IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

OMAR ADBUL ALIM, an individual; MICHAEL THYNG, an individual; THE SECOND AMENDMENT FOUNDATION, INC., a Washington non-profit corporation; and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; a New York non-profit association,

Plaintiffs,

v.

CITY OF SEATTLE, a municipality; JENNY DURKAN, Mayor of the City of Seattle, in her official capacity; SEATTLE POLICE DEPARTMENT, a department of the City of Seattle; and CARMEN BEST, Chief of Police, in her official capacity,

Defendants.

Case No. 18-2-18114-3 SEA

DEFENDANTS' OPPOSITION TO MOTION FOR RECONSIDERATION

The Honorable Barbara Linde
Hearing Date: November 16, 2018



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## I. RELIEF REQUESTED

Plaintiffs' motion for reconsideration is meritless and should be denied. The motion raises no new facts and no new law, and instead rehashes old arguments already considered and correctly rejected by this Court. The only thing that is new is that Plaintiffs now attach a proposed amended complaint for the Court's consideration. But this is something they could and should have done when they originally asked the Court for leave to amend their complaint—especially since all the "new" facts in the proposed amended complaint were of course known to Plaintiffs since the time they filed this case. Their failure to attach a proposed amended complaint or proffer the additional facts they now ask this Court to consider was the proper basis for the Court denying leave to amend at the hearing on the motion to dismiss, and belatedly attaching a proposed amended pleading now provides no basis for reconsideration under CR 59. Plaintiffs made a strategic decision not to submit (or even describe) a proposed amended complaint in response to the motion to dismiss. They should not now be rewarded for their gamesmanship and waste of judicial resources. This Court's decision to grant Defendants' motion to dismiss with prejudice was a legally correct decision and should not be disturbed.

## II. STATEMENT OF FACTS

**Procedural Background**. As the Court knows, in July 2018, the City of Seattle enacted Ordinance 125620 (hereinafter "the Ordinance"), which requires responsible storage when firearms are not being carried by or otherwise under the control of the owner, and which imposes civil penalties if a firearm is accessed by an unauthorized person. Plaintiffs immediately brought suit to invalidate the Ordinance. On August 30, 2018, Defendants moved to dismiss the Complaint for lack of standing and ripeness. In conferring about the briefing and case schedule after that filing, Defendants' counsel asked if Plaintiffs intended to respond by amending their



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pleadings and was told that Plaintiffs would stand on their complaint. Decl. of Daniel J. Dunne in Opp. to Plaintiffs' Motion for Reconsideration, ¶ 2. Plaintiffs' opposition, filed on October 8, 2018, included a declaration by one Plaintiff, Mr. Thyng, attempting to cure at least one of the pleading deficiencies identified in the motion. It also included a section requesting that the Court grant leave to amend the complaint should the Court grant the Defendants' motion to dismiss, citing CR 15(a). Plaintiffs' Opposition to Motion to Dismiss at 20, Dkt. No. 32. Significantly, Plaintiffs did not attach a proposed amended complaint or otherwise describe how they would cure the defects in their operative complaint. At oral argument on October 19, 2018, Plaintiffs had more than adequate time and opportunity to proffer details as to how they could cure the complaint's deficiencies, but they chose not to do so, and the Court accordingly granted the motion to dismiss with prejudice. Plaintiffs now seek reconsideration under CR 59(a)(8) of the Court's decision to grant the motion to dismiss and to deny the Plaintiffs' request for leave to amend the complaint, pursuant to CR 15(a).

Plaintiffs attach a proposed amended complaint to their motion for reconsideration. For the first time, at least one Plaintiff, Mr. Alim, has now identified proposed amendments intended to more precisely state his current firearms storage practices. Plaintiffs' Proposed Amended Complaint ¶¶ 17-20, Dkt. No. 47. There are no amendments to the allegations about Mr. Thyng, except to note that he is a member of both the NRA and the SAF. Id. ¶¶ 3, 4. The proposed amended complaint still does not allege that any Plaintiff intends to continue a specific practice of irresponsible gun ownership proscribed by the Ordinance. With respect to the NRA and the SAF, the proposed amended complaint contains no new allegations as to the germaneness of this lawsuit to the organizational purposes, except that they now allege that the "storage methods



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proscribed by the Ordinance does not comport with the best practices for safe storage as outlined and recommended by the NRA and SAF." Id. ¶ 23.

