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 10 OFFICER WILKENING

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

13 RICHARD J. GLAIR,
 14 Plaintiff,

15 v.

16 CITY OF SANTA MONICA, CALIFORNIA,
 17 TIMOTHY J. JACKMAN, POLICE CHIEF
 18 OF SANTA MONICA, CALIFORNIA,
 19 SANTA MONICA POLICE OFFICERS
 20 WILKENING, BOYD, & AMIACHE

21 Defendants.

CASE NO.: CV 11 0093 R (RNB)
 (Case assigned to Hon. Manuel L. Real)

PRO-SE MATTER

**UNCONTROVERTED FACTS AND
 CONCLUSIONS OF LAW AND
 ORDER THEREON**

Motion Hearing Date: July 22, 2013
 Time: 10:00 a.m.
 Ctrm.: 8

22 On July 22, 2013, the motion of defendant, Officer Brent Wilkening, for
 23 summary judgment came on for hearing before the undersigned United States District
 24 Judge. Appearing on behalf of moving defendant was Carol Ann Rohr, Deputy City
 25 Attorney for the City of Santa Monica; appearing for opposing plaintiff was Richard
 26 Glair, pro se. The Court, having orally granted the motion, now enters its written
 27 findings of fact and conclusions of law.

28 After review of the moving, opposition and reply papers, and hearing the
 parties' oral arguments, the Court finds that there is no triable issue of material fact as
 to Plaintiff's First and Second Claims alleging violation of his Fourth Amendment
 rights or as to his Third Claim alleging retaliation in violation of his First Amendment

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2. **Defendant asked plaintiff for identification and plaintiff complied.**

Supporting evidence:

Plaintiff's deposition Exhibit "A", 45:3-24; 46:8-47:3;47:17-48:9.

3. **Defendant proceeded to ask plaintiff a series of questions about his identity.**

Supporting evidence:

Plaintiff's deposition Exhibit "A", 47:17-48:9;51:19-25

4. **Plaintiff refused to answer questions and attempted to explain to officer Wilkening that he was wrong about the law.**

Supporting evidence:

Plaintiff's deposition Exhibit "A", 47:17-48:9, 48:10-23, 50:20-23; 54:20-22; 55:12-15 ; 61:24-62:25; 64:1-12; 64:20-65:3; 70:3-4; 71:3-23; 101:14-25; Plaintiff's FAC Exhibit "D" – page 4, lines 1-4; Plaintiff's FAC – Exhibit "D" – page 4, lines 4-7.

5. **Plaintiff had his hands in his pockets at times and at other times his hands were out of his pockets.**

Supporting evidence:

"When detaining plaintiff for the investigation of the violation of SMMC § 3.12.540 and to issue him a citation, ...*plaintiff continued to put his hands in his pockets.* Due to plaintiff's ...refusal to take his hands out of his pockets ... Officer Wilkening considered

1 him a hazard to [Officer Wilkening's] safety, [Glair's]
2 own safety and the safety of others. At approximately
3 2:56:31, he contacted dispatch and requested backup.
4 Just after the verbal time stamp of 2:56:31 on Exhibit
5 "B" Officer Wilkening recognizes his voice stating
6 "Can I get a backup?" He asked for backup in order to
7 have someone standing by when he conducted the pat-
8 down search in the event plaintiff decided to fight or
9 worse, was concealing a weapon". Dec. Wilkening ¶
10 ¶ 2 (in part, as set forth above) and ¶ 6, Exhibit "B"
11 Recording of Radio Broadcast of Incident No. 10-
12 34485, January 10, 2010; Exhibit "C" Notice to
13 Appear.

