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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WAYNE SPINDLER,) NO. CV 17-250-JLS(E)
)
Plaintiff,)
)
v.) MEMORANDUM AND ORDER
)
CITY OF LOS ANGELES, et al.,)
)
Defendant.)
)
)
)
)

BACKGROUND

Plaintiff, a practicing attorney proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. section 1983 on January 11, 2017. Defendants are: (1) the City of Los Angeles ("City"); (2) City Councilman and City Council President Herman S. Wesson, Jr., sued in his individual and official capacities; (3) Hugo S. Rossiter, an employee of the Los Angeles City Attorney's Office, sued in his individual and official capacities; and (4) Los Angeles Police
///
///

1 Department detectives Eric Reade and Nelly Nava-Mercado.¹

2
3 On June 22, 2017, Defendants filed a "Motion to Dismiss the
4 Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(6) and
5 Motion to Strike Pursuant to Federal Rules of Civil Procedure 12(f),"
6 accompanied by a Request for Judicial Notice. On July 21, 2017,
7 Plaintiff filed: (1) "Plaintiff's Memorandum of Points and Authorities
8 in Opposition to Defendants' Motion to Dismiss, etc." ("Opposition");
9 (2) a "Filing of Original Declaration of Wayne Spindler";
10 (3) "Plaintiff's Statement of Genuine Issues"; and (4) "Plaintiff's
11 Request for Judicial Notice, etc."

12
13 **SUMMARY OF ALLEGATIONS IN PLAINTIFF'S COMPLAINT**

14
15 The Complaint is confused, rambling and disorganized.
16 Plaintiff's claims appear to arise out of an incident at a City
17 Council meeting on May 11, 2016, at which Plaintiff submitted a
18 speaker card which assertedly caused Plaintiff to be arrested for
19 making criminal threats. Plaintiff alleges the following:

20
21 Plaintiff is a "private non-public person" who speaks
22 at and participates in meetings of various municipal bodies
23 including the City Council, the Los Angeles Police
24

25 ¹ The Complaint does not indicate the capacities in which
26 Plaintiff sues Defendants Reade and Nava-Mercado. However,
27 "where state officials are named in a complaint which seeks
28 damages under 42 U.S.C. § 1983, it is presumed that the officials
are being sued in their individual capacities." Entler v.
Gregoire, ___ F.3d ___, 2017 WL 4448218, at *1 n.1 (9th Cir.
Oct. 6, 2017) (citation omitted).

1 Commission and various Committees (Complaint, pp. 3-4.[²]
2 Defendants have targeted Plaintiff as a "troublemaker" and
3 "Racist" for peacefully and lawfully defending Plaintiff's
4 rights (id., p. 4).

5
6 The City has adopted and enforced policies authorizing
7 the selective censorship of Plaintiff's speech expressing
8 views critical of the City and/or its officials. These
9 policies include its "Rules of Decorum" and related
10 practices, the use of criminal prosecutions and restraining
11 orders, the fabrication of reports and statements, the use
12 of press conferences "to further the lies," the use of "high
13 powered lobbyist contacts," the removal of persons from
14 public meetings and the interference with individuals'
15 rights to speak and assemble at public meetings (id., pp. 4-
16 5). The City has failed to train, supervise, monitor and
17 correct City officials who preside over public meetings and
18 City police officers (id., p. 6).

19
20 Defendants have "trampled on" California's Brown Act by
21 limiting the public to one minute of public comment, cutting
22 speakers off in mid-sentence, expelling speakers from
23 meetings on false claims of disruption, and misplacing,
24 losing or overlooking "speaker cards" (id., p. 8).

25 ///

26
27 ² Portions of the Complaint contain numbered paragraphs,
28 while other portions do not. The Court refers to the allegations
in the Complaint by page number.

1 The City's Department of Water and Power ("DWP")
2 ignores residents' requests for help and has "draconian"
3 ways of dealing with those with whom it disagrees or who
4 expose its corruption (id., p. 9).

5
6 On April 16, 2016, Defendant Rossiter prepared an
7 affidavit in support of a petition for a restraining order
8 stating that Plaintiff had submitted a speaker card at a
9 City Council meeting depicting violent conduct such as
10 hanging (id., p. 17).^[3] Rossiter did not register his
11 outside business for payment of tax licenses, etc. (id.).
12 Defendant Wesson did not use his true name in an affidavit
13 filed in support of the petition for a restraining order
14 (id., p. 18). Wesson also "fudged some very important voter
15 registration paperwork in what appears to be voter fraud and
16 perjury" (id.) (emphasis deleted). Wesson secured two
17 mortgages in two different names and defaulted on both
18 (id.).

19
20 At a meeting of the Rules, Elections and Neighborhood
21 Empowerment Committee at the Van Nuys City Hall on May 11,
22 2016, Defendant Wesson ("who uses the fake first name
23 'Herb'") became angry at Plaintiff because of Plaintiff's
24

25 ³ The copy of this alleged declaration attached to the
26 Complaint shows an execution date of April 16, 2016,
27 approximately two weeks before the alleged event giving rise to
28 Plaintiff's claims. It is unclear whether the date(s) are in
error or whether the April 16 affidavit related to a meeting
different from the meeting on which Plaintiff's present claims
are based.

