08-5368-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

M. PETER KUCK, individually,
and on behalf of others similarly situated,

Plaintiff-Appellant,

v.

JOHN A. DANAHER III, I/O Comm CT Dept of Public Safety,
ALBERT J. MASEK, JR., I/O Commanding Ofcr CT Dept of Public Safety,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut (New Haven)

BRIEF FOR PLAINTIFF-APPELLANT M. PETER KUCK

To Be Argued By:

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JURISDICTIONAL STATEMENT

This is an appeal from a July 25, 2008, final judgment of the United States District Court for the District of Connecticut, Vanessa L. Bryant, Judge, entered in favor of the two named Defendants, Albert J. Masek, Jr. and John A Danaher III that disposed of all claims. (A77) (Judgment.)

Plaintiff appeals from Orders of the district court: (1) Dismissing, on July 25, 2008, a September 17, 2007, Complaint alleging denials of procedural and substantive due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and retaliation in violation of the First and Fourteenth Amendments to the United States Constitution, brought pursuant to 42 U.S.C. § 1983 (A70-A76) (Mem. of Decision); (2) Denying, as futile, on July 25, 2008, Plaintiff's Request for Leave to Amend the Complaint, Motion to Supplement the Complaint, and Motion for Joinder of Party Defendants (A70-A76); and (3) Denying, on October 14, 2008, the Plaintiff's Motion for Reconsideration of the dismissal of the Complaint and denial of the request to amend and motions to supplement and join additional parties to the Complaint. (A81) (Order.)

The jurisdiction of the district court over the cause of action derived from 42 U.S.C. §§ 1983, 1988, and 28 U.S.C. §§ 1331, 1343(a)(3) and (4). (A8) (Compl. ¶ 5.) The district court docketed a timely Notice of Appeal on November 3, 2008. (A82-A83) (Notice of Appeal.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court err in (a) not accepting all allegations in the Plaintiff's Complaint as true and (b) failing to draw all inferences in the Plaintiff's favor when it granted the Defendants' Motion to Dismiss?

II. Did the district court err in denying Plaintiff's Request for Leave to Amend the Complaint, Motion to Supplement the Complaint, and Motion for Joinder of Party Defendants?

III. Did the district court abuse its discretion in denying Plaintiff's Motion for Reconsideration of the Complaint's dismissal and denial of Plaintiff's Request for Leave to Amend the Complaint, Motion to Supplement the Complaint, and Motion for Joinder of Party Defendants when the Court did not address the impact of the Supreme Court case in the matter of District of Columbia v. Heller, __ U.S. __, 128 S.Ct. 2783, 171 L.Ed. 637 (2008) on the claims in Plaintiff's Complaint concerning the process due when an individual is denied renewal of a state permit to carry a pistol or revolver?

PRELIMINARY STATEMENT OF THE CASE

Plaintiff-Appellant M. Peter Kuck ("Kuck" or "Plaintiff") appeals from a July 25, 2008, judgment of the United States District Court for the District of Connecticut, Vanessa L. Bryant, Judge, entered in favor of the two named Defendants, Albert J. Masek, Jr. and John A Danaher III. (A77.)[1]

Plaintiff filed a Complaint in the district court claiming in three counts denials of procedural and substantive due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and retaliation in violation of the First and Fourteenth Amendments to the United States Constitution. (A7-A20) (Compl. ¶¶ 1-96.) The factual allegations supporting Plaintiff's claims set forth and imply the Defendants' intentional conduct in denying Plaintiff a meaningful and timely opportunity to be heard on the denial of his application to renew his state permit to carry a pistol or revolver ("state permit"). (A18) (Compl. ¶ 86.) The Defendants' unlawful denial of Plaintiff's renewal application on March 16, 2007, created a retaliatory *de facto* period of suspension not contemplated under the Connecticut Constitution, Art. 1, § 15,[2] or state statutory laws. (A7-A8) (Compl. ¶ 4.) The Complaint and the Amended Complaint allege a denial of Kuck's property right to hold a valid state permit and

[1] The district court's Memorandum of Decision (A70-A76) and Order on Motion for Reconsideration (A81) are not reported. See Second Circuit Local Rule 28(2).
[2] The Connecticut Constitution, Art. 1, § 15, provides: "Every citizen has a right to bear arms in defense of himself and the state."

liberty interest in lawfully carry a pistol or revolver. (A17-A18) (Compl. ¶¶ 78-83, 84-89) (A64) (Am. Compl. ¶ 227.) The Defendant John A. Danaher III ("Comm. Danaher"), at all times relevant to the events alleged in the Complaint and Amended Complaint, was the Connecticut State Department of Public Safety (CT DPS) Commissioner. (A10) (Compl. ¶¶ 16-19.) The Defendant Albert J. Masek, Jr. ("Capt. Masek"), at all times relevant to the events alleged in the Complaint and Amended Complaint, was the supervisor of the CT DPS Special Licensing Firearms Unit (SLFU). (A10) (Compl. ¶¶ 21-22) (A34) (Am. Compl. ¶¶ 19-20.)

The district court dismissed Plaintiff's Complaint and denied as futile Plaintiff's Request for Leave to Amend the Complaint and Motion for Joinder of Party Defendants to add factual allegations discovered by Plaintiff between the September 17, 2007, filing of the Complaint and the January 22, 2008, Request for Leave to Amend the Complaint and join additional defendants based on that information. (A74-A76.) The Plaintiff moved for reconsideration of each of the district court's orders. (A78-A79) (Mot. for Recon.) The district court denied Plaintiff's Motion for Reconsideration in its entirety on October 14, 2008.[3] (A81) (Order.)

[3] The electronic entry states: "ORDER denying 35 Motion for Reconsideration, as the plaintiff has not identified any controlling decisions or data that the Court overlooked and that would reasonably be expected to alter its previous conclusions. Signed by Judge Vanessa L. Bryant on 10/14/08. (Wilson, J.) (Entered: 10/14/2008)."

STATEMENT OF RELEVANT FACTS

Kuck submitted an application to the CT DPS for renewal of his state permit on or about March 16, 2007. (A11) (Compl. ¶ 26.) State permits expire five years after date of issuance or renewal. (A11) (Compl. ¶ 25.) When Kuck submitted his application for renewal on March 19, 2007, his state permit held an expiration date of April 17, 2007. (A11) (Compl. ¶ 26.)

The CT DPS, acting through Capt. Masek, demanded from Kuck a United States passport or birth certificate as a condition for renewal of his state permit. (A11, A12) (Compl. ¶ 28, 34-36.) State law does not require the submission of a United States passport or birth certificate as a condition for renewal of a state permit. (A35-A36) (Compl. ¶¶ 29-33, 37) (A36-A37, A38) (Am. Compl. ¶¶ 38-40, 51.) Kuck filed a timely appeal to the Board of Firearms Permit Examiners ("Board") from the denial of his application for renewal of his state permit. (A12) (Comp. ¶ 41.) The Board notified Kuck on April 20, 2007, of a hearing on his appeal scheduled for November 18, 2008. (A12-A13) (Compl. ¶ 42.)