## III. STATEMENT OF ISSUES

1. Whether the Court properly granted Defendants' motion to dismiss for lack of justiciability; and

2. Whether the Court properly denied Plaintiffs' request for leave to file an amended complaint.

## IV. AUTHORITY

### A. Legal Standard

On a motion for reconsideration under CR59(a)(8), the movant must show that the challenged decision contained an error of law. CR 59 does not require a court to consider arguments that were not raised before. As the Court of Appeals explained in River House Dev. Inc. v. Integrus Architecture, P.S., 167 Wash. App. 221, 231, 272 P.3d 289, 294 (Wash. App. 2012), the standard of review is strict:

> By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts. But while the issue is preserved, the standard of review is less favorable. CR 59 provides that on the motion of an aggrieved party the court 'may' vacate an interlocutory order and grant reconsideration. The trial court's discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse.

(Internal citations omitted). The only question before the Court is whether the underlying order was properly decided at the time it was decided. A party may not "propose new theories of the case that could have been raised before entry of an adverse decision." Wilcox v. Lexington Eye Institute, 130 Wash. App. 234, 241, 122 P.3d 729, 732 (Wash. App. 2005).

**B. This Court Properly Granted Defendants' Motion to Dismiss.**

None of the arguments raised by Plaintiffs in this motion for reconsideration—after they have had opportunity to oppose the motion to dismiss, submit supplemental declarations, and argue the motion before the Court—come anywhere close to identifying an error in law in the Court's decision to grant the Defendants' motion to dismiss.

First, Plaintiffs belatedly argue that the Court applied the wrong standard in deciding this motion to dismiss. Whereas Plaintiffs' opposition previously argued only that the Court should deny Defendants' challenge to standing and justiciability under CR 12(b)(1), (Plaintifs' Opposition to Motion to Dismiss at 5-6, Dkt. No. 32), on reconsideration, Plaintiffs argue for the first time that the Court should have applied the more liberal "any hypothetical facts" test for a "failure to state a claim" under CR 12(b)(6). But Plaintiffs' argument on reconsideration relies on Habermann v. WPPSS, 109 Wash.2d 107, 744 P.2d 1032 (Wash. 1987), and other cases interpreting the different standard under CR 12(b)(6)), cases that Plaintiffs did not previously cite. See generally Wright v. Colville Tribal Enterprise Corp., 159 Wash. 2d 108, 119 (Wash. 2006) (Madsen, J., concurring) ("Dismissal under CR12(b)(1) and CR 12(b)(6) are analytically distinct."). Plaintiffs waived this argument, because at no point in their opposition to Defendants' motion to dismiss did they argue for the CR 12(b)(6) "any hypothetical facts" standard. See Wilcox, 130 Wash. App. at 241. In any event, the Court property dismissed the case under CR 12(b)(1). Oct. 19, 2018 Hr'g Tr. 28:12-14 ("the motion to dismiss is well taken, whether under 12(b)(1), which I think is the appropriate avenue, or 12(b)(6)); see Reply re Motion to Dismiss at 1-3, Dkt. No. 40.

Even if CR 12(b)(6) standards were to apply, Plaintiffs did not plead facts in the filed complaint sufficient to warrant the hypothetical inferences they ask this Court to draw. Plaintiffs suggest that it is plausible to read the operative complaint as implying that Mr. Alim and

Mr. Thyng regularly leave their firearms outside of their control, but the skeletal allegations in the operative complaint cannot bear that weight. The Court was correct to reject this type of argument before, and nothing new supports a basis for reversing course now. Plaintiffs ask the Court to engage in precisely the sort of "hypothetical" (Plaintiffs' Motion for Reconsideration at 8, Dkt. No. 46) speculation that Diversified Industries Dev. Corp. v. Ripley, 82 Wash. 2d 811, 815 (Wash. 1973), requires courts to avoid. Id. (requiring "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, **hypothetical, speculative**, or moot disagreement" (emphasis added)).

In place of the Complaint's generalized allegations—e.g. "Mr. Thyng has a strong desire to continue having his firearm in an unlocked and usable state in his home" (Complaint ¶ 2, Dkt. No. 1)—Plaintiffs now urge this Court to indulge in speculation about the possibility of non-compliant behavior—e.g. "And when either Mr. Thyng or Mr. Alim are in the home and not carrying a firearm, there will *inevitably* be periods of time when such a firearm is unlocked and not under their control." Plaintiffs' Motion for Reconsideration at 6, Dkt. No. 46.