1 comments regarding a DWP proposal and read out Plaintiff's
2 true name, breaching Plaintiff's anonymity (id.). Defendant
3 Wesson called Plaintiff an "idiot" and threatened to beat
4 Plaintiff up (id.). Plaintiff was told to leave the
5 building (id.).
6

7 Defendant Wesson also informed the City Attorney about
8 Plaintiff's "speaker card" which contained a cartoon and
9 comments about Defendant Wesson to the effect that Wesson
10 was "equal to a 'Nigger'" and the expression "F-U-Herb"
11 (id.). The cartoon showed a person hanging from a tree, a
12 picture resembling a burning cross and a hooded figure with
13 "cute little feet, and a tongue stuck out carrying what
14 [was] a small sign that [read] 'Herb = 'Nigger'" (id., pp.
15 9-10). Many other people have submitted speaker cards with
16 cartoons and doodles, and "black people" and others have
17 called Wesson a "Nigger" because he is a "sell-out" (id., p.
18 10). The City's mascot for its water conservation program
19 was a blue water drop with features and feet resembling a
20 hooded figure "like a funny KKK caricature" (id.).
21 Plaintiff views the DWP as "lynching" taxpayers, and sees
22 City Hall as a "hooded figure" "coming always to 'lynch' the
23 rate-payers." According to Plaintiff, "[t]he City itself is
24 being destroyed by corruption, as if it is a burning cross
25 on a hill" (id.). Wearing a hood and drawing "KKK like"
26 drawings and swastikas are expressions of Plaintiff's
27 political message protected by the First Amendment, evincing
28 Plaintiff's protest of his oppression as a White American by

1 Afro-American and Jewish American City Officials (id., p.
2 12). The epithets "Nigger" and "Jewboy" are "symbols of
3 blatant racism toward African Americans by LAPD" (id.).
4

5 A police "sergeant at arms" escorted Plaintiff out of
6 the room; however Plaintiff was not arrested (id., p. 11).
7

8 Two days later, on May 13, 2016, police officers
9 surrounded Plaintiff on the steps of City Hall (id.).
10 Defendants Reade and Nava-Mercado took Plaintiff to the
11 Metropolitan Detention Center and booked Plaintiff for a
12 hate crime and making a criminal threat (id.). Defendants
13 set bonds totaling \$100,000 (id.). After eight and a half
14 hours in detention, Plaintiff posted bond and was released
15 (id.). The District Attorney did not file charges (id.).
16 The arrest was unlawful and illegal (id.). The detention
17 constituted excessive force and cruel and unusual punishment
18 (id., p. 12). Defendants previously caused Plaintiff to be
19 arrested for misdemeanor "failure to disperse" (id., p. 11).
20

21 Defendant Rossiter, along with a cameraman and an
22 "entourage" including Defendants Reade and Nava-Mercado,
23 obtained a three-year restraining order from the Los Angeles
24 County Superior Court (id., p. 11).
25

26 The City's Rules of Decorum, as interpreted and applied
27 by Defendants, are impermissible content-based prior
28 restraints on free speech and the right of assembly, are

1 vague and ambiguous, and allow for unbridled discretionary
2 enforcement based on subjective analysis by Defendants (id.,
3 p. 13). Depending on a city official's interpretation of
4 the word "impertinent," a speaker may be silenced or ejected
5 based on the viewpoint expressed (id., p. 15). The Rules of
6 Decorum do not provide a person of ordinary intelligence a
7 reasonable opportunity to understand what conduct or speech
8 is prohibited, and instead authorize and encourage arbitrary
9 and discriminatory enforcement (id.).

10
11 Defendant Wesson went on a "press barrage" calling for
12 a "lynch mob of every community group possible to attack
13 Plaintiff" (id., p. 18). As a result, Plaintiff has lost
14 nearly all of his business and tens of thousand of dollars,
15 and has received death threats (id.). Plaintiff cannot hold
16 regular business hours for fear of harm to himself and
17 clients (id.). The media has labeled Plaintiff a racist, a
18 misogynist, a homophobe and a KKK member (id., p. 19).
19 These "false light attacks" by Wesson have damaged Plaintiff
20 (id.).

21
22 Wesson and Rossiter conspired with a lobbying firm and
23 the family that owns the Los Angeles Sentinel newspaper
24 (id.). A lobbyist has contacted the State Bar to "agitate"
25 for disbarment proceedings against Plaintiff (id.). Someone
26 has been encouraging Plaintiff's clients to file complaints
27 with the State Bar or demand refunds (id.). The Los Angeles
28 Police Department lobbied the district attorney's office to

1 file charges against Plaintiff (id., p. 20). Plaintiff
2 removed himself from the "voter rolls" (id.). Defendants
3 have created a "life threatening situation where Plaintiff
4 would be attacked and killed without so much as a weapon to
5 defend himself!" (id.) (emphasis deleted).
6

7 Plaintiff went into hiding (id.). Plaintiff believes
8 Defendants schemed to extort money from or to bankrupt
9 Plaintiff (id.).
10

11 The Complaint contains the following claims for relief:
12

13 1. Unlawful arrest in violation of the First, Fifth and
14 Fourteenth Amendments (First Claim for Relief);
15

16 2. Enforcement of unconstitutional Rule of Decorum in violation
17 of the First, Second, Fourth, Fifth and Fourteenth Amendments (Second
18 Claim for Relief);
19

20 3. "Fabrications," based on an alleged failure to intervene in
21 unlawful detention and arrest by Defendants, purportedly under United
22 States v. Koon, 34 F.3d 1416 (9th Cir. 1994), rev'd on other grounds,
23 518 U.S. 81 (1996) (Third Claim for Relief);
24

25 4. Violation of the Bane Act, California Civil Code section
26 52.1, apparently against the City on a theory of vicarious liability
27 (Fourth Claim for Relief);
28

///
28

1 5. Malicious prosecution, apparently based on the obtaining of
2 the restraining order from a "fabricated set of facts" deeming
3 Plaintiff's speaker card to contain a "criminal threat" (Fifth Claim
4 for Relief); and

5
6 6. False imprisonment, attempted extortion, malicious
7 interference with business relations, harassment, retaliation, theft
8 and "Anti-Slapp," based on the allegations that Defendants allegedly
9 "detained, attempted to extort money and concessions of liberty,"
10 deprived Plaintiff of his right to conduct business, harassed,
11 retaliated against and discriminated against Plaintiff, took
12 Plaintiff's guns and ammunition, and engaged in strategic litigation
13 against public participation by obtaining the restraining order and by
14 falsely arresting and detaining Plaintiff (Sixth Claim for Relief).