14 See also, the following which was not attached to
15 Defendant's Declarations and Exhibits in Support of
16 his Motion for Summary Judgment, but filed in
17 Defendant's Objection/Response to Plaintiff's
18 Statement of Controverted Facts and Matters of Law,
19 (Document 129) which cited to Declaration of
20 Richard J. Glair, Exhibit "A" to Plaintiff's List of
21 Exhibits in Opposition to Defendant's Motion
22 Summary Judgment Motion. (Document 126)
23 Defendant's Objection/Response re: Fact No. 3: page
24 6, lines 3-17:

25 Plaintiff's Declaration 3:5 - Plaintiff states "I had my
26 hands at my side, I never put them in *my* pocket."
27 (upon Wilkening's arrival); and,
28 Plaintiff's Declaration 4: 3 – Plaintiff states "my hands

1 were not in my pockets (sic)".²

2 Defendant's Objection/Response re: Fact No. 4: page
3 7, line 19 – page 8, line 5:

4 Plaintiff's Declaration 3:18- he never told me to "take
5 my hands out of my pocket".

6 Plaintiff never states that he had neither hand in a
7 pocket at any time, just that he didn't have "both
8 hands in his pocket".

9 Exhibit "C", to Plaintiff's List of Exhibits in
10 Opposition to Defendant's Summary Judgment
11 Motion, Plaintiff's Deposition, pages 52, lines 21
12 through 25, wherein he denies he had his hands in his
13 pockets with the argument "Who has both their hands
14 in their pockets?" And, Exhibit "C", page 53, lines 2-
15 4, wherein plaintiff states: "No. Who puts both hands
16 in their pockets, Ms. Rohr. He specifically says
17 'hands in his pocket.'" Plaintiff mischaracterizes the
18 Officer's declaration, which states "and continued to
19 put his hands in his pockets". (Dec. Wilkening, page
20 1, lines 18-22) The Officer does not state that the
21 plaintiff "kept" his hands in his pockets, but that he
22 continued to "put" his hands in his pockets. Plaintiff
23 has not denied having either of his hands in either of
24 his pockets at any time, just having both hands in his
25 pockets, or his pocket, at the same time.

26
27 ² In his Declaration, page 4, line 3, Plaintiff stated "my hands were not in my pocket". The
28 "s" at the end of the word pocket in Defendant's Objection/Response re:Fact No. 3 regarding
Plaintiff's Declaration at page 4, line 3, was a typographical error.

1
2 **6. Defendant performed a pat-down search on plaintiff and removed items from**
3 **plaintiff's pocket.**

4 **Supporting evidence:**

5 Plaintiff's deposition Exhibit "A", 61:24-62:25; 63: 5-
6 18; 64:1-12.

7 "Due to these exigent circumstances, Officer
8 Wilkening told plaintiff he was going to search him
9 for weapons. In his attempt to conduct a pat-down
10 Officer Wilkening ordered him to turn around and
11 place his hands behind his back". Dec. Wilkening ¶ 2
12 (in part, as set forth under No. 5 above) and ¶ 3;
13 Exhibit "B" Recording of Radio Broadcast of Incident
14 No. 10-34485.

15 "Immediately upon Officer Boyd's arrival he was told
16 by Officer Wilkening to "stand by" as he was going to
17 pat down the subject". Dec. Boyd ¶ 4 ,in part.

18 "In Officer Wilkening's attempt to conduct a pat-down
19 Officer Boyd heard Officer Wilkening order Mr. Glair
20 to turn around and place his hands behind his back".
21 Dec. Boyd ¶ 5, in part.

22
23 **7. Plaintiff was sent on his way after the brief stop.**

24 **Supporting evidence:**

25 Plaintiff's deposition Exhibit "A", 64:1-12; 70:3-4;
26 71:3-23.

1 **8. Plaintiff and defendant had a heated conversation.**

2 ***Supporting evidence:***

3 Plaintiff's Deposition, Exhibit "A" 33:23-34:21;
4 39:24-40:15; 41:7-10; 24-42:14; 45:3-24; 46:8-47:3;
5 47:17-48:9; 48:10-23, 50:20-23; 51:19-25; 54:20-22;
6 55:12-15; 61:24-62:25; 63:5-18; 64:1-12; 64:20-65:3;
7 70:3-4; 71:3-23; 101:14-25; Plaintiff's FAC Exhibit
8 "D" – page 4, lines 1-7.