The CT DPS caused the nineteen (19) month delay in the hearing of Kuck's appeal to the Board, and the backlog of appeals in general, when the SLFU and Capt. Masek (a) increased the number of appeals by denying state permit renewals based upon arbitrary and illegal requirements for renewal (A13, A18) (Compl. ¶ 50, 82) and (b) failed to investigate, review, process or prepare the appeal cases in

a reasonable and timely manner for the Board's review. (A13) (Compl. ¶ 49.) The CT DPS, knowing that it denies application for state permits, revokes state permits, and denies applications for renewal applications for state permits without investigation, review, processing, preparation or authority in law, withholds its case statements and positions from the Board until just prior to the scheduled hearing and then settles cases near the Board hearing date to avoid Board scrutiny. (A15) (Compl. ¶ 61.) Comm. Danaher refused to respond to the Board's requests that the SLFU cooperate in decreasing the backlog of appeals waiting for hearing before the Board. (A13, A15, A17-A18) (Compl. ¶¶ 43-45, 65, 81) (A37, A42-A43, A45, A54-A56, A57) (Am. Compl. ¶¶ 40-42, 81-83, 98, 102, 164-179, 181.)

SUMMARY OF THE ARGUMENT

In its Memorandum of Decision dated July 25, 2008, granting the Defendants' Motion to Dismiss and denying Kuck's motions to amend and for joinder, the district court disregards facts alleged in the Complaint and Amended Complaint, relies on facts not contained in the record, and then uses the facts not contained in the record to support its decision and orders. The facts and inferences drawn by the district court and used to support the orders derive from an erroneous application of the standard for consideration of a motion to dismiss and divide into eight categories of error. The district court's denials of Plaintiff's Request for Leave to Amend, Motion to Supplement the Complaint, and Motion for Joinder of

Party Defendants extend the same incorrect application of the standard for consideration of a motion to dismiss to the consideration of the Amended Complaint.

While the Complaint was sufficient, Plaintiff requested leave to amend, moved to supplement, and moved to join defendants using information discovered in the four (4) month interim between the filing of the Complaint and Plaintiff's Request for Leave to Amend the Complaint, Motion to Supplement the Complaint, and Motion for Joinder. The newly discovered information amplified Plaintiff's Complaint with allegations that rendered the claims even more plausible. The detailed information set forth by Plaintiff in the Amended Complaint, which expanded the pleading from a fourteen (14) page to a thirty-nine (39) page document, described the conduct of the original Defendants and those sought to be joined by citing emails and other tangible evidence. The Complaint satisfied the Rule 8(a) of the Federal Rules of Civil Procedure standard of a short and plain statement of the claim showing entitlement to relief. The Amended Complaint amplified the short and plain statement to render the allegations that the Defendants acted intentionally plausible.

Plaintiff argued in his Motion for Reconsideration, among other things subject to the de novo review of the Appellate Court, that, since the filing of the Complaint and the motions to amend and for joinder, the United States Supreme

Court's decision in District of Columbia v. Heller, 128 S.Ct. 2783 (2008), holding that the "Second Amendment right to keep and bear arms is exercised individually and belongs to all Americans," id at 2791, merited reconsideration of the district court's finding that the process accorded Kuck in his appeal from the denial of his application for renewal was adequate under the Fifth and Fourteenth Amendments to the United States Constitution. The district court denied Plaintiff's motion without written decision. Plaintiff argues that this omission was an abuse of discretion.

ARGUMENT

I. Plaintiff's Complaint States a Claim Showing Entitlement to Relief

A. Standard of Review

A Complaint "need only satisfy Rule 8(a)'s standard of a 'short and plain statement of the claim showing that [she] is entitled to relief.'" Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir. 2008) (bracketed language in original) (quoting Fed. R. Civ. P. 8(a)(2)). In Boykin, the Second Circuit discussed the Supreme Court's decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), as the "source of some uncertainty" in applying the "appropriate standard for assessing the sufficiency of pleadings under Rule 8(a)." Boykin, 521 F.3d at 213; see also Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007). The Boykin panel, stating its agreement with the Second Circuit

panel deciding Iqbal, concluded that Twombly is "not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." Boykin, 521 F.3d at 213 (emphasis in original) (quoting Iqbal, 490 F.3d at 157-58); see also Van Dorsten v. Provident Life and Acc. Ins. Co., 554 F.Supp.2d 285, 287 (D.Conn. 2008) (After citing its previous decisions regarding Rule 12(b)(6) and the defendant's reliance on Twombly in moving to dismiss, the court resolved: "Nevertheless, the Second Circuit concluded that "[a]fter careful consideration of the [Supreme] Court's opinion and the conflicting signals from it that we have identified, we believe that the Court is not requiring a universal standard of heightened fact pleading...."') (quoting Iqbal, 490 F.3d at 157).

In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court "'construe[s] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor.'" Goldstein v. Pataki, 516 F.3d 50, 56 (2d Cir. 2008) (bracketed language not in original) (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)). The court "accept[s] the facts alleged in the amended complaint as true." Spool v. World Child Intern. Adoption Agency, 520 F.3d 178,

180 (2d Cir. 2008) (bracketed language not in original) (citing GICC Capital Corp. v. Tech. Fin. Corp., 67 F.3d 463, 465 (2d Cir.1995)).[4]

B. The District Court's Decision and Order Does Not Accept the Alleged Facts as True and Draw All Reasonable Inferences

In its Memorandum of Decision, the Court disregards facts alleged in the Complaint and Amended Complaint, relies on facts not contained in the record, and then uses the facts not contained in the record to support its order of dismissal.

1. Decision and Order Finding No. 1 Not Alleged By Plaintiff

"When Kuck applied for renewal in 2007, the public safety department's licensing unit requested that he provide his birth certificate, United States passport, or voter registration card because pistol permits cannot be issued to illegal aliens pursuant to Conn. Gen. Stat. § 29-36f(b)(9)." (A71.)

First, the state statute cited by the district court pertains to the issuance of eligibility certificates for pistols or revolvers. Conn. Gen. Stat. § 29-36f. Kuck held a valid state permit pursuant to General Statutes § 29-28 and sought renewal pursuant to General Statutes § 29-30. The state statute cited by the district court is inapplicable to Kuck's cause of action.[5]

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[4] See Memorandum of Decision at 1-2 (A70-A71) ("Pursuant to Fed. R. Civ. P. 12(b)(6), the defendants move to dismiss on the ground of failure to state claims upon which relief can be granted.").

