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9 **Attorneys for Defendant CITY OF LOS ANGELES**

10 **UNITED STATES DISTRICT COURT**

11 **CENTRAL DISTRICT OF CALIFORNIA**

12 **CARL MITCHELL, MICHEAL**
 13 **ESCOBEDO, SALVADOR ROQUE,**
 14 **JUDY COLEMAN, as individuals; LOS**
 15 **ANGELES CATHOLIC WORKER,**
 16 **CANGRESS, as organizations,**

17 **PLAINTIFFS,**

18 **v.**

19 **CITY OF LOS ANGELES, a municipal**
 20 **entity; LT. ANDREW MATHIS, SGT.**
 21 **HAMER and SGT. RICHTER, in their**
 22 **individual and official capacities,**

23 **DEFENDANTS.**

CASE NO. CV16-01750 SJO (JPRx)
[Assigned to the Honorable S. James
Otero, Courtroom 1]

CITY OF LOS ANGELES' NOTICE
OF MOTION AND MOTION TO
DISMISS FIRST AMENDED
COMPLAINT
[F.R.Civ.P 12(b)(6)]

Date: May 9, 2016
Time: 10 a.m.
Place: Courtroom 1

Meet and confer under L.R. 7-3
conducted on March 29, 2016

24 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:**

25 **PLEASE TAKE NOTICE** that on May 9, 2016 at 10 a.m., or as soon
 26 thereafter as this matter may be heard in Courtroom 1 of the above-entitled court,
 27 located at 312 N. Spring Street, Los Angeles, California, 90012, Defendant CITY OF
 28 LOS ANGELES (“the City”) will move the Court to dismiss the following portions
 of the first amended complaint (“FAC”) on the following grounds:

- 1 1) The second cause of action for “Right to Due Process of Law,” on the grounds
2 that an adequate process is provided under state law, such that this cause of
3 action cannot state a claim upon which relief can be granted;
- 4 2) The sixth cause of action for “Violation of Civil Rights” brought under state
5 law fails to state a valid claim, as Plaintiffs did not comply with the claims
6 filing requirements under state law;
- 7 3) The seventh cause of action for “California Government Code §11135”
8 brought under state law fails to state a valid claim, as Plaintiffs did not comply
9 with the claims filing requirements under state law;
- 10 4) The seventh cause of action for “California Government Code §11135”
11 brought under state law fails to state a valid claim, as nothing in the statute
12 cited shows that it creates a private right of action;
- 13 5) The eighth cause of action for “Violation of Civil Rights” brought under state
14 law fails to state a valid claim, as Plaintiffs did not comply with the claims
15 filing requirements under state law;
- 16 6) The ninth cause of action for “California Civil Code §2080” brought under
17 state law fails to state a valid claim, as Plaintiffs did not comply with the
18 claims filing requirements under state law;
- 19 7) The ninth cause of action for “California Civil Code §2080” brought under
20 state law fails to state a valid claim, as nothing in the statute cited shows that it
21 creates a private right of action;
- 22 8) The tenth cause of action for “Conversion” brought under state law fails to
23 state a valid claim, as Plaintiffs did not comply with the claims filing
24 requirements under state law; and
- 25 9) The eleventh cause of action for “False Arrest” brought under state law fails to
26 state a valid claim, as Plaintiffs did not comply with the claims filing
27 requirements under state law.

28 This motion will be based upon this Notice, the accompanying Memorandum

1 of Points and Authorities, the Request for Judicial Notice filed concurrently herewith,
2 all pleadings and papers on file in this action, and upon such further evidence or
3 argument as may be presented to the Court at the time of the hearing.

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DATED: April 5, 2016

MICHAEL N. FEUER, City Attorney
THOMAS H. PETERS, Chief Asst. City Attorney
ERIC BROWN, Deputy City Attorney

By: /s/ Eric Brown
ERIC BROWN
Deputy City Attorney

Attorneys for Defendant
CITY OF LOS ANGELES

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MEMORANDUM OF POINTS AND AUTHORITIES

General Authority for a Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6) standard, “A complaint may be dismissed as a matter of law for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim.” *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (N.D. Cal. 1984).

“Although this Court must for the purposes of a Rule 12(b)(6) motion read the complaint indulgently, the Court is not required to accept as true unsupported conclusions and unwarranted inferences. *Schuylkill Energy Resources v. PP & L*, 113 F.3d 405, 417 (3d Cir.1997). There must be an actual, actionable claim underlying the complaint's allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).”

Maertin v. Armstrong World Industries, Inc., 241 F.Supp.2d 434, 450 (D.N.J. 2002).

A complaint must assert more than “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.” *Ashcroft v. Iqbal* (“*Iqbal*”), 556 U.S. 662, 678, 129 S.Ct. 1937, 176 L.Ed.2d 868 (2009). The allegations must demonstrate that a claim has “facial plausibility.” *Bell Atlantic*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to

1 relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). In other
 2 words, “bare assertions” or “a formulaic recitation of the elements” of a cause of
 3 action will not suffice. *Id.*, citing *Iqbal*, 556 U.S. at 678.