9
10 **9. Plaintiff became very agitated.**

11 ***Supporting evidence:***

12 Plaintiff does not dispute that he became agitated.
13 "When detaining plaintiff for the investigation of the
14 violation of SMMC § 3.12.540 and to issue him a
15 citation,...plaintiff *continued to put his hands in his*
16 *pockets*. Due to plaintiff's refusal to take his hands
17 out of his pockets ... Officer Wilkening considered
18 him a hazard to [Officer Wilkening's] safety, [Glair's]
19 own safety and the safety of others. Additionally,
20 Plaintiff also *became very agitated*, a fact he does not
21 dispute. At approximately 2:56:31, he contacted
22 dispatch and requested backup. Just after the verbal
23 time stamp of 2:56:31 on Exhibit "B" Officer
24 Wilkening recognizes his voice stating "Can I get a
25 backup?" He asked for backup in order to have
26 someone standing by when he conducted the pat-
27 down search in the event plaintiff decided to fight or
28 worse, was concealing a weapon". Dec. Wilkening ¶

¶ 2 (in part, as set forth above) and 6, Exhibit "B" Recording of Radio Broadcast of Incident No. 10-34485, January 10, 2010, and Exhibit "C" Notice to Appear.

See also, the following which was not attached to Defendant's Declarations and Exhibits in Support of his Motion for Summary Judgment, but filed in Defendant's Objection/Response to Plaintiff's Statement of Controverted Facts and Matters of Law, (Document 129) which cited to Declaration of Richard J. Glair, Exhibit "A" to Plaintiff's List of Exhibits in Opposition to Defendant's Motion Summary Judgment Motion. (Document 126) Defendant's Objection/Response re: Fact No. 3: page 5, lines 25-26.

Plaintiff's Declaration 3:7 –plaintiff states "no sudden movements" but does not deny that he was "agitated".

10. Plaintiff wouldn't stand still.

Supporting evidence:

Plaintiff does not dispute that he wouldn't stand still. "When detaining plaintiff for the investigation of the violation of SMMC § 3.12.540 and to issue him a citation, ...plaintiff *continued to put his hands in his pockets*. Due to plaintiff's refusal to take his hands out of his pockets, Officer Wilkening considered him a hazard to [Officer Wilkening's] safety, [Glair's] own safety and the safety of others. Additionally, plaintiff

1 still".)

2 **11. Plaintiff was making exaggerated hand gestures.**

3 ***Supporting evidence:***

4 Plaintiff does not dispute that he made exaggerated
5 hand gestures. "When detaining plaintiff for the
6 investigation of the violation of SMMC § 3.12.540
7 and to issue him a citation, ...plaintiff *continued to*
8 *put his hands in his pockets.* Due to plaintiff's refusal
9 to take his hands out of his pockets ... Officer
10 Wilkening considered him a hazard to [Officer
11 Wilkening's] safety, [Glair's] own safety and the
12 safety of others. Additionally, plaintiff *was making*
13 *exaggerated hand gestures*, a fact he does not dispute.
14 At approximately 2:56:31, he contacted dispatch and
15 requested backup. Just after the verbal time stamp of
16 2:56:31 on Exhibit "B" Officer Wilkening recognizes
17 his voice stating "Can I get a backup?" He asked for
18 backup in order to have someone standing by when he
19 conducted the pat-down search in the event plaintiff
20 decided to fight or worse, was concealing a weapon".
21 Dec. Wilkening ¶¶ 2 (in part, as set forth above) and
22 6, Exhibit "B" Recording of Radio Broadcast of
23 Incident No. 10-34485, January 10, 2010, and Exhibit
24 "C" Notice to Appear.

25 See also, the following which was not attached to
26 Defendant's Declarations and Exhibits in Support of
27 his Motion for Summary Judgment, but filed in
28 Defendant's Objection/Response to Plaintiff's

1 Statement of Controverted Facts and Matters of Law,
2 (Document 129) which cited to Declaration of
3 Richard J. Glair, Exhibit "A" to Plaintiff's List of
4 Exhibits in Opposition to Defendant's Motion
5 Summary Judgment Motion. (Document 126)
6 Defendant's Objection/Response re: Fact No. 3: page
7 6, lines 1-2.
8 Plaintiff's Declaration 3:8 –plaintiff states "not
9 waiving his hands" but does not deny he was "making
10 exaggerated hand gestures".