15
16 Plaintiff seeks injunctive relief and compensatory and punitive
17 damages (id., pp. 16, 26-28).

18
19 Plaintiff attaches a number of exhibits to the Complaint,
20 including: (1) a "City of Los Angeles Speaker Card" dated May 11,
21 2016. from "Wayne from Encino," bearing drawings appearing to be a
22 burning cross, a person hanging from a tree, and a cartoon figure
23 bearing a sign stating "Herb = Nigger"; (2) a "Notice of Lobbying
24 Registration" overwritten with the handwritten statement "FUCK-U
25 HERB"; (3) Plaintiff's tort claims; (4) documents related to
26 Plaintiff's prosecution for making criminal threats in violation of
27 California Penal Code section 422, including a deputy district
28 attorney's "Charge Evaluation Worksheet" memorializing the decision

1 declining to prosecute Plaintiff; (5) a "Workplace Violence
2 Restraining Order After Hearing," apparently issued against Plaintiff
3 pursuant to California Code of Civil Procedure section 527.8⁴ by a
4 judge of the Los Angeles County Superior Court on June 10, 2016, and a
5 reporter's transcript of proceedings in that case; (6) the
6 "Declaration of Herman J. Wesson, Jr." and the "Declaration of Deputy
7 City Attorney Hugo S. Rossiter apparently filed in the restraining
8 order case; (7) a letter from a Los Angeles police detective to
9 Plaintiff recording that Plaintiff allegedly had surrendered his
10 firearms for safekeeping due to the issuance of the restraining
11 order;⁵ (8) a "Certificate of Release of Federal Tax Lien" and a
12 "Notice of Rescission of Notice of Default" apparently relating to
13 Defendant Wesson; and (9) various newspaper articles.

14
15 **MOTION TO DISMISS**

16
17 **I. Defendants' Contentions**

18
19 Defendants contend:

20
21 1. Plaintiff assertedly fails to allege a First Amendment
22 violation because: (a) Plaintiff allegedly made an unprotected "true
23 threat"; (b) detectives assertedly had probable cause to arrest

24
25 ⁴ Section 527.8 authorizes an employer to seek a
26 restraining order on behalf of an employee who has "suffered
27 unlawful violence or a credible threat of violence from any
28 individual. . . ."

⁵ See Cal. Code Civ. Proc. § 527.9 (requiring person
subject to a restraining order issued pursuant to section 527.8
to relinquish firearms).

1 Plaintiff for violation of California Penal Code section 422; (c) the
2 Superior Court's order allegedly did not violate the First Amendment;
3 and (d) application of the Rules of Decorum to Plaintiff assertedly
4 did not violate the First Amendment;

5
6 2. Plaintiff assertedly fails to allege a Fourth Amendment false
7 arrest or excessive force claim because probable cause assertedly
8 existed for the arrest and Plaintiff allegedly suffered no physical
9 injury;

10
11 3. Plaintiff assertedly fails to allege any Fifth or Fourteenth
12 Amendment due process violation;

13
14 4. Plaintiff's excessive force claim allegedly lacks merit
15 because Plaintiff assertedly did not suffer any conviction and because
16 Plaintiff allegedly fails to allege physical injury;

17
18 5. Plaintiff assertedly fails to allege a violation of the Free
19 Speech Clause of the California Constitution; money damages allegedly
20 are unavailable under that provision;

21
22 6. Plaintiff assertedly failed to allege a section 1983 claim or
23 a Monell⁶ claim;

24 ///

25 ///

26 7. Plaintiff's state law claims for "fabrication," violation of
27

28 ⁶ See Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) ("Monell").

1 the Bane Act, malicious prosecution, false imprisonment, attempted
2 extortion, malicious interference with business relations, harassment,
3 retaliation, theft and "anti-Slapp" allegedly do not state any claim
4 for relief and violate Rule 8 of the Federal Rules of Civil Procedure;
5 and

6
7 8. Plaintiff allegedly is not entitled to punitive damages.
8

9 **II. Standards Governing Motion to Dismiss**

10
11 To survive a motion to dismiss under Rule 12(b)(6), "a complaint
12 must contain sufficient factual matter, accepted as true, to state a
13 claim to relief that is plausible on its face." Ashcroft v. Iqbal,
14 556 U.S. 662, 678 (2009) (citation and internal quotations omitted).
15 "A claim has facial plausibility when the plaintiff pleads factual
16 content that allows the court to draw the reasonable inference that
17 the defendant is liable for the misconduct alleged." Id.

18
19 The Court "must accept as true all of the factual allegations
20 contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94
21 (2007) (citations omitted); Zucco Partners, LLC v. Digimatic Corp.,
22 552 F.3d 981, 989 (9th Cir. 2009) (on motion to dismiss, court takes
23 as true all non-conclusory factual allegations in the complaint and
24 construes the complaint in the light most favorable to the plaintiff).
25 Ordinarily the court must construe a pro se litigant's pleading
26 liberally and hold a pro se plaintiff "to less stringent standards
27 than formal pleadings drafted by lawyers." See Erickson v. Pardus,
28 551 U.S. at 94 (citation omitted). However, licensed attorneys

1 representing themselves, such as Plaintiff, "are not entitled to the
2 same liberal treatments as pro se litigants if they are registered
3 members of the bar." Osgood v. Main Street Marketing, LLC, 2017 WL
4 131829, at *3 (S.D. Cal. Jan. 13, 2017) (citing cases).