[5] The ten grounds listed in General Statutes § 29-36(b) as "just cause" for denial of an "eligibility certificate" and the ten grounds listed in General Statutes § 29-28(b) as "just cause" for denial of a state permit application nonetheless are the same. By incorporation, General Statutes § 29-29(d) provides for the same ten grounds as "just cause" for the denial of an application to renew a state permit. The ninth ground comprising "just cause" to deny an individual an "eligibility certificate," a

Second, Kuck does not allege that when he applied for renewal of his state permit on March 16, 2007, the CT DPS requested a United States passport, birth certificate, or voter registration card. The Complaint alleges that the CT DPS demanded a United States passport or birth certificate as a condition for granting Kuck's application to renew his state permit. (A11) (Compl. ¶¶ 27, 28) (A36) (Am. Compl. ¶¶ 32, 33.)

Third, Kuck does not allege that the CT DPS demanded his birth certificate or United States passport for the reason, as stated in the Memorandum of Decision, "because pistol permits cannot be issued to illegal aliens pursuant to Conn. Gen. Stat. § 29-36f(b)(9)." (A71.) Plaintiff alleges the opposite. Connecticut state statutes place the burden on the CT DPS to provide "just and proper cause" prior to denying a state permit renewal application on the ground that a person is an "alien illegally or unlawfully in the United States." Conn. Gen. Stat. §§ 29-28(b)(9), 29-32b(b).[6] The law does not place the burden on an individual to prove to the CT

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state permit, or the renewal of a state permit specifies: "No state or temporary state permit to carry a pistol or revolver shall be issued under this subsection if the applicant … (9) is an alien illegally or unlawfully in the United States."

[6] Section 29-32b(b) provides in relevant part: "Any person aggrieved by any refusal to issue or renew a permit or certificate under the provisions of section 29-28 or 29-36f, or by any limitation or revocation of a permit or certificate issued under any of said sections, or by a refusal or failure of any issuing authority to furnish an application as provided in section 29-28a, may, within ninety days after receipt of notice of such refusal, limitation or revocation, or refusal or failure to supply an application as provided in section 29-28a, and without prejudice to any other course of action open to such person in law or in equity, appeal to the board.

DPS that the individual is not "an alien illegally or unlawfully in the United States." The distinction between placing the burden on the CT DPS of having "just and proper cause" to deny a renewal application because Plaintiff is an "alien illegally or unlawfully in the United States" and placing the burden on the Plaintiff of proving that he is not an "alien illegally or unlawfully in the United States" is an important distinction that defines no less than the status and relationship of an individual to his or her government. In Connecticut, the legislature has placed the burden on the CT DPS, not the individual.

If the government may deny rights based upon an individual's status as an "alien illegally or unlawfully in the United States" and the government enforces this mandate to deny rights unless an individual proves that he or she is not "an alien illegally or unlawfully in the United States," then, rather than needing cause to deny an individual his or her rights, the government may deny rights based on an individual's refusal to prove that he or she has certain rights. The Complaint and Amended Complaint allege that the CT DPS, seeks, invidiously, to place the burden on an individual of proving that he or she is not "an alien illegally or unlawfully in the United States" rather than accepting its legislatively mandated

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On such appeal the board shall inquire into and determine the facts, de novo, and unless it finds that such a refusal, limitation or revocation, or such refusal or failure to supply an application, as the case may be, would be for just and proper cause, it shall order such permit or certificate to be issued, renewed or restored, or the limitation removed or modified, as the case may be."

burden of needing "just and proper cause" to deny a state permit on the ground that an individual is "an alien illegally and unlawfully in the United States." If September 11, 2001, or various Homeland Security Acts necessitate a shift in this burden, our democratic-based government still requires that the shift occur as a result of the legislative process not as a product of law enforcement edict. (A11) (Compl. ¶ 29.)

The issue then is what "just cause" the CT DPS had to find that Kuck was "an alien illegally or unlawfully in the United States." Plaintiff alleges that he is a United States citizen. (A8) (Compl. ¶ 5.) The CT DPS had no "just cause" to find that Plaintiff is an "alien illegally or unlawfully in the United States.".[7] An inference favorable to Plaintiff drawn from the Complaint and Amended Complaint is that the denial of a state permit without "just and proper cause" for such denial is suspect, unlawful and violated Plaintiff's rights. The unlawful, denial of a property or liberty interest under egregious, shocking, or unconscionable circumstances is a substantive due process violation. The lack of an opportunity for timely hearing is a procedural due process violation. The arbitrary imposition of a requirement, in consideration of the exercise of free

[7] For example, (1) Kuck's valid state pistol permit was proof that Kuck was not "an alien illegally or unlawfully in the United States" and the CT DPS never sought to revoke his state permit on that ground or any other ground; and (2) Kuck was a member of the Board. State law does not permit the Governor to appoint "an alien illegally or unlawfully in the United States to the Board. (A8) (Compl. ¶¶ 6-7.)

speech alleged in the Complaint and Amended Complaint by the Plaintiff, is a violation of the First Amendment.

2. Decision And Order Finding No. 2 Not Alleged By Plaintiff

"He [Plaintiff] declined to provide any of the requested documents in 2007, asserting that the request was unconstitutional." (A70-A71.)

Kuck never asserted to the CT DPS that its demand for a United States passport or birth certificate was unconstitutional. (A7-A20) (Compl. ¶¶ 1-96) (A31-A69) (Am. Compl. ¶¶ 1-247.) Kuck requested information from Capt. Masek about the bases for the demand that he provide a United States passport or birth certificate. (A12) (Compl. ¶ 34.) When Kuck was not provided any bases in law for the demand, he declined to submit the United States passport or birth certificate. (A12) (Compl. ¶ 36.) In filing his Complaint, Plaintiff alleged that he was denied a meaningful and timely opportunity to be heard on the issue of whether his declination to submit a United States passport or birth certificate provided just and proper cause for the CT DPS to find that he was "an alien illegally or unlawfully in the United States." (A9, A17) (Compl. ¶¶ 3, 80.) Plaintiff alleged that the arbitrary requirements for renewal of state permits and the fourteen (14) to twenty (20) month period for opportunity to be heard constituted a denial of substantive due process. (A18) (Compl. ¶¶ 84-89.) Plaintiff alleged that the imposition of the requirement that he submit a birth certificate or United States passport, because it was contrary to the law and not imposed upon everyone and

because the CT DPS knew that Kuck would wait a substantial period for review, was a retaliatory act directed toward Kuck's exercise of his First Amendment rights. (A19) (Compl. ¶¶ 90-96.)