4 The court may take judicial notice of public matters without converting the
 5 motion to dismiss into a motion for summary judgment. *Mack v. South Bay Beer*
 6 *Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986) *abrogated on unrelated ground*
 7 *Astoria Fed. Savings & Loan Association v. Solimino*, 501 U.S. 104, 110-113 (1991).

8 Argument

9 I. Plaintiffs have not stated a claim for due process on the facts alleged.

10 Plaintiff’s due process claim is based on allegations that property is seized and
 11 destroyed without notice. FAC ¶ 81. But the allegations are not specific enough to
 12 state a wrongful seizure.

13 In Los Angeles, “In the event Personal Property placed in a Public Area poses
 14 an immediate threat to the health or safety of the public, it may be removed without
 15 prior notice and discarded.” Los Angeles Municipal Code (“LAMC”) § 56.11.3(f).
 16 Plaintiffs are charged with notice of the law. *People v. O’Brien*, 96 Cal. 171, 176
 17 (1892). Plaintiffs never plead that all of the property seized was lawful to possess,
 18 and was clean or at least uncontaminated by direct contact with or close proximity to
 19 the hazardous materials common on a Skid Row street – feces, rats, maggots, blood,
 20 etc. – such that the property did not pose an immediate hazard to health. Plaintiffs
 21 only plead that they were homeless and their property was seized. But “the People
 22 have the right to detain any property which it is unlawful to possess, and such right
 23 exists whether the property was lawfully seized or not.” *People v. Superior Court*
 24 (*McGraw*), 100 Cal. App. 3d 154 (1979).

25 If Plaintiffs do not have the facts to allege that the seizure itself is the problem,
 26 then state law processes provide the remedy for any wrongful destruction of property
 27 that is not an immediate threat to health or safety. California law recognizes an action
 28 for claim and delivery, also known as replevin: “A person whose property is illegally

1 seized may replevy the same from the officer seizing it, or, if it has been destroyed,
2 he may have an action for its value.” *Silva v. Macauley*, 135 Cal. App. 249, 253
3 (1933) (internal quotes omitted); Cal. Civ. Proc. Code § 340.

4 Intentional destruction of property by a government employee does not violate
5 federal due process under the Fifth Amendment if the state provides a remedy for the
6 loss. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Because the Fourteenth
7 Amendment makes due process applicable to the states, and a state process exists, the
8 Second Cause of Action should be dismissed.

9 The cause of action is not saved by Plaintiffs’ attempt to base it on Article I, §
10 7 of the California Constitution. That section does not support a suit for money
11 damages. *Katzberg v. Regents of University of California*, 29 Cal. 4th 300, 329
12 (2002). And that is what Plaintiffs seek through that cause of action.

13 **II. Plaintiffs’ state law claims are all barred by Plaintiffs’ failure to comply**
14 **with the Government Claims Act.**

15 Plaintiffs plead all of their causes of action against all defendants, individuals
16 and public entity alike. But liability of a public employee, and liability of a public
17 entity, do not follow the same standards. A California government entity’s liability in
18 a state action must be based on a statute. Cal. Gov’t Code § 815(a). The City is not
19 aware of statutes which make it liable for conversion under the Tenth Cause of
20 Action or false arrest pursuant to the Eleventh Cause of Action. But if there are such
21 statutes, Plaintiffs still cannot state any of their state law claims against the City
22 because they did not comply with the claims presentation requirements of the
23 Government Claims Act.

24 The Government Claims Act requires a plaintiff to present a claim to the local
25 government entity that purportedly caused the plaintiff’s harm. Cal. Gov’t Code §
26 915(a). This must be done before filing suit. Cal. Gov’t Code § 945.4. Any claim
27 relating to injury to person or property must comply with this procedure. Cal. Gov’t
28 Code § 911.2(a).

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Plaintiffs filed suit on March 14, 2016, but presented a claim to the City Clerk for the first time on March 17, 2016. Request for Judicial Notice (“RJN”) Ex. 1.

“The Legislature's intent to require the presentation of claims *before* suit is filed could not be clearer.” *City of Stockton v. Superior Court (Civic Partners Stockton)*, 42 Cal. 4th 730, 746 (2007) (emphasis in original). Plaintiffs failed to comply with this clear requirement. Accordingly, their state law claims should be dismissed.

CONCLUSION

For the reasons set forth herein, the City respectfully requests that this Court grant it judgment on the pleadings. Defendants further request that this Court grant any additional relief that it deems just and proper.

DATED: April 5, 2016

MICHAEL N. FEUER, City Attorney
THOMAS H. PETERS, Chief Asst. City Attorney
ERIC BROWN, Deputy City Attorney

By: /s/ Eric Brown
ERIC BROWN
Deputy City Attorney

Attorneys for Defendants
CITY OF LOS ANGELES