Plaintiffs' argument that they need not "plead facts that anticipate Defendants' affirmative reliance on the second sentence of SMC 10.79.020" (Plaintiffs' Motion for Reconsideration at 7, Dkt. No. 46) likewise misses the mark. As an initial matter, they did not make this argument in their opposition to Defendants' motion to dismiss and therefore waived it. See Wilcox, 130 Wash. App. at 241. On the merits, the argument ignores both precedent and common sense. To bring a declaratory judgment action challenging the validity of a statute, a plaintiff must plead that they intend to engage in specific behavior that will violate the ordinance once it goes into effect. See, e.g., Forbes v. Pierce Cty., No. 51548-2-II, 2018 WL 4441786, at *5 (Wash. Ct. App. Sep. 18, 2018) ("[Plaintiffs] have not made any allegation that they intend

to engage in conduct prohibited by [the ordinance] in the future. Therefore, whether any violation of [the ordinance] will occur and whether [Plaintiffs] will be subject to criminal sanction at that point is speculative. . . . Accordingly, we hold that the [Plaintiffs] lack standing to challenge [the ordinance]").

The second sentence of Section 10.79.020 is as much a part of the Ordinance as the first sentence. This is not a question of whether Plaintiffs must have anticipated some affirmative defense—Washington law is clear that they must plead facts sufficient to show standing in order for the Court to have jurisdiction over their Uniform Declaratory Judgment Act claim. To-Ro Trade Shows v. Collins, 144 Wash. 2d 403, 411, 27 P.3d 1149, 1153 (Wash. 2001); Forbes v. Pierce Cty., No. 51548-2-II, 2018 WL 4441786, at *5 & n. 1 (Wash. Ct. App. Sep. 18, 2018).

Plaintiffs' reliance upon Bravo v. Dolsen Companies, 125 Wash.2d 745, 888 P.2d 147 (Wash. 1995), is unavailing. As an initial matter, that case involved a dismissal under CR 12(b)(6), which—as noted above—is analytically distinct from CR 12(b)(1). The Court in Bravo further held that "[a]lleging union involvement [was] not a necessary element of a claim under" the Washington statute (i.e., it was not required to state a claim), and that it was "particularly inappropriate" to grant a CR 12(b)(6) motion when the law was in development so that it was not clear what the elements of a claim were. Id. at 750-51. The Bravo case thus concerns a constellation of factors not present in this case.

Here, the Court did not dismiss for failure to state an element of a claim, but instead for failure to plead facts showing that the Court has jurisdiction—i.e. "power to adjudicate the claim." Wright, 159 Wash. 2d at 119 (Madsen, J., concurring). And Plaintiffs are (presumably) not disputing that they must show that they have standing to bring this claim—unlike in Bravo, where whether the plaintiffs needed to show union involvement was an open question. It was

and is absolutely clear that Plaintiffs had to plead that they intended to violate the Ordinance—they simply chose not to do so. The Court therefore correctly held that Plaintiffs could not satisfy the four factors to establish justiciability (incorporating both standing and ripeness) identified in Diversified Industries Development Corp. v. Ripley, 82 Wash. 2d 811 (1973). That failure remains fatal to their case.

**C. The Court Properly Denied Plaintiffs' Request for Leave to File An Amended Complaint under CR 15(a).**

Courts are given broad latitude in whether to grant CR15(a) motions. Wilson v. Horsley, 974 P.2d 316, 319, 137 Wash.2d 500, 505 (Wash. 1999) ("The decision to grant leave to amend the pleadings is within the discretion of the trial court. Therefore, when reviewing the court's decision to grant or deny leave to amend, we apply a manifest abuse of discretion test." (internal citations omitted)).

Here, Plaintiffs' request for leave to file an amended complaint was properly denied by this Court. Though Plaintiffs now attach a proposed amended complaint to their motion for reconsideration, this does not cure the earlier defects. And even if this Court were to permit Plaintiffs to file their proposed amended complaint, it would be futile because they still have not presented this Court with a justiciable dispute.