Plaintiff never alleged that the SLFU's demand that he provide a United States passport or birth certificate was unconstitutional. Plaintiff does allege that the CT DPS arbitrary use of such requirements not found in the law, without a meaningful and timely opportunity for review of such requirements, is a violation of the Due Process Clause of the Fifth and Fourteenth Amendments.

3. Decision And Order Finding No. 3 Not Alleged By Plaintiff

"Consequently, in April 2007, the licensing unit declined to renew Kuck's permit." (A72.)

The Memorandum of Decision links two sentences together as follows:

- He [Plaintiff] declined to provide any of the requested documents in 2007, asserting that the request was unconstitutional. (A71-A72)

- Consequently, in April 2007, the licensing unit declined to renew Kuck's permit. (A72.)

Plaintiff does not allege that the submission of a birth certificate or United States passport was a requirement for state permit renewal. Therefore he cannot allege that this was the reason for the denial of his application for renewal of the state permit. Plaintiff alleges that the state legislature had rejected such a requirement. (A36-A37, A38) (Am. Compl. ¶¶ 38-40, 51.) Therefore, Plaintiff

cannot have alleged nor is it plausible to find that Plaintiff alleged that the SLFU's denial of his application for renewal was based on Plaintiff's declination to submit a United States passport or birth certificate. The Complaint draws a reasonable inference that the CT DPS denied Kuck's application for renewal absent authority. The Amended Complaint amplifies Plaintiff's claims that the CT DPS conduct was intentional.

State statutory law provides that the SLFU must deny an application for renewal when it finds that the applicant is "an alien illegally or unlawfully in the United States." Conn. Gen. Stat. § 29-28(b). State statutory law does not provide authority for the SLFU to deny an application for renewal if the individual does not prove that he or she is not "an alien illegally or unlawfully in the United States." (A36-A37, A38) (Am. Compl. ¶¶ 38-40, 51.)

4. Decision And Order Finding No. 4 Not Alleged By Plaintiff

"Because parties commonly endure significant delays in securing administrative and judicial review, the Court cannot conclude that a nineteen-month wait for a hearing is so inadequate as to make the availability of review by the firearms board 'meaningless and nonexistent.'" (A74-A75.) (quoting "Gyadu v. Workers' Compensation Com'n, 129 F.3d 113, 1997 WL 716128 at * 2 (2d Cor. Nov. 17, 1997)." (A74.)

The standard in the consideration of a motion to dismiss is not whether a court can conclude that a defendant has not violated a right, i.e. "the Court cannot conclude that a nineteen month wait for a hearing is so inadequate," the standard is whether, accepting all allegations of fact as true and drawing all reasonable

inferences in favor of the plaintiff, the complaint sets forth a claim that the defendant did violate a right and the plaintiff is entitled to relief if and when that claim is proven. The standard demands that the district court "'construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor.'" Goldstein v. Pataki, 516 F.3d at 56 (brackets added) (quoting Chambers v. Time Warner, Inc., 282 F.3d at 152). The relevant finding in Kuck's action is whether it is plausible, accepting all factual allegations of the Complaint and Amended Complaint as true and drawing all reasonable inferences in the Plaintiff's favor, that the CT DPS denied Kuck's application for renewal without authority in law, whether it is plausible that a nineteen (19) month wait period is inadequate due process, and whether it is plausible that the CT DPS acted in retaliation against Kuck in denying his application for renewal.

At the pleading stage of this action, Kuck cannot be held to the standard imposed by the district court that a plaintiff allege facts which compel the district court to conclude that a defendant violated the law. If a plaintiff were required to allege facts such that a trial court were compelled to conclude that a defendant violated the law then there would be no need to proceed to discovery or, if discovery were pursued, it would be for the benefit of the defendant who would have the burden of proving that it did not violate the law so that the trial court

would not render summary judgment against the defendant based on the trial court's earlier conclusion from the complaint that the defendant violated the law.

In finding that it cannot conclude that the availability of review is inadequate, the district court imposes upon Kuck the burden of proving, by his Complaint and Amended Complaint, that the availability of review is inadequate. The issue for consideration on a motion to dismiss, in this context, is whether accepting the Complaint's and Amended Complaint's allegations as true and drawing all reasonable inferences in support of the claims, a court cannot find other than that the availability of review is adequate. If the district court cannot conclude that the availability of review is adequate then the claims must survive. Therefore, the district court's finding that it cannot conclude that review is inadequate is inapposite to a consideration of the motion to dismiss.

In consideration of the fact that there has been no discovery or findings regarding the three Mathews v. Eldridge, 424 U.S. 319, 335 (1976), factors, the record does not support a conclusion that the availability of review by the Board is adequate. "Due process is inevitably a fact-intensive inquiry." Krimstock v. Kelly, 306 F.3d 40, 51 (2d Cir. 2002) (citing Connecticut v. Doehr, 501 U.S. 1, 10 (1991) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."). "The "'timing and nature of the required hearing will depend on appropriate accommodation of the

competing interests involved.'" Id (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982)). Whether a fourteen (14) to twenty (20) month delay is warranted is dependent on the facts and the law. The Complaint and Amended Complaint plausibly allege that a delay of fourteen (14) to nineteen (19) months is not an adequate opportunity for hearing of state or federal constitutional claims.

In Krimstock, the plaintiffs challenged the due process afforded them in the seizure of their motor vehicles post-arrest. The vehicles had been seized by the defendant city between March and May of 1999. According to the Appellate Court, the city defendant's administrative code operated as follows:

> If a claimant makes a formal demand for the return of the vehicle, the City has twenty-five days in which either to initiate a civil forfeiture proceeding under the City's Administrative Code or to release the vehicle. Even if the City chooses to commence a civil forfeiture proceeding within the twenty-five day period, however, the proceeding is commonly stayed until the criminal proceeding concludes.

Id at 45 (internal citations omitted). One of the seven plaintiffs in Krimstock waited twenty-three (23) months for the return of his vehicle with no opportunity to challenge the city defendant's continued retention. Id at 46. A second plaintiff waited thirteen (13) months. Id. In the case of a third plaintiff whose vehicle was seized in April, 1999, the Appellate Court found that by December, 1999, he "still had received no hearing in the forfeiture action and his car remained in police custody." Id. This plaintiff, as a result of the delay, "had not been given an

opportunity to present evidence that a prescription anti-depressant medication he was taking at the time of the arrest caused the Breathalyzer test to exaggerate the percentage of alcohol in his bloodstream." Id. The plaintiffs alleged violations of the Due Process Clause of the Fourteenth Amendment and sought "a prompt hearing following the seizure of vehicles, at which the City must demonstrate probable cause that the car was used in furtherance of a crime and that it is necessary that the vehicle remain in the City's custody until the conclusion of the forfeiture proceeding." Id (internal quotations omitted).

