfeiting his [or her] property. . .” *Whiting v.*
13 *U.S.*, 231 F.3d 70, 76 (1st Cir. 2000).

14 F. Statutory Violation - California Penal Code § 33800 *et seq.*

15 Plaintiff already addressed the utter lack of merit in Defendants’ theory that
16 Penal Code § 33800 does not provide for hearings. The plain language of the
17 statute contemplates attorney fees and costs to prevailing parties. Furthermore, as
18 noted above (ad nauseam) Judge Kirwan’s order was modified by the Sixth District
19 Court of Appeal.

20 IV. CONCLUSION

21 Under any of the theories plead, and according to the undisputed facts and
22 clearly established law, the City of San Jose is wrongfully retaining Lori’s property.

23 This Court should order the return of that property, order the Defendants to
24 modify their policies in circumstance where a responsible adult can assume control
25 over and safely store firearms.

26 This declaratory and injunctive relief is necessary to right a past wrong, prevent
27 future wrongful seizure and promote the efficient and timely return of firearms that
28 are seized.

1 Respectfully Submitted on October 7, 2016,

2 /s/ Donald Kilmer

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