First, this Court correctly denied Plaintiffs' request to amend their complaint because it was procedurally and substantively deficient. In their motion for reconsideration, Plaintiffs purport to quote the "pertinent part[s]" of Rule 15(a), (Plaintiffs' Motion for Reconsideration at 9, Dkt. No. 46), but they omit one very relevant requirement: CR 15(a) requires that "[i]f a party moves to amend a pleading, a copy of the proposed amended pleading . . . **shall be attached** to the motion." (emphasis added). This is not optional—the use of "shall" in Rule 15(a) "is presumptively imperative and operates to create a duty." Hook v. Lincoln Cty. Noxious Weed

Control Bd., 166 Wash. App. 145, 160 (2012) (citing Crown Cascade, Inc. v. O'Neal, 100 Wn.2d 256, 261 (1983)); Parsons v. Estate of Parsons, 192 Wash. App. 1073 (2016) ("CR 15(a) governs pleading amendments and provides that the moving party 'shall' attach a proposed amended pleading to the motion. The use of the word 'shall' is a mandatory directive." (citations and internal quotation marks omitted)). Courts have held that a party's failure to attach a proposed amended complaint provides an *independent basis* for denying leave to amend. Id.

Here, although Plaintiffs moved in their opposition brief for leave to file an amended complaint under CR15(a), that motion was properly denied as they did not attach a copy of the proposed amended pleading to their brief. While Plaintiffs did attach to their Opposition to the Motion to Dismiss a brief declaration from Plaintiff Michael Thyng, it did not cure the Complaint's core deficiency with respect to pleading an intent to violate the Ordinance; to the contrary, the Thyng declaration shows that Plaintiffs had the opportunity, and knew that they were required, to offer up proposed amendments to cure the failings of their complaint, but decided to hold certain facts back. Even at oral argument, when Plaintiffs had an additional opportunity to explain to the Court how they would cure the defect and plead an intention to violate the Ordinance, they made the decision not to offer even the barest of proffers.

Plaintiffs' failure to include a proposed amended pleading or even offer a proffer to support their earlier request for leave to amend—despite numerous opportunities to do so, and even though the additional facts were necessarily known to them at the time—is fatal under the plain language of CR 15(a). Plaintiffs here made the strategic decision to hold certain facts back, presumably hoping for a favorable decision on the motion to dismiss so they could proceed on the most broadly stated allegations possible, and would not be required to reveal publicly that at least one plaintiff apparently engages in the kind of irresponsible and dangerous firearm storage

that the City has now prohibited (and that even the organizational plaintiffs do not support). So while leave to amend is to be "freely given when justice so requires" under CR 15(a), in the absence of the proposed amended complaint required by CR 15(a) or even any proffer, and with no explanation as to why the "new facts" were not pled sooner, the Court acted well within its discretion in denying and determining that it would be futile to grant leave to amend. Oct. 19, 2018 Hr'g Tr. 30:23-24 ("I haven't heard anything that would suggest to me that there is an amendment that would cure these issues."). See McKee v. Kitsap Cty. Prosecutor's Office, 162 Wash. App. 1032 (2011) (in context of motion to dismiss, affirming dismissal with prejudice and finding "no manifest abuse of discretion" where the plaintiff "offer[ed] no excuse for his lack of diligence in seeking to amend the complaint, opting instead to argue that his complaint was sufficient. This was an unnecessary risk . . . ."). See also Miller v. One Lincoln Tower LLC, 139 Wash. App. 1018 (2007) (affirming denial of leave to amend where plaintiff's summary judgment opposition included a request for leave to amend but failed to attach a proposed amended complaint and the basis for amendment, proffered in an untimely motion to amend following summary disposition, was known prior to the filing of the initial complaint).[1,2]

[1] Plaintiffs cite a case which interprets the Federal Rules of Civil Procedure, Katyle v. Penn Nat. Gaming, Inc., 637 F.3d 462 (4th Cir. 2011), to argue that the Court should evaluate a post-judgment motion for leave to amend under the standards of a motion for leave to amend—rather than as a motion to vacate. But Plaintiffs here are seeking reconsideration of a *pre-judgment* request for leave to amend and, as noted above, they failed to comply with the standards of CR15(a) governing motions for leave to amend when they filed their request. Plaintiffs' reliance upon Detrick v. Garretson Packing Co., 73 Wash. 2d 804, 812, 440 P.2d 834, 839 (1968), is similarly unavailing. That case merely stands for the proposition that a trial court's conclusions of law are subject to de novo review upon appeal—an assertion that, while true, is not relevant here.