The district court dismissed the Krimstock complaint finding that the plaintiffs' interests were adequately protected, after applying the Mathews factors, by the "probable cause arrest" and the forfeiture proceedings. Id. The Appellate Court vacated the district court's dismissal of the compliant and remanded the case.

In vacating the district court's decision and remanding the case, Krimstock applied the three factors set forth in Mathews v. Eldridge, 424 U.S. 319, 335:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

i. First Mathews *Factor*

"The first factor to be considered in the Mathews inquiry is 'the private interest affected by the official action.'" Krimstock, 306 F.3d at 60 (quoting Mathews, 424 U.S. at 335).

According to the Krimstock court, the "particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood." Id at 61. [8] An "individual has an important interest in the possession of his [or her] motor vehicle," which is "often his [or her] most valuable possession." Id. Whether or not there is relief from the "hardship"

[8] In Connecticut, a motor vehicle operator arrested for driving under the influence of alcohol or drugs is afforded a pre-deprivation hearing prior to the suspension of his motor vehicle license with limited exceptions. Conn. Gen. Stat. § 14-227b. The operator receives a notice that his license will be suspended in thirty (30) days and is afforded seven (7) days to contact the motor vehicle department to schedule a hearing. The hearing is held prior to the expiration of the thirty day period scheduled for suspension and a decision rendered. Id. The due process afforded a motor vehicle operator regarding his or her license suspension is exhaustive and detailed. Section 14-227b(e)(1) provides: "Except as provided in subdivision (2) of this subsection, upon receipt of such report, the Commissioner of Motor Vehicles may suspend any license or nonresident operating privilege of such person effective as of a date certain, which date shall be not later than thirty days after the date such person received notice of such person's arrest by the police officer. Any person whose license or operating privilege has been suspended in accordance with this subdivision shall automatically be entitled to a hearing before the commissioner to be held prior to the effective date of the suspension. The commissioner shall send a suspension notice to such person informing such person that such person's operator's license or nonresident operating privilege is suspended as of a date certain and that such person is entitled to a hearing prior to the effective date of the suspension and may schedule such hearing by contacting the Department of Motor Vehicles not later than seven days after the date of mailing of such suspension notice." The state interest is ensuring that intoxicated motor vehicle operators do not drive and injure or kill others on the roadway. Still, a pre-deprivation hearing is afforded.

imposed by the deprivation is another consideration in weighing the first Mathews factor. Id. In Krimstock, the city defendant made no provision for situations in which the deprivation would cause a hardship. Id. Another consideration is the length of the deprivation "which increases the weight of the owner's interest in possessing the vehicle." Id. Based upon these considerations, the Krimstock court could not "agree with the district court's cursory assessment of the interest at stake based solely on its observation that the seizure of the vehicles occurred 'in a jurisdiction that abounds in mass transit facilities.'" Id at 62 (quoting Krimstock v. Safir, No. 99 Civ. 12041, 2000 WL 1702035, at *6 (S.D.N.Y. Nov.13, 2000)). "As noted above, the City retains seized vehicles for months or sometimes years before the merits of a forfeiture action are addressed." Id at 61.

ii. Second Mathews *Factor*

> "The second factor to be considered under the Mathews test is 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.'" Krimstock, 306 F.3d at 62 (quoting Mathews, 424 U.S. at 335).

The Krimstock court expressed concern about the district court's conclusion that "the procedures used by the City-a warrantless arrest and the ultimate forfeiture proceeding-adequately protect plaintiffs against erroneous deprivation of their vehicles." Id at 62. Although the city defendant narrowly prevailed in this second Mathews factor, it prevailed due to the Appellate Court's reliance on the arresting police officer's training and ability to identify intoxicated drivers. Id.

iii. Third Mathews *Factor*

"The third Mathews factor examines 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" Krimstock, 306 F.3d at 64 (quoting Mathews, 424 U.S. at 335).

The defendant city argued that its interest lay in "the need to prevent the offending *res*-here, the seized vehicle-from being used as an instrumentality in future acts of driving while intoxicated." Id at 66. In rejecting the relationship of this interest to the retention of the vehicles, the Appellate Court found:

> Even if driving while intoxicated were considered a matter of 'executive urgency,' the response the City has chosen, requiring the impoundment of vehicles until forfeiture proceedings are terminated, is ill-suited to address the urgency.

Krimstock, 306 F.3d at 66. The Krimstock plaintiffs were not concerned with the speed of the institution or conduct of the civil forfeiture proceedings. Id at 68. "Instead, plaintiffs seek a prompt post-seizure opportunity to challenge the legitimacy of the City's retention of the vehicles while those proceedings are conducted." Id.

Kuck's claims concern both the opportunity for a prompt hearing, pre-deprivation, as the State of Connecticut employs in the context of license suspensions for operating under the influence, and a prompt hearing, post-deprivation, dependent upon nature of the deprivation and the availability of a pre-deprivation hearing. In addressing this issue, pre-District of Columbia v. Heller,

128 S.Ct. 2783, a state trial court, Rabbitt v. Leonard, 36 Conn.Supp. 108 (1979), reviewing a Board decision on the revocation of a state permit, applied the three Mathews factors and commented on the duration of the wait for a hearing.

The Rabbitt court assessed and applied the first of the three factors in Mathews v. Eldridge, 424 U.S. 319, as follows:

> The plaintiff's private interest here is the continued possession of his pistol permit and his ability to carry his pistol on his body. Unless the plaintiff has shown that he needs the weapon in connection with his livelihood or that it is absolutely necessary for his self-defense, this interest, although important, is not substantial.

and the second Mathews v. Eldridge factor:

> The second factor the risk of erroneous deprivation and the probable value, if any, of safeguards requires an assessment of the relative reliability of the procedures used and the substitute procedures sought.

and the third Mathews v. Eldridge factor:

> The government's interest, including the function involved and the fiscal and administrative burdens that the plaintiff's suggested procedures would produce, is the final factor to be weighed. The governmental interest here is to protect the safety of the general public from individuals whose conduct has shown them to be lacking the essential character or temperament necessary to be entrusted with a weapon.

Rabbitt v. Leonard, 36 Conn.Supp. at 115-116.

The state trial court in Rabbitt then considered that "[a]n important factor in assessing the impact of official action on a private interest is the duration of any

potentially wrongful deprivation of the property interest." Id at 114 (citing Mackey v. Montrym, 443 U.S. 1 (1979)). However, the court remained silent on an acceptable duration because "[h]ere, the plaintiff could have requested a hearing within ninety days of receipt of the notice of revocation, but he failed to do so."[9] Id. The Rabbit court concluded, under the first factor, that "[u]nless the plaintiff has shown that he needs the weapon in connection with his livelihood or that it is absolutely necessary for his self-defense, this interest, although important, is not substantial." Rabbitt, 36 Conn.Supp. at 111.