11 CONCLUSIONS OF LAW

12
13
14 1. Summary judgment is proper if the pleadings, depositions, answers to
15 interrogatories and affidavits show there is no genuine issue as to any material facts
16 and that the moving party is entitled to judgment as a matter of law. (Fed. Rules Civil
17 Proc., Rule 56(c).) Defendant, Officer Wilkening, has established that the record does
18 not disclose a genuine dispute on a material fact as to the claims against him. *Celotex*
19 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once this is done, the burden shifts to the
20 non-moving party to set forth affirmative evidence, or specific facts which show that a
21 genuine dispute on the issues exists. See *Anderson v. Liberty Lobby, Ind.*, 477 U.S.
22 242, (1986).

23 2. The Court need not accept as true unreasonable inferences or legal
24 conclusions cast in the form of factual allegations. *Ashcroft v. Iqbal*, 129 S.Ct. 1937
25 (2009). Nor is the Court required to accept plaintiff's *unreasonable* inferences or
26 unwarranted deductions of fact. *In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th
27 Cir. 1993); *Taylor v. F.D.I.C.* 132 F.3d 753, 762 (D.C. Cir. 1997); *Transphase*
28 *Systems, Inc. v. Southern Calif. Edison Co.* 839 F.Supp. 711 , 718 (CD CA 1993);

1 *Beliveau v. Caras*, 873 F.Supp. 1393, 1395-1396 (C.D. Cal. 1995). *Ashcroft v. Iqbal*,
2 129 S. Ct.1937,1949 ["A pleading that offers 'labels and conclusions' or 'a formulaic
3 recitation of elements of a cause of action will not do.'(citations omitted) Nor does a
4 complaint suffice if it tenders 'naked assertions' devoid of 'further factual
5 enhancement.'"]

6 3. A police officer may conduct a brief stop for investigatory purposes
7 when the officer has only "reasonable suspicion" to believe the stopped individual is
8 engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 23-27 (1968) Reasonable
9 suspicion is formed by 'specific, articulable facts which, together with objective and
10 reasonable inferences, form the basis for suspecting that the particular person detained
11 is engaged in criminal activity.'" *United States v. Dorais*, 241, F.3d 1124, 1130 (9th
12 Cir. 2001)

13 4. Fourth Amendment jurisprudence has long recognized that the right to
14 make an arrest or investigatory stop necessarily carries with it the right to use some
15 degree of physical coercion or threat thereof to effect it. *Graham v. Connor*, 490 U.S.
16 386, 396, 109 S.Ct. 1865. (1989) Restraint, and not more, does not rise to the level of
17 a Fourth Amendment violation. *Graham*, 490 U.S. at 395, 396. Summary judgment
18 should be granted as to Plaintiff's First Claim for illegal seizure under the Fourth
19 Amendment as based upon the undisputed material facts the seizure of plaintiff was
20 constitutionally permissible. *Terry*, 392 U.S. at 23-27.

21 5. Exceptions to the warrant requirement include limited searches for
22 weapons based on reasonable suspicion, *Terry*, 392 U.S. at 23 - 27, and exigent
23 circumstances, *see United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637 (1983)
24 "The sole justification for the search in the present situation is the protection of the
25 police officer and others nearby, and it must therefore be confined in scope to an
26 intrusion reasonably designed to discover guns, knives, clubs, or other hidden
27 instruments for the assault of the police officer". *Terry*, 392 U.S. at 29.

28 6. It is a well-settled exception to the warrant requirement that "exigent

1 circumstances" can justify a warrantless search consistent with the Fourth
2 Amendment. *See Warden v. Hayden*, 387 U.S. 294, 298 (1987) upholding a
3 warrantless search where "the exigencies of the situation made the course imperative."
4 The Ninth Circuit has defined exigent circumstances to include those circumstances
5 that would cause a reasonable person to believe that the search was necessary to
6 prevent physical harm to the officers or other persons. *Menotti v. City of Seattle*, 409
7 F.3d 1113, 1152 (9th Cir 1952).