5
6 "Generally a court may not consider material beyond the complaint
7 in ruling on a Fed. R. Civ. P. 12(b)(6) motion." Intri-Plex
8 Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052 (9th Cir.
9 2007) (citation and footnote omitted). "When ruling on a Rule
10 12(b)(6) motion to dismiss, if a district court considers evidence
11 outside the pleadings, it must normally convert the 12(b)(6) motion
12 into a Rule 56 motion for summary judgment, and it must give the
13 nonmoving party an opportunity to respond." United States v. Ritchie,
14 342 F.3d 903, 907 (9th Cir. 2003) (citations omitted). Here, because
15 the Court is dismissing the Complaint with leave to amend for the
16 reasons discussed below, the Court need not and does not convert the
17 Motion to Dismiss into a summary judgment motion. However, the Court
18 may consider allegations in Plaintiff's opposing documents in deciding
19 whether to grant leave to amend. See Broam v. Bogan, 320 F.3d 1023,
20 1026 n.2 (9th Cir. 2003).⁷

21
22 The Court may not dismiss a complaint without leave to amend
23 unless "it is absolutely clear that the deficiencies of the complaint
24 could not be cured by amendment." Karim-Panahi v. Los Angeles Police
25 Dep't, 839 F.2d 621, 623 (9th Cir. 1988) (citations and quotations
26

27 ⁷ Except as expressly stated herein, the Court denies
28 without prejudice the parties' respective Requests for Judicial
Notice.

1 omitted); see also Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)
2 (en banc) (district court should grant leave to amend “unless it
3 determines that the pleading could not possibly be cured by the
4 allegation of other facts”) (citation and internal quotations
5 omitted).

6
7 **III. The Complaint States a First Amendment Claim Relating to the**
8 **Speaker Card.**

9
10 The Free Speech guarantee of the First Amendment is not absolute.
11 Virginia v. Black, 538 U.S. 343, 358 (2003). Among other things, “the
12 First Amendment permits a State to ban a ‘true threat.’” Id.
13 (citation omitted); see United States v. Bagdasarian, 652 F.3d 1113,
14 1116 (9th Cir. 2011). Defendants contend the speaker card contained
15 “true threats,” and hence Plaintiff’s expulsion from the City Council
16 meeting and subsequent arrest assertedly did not violate the First
17 Amendment.

18
19 “‘True threats’ encompass those statements where the speaker
20 means to communicate a serious expression of an intent to commit an
21 act of unlawful violence to a particular individual or group of
22 individuals.” Virginia v. Black, 538 U.S. at 359 (citations omitted).
23 The speaker need not actually intend to carry out the threat or to
24 cause physical harm to the listener. See id. at 359-60. “Rather, a
25 prohibition on true threats ‘protect[s] individuals from the fear of
26 violence’ and ‘from the disruption that fear engenders,’ in addition
27 to protecting people ‘from the possibility that the threatened
28 violence will occur.’” Id. at 360 (citation omitted; original

1 brackets). Whether a statement constitutes a true threat generally is
2 a question of fact for the trier of fact. See Fogel v. Collins, 531
3 F.3d 824, 829 (9th Cir. 2008); Melugin v. Hames, 38 F.3d 1478, 1485
4 (9th Cir. 1994); see also Nielander v. Bd. of County Commissioners of
5 County of Republic, Kan., 582 F.3d 1155, 1166 (10th Cir. 2009).

6
7 In United States v. Bagdasarian, 652 F.3d at 1117, the Ninth
8 Circuit held that a true threat exists if the speaker subjectively
9 intended the statement as a threat.⁸ The Ninth Circuit previously had
10 applied an objective test asking whether "a reasonable person would
11 foresee that the statement would be interpreted by those to whom [the
12 speaker] communicates the statement as a serious expression of intent
13 to harm or assault." Fogel v. Collins, 531 F.3d at 831. In United
14 States v. Bagdasarian, a criminal case, the Ninth Circuit approved the
15 use of a subjective test but ruled that whether the objective test
16 also applied depended on the language of the criminal statute at
17 issue. United States v. Bagdasarian, 562 F.3d at 1117. The Ninth
18 Circuit has not decided whether both tests apply in a civil case. See
19 Fogel v. Collins, 531 F.3d at 831 (pre-Bagdasarian civil case
20 observing that the Ninth Circuit had "thus far avoided deciding
21 whether to use an objective or a subjective standard in demonstrating
22 whether there has been a 'true threat'"; declining to resolve issue);
23 Burge v. Colton Sch. Dist., 100 F. Supp. 3d 1057, 1068 (D. Or. 2015)

24
25 ⁸ Other circuits adhere to an objective test. See, e.g.,
26 United States v. Clemens, 738 F.3d 1, 11-12 (1st Cir. 2013)
27 (noting circuit split); United States v. Stock, 728 F.3d 287, 296
28 n.7 (3d Cir. 2013) (same). In United States v. Elonis, 135 S.
Ct. 2001 (2015), the Supreme Court declined to reach the issue
whether a subjective intent to threaten is a necessary component
of a true threat for purposes of the First Amendment. See id. at
2012.

1 (under Bagdasarian, "if only one standard applies in the civil
2 context, it is the subjective standard"; however, the objective
3 standard "may also apply, depending on the statute or policy under
4 which the speaker has been punished") (citation omitted).

5
6 In the present case, under either test, the Complaint suffices to
7 allege facts that could support a conclusion that the speaker card
8 Plaintiff submitted was protected by the First Amendment.

9
10 First, applying the subjective test, Plaintiff alleges that he
11 subjectively intended the "cartoons" and statements on the speaker
12 card to express criticism of the City Council and the DWP rather than
13 any threat of violence. The Court must "accept as true" these non-
14 conclusory factual allegations for purposes of ruling on a motion to
15 dismiss. See Zucco Partners, LLC v. Digimatic Corp., 552 F.3d at 989.