The Supreme Court decision in Heller has changed this analysis. In Heller, the Supreme Court held that the Second Amendment of the United States Constitution guarantees "the individual right to possess and carry weapons in case of confrontation." Heller, 128 S.Ct. at 2797. The Heller court does not reference or otherwise consider the impact of an individual's use of firearms in his or her profession on that individual's right to bear arms. No objective and reliable test exists to measure an individual's likelihood of confrontation at any given moment. The individual interest and urgency is created by the unpredictable and unforeseeable potential for confrontation.

[9] The Rabbitt court may have found, in all likelihood, that a nineteen (19) month delay failed to afford due process for the deprivation of a state constitutional right had that issue been before the trial court. Based upon the Rabbitt court's dicta that an important consideration is the duration of the wrongful deprivation, this is a reasonable inference to draw.

"The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" Id.[10] The difference between the import afforded the right to bear arms in defense by the Supreme Court and the import afforded the right to bear arms in defense by the Rabbitt court necessarily leads to a different outcome of opinion regarding the degree of due process afforded prior to the state's deprivation of that right. In the majority opinion of Heller, Justice Scalia writes:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government-even the Third Branch of Government-the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 128 S.Ct. at 2821. The Heller decision does not differentiate between a person who bears arms pursuant to his or her occupation and a person who bears arms according to his or her right to do so in self-defense any more so than the state considers a person's profession in determining the due process required prior to suspending or revoking a individual's person's license. The Rabbitt court did not foresee that the Supreme Court would hold that the right to bear arms is an enumerated constitutional right. See Rabbitt, 36 Conn.Supp. at 110 ("The obvious

[10] "At the time of the founding, as now, to 'bear' meant to 'carry.'" Heller, 128 S.Ct. at 2793.

purpose of the second amendment was to assure the continuation and the effectiveness of the state militia. It must therefore be interpreted and applied with that end in view."). The Rabbitt court did not foresee that the Supreme Court would write:

> One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.

Heller, 128 S.Ct. at 2807. A court, following the Heller decision, may no longer assume, upon mere assertion by the state, that the state's deprivation of an individual's right to bear arms is consistent with and employed for public safety. The Heller court specifically rejects the "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" Heller, 128 S.Ct. at 2821.[11] The mere fact that a hearing is scheduled nineteen (19) months from revocation of a state permit does not, by itself, or in the absence of facts supporting a direct relation between the delay and the furtherance of a lawful state interest, with no evidence of what exactly the state

[11] See also Heller, 128 S.Ct. at 2822 ("We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. … But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

plans to do during that nineteen (19) months, warrant a finding that the delay furthers public safety. A reasonable inference, supported by the United States Supreme Court, is that such a delay may be intended to disarm the people. In its consideration of Defendants' Motion to Dismiss, the district court erred in failing to draw this reasonable inference from the factual allegations of the Complaint and proposed Amended Complaint.

5. Decision And Order Finding No. 5 Not Alleged By Plaintiff

> "Kuck has not alleged any facts that rise to the high level needed to maintain a substantive due process claim. The government action, namely, the licensing unit's denial of Kuck's renewal permit application, on the basis of Kuck's refusal to provide documentation of his citizenship, was not egregious, outrageous, or shocking to the contemporary conscience." (A75.)

Kuck alleges facts in addition to the SLFU's denial of his application for renewal in support of his substantive due process claims.[12] Substantive due process claims do require indicia of conduct egregious, outrageous, or shocking to the conscience. In his Amended Complaint, filed after he obtained newly discovered evidence, Kuck alleges egregious conduct on the part of the Defendants trampling his intrinsic property and liberty rights to defend himself and to keep and bear arms under the Second, Fifth, and Fourteenth Amendments to the United

[12] For the reasons stated under section I(B)(3), above, entitled "Decision And Order Finding No. 3 Not Alleged By Plaintiff," a causative connection between Plaintiff's refusal to provide the demanded documents and the non-renewal of his state pistol permit is not alleged in the Complaint, contrary to the finding of the district court.

States Constitution and the Connecticut Constitution. (A40, A41, A42, A46, A47-A48, A49, A50, A57-A58, A62) (Am. Compl. ¶¶ 66, 67, 71, 74, 76, 77, 106-107, 112-120, 124, 128-131, 137, 183-193, 217-221.)

In Natale v. Town of Ridgefield, 170 F.3d 258, 259 (2d Cir. 1999), the Second Circuit reviewed an appeal from the Town of Ridgefield following a jury verdict in favor of the property-owner plaintiff who claimed in the trial court that "the action of local officials in denying him permits … deprived him of his constitutionally protectable right not to be deprived of his property without due process of law." The Second Circuit set aside the verdict:

> We conclude that the verdict must be set aside because the jury was not instructed that liability could be established only upon a finding that the Natales were deprived of any property interest they might have had in the permits by conduct that violated the substantive standards of the Due Process Clause, *i.e.*, conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.

Id at 259. A denial of substantive due process "is not established simply by proving that someone did not obtain what he or she is entitled to under state law." Natale, 170 F.3d at 262 (citing and quoting, among other thins, Pearson v. City of Grand Blanc, 961 F.2d 1211, 1221 (6th Cir. 1992) ("To prevail, a plaintiff must show that the state administrative agency has been guilty of arbitrary and capricious action in the strict sense, meaning that there is no rational basis for the ... decision.") (citation and internal quotation marks omitted). "Substantive due

process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." Natale, 170 F.3d at 263 (citing and quoting, among other things, Silverman v. Barry, 845 F.2d 1072, 1080 (D.C.Cir. 1988) ("Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.") (citation omitted).

Kuck alleges in his Complaint at paragraph 74 and in his Amended Complaint at paragraph 132: "A member of the SLFU, Detective Barbara Mattson ("Det. Mattson"),[13] has stated her opinion to Plaintiff that guns should not be possessed by persons not affiliated with law enforcement." (A16) (Compl. ¶ 74.) The Complaint and the Amended Complaint allege "a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights … ." Silverman v. Barry, 845 F.2d at 1080. (A18) (Compl. ¶ 88.) Kuck alleges that state and federal constitutional rights have been trammeled prompted by a personal animus against him as a member of a Ye Connecticut Gun Guild[14] and as an advocate of the right

[13] Plaintiff's Motion for Joinder of Party Defendants moved to join Det. Mattson as a party Defendant. (A27-A30.)

[14] The Complaint alleges in ¶ 11 and the Amended Complaint alleges at ¶ 60: "The stated purposes of Ye Connecticut Gun Guild, Inc. are (a) to establish and maintain in Connecticut a permanent organization for the promotion of friendship among,

of the individual to keep and bear arms. (A11-A12) (Compl. ¶¶ 31-32) (A47, A49) (Am. Compl. ¶¶ 116, 131, 134.) The allegations set forth in Count Two of the Complaint and amplified in Count Two of the Amended Complaint satisfy the standard of Rule 8 of the Federal Rules of Civil Procedure to survive a motion to dismiss.