8 7. In this case there are two critical facts that are relevant to determining
9 whether defendant's frisk and search and the seizure of the items from plaintiff was
10 constitutionally permissible –*Plaintiff and Defendant had a heated discussion*; and,
11 *Plaintiff had his hands in his pockets at times and at other times his hands were out of*
12 *his pocket*. Viewed objectively under the totality of the circumstances of this case, the
13 facts articulate reasonable grounds for suspecting the Plaintiff [Glair] was armed and
14 dangerous. *Terry v. Ohio*, 392 U.S. 1 (1986). Summary judgment should be granted
15 as to Plaintiff's Second Claim for illegal search under the Fourth Amendment as based
16 upon the undisputed material facts the search of plaintiff was constitutionally
17 permissible. *Terry*, 392 U.S. at 23-27.

18 8. Under Section 1983, qualified immunity must be recognized as long as
19 "officers of reasonable competence could disagree" on the propriety of the officer's
20 conduct. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The qualified immunity inquiry
21 is objective, and immunity may not be denied merely because, in the end, the officer's
22 conduct was unlawful.

23 9. Officers can have reasonable, but mistaken, beliefs as to the facts and in
24 those situations, courts will not hold that they have violated the Constitution. *Id.*;
25 *Saucier v. Katz*, 531 U.S. 991 (2001).

26 10. Qualified immunity thus serves to ensure that officials do not "exercise
27 their discretion with undue timidity." *Wood v. Strickland*, 420 U.S. 308, 321 (1975)
28 Consistent with that goal, it provides "ample room for mistaken judgments' by

1 protecting 'all but the plainly incompetent or those who knowingly violate the law.'"
2 *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley*, 475 U.S. at 343, 341).

3 11. In the Fourth Amendment context, the "reasonableness" inquiry is an
4 objective one: the question is whether the officers' actions are "objectively reasonable"
5 in light of the facts and circumstances confronting them, without regard to their
6 underlying intent or motivation. *Graham v. Connor*, 490 U.S. at 397.

7 12. As restraint, and not more, does not rise to the level of a Fourth
8 Amendment violation, Officer Wilkening is entitled to qualified immunity on
9 Plaintiff's Second Claim because under the totality of the circumstances a reasonable
10 officer could have concluded that his seizure of Plaintiff was objectively reasonable.
11 *See Graham v. Connor*, 490 U.S. at 395, 396.

12 13. Further, even if the pat down were not justified, Defendant Officer
13 Wilkening is entitled to qualified immunity on Plaintiff's First Claim because under
14 the circumstances a reasonable officer could have concluded that plaintiff's conduct
15 presented a danger to the officer or the public. *Pearson v. Callahan*, 555 U.S. 223,
16 (2009) *Harlow v. Fitzgerald* 457 U.S. 800.(1982)

17 14. Defendant Officer Wilkening has articulated undisputed facts
18 demonstrating his reasonable suspicion, which are wholly apart from the content of
19 plaintiff's speech, that plaintiff posed a danger to the officer or the public. Therefore,
20 Officer Wilkening would have conducted the frisk and subsequent search and seizure
21 whether or not plaintiff disagreed with his issuance of a bicycle citation. *Mendocino*
22 *Environmental Center v. Mendocino County*, 192 F.3d 1283 (9th Cir. 1999). The
23 proper inquiry is whether an "official's acts would chill or silence a person of ordinary
24 firmness from future First Amendment activities." *Mendocino Env'l Ctr.*, 192 F.3d at
25 1300.