16
17 In applying the objective test, the trier of fact should consider
18 "the entire factual context of the statements including: the
19 surrounding events, the listeners' reaction, and whether the words are
20 conditional." United States v. Bagdasarian, 652 F.3d at 1119-20
21 (citation, brackets and internal quotations omitted). Construed
22 liberally, the Complaint alleges that: (1) Defendant Wesson previously
23 had been called "Nigger" many times by both black and white people;
24 (2) Plaintiff submitted the speaker card in the relatively formal
25 setting of a City Council meeting; (3) Plaintiff was known to be a
26 frequent attendee and commenter at City Council meetings (see Exhibit
27 H to Complaint); (4) Defendant Wesson became angry at Plaintiff,
28 called Plaintiff an "idiot" and threatened to beat Plaintiff up; (5)

1 Plaintiff was not arrested until two days later; and (6) the District
2 Attorney declined to prosecute Plaintiff for allegedly making criminal
3 threats. These factual allegations, accepted as true for purposes of
4 the Motion to Dismiss, could lead a reasonable person to conclude that
5 the speaker card did not communicate a "serious expression of intent
6 to harm or assault." See Watts v. United States, 394 U.S. 705, 706,
7 708 (1989) (mere "political hyperbole" does not amount to a true
8 threat; reversing conviction of draftee who stated during public event
9 in Washington, D.C., that "If ever they make me carry a rifle, the
10 first person I want to get in my sights is L.B.J. [Lyndon Baines
11 Johnson]"); see also Virginia v. Black, 538 U.S. at 363 (although
12 cross burning has "a long and pernicious history as a signal of
13 impending violence," burning a cross at a political rally "would
14 almost certainly be protected expression"); United States v.
15 Bagdasarian, 562 F.3d at 1115, 1119-20 (online messages "Re: Obama fk
16 the nigger, he will have a 50 cal in the head soon" and "shoot the
17 nig" did not constitute true threats); Bauer v. Sampson, 261 F.3d 775,
18 783-84 (9th Cir. 2001) (professor's writing of his hope to drop a
19 slate of granite on the head of the university president and
20 professor's illustration depicting the assembling and pointing of a
21 rifle were not true threats); United States v. Poocha, 259 F.3d 1077,
22 1081-82 (9th Cir. 2001) (statement "Fuck you" uttered to National Park
23 Service ranger and accompanied by the clenching of fists was
24 constitutionally protected speech).

25 ///

26 ///

27

28 **IV. The Complaint Does Not Show That the Collateral Attack Doctrine**

1 Applies.

2
3 Defendants contend the Complaint fails to state any First
4 Amendment claim arising from the Superior Court restraining order
5 because the "collateral attack doctrine" supposedly precludes this
6 Court from reviewing that order (Defendants' Memorandum, etc., pp. 10-
7 11).⁹

8
9 "The collateral attack doctrine precludes litigants from
10 collaterally attacking the judgments of other courts." Rein v.
11 Providian Fin. Corp., 270 F.3d 895, 902 (9th Cir. 2001); see Celotex
12 Corp. v. Edwards, 514 U.S. 300, 313 (1995). "A 'collateral attack' is
13 a tactic whereby a party seeks to circumvent an earlier ruling of one
14 court by filing a subsequent action in another court." Pratt v.
15 Ventas, Inc., 365 F.3d 514, 519 (6th Cir. 2004) (citations omitted).
16 For the collateral attack doctrine to apply, the court in the prior
17 proceedings must have addressed and ruled on the specific issue or
18 claim presented in the subsequent proceeding. See Pub. Util. Dist.
19 No. 1 of Grays Harbor Cnty. Wash. v. IDACORP Inc., 379 F.3d 641, 652
20 n.12 (9th Cir. 2004) (noting that there was no impermissible
21 collateral attack in "the absence of a finding" despite plaintiff's
22 "advanced arguments" on the issue).

23
24
25 ⁹ An appeal of the restraining order presently is pending
26 in the California Court of Appeal. See Declaration of Wayne
27 Spindler, ¶ 13; Plaintiff's Request for Judicial Notice, Ex. B.
28 The Court takes judicial notice of the docket in Office of the
City Attorney v. Spindler, California Court of Appeal case number
B276413, which shows the appeal is pending. See Mir v. Little
Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court
may take judicial notice of court records).

1 It is unclear from the Complaint whether Plaintiff actually seeks
2 review or circumvention of the Superior Court's restraining order.
3 Plaintiff generally mentions restraining orders among his allegations
4 concerning the City's alleged pattern and practice of purportedly
5 suppressing speech (Complaint, p. 5). Plaintiff alleges that
6 Defendant Wesson failed to disclose his proper name on an affidavit
7 for a restraining order, and attaches to the Complaint documents
8 including the restraining order and affidavits allegedly filed in
9 support of the petition for a restraining order (id., p. 18; Ex. D).
10 Plaintiff also asserts a malicious prosecution claim based apparently
11 on the restraining order (id., p. 25). However, the Complaint does
12 not appear expressly to allege any First Amendment challenge to the
13 validity of the restraining order itself.¹⁰ Thus, on the face of the
14 Complaint, the collateral attack doctrine appears inapplicable.

15
16 **V. Plaintiff's Challenge to the Rules of Decorum Is Insufficient.**

17
18 Plaintiff's challenge to the Rules of Decorum is unclear and
19 marred by the perhaps inadvertent repetition of some of Plaintiff's
20 allegations. Plaintiff alleges that the Rules of Decorum constitute
21 impermissible prior restraints and allow for unbridled discretionary
22

23
24 ¹⁰ In Plaintiff's Opposition, Plaintiff does assert that
25 the restraining order "was void the moment it was filed" and that
26 the statute pursuant to which the restraining order assertedly
27 was based, California Code of Civil Procedure section 527.8,
28 purportedly is unconstitutional as applied to Plaintiff (see
Opposition, pp. 11-14). These allegations, if made in a
complaint, might well challenge the validity of the Superior
Court's order. However, allegations in an opposition cannot
augment allegations in a complaint for purposes of ruling on a
motion to dismiss. See Schneider v. California Department of
Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

1 enforcement. However, Plaintiff fails to allege how any particular
2 provision or aspect of the Rules of Decorum, or any application
3 thereof by any Defendant, supposedly violated Plaintiff's rights.
4 Plaintiff refers to the apparent use of various terms such as
5 "impertinent," "abusive," "slanderous" or "threatening" (see
6 Complaint, pp. 15-16), but does not allege how (if at all) application
7 of these terms to Plaintiff supposedly violated Plaintiff's rights.
8