6. Decision and Order Finding No. 6

"He [Plaintiff] acknowledges that his application was denied for failure to provide documentation of his citizenship, a reason entirely distinct and unrelated to his exercise of free speech." (A76.)

For the reasons stated under section I(B)(3), above, entitled "Decision And Order Finding No. 3 Not Alleged By Plaintiff," the causative connection found by the district court between Plaintiff's refusal to provide the United States passport and birth certificate and the non-renewal of his state permit is not found in the Complaint or the Amended Complaint and it is not reasonable to draw the inference from the Complaint and the Amended Complaint that the Plaintiff claims that the reason for the non-renewal of his state pistol permit was his refusal to provide the United States passport and birth certificate.

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and for the mutual benefit of, persons interested in the collection, preservation, and use of arms and accessories and (2) to take a united stand in opposing legislation or regulation at any level of government which may be injurious to the collection, preservation, possession, or use of firearms by responsible collectors, shooters, sportsmen, and other firearms owners." (A8-A9) (Compl. ¶ 11) (A39)(Am. Compl. ¶ 60.)

7. Decision and Order Finding No. 7

"In order to renew a permit, the licensing unit requires documentation of citizenship pursuant to Conn. Gen. Stat. § 29-36f(b)(9)."[15] (A76.)

The allegations in Kuck's Complaint and Amended Complaint are contrary, in their entirety, to this finding. See section I(B)(1), above, entitled "Decision And Order Finding No. 1 Not Alleged By Plaintiff and n. 5, above.

8. Decision and Order Finding No. 8

"Therefore, the licensing unit would have denied Kuck's application regardless of any statements he made that allegedly displeased the defendants." (A76.)

The Court's Decision and Order Finding No. 8 is a conclusion based on its finding that an applicant must provide documentation of citizenship for the renewal of a state permit. First, Plaintiff does not argue whether the SLFU needs to confirm that an individual is not "an alien illegally or unlawfully in the United States." Plaintiff does allege that he is not required to submit documentation to prove that he is not "an alien illegally or unlawfully in the United States." See n. 5, above. The CT DPS imposed this arbitrary requirement that Plaintiff submit a birth certificate or United States passport and denied his application for renewal in retaliation for the exercise of his First Amendment rights that displeased the CT DPS. Plaintiff alleges that the Defendants' acts were egregious and shocking

[15] The district court's Memorandum of Decision references a statute applicable to "eligibility certificates." Conn. Gen. Stat. § 29-36f(b)(9). Plaintiff does not allege that he sought an eligibility certificate so General Statutes § 29-36f(b)(9) is inapplicable to the Complaint and the Amended Complaint. See n. 5, above.

because Defendants knew that Plaintiff would be subject to a nineteen (19) month wait period before his appeal to the Board would be reviewed. The Board Defendants[16] in the Amended Complaint condoned and abetted the CT DPS in delaying Kuck's opportunity for hearing by preventing Kuck from performing his duties as the Board Secretary to decrease the backlog of appeals. Plaintiff claims that a member of the SLFU, the foundation of decisions for state permit issuance, was biased against individual gun possession and that the Board Defendants, through the Office of the Governor, attempted to remove Plaintiff from the Board. (A16, A47) (Am. Compl. ¶¶ 100, 112-117.) For all of these reasons, it is plausible that the CT DPS was intent upon denying Plaintiff's application for renewal of his state permit on the basis of an illegal and unlawful demand without authority in law to retaliate against the Plaintiff for his spoken opposition to the CT DPS creation of a back log of appeals to the Board.

II. The District Court Erred in Denying Plaintiff's Request for Leave to Amend and Motions for Joinder and to Supplement the Complaint

A. Standard of Review

In its Memorandum of Decision, with no elaboration, the district court deemed the Plaintiff's request to amend and motion for joinder "futile." (A76.) "Determinations of futility are made under the same standards that govern Rule

[16] The Amended Complaint sets forth allegations against the former Chairman of the Board, Christopher R. Adams, and the Executive Head of the Board, Susan Mazzoccoli. (A35) (Am. Compl. ¶¶ 24-26.)

12(b)(6) motions to dismiss." Nettis v. Levitt, 241 F.3d 186, 194 (2d Cir. 2007). "Here, each district judge denied the motions for leave to amend as futile based on their interpretation of the FLSA; so we review those denials *de novo*." Gorman v. Consolidated Edison Corp., 488 F.3d 586, 592 (2d Cir. 2007).

A district court's denial of a motion to join a party is reviewed for an abuse of discretion. Cortese v. New Fairfield Bd. of Educ., 210 Fed.Appx. 83, 84-85, (2d. Cir. 2006). In Cortese, the Appellate Court found that the district court abused its discretion in denying a motion to join a party "where the sole articulated basis for its decision was Christian's [the minor's] lack of majority, which he attained in the time period between the filing of the motion and the district court's ruling on it." Id at 85. The district court's Memorandum of Decision articulates no basis for the denial of joinder in Kuck. The order on Plaintiff's Motion for Reconsideration does not elaborate. A district court's denial of a motion to supplement a complaint is reviewed for abuse of discretion. Weeks v. New York State (Div. of Parole), 273 F.3d 76, 87 (2d Cir. 2001) (citing Quaratino v. Tiffany & Co., 71 F.3d 58, 66 (2d Cir.1995)).

> Fed.R.Civ.P. 15(d) permits a party to move to serve a supplemental pleading and the district court may grant such a motion , in the exercise of its discretion, upon reasonable notice and upon such terms as may be just. Absent undue delay, bad faith, dilatory tactics, undue prejudice to the party to be served with the proposed pleading, or futility, the motion should be freely granted.

Quaratino, 71 F.3d at 65-66) (citing Foman v. Davis, 371 U.S. 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). The district court's Memorandum of Decision articulates no basis for the denial of the Motion to Supplement the Complaint in Kuck. The order on Plaintiff's Motion for Reconsideration does not elaborate.

B. The Amended Complaint Amplifies the Complaint and Avoids Piecemeal Litigation

Plaintiff filed a Notice of Amended Complaint, or, Alternately, Request for Leave of Court to File Amended Complaint and Motion to Supplement Complaint and attached a proposed Amended Complaint on January 22, 2008. (A23-A26) (Notice/Request/Motion) (A23-A26.) The Amended Complaint (1) incorporates the information gathered subsequent to September 17, 2007, in support of Plaintiff's claims and (2) supplements the Complaint with events occurring after September 17, 2007, including Plaintiff's removal as Secretary of the Board of Firearms Permit Examiners. (A44, A51) (Am. Compl. ¶¶ 94-95, 142, 147.)