26 15. To demonstrate retaliation in violation of the First Amendment,
27 [plaintiff] must ultimately prove first the [defendant] took action that would chill or
28 silence a person of ordinary firmness from future First Amendment activities... The

1 second requirement is [that] [plaintiff] must ultimately prove that [defendant's] desire
2 to cause the chilling effect was a but-for cause of [defendant's] action." *Dietrich v.*
3 *John Ascuaga's Nugget*, 548 F.3d 892, 900-01(9th Cir. 2008), quoting *Skoog v. County*
4 *of Clackamas*, 469 F.3d 1221, 1231-32 (9th Cir. 2006) To rise to the level of a
5 constitutional violation, plaintiff must prove that the challenged conduct would chill
6 or silence a person or ordinary firmness from future First Amendment activities and
7 also that the defendant's desire to cause the chilling effect was a but-for cause of the
8 action. *Dietrich*, 548 F.3d at 900-01; *Skoog*, 469 F. 3d at 1231-32. The relevant
9 causation is understood to be but-for causation, without which the adverse action
10 would not have been taken. *Hartman v. Moore*, 547 U.S. 250, 260, 126 S. Ct 1695,
11 164 L. Ed. 2d 441 (2006).

12 16. Further, based on the conclusions of law articulated above, and on the
13 undisputed facts presented in this case, defendant Officer Wilkening is entitled to
14 qualified immunity on Plaintiff's Third Claim for First Amendment Retaliation. *See,*
15 *Holland v. City of San Francisco*, 2013 WL 968295 (N.D.Cal. 2013).

16 17. Although plaintiff and defendant disagree on who escalated the tone and
17 volume of the conversation during the stop in which defendant cited plaintiff for
18 riding his bicycle on the sidewalk, that dispute is not material. Plaintiff has failed to
19 established any material facts to defeat summary judgment on behalf of Officer
20 Wilkening, because for purposes of summary judgment, a dispute is material only if it
21 would affect the outcome of the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242
22 (1986).

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1 **PROOF OF SERVICE**
2 Richard J. Glair v. City of Santa Monica, et al
3 CV 11 0093 R (RNB)

4 I am employed in the County of Los Angeles, State of California. I am over the
5 age of 18 and not a party to the within action. My business address is 1685 Main
6 Street, Third Floor, Santa Monica, California 90401-3295. On August 6, 2013, I
7 served the document(s) described as **UNCONTROVERTED FACTS AND**
8 **CONCLUSIONS OF LAW AND ORDER THEREON** on the interested parties in
9 this action as follows:

10 by placing the original a true copy thereof enclosed in sealed
11 envelopes addressed as follows:

12 Richard J. Glair
13 1183 Queen Anne Place
14 Los Angeles, CA 90019

15 Plaintiff – in pro per
16 Telephone No.: (323) 860-8719

17 **BY MAIL:** I am readily familiar with the firm's practice of collection and processing
18 correspondence, pleadings, and other matters for mailing with the United States Postal
19 Service. In the ordinary course of business, the correspondence would be deposited with the
20 United States Postal Service on that same day with postage thereon fully prepaid at Santa
21 Monica, California in the ordinary course of business. I am aware that on motion of the party
22 served, service is presumed invalid if the postal cancellation date or postage meter date is
23 more than one day after date of deposit for mailing in affidavit.

24 **BY FEDERAL EXPRESS** **UPS NEXT DAY AIR** **OVERNIGHT DELIVERY:** I
25 deposited such envelope in a facility regularly maintained by **FEDERAL EXPRESS**
26 **UPS** **Overnight Delivery** [specify name of service:] with delivery fees fully provided for
27 or delivered the envelope to a courier or driver of **FEDERAL EXPRESS** **UPS**
28 **OVERNIGHT DELIVERY** [specify name of service:] authorized to receive documents at
1685 Main Street, Santa Monica, California 90401, with delivery fees fully provided for.

BY FAX: I telecopied a copy of said document(s) to the following addressee(s) at the
following number(s) in accordance with the written confirmation of counsel in this action.

BY PERSONAL SERVICE: **Santa Monica Express, Inc.**, personally delivered such
envelope by hand to the addressee(s).

[State] I declare under penalty of perjury under the laws of the State of California that
the above is true and correct.

[Federal] I declare that I am employed in the office of a member of the Bar of this Court
at whose direction the service was made.

Executed on August 6, 2013, at Santa Monica, California.

/s/ Maria Comer

MARIA COMER