9 Under Rule 8(a) of the Federal Rules of Civil Procedure, a
10 complaint must contain a "short and plain statement of the claim
11 showing that the pleader is entitled to relief." "Each allegation
12 must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1).
13 "Experience teaches that, unless cases are pled clearly and precisely,
14 issues are not joined, discovery is not controlled, the trial court's
15 docket becomes unmanageable, the litigants suffer, and society loses
16 confidence in the court's ability to administer justice." Bautista v.
17 Los Angeles County, 216 F.3d 837, 841 (9th Cir. 2000) (citations and
18 quotations omitted). Plaintiff's confused and conclusory allegations
19 concerning the Rules of Decorum are insufficient under these
20 standards. See Ashcroft v. Iqbal, 556 U.S. at 678, 686; Ivey v. Board
21 of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

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27 **VI. The Complaint States a Fourth Amendment Claim for Alleged False**
28 **Arrest and False Imprisonment.**

1
2 "[A] warrantless arrest by a law officer is reasonable under the
3 Fourth Amendment where there is probable cause to believe that a
4 criminal offense has been or is being committed." Devenpeck v.
5 Alford, 543 U.S. 146, 152 (2004) (citations omitted). Probable cause
6 "exists where, under the totality of the circumstances known to the
7 arresting officers, a prudent person would have concluded that there
8 was a fair probability that the suspect had committed a crime." Peng
9 v. Mei Chin Penghu, 335 F.3d 970, 976 (9th Cir. 2003), cert. denied,
10 540 U.S. 1218 (2004) (citation, internal quotations and brackets
11 omitted). If the arresting officers had probable cause to arrest, the
12 officers' subjective motivations for the arrest are immaterial to the
13 Fourth Amendment analysis. Whren v. United States, 517 U.S. 806, 813-
14 15 (1996). To plead a claim for false arrest and imprisonment in
15 violation of the Fourth Amendment, Plaintiff must allege an absence of
16 probable cause. See Beck v. City of Upland, 527 F.3d 853, 864-66 (9th
17 Cir. 2008).

18
19 Plaintiff alleges that officers arrested Plaintiff for making a
20 "criminal threat" in supposed violation of California Penal Code
21 section 422(a) (Complaint, p. 11 & Ex. B). California Penal Code
22 section 422(a) provides:

23
24 Any person who willfully threatens to commit a crime which
25 will result in death or great bodily injury to another
26 person, with the specific intent that the statement, made
27 verbally, in writing, or by means of an electronic
28 communication device, is to be taken as a threat, even if

1 there is no intent of actually carrying it out, which on its
2 face and under the circumstances in which it is made, is so
3 unequivocal, unconditional, immediate, and specific, as to
4 convey to the person threatened, a gravity of purpose and an
5 immediate prospect of execution of the threat, and thereby
6 causes that person reasonably to be in sustained fear for
7 his or her own safety or for his or her immediate family's
8 safety, shall be punished by imprisonment in the county jail
9 not to exceed one year, or by imprisonment in the state
10 prison.

11
12 "[T]he type of threat satisfying the criminal threat provisions
13 of section 422 . . . constitutes speech that falls outside the
14 protection of the First Amendment." People v. Toledo, 26 Cal. 4th
15 221, 233, 109 Cal. Rptr. 2d 315, 26 P.3d 1051 (2001); see People v.
16 Morera-Munoz, 5 Cal. App. 5th 838, 850 n.7, 210 Cal. Rptr. 3d 409
17 (2016) (section 422 applies to "true threats, which are not protected
18 by the First Amendment") (citations omitted). For the reasons
19 discussed above, Plaintiff sufficiently has alleged that the speaker
20 card did not convey a "true threat" outside the protections of the
21 First Amendment. Therefore, for purposes of the present motion,
22 Plaintiff sufficiently has alleged an absence of probable cause for
23 his arrest for making criminal threats.

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27 **VII. Plaintiff's Excessive Force Claim Is Insufficient.**

28

1 The Complaint mentions the Eighth Amendment (Complaint, pp. 22,
2 27). To the extent Plaintiff attempts to state an Eighth Amendment
3 excessive force claim, this claim is insufficient as a matter of law.
4 The Eighth Amendment's prohibition against cruel and unusual
5 punishment applies only after conviction. See Pierce v. Multnomah
6 County, Oregon, 76 F.3d 1032, 1042 (9th Cir.), cert. denied, 519 U.S.
7 1006 (1996); see also Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475
8 (2015). Plaintiff's claims concerning the alleged false arrest and
9 detention of Plaintiff do not allege any Eighth Amendment violation.
10 See Sanchez v. City of Los Angeles, 2011 WL 6951822, at *7 (C.D. Cal.
11 Oct. 31, 2011), adopted, 2012 WL 27722 (C.D. Cal. Jan. 5 2012)
12 (citizen removed from City Council meeting and arrested for alleged
13 violation of City's Rules of Decorum could not assert Eighth Amendment
14 claim).

15
16 Claims of excessive force in the context of an arrest are
17 analyzed under the Fourth Amendment "reasonableness" standard. Graham
18 v. Connor, 490 U.S. 386, 394-95 (1989); Lowry v. City of San Diego,
19 858 F.3d 1248, 1254-55 (9th Cir. 2017) (en banc). In assessing the
20 objective reasonableness of a particular use of force, a court
21 considers: (1) the severity of the intrusion on the individual's
22 Fourth Amendment rights by evaluating the type and amount of force
23 inflicted; (2) the government's interest in the use of force; and
24 (3) the balance between the gravity of the intrusion on the individual
25 and the government's need for that intrusion. Lowry v. City of San
26 Diego, 858 F.3d at 1256 (citation omitted).