[2] To the extent Plaintiffs argue on reply that they never formally moved for leave to amend and therefore had no obligation to attach an amended pleading, that argument should be rejected. Plaintiffs clearly requested leave to amend under CR 15(a) on page 20 of their Opposition to the Defendants' Motion to Dismiss, Dkt. No. 32, and they implicitly if not explicitly reiterated that request at oral argument. But even if the Court finds that no such motion for leave to amend was in fact made, that would provide a separate and sufficient basis for denying the motion for reconsideration, as Plaintiffs have offered no excuse for waiting until now to seek to do so.


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Even if the Court were to grant the motion for reconsideration as to the belatedly proffered amended complaint, the Plaintiffs still have not pled sufficient facts to establish justiciability. The amendments do nothing to alter the fatal problem for the Organizational Plaintiffs that the Court identified in its ruling: the Organizations' undisputed public position is that they support safe storage and do not recommend that their members leave firearms stored in such a way that they could be easily accessed by minors or that they leave unlocked guns outside of their control. Unsurprisingly, the proposed amended complaint confirms that the Organizational Plaintiffs both, in fact, are not opposed to the Ordinance's requirements; it merely states that the irresponsible storage methods prohibited by the Ordinance are not considered best practices by the NRA or the SAF. See Proposed Amended Complaint ¶ 23, Dkt. No. 47 ("The storage methods proscribed by the Ordinance does [sic] not comport with the best practices for safe storage as outlined and recommended by the NRA and SAF"); see also Plaintiffs' Motion for Reconsideration at 12, Dkt. No. 46 ("Second, the storage methods proscribed by the Ordinance do not comport with the best practices for safe storage as outlined and recommended by the NRA and SAF."). Given that the Organizational Plaintiffs agree that responsible storage is important and that the practices prohibited by the Ordinance are not best practices, this allegation does not state a basis for organizational standing.

As for the Individual Plaintiffs, Plaintiffs appear to have dropped any argument that Mr. Thyng has standing—he does not, and the proposed amended complaint contains no new allegations that he intends to store his firearms in a manner proscribed by the Ordinance. Mr. Alim now alleges that he engages in the clearly irresponsible type of storage that the Ordinance prohibits, though he does not allege an intent to do so in the future[3] and he has alleged

[3] The proposed amended complaint alleges that "The individual Plaintiffs store or keep unlocked and usable firearms in Seattle and plan to do so in the future," but this allegation is vague and does not specify what, precisely,

nothing that establishes that this dispute is ripe for decision under the Diversified Industries framework. 82 Wash. 2d at 815; To-Ro Trade Shows v. Collins, 144 Wash. 2d 403, 411, 27 P.3d 1149, 1153 (Wash. 2001). The proposed amended complaint contains no allegations indicating that the issues are fit for judicial decision or that he would suffer a hardship if made to wait until enforcement to challenge the validity of the Ordinance. See Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 718 (1999); see generally Motion to Dismiss at 15-17, Dkt. 22. Further, there is nothing in the proposed amended complaint that could not have been raised in the original complaint, in the Plaintiffs' opposition to the motion to dismiss, in a declaration attached thereto, or at oral argument.

Plaintiffs' motion presents "new theories of the case that could have been raised before entry of an adverse decision." Wilcox, 130 Wash. App. at 241. The Court should not—and need not—disturb its decision to dismiss the case with prejudice because Plaintiffs have now—months after they were alerted to the deficiencies in their Complaint and were afforded multiple opportunities to cure those deficiencies—alleged that one of their four plaintiffs may engage in conduct proscribed by the Ordinance. This is precisely the type of wasteful gamesmanship CR 15(a) and CR 59 are designed to prevent.

## V. CONCLUSION

For the foregoing reasons, Defendants urge this Court to deny Plaintiffs' motion for reconsideration.

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Plaintiffs plan to do in the future. Proposed Amended Complaint, ¶17, Dkt. No. 47. And, in the same paragraph, the Proposed Amended Complaint undercuts this allegation by alleging that Plaintiffs "will be forced to choose between altering to their detriment the manner in which they store or keep unlocked and usable firearms, or Plaintiffs will be subject to enforcement of the Ordinance." Id. Plaintiffs thus have not stated unequivocally that they intend to engage in proscribed practices if the Ordinance goes into enforcement. They leave open the possibility that they may, instead, elect to store their firearms in a manner that complies with the Ordinance.



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I certify that this memorandum contains 3816 words, in compliance with the Local Civil Rules.

Dated: November 14, 2018

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