In Kassner v. 2nd Avenue Delicatessen Inc., 496 F.3d 229, 244 (2d Cir. 2007), the Appellate Court found: "Because the complaint, for the reasons discussed previously, is, with respect to some claims, sufficient to withstand a motion to dismiss under Rule 12(b)(6), the district court's futility analysis rested on an incorrect conclusion of law." In the instant appeal, because the Complaint states a claim for relief under the standards set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 54 (2007), Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir.

2008), Spool v. World Child Intern. Adoption Agency, 520 F.3d 178, 180 (2d Cir. 2008), Goldstein v. Pataki, 516 F.3d 50, 56 (2d Cir. 2008), Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007), the Amended Complaint is not futile and would supplement the Complaint with (a) information gathered subsequent to the filing of the Complaint and (2) transactions and events occurring after the filing of the Complaint.

III. The District Court Abused its Discretion in Failing to Address the Impact of District of Columbia v. Heller on Plaintiff's Due Process Claims

The Second Amendment to the United States Constitution "confers an individual right to keep and bear arms." Maloney v. Cuomo, 554 F.3d 56, 58 (2d Cir. 1009) (citing District of Columbia v. Heller, 128 S.Ct. 2783). "It is settled law, however, that the Second Amendment applies only to limitations the federal government seeks to impose on this right." Maloney v. Cuomo, 554 F.3d 56, 58 (2d Cir. 2009) (citing Presser v. Illinois, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886)); but cf. Heller, 128 S.Ct. at 2813 ("Presser said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.").

Heller does not decide the application of the Second Amendment to the states through the Fourteenth Amendment by incorporation but neither does it assume that the issue is settled law. See Heller, 128 S.Ct. at 2821 ("And whatever

else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). Throughout the decision, the Supreme Court compares the Second Amendment to the First and Fourth Amendments, amendments that once were not incorporated through the Fourteenth Amendment but now are applicable to the states. See Heller, 128 S.Ct. at 2797 ("We look to this [the historical background of the Second Amendment] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.") (emphasis in original); Heller, 128 S.Ct. at 2799 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, e.g.,United States v. Williams, 553 U.S. ----, 128 S.Ct. 1830, --- L.Ed.2d ---- (2008).").

In reviewing the post-Bill of Rights ratification commentary, Justice Scalia quotes an influential Second Amendment treatise by William Rawle, a prominent lawyer and a member of the Pennsylvania Assembly that ratified the Bill of Rights. Rawle believed that the Second Amendment could be applied against the states:

> 'The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of

> inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.'

Heller, 128 S.Ct. at 2807 (quoting Rawle, Second Amendment Treatise at 121-22.). Justice Scalia points out that the petitioner District of Columbia's "view that it [the Second Amendment] protected only a right to possess and carry arms when conscripted by the State itself into militia service" would be "nonsensical" when considered that Rawle anticipated that the Second Amendment would be used to prevent the states from violating an individual's Second Amendment rights. Id. Justice Scalia adopts an "either-or" position relative to the petitioner District of Columbia's argument that the Second Amendment does not provide for an individual's right to bear arms and Rawle's implicit assumption of Second Amendment incorporation implied by his reference to the Second Amendment as a restraint against state legislative action. Either the petitioner District of Columbia's argument prevails or Rawle's premise of Second Amendment incorporation is valid. Heller rejected the petitioner District of Columbia's argument leaving Rawle's premise of Second Amendment incorporation valid.

The relationship between the Fourteenth Amendment and the Second Amendment arose post-Civil War in the context of the Civil Rights Act of 1871 and the right of "freed blacks the right to keep and bear arms." Heller, 128 S.Ct. at 2810. In discussing section eight of the Civil Rights Act of 1871 and the Fourteenth Amendment, Congressional Representative Butler ("Rep. Butler") said:

> 'Section eight is intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to "keep and bear arms," and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same.'

Heller, 128 S.Ct. at 2810-11 (quoting Rep. Butler, H.R.Rep. No. 37, 41st Cong., 3d Sess., pp. 7-8 (1871)). "It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense." Id at 2811. In Rep. Butler's broad statement, state action is implied because the crime of larceny for taking personal property existed already. The issue was whether the states would enforce the law against larceny when freed black slaves were the victims. By iterating that it was an offense to take away arms and weapons, Rep. Butler sent a message to the states that the law must be enforced and violations not condoned no matter who the victim.

Finally, in discussing the impact of United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1876),[17] on incorporation, Justice Scalia includes a footnote that leans toward Second Amendment incorporation at its beginning and then

[17] In Cruikshank, 92 U.S. 542, the Supreme Court, "in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government." Id at 2812.

reaffirms the exclusive applicability of the Second Amendment to the federal government at its end:

> With respect to Cruikshank's continuing validity on incorporation, a question not presented by this case, we note that Cruikshank also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in Presser v. Illinois, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) and Miller v. Texas, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

Id at 2813 n. 23. In discussing the bases of Plaintiff's procedural due process claim, however, whether the claim rests on the due process clause of the Fourteenth Amendment *simpliciter* or on the Second Amendment's guarantee of the individual's right to bear arms as incorporated in the Due Process Clause of the Fourteenth Amendment, Plaintiff is entitled to relief if the state deprived him of his constitutional rights. See U.S. ex rel. Smith v. McMann, 417 F.2d 648, 657 (2d Cir. 1969) ("Whether the majority's ruling rests on the equal protection clause of the Fourteenth Amendment, on the Sixth Amendment's guarantee of the right to the assistance of counsel as incorporated in the due process clause of the Fourteenth, or on the due process clause of the Fourteenth simpliciter, Smith is not entitled to relief unless the State deprived him of his constitutional rights."). The Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kuck is a citizen of the United States and a citizen of the State of Connecticut, according to the Fourteenth Amendment, by virtue of his residence in the State of Connecticut. The state has deprived Kuck of his property interest and liberty interest by the illegal and unlawful use of its authority to deny his application for renewal of a state permit and the denial of a meaningful and timely opportunity for hearing on the denial. These denials of due process entitle Kuck to relief.

CONCLUSION

For the foregoing reasons and arguments submitted in sections I, II, and III, above, Kuck respectfully requests that the Order dismissing his Complaint and denying his Request for Leave to Amend, Motion to Supplement the Complaint, and Motion for Joinder of Party Defendants be reversed, the judgment vacated, and the matter remanded to the district court for further proceedings.

_____
Rachel M. Baird
Attorney for Plaintiff-Appellant

Dated: March 5, 2009

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. It contains 10,678 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure. It has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14 point type.

_____

Rachel M. Baird
Attorney for Plaintiff-Appellant

Dated: March 5, 2009

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

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