27 Here, Plaintiff alleges only that his detention on May 13, 2016
28 "was excessive force and cruel and unusual punishment for something

1 [sic] merely to try to speak at public meeting for a minute or two"
2 (Complaint, pp. 12-13). Plaintiff fails to allege any facts
3 supporting his claim of alleged excessive force. Plaintiff's
4 conclusory allegations are insufficient to state a claim of excessive
5 force. See Ashcroft v. Iqbal, 556 U.S. at 678 (to state a claim for
6 relief a plaintiff must allege more than an "unadorned, the-defendant-
7 unlawfully-harmed-me accusation"; a pleading that "offers labels and
8 conclusions or a formulaic recitation of the elements of a cause of
9 action will not do"); Watkins v. Greenwood, 2016 WL 8730860, at *2
10 (E.D. Cal. Sept. 30, 2016) (conclusory allegations of excessive force
11 during arrest insufficient).¹¹

12
13 **VIII. The Complaint Fails to Plead a Municipal Liability Claim.**

14
15 The Court must construe Plaintiff's official capacity claims
16 against the individual Defendants as claims against the City. See
17 Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) (official capacity
18 claims against municipal employee is a claim against the
19 municipality). Plaintiff appears to allege that the City is liable
20 for the acts of its agents or employees on a theory of respondeat
21 superior (see Complaint, p. 4). Plaintiff may not state a section
22

23
24 ¹¹ Contrary to Defendants' assertion, a plaintiff alleging
25 excessive force need not allege more than de minimis physical
26 injury. See Robinson v. Solano County, 278 F.3d 1007, 1014-15
27 (9th Cir. 2002) (en banc) (pointing gun at close range at
28 plaintiff's head could constitute excessive force); Wilks v.
Reyes, 5 F.3d 412, 416 (9th Cir. 1993) (plaintiff could be
entitled to nominal damages on excessive force claim "even if the
plaintiff suffered no actual damage"). The extent of any injury
is relevant to the determination of whether the use of force was
unreasonable, however. See Lowry v. City of San Diego, 858 F.3d
at 1256.

1 1983 claim against the City on a theory of respondeat superior, which
2 is not a theory of liability cognizable under 42 U.S.C. section 1983.
3 See Connick v. Thompson, 563 U.S. 51, 60-61 (2011); Ashcroft v. Iqbal,
4 556 U.S. at 676; Polk County v. Dodson, 454 U.S. 312, 325 (1981);
5 Castro v. County of Los Angeles, 833 F.3d 1060, 1073 (9th Cir. 2016)
6 (en banc), cert. denied, 137 S. Ct. 831 (2017). A municipality may be
7 held liable only if the alleged wrongdoing was committed pursuant to a
8 municipal policy, custom or usage. See Board of County Commissioners
9 of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 402-04 (1997);
10 Monell v. New York City Department of Social Services, 436 U.S. 658,
11 691 (1978). Conclusory allegations do not suffice to plead a
12 municipal liability claim. See Ashcroft v. Iqbal, 556 U.S. at 678
13 (plaintiff must allege more than an "unadorned, the-defendant-
14 unlawfully-harmed-me accusation"; a pleading that "offers labels and
15 conclusions or a formulaic recitation of the elements of a cause of
16 action will not do") (citation and internal quotation marks omitted);
17 Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (en banc), cert.
18 denied, 132 S. Ct. 2101 (2012) ("allegations in a complaint or
19 counterclaim may not simply recite the elements of a cause of action,
20 but must contain sufficient allegations of underlying facts to give
21 fair notice and to enable the opposing party to defend itself
22 effectively").

23
24 Plaintiff also generally alleges that the City has policies
25 and/or practices of purportedly using Rules of Decorum, criminal
26 prosecutions, civil restraining orders, fabricated reports, perjured
27 statements, press conferences and "high-powered" lobbyists to repress
28 speech critical of City officials (Complaint, pp. 4-6). Plaintiff

1 further alleges, in conclusory fashion, that the City assertedly has
2 failed to "train, supervise, monitor and correct" City officials who
3 preside over public meetings and "members of General Services Police
4 Officers, within the Department of Public Safety" (id.). Plaintiff's
5 general, vague and conclusory allegations are insufficient to allege a
6 Monell claim against the City. See Ashcroft v. Iqbal, 556 U.S. at
7 678.¹²

8
9 **IX. There Exists No Damages Remedy for Alleged Violation of the Free**
10 **Speech Clause of the California Constitution.**

11
12 To the extent Plaintiff requests damages for alleged violation of
13 the free speech clause of the California Constitution, Cal. Const.
14 Art. 1, section 2(a), any such request fails as a matter of law.
15 There exists no damages remedy for violation of this clause. See
16 Degrassi v. Cook, 29 Cal. 4th 333, 343-44, 127 Cal. Rptr. 2d 508, 58
17 P.3d 360 (2002).

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22
23 **X. Plaintiff's Remaining State Law Claims Are Insufficient.**

24
25 _____
26 ¹² Additionally, Plaintiff may not recover punitive
27 damages against a governmental entity or an individual
28 governmental officer sued in his or her official capacity. See
City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981);
Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 524 (9th Cir.),
cert. denied, 528 U.S. 1003 (1999).

1 Plaintiff's claims for false imprisonment, attempted extortion,
2 malicious interference with business relations, harassment,
3 retaliation, theft and "anti-Slapp" consist only of headings
4 (Complaint, p. 25). Plaintiff does not identify the Defendants sued
5 on these purported claims or provide any supporting factual
6 allegations. Such pleading is manifestly deficient under Rule 8
7 standards. See Ashcroft v. Iqbal, 556 U.S. at 678; McHenry v. Renne,
8 84 F.3d 1172, 1178 (9th Cir. 1996) (a complaint is subject to
9 dismissal if "one cannot determine from the complaint who is being
10 sued, for what relief, and on what theory"; Chevalier v. Ray
11 and Joan Kroc Corps. Community Center, 2012 WL 2088819, at *2 (N.D.
12 Cal. June 8, 2012) (complaint which did not "simply, concisely, or
13 directly identify which wrongs were committed by which Defendant"
14 violated Rule 8).¹³

15
16 Plaintiff's "Fabrications" claim consists only of the following
17 sentence: "Failure to intervene in the unlawful detention and arrest
18 by Defendants per *U.S. v. Koon*, 34 F.3d 1416 (9th Cir. 1994)."
19 (Complaint, p. 25). Plaintiff does not describe the purported
20 "fabrications," identify the Defendant(s) against whom this claim is
21 brought, explain the relevance of the reference to United States v.
22 Koon or provide any factual allegations supporting this claim. Such

23
24 ¹³ Plaintiff's purported "anti-Slapp" claim is
25 particularly obscure. California's "anti-Slapp" statute,
26 California Civil Procedure section 425.16, authorizes a person
27 against whom a cause of action is asserted to move to strike that
28 cause of action on the ground that the cause of action arises out
of that person's exercise of his or her rights of petition or
free speech. See Jordan-Benel v. Universal City Studios, Inc.,
859 F.3d 1184, 1188-89 (9th Cir. 2017). The Complaint fails to
elucidate how this statute supposedly authorizes any claim for
relief in the circumstances alleged.

1 confusing and conclusory allegations are insufficient. See Ashcroft
2 v. Iqbal, 556 U.S. at 678; McHenry v. Renne, 84 F.3d at 1178; Fed. R.
3 Civ. P. 8(a).

4
5 The Fourth Claim for Relief, which purports to assert a violation
6 of California's Bane Act, California Civil Code section 52.1, consists
7 of a heading and the following statement: "City is vicariously liable
8 for its acts of its employees as an employer[.]" (Complaint, p. 25).
9 Plaintiff does not even attempt to allege any factual allegations
10 satisfying the elements of a Bane Act claim. Again, such conclusory
11 allegations are insufficient. See Ashcroft v. Iqbal, 556 U.S. at 678.

12
13 Plaintiff's malicious prosecution claim is based on the following
14 allegation: "Defendants abused the prosecution of a T.R.O. and 3 year
15 injunction against Plaintiff based upon a fabricated and pre-
16 fabricated set of facts calling a lawful action of handing in a
17 speaker card 'a criminal threat.'" (Complaint, p. 25). "In order to
18 establish a cause of action for malicious prosecution of either a
19 criminal or civil proceeding, a plaintiff must demonstrate that the
20 prior action (1) was commenced by or at the direction of the defendant
21 and was pursued to a legal termination in [plaintiff's] favor
22 [citations]; (2) was brought without probable cause [citations]; and
23 (3) was initiated with malice [citations]." Casa Herrera, Inc. v.
24 Beydoun, 32 Cal. 4th 336, 341, 9 Cal. Rptr. 3d 97, 83 P.3d 497 (2004).
25 Plaintiff does not allege any favorable termination of the restraining
26 order proceedings. An appeal of the restraining order is pending, and
27 "a civil action for malicious prosecution will not lie while an appeal
28 in the underlying action is pending." Friedman v. Stadum, 171 Cal.

1 App. 3d 775, 778, 217 Cal. Rptr. 585 (1985) (citations omitted).
2 Moreover, even if Petitioner could show a favorable termination of the
3 restraining order proceedings, a state law malicious prosecution
4 action does not arise from an unsuccessful petition for a civil
5 restraining order. See Robinzine v. Vicory, 143 Cal. App. 4th 1416,
6 50 Cal. Rptr. 3d 65 (2006); Siam v. Kizilbash, 130 Cal. App. 4th 1563,
7 1572-74, 31 Cal. Rptr. 3d 368 (2005); Cuviello v. Feld Entertainment,
8 Inc., 671 Fed. App'x 979, 980 (9th Cir. 2016).

9
10 **ORDER**

11
12 The Motion to Dismiss is granted in part and denied in part. The
13 Complaint is dismissed with leave to amend. The Motion to Strike is
14 denied as moot. If Plaintiff still wishes to pursue this action, he
15 is granted thirty (30) days from the date of this Order within which
16 to file a First Amended Complaint. While the Court does not deem
17 insufficient all of Plaintiff's allegations, the Court does require
18 that any First Amended Complaint be complete in itself and not refer
19 in any manner to the prior Complaint. Any First Amended Complaint
20 must comply with the requirements of Rule 8 of the Federal Rules of
21 Civil Procedure. Plaintiff may not add Defendants without leave of
22 court. See Fed. R. Civ. P. 21. Failure to file timely a First
23 Amended Complaint in conformity with this Order may result in the
24 dismissal of this action. See Pagtalunan v. Galaza, 291 F.3d 639,
25 642-43 (9th Cir. 2002), cert. denied, 538 U.S. 909 (2003) (court may
26 dismiss action for failure to follow court order); Simon v. Value
27 Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir.), amended, 234
28 F.3d 428 (9th Cir. 2000), cert. denied, 531 U.S. 1104 (2001),

1 overruled on other grounds, Odom v. Microsoft Corp., 486 F.3d 541 (9th
2 Cir.), cert. denied, 552 U.S. 985 (2007) (affirming dismissal without
3 leave to amend where plaintiff failed to correct deficiencies in
4 complaint, where court had afforded plaintiff opportunities to do so,
5 and where court had given plaintiff notice of the substantive problems
6 with his claims); Plumeau v. School District #40, County of Yamhill,
7 130 F.3d 432, 439 (9th Cir. 1997) (denial of leave to amend
8 appropriate where further amendment would be futile).

9
10 IT IS SO ORDERED.

11
12 DATED: November 20, 2017.

13
14 

15 _____
16 JOSEPHINE L. STATON
17 UNITED STATES DISTRICT JUDGE

18 PRESENTED this 12th day
19 of October, 2017, by:

20
21 _____ /s/
22 CHARLES F. EICK
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28