

1 Alan Gura, Calif. Bar No.: 178221
2 Gura & Possessky, PLLC
3 105 Oronoco Street, Suite 305
4 Alexandria, VA 22314
5 703.835.9085/Fax 703.997.7665

6 Donald E.J. Kilmer, Jr., Calif. Bar No.: 179986
7 Law Offices of Donald Kilmer, A.P.C.
8 1645 Willow Street, Suite 150
9 San Jose, CA 95125
10 408.264.8489/Fax 408.264.8487

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Ivan Peña, et al.,) Case No. 2:09-CV-01185-KJM-CKD
)
Plaintiffs,) MEMORANDUM OF POINTS AND
)
vs.) AUTHORITIES IN SUPPORT OF
)
Stephen Lindley,) PLAINTIFFS' MOTION TO
)
) SUPPLEMENT THE RECORD ON
)
) SUMMARY JUDGMENT
)
Defendant.)
_____)

PRELIMINARY STATEMENT

As the Court may recall, handguns may remain grandfathered on the California roster so long as manufacturers pay the annual listing fee. The Court's order of December 18, 2013 expressed interest in the number of semi-automatic handguns that "are grandfathered and not subject to the UHA's microstamping requirement."

A material change in the circumstances surrounding the grandfathered status of semi-automatics has arisen since the parties' responsive stipulation of December 31, 2013, regarding the state of the roster as it existed on October 23,

1 2013 (Exhibit A to Defendant’s declaration (Dkt. #59)). Semi-automatic handguns
2 made by a variety of manufacturers have begun to fall off the roster in large
3 numbers. Defendant publishes the roster at <http://certguns.doj.ca.gov/> (last visited
4 January 28, 2014). The Court is respectfully asked to take judicial notice of the
5 roster as it now exists. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-99 (9th
6 Cir. 2010) (judicial notice of data on government websites). As of this writing, the
7 roster contains 1,146 models, a 10% drop from October 23, 2013.
8

9 The roster will continue to shrink significantly. Two of the largest handgun
10 manufacturers, Sturm, Ruger & Co. (“Ruger”) and Smith & Wesson, have just
11 announced that they will curtail the continued listing of grandfathered semi-
12 automatic handguns. These manufacturers wish to continue improving and
13 modifying their rostered handgun designs, but cannot submit newly-modified
14 handgun models for testing absent the microstamping features which they assert
15 are infeasible.
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17 Ruger and Smith & Wesson have announced that they cannot commit to the
18 continued production of roster-compliant grandfathered models as they seek to
19 serve markets outside California. Thus, the number of semi-automatic handgun
20 models available for sale to California consumers will continue its steep decline. It
21 appears that absent relief from the microstamping requirement, semi-automatic
22 handguns will all but disappear from the California consumer market in due course.
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24 These material facts developed after the parties completed summary
25 judgment briefing and were therefore unavailable when the matter was submitted.
26 Accordingly, Plaintiffs seek to supplement the summary judgment record with the
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1 attached declarations of Michael Fifer, Chief Executive Officer of Sturm, Ruger &
2 Co.; and James Debney, President and Chief Executive Officer of Smith & Wesson,
3 setting forth their newly-developed circumstances.
4

5 Critically, Mr. Fifer declares that “the microstamping requirement is now
6 forcing Ruger to cease semi-automatic handgun sales in California as its handguns
7 are forced off the roster.” Fifer Decl., ¶ 7. The last of Ruger’s thirty rostered semi-
8 automatic handgun models will expire from the roster on September 15, 2014, “and
9 no Ruger semi-automatic handguns can or will be added to the roster unless the
10 microstamping requirement is rescinded.” *Id.* Mr. Debney declares that “Smith &
11 Wesson is losing its ability to sell many of its semi-automatic handguns in
12 California, as its handguns are forced off the roster.” Debney Decl., ¶ 7. Aside from
13 the M&P® Shield™, which, like the company’s SDVE™ pistols, was submitted for
14 roster testing just prior to the microstamping requirement taking effect, *id.* ¶ 8, all
15 of Smith & Wesson’s popular M&P® pistols will fall from the roster by this coming
16 August, most by the end of this month. *Id.* ¶ 7. Mr. Debney adds that “over time [it]
17 may be unrealistic” to expect any Smith & Wesson semi-automatic handgun models
18 to remain available for sale in California under the current microstamping regime.
19 *Id.* ¶ 8.
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22 ARGUMENT

23 Parties and counsel have an on-going duty to apprise the Court of material
24 developments that may impact the outcome of a case under submission. Moreover,
25 while the rules do not specifically authorize a motion to supplement the summary
26 judgment record, parties may file a motion for reconsideration based on new facts
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1 that were unavailable at the time the motion was submitted. *Sch. Dist. No. 1J v.*
2 *ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993) (“[a] district court may reconsider
3 its grant of summary judgment under either Federal Rule of Civil Procedure 59(e)
4 (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment)”); *see*
5 *also* Local Rule 230(j)(3). Indeed, even if a record does not support summary
6 judgment, “a successive motion for summary judgment is particularly appropriate
7 on an expanded factual record.” *Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th
8 Cir. 2010) (citations omitted). “[A] successive summary judgment motion potentially
9 can save all concerned the far greater expenses of a trial.” *Id.* at 912. It would
10 appear to be the better practice for parties to move to supplement the record with
11 new developments *before* the motion is first ruled on. *See, e.g., Pepper v. JC Penney*
12 *Corp.*, No. C07-1781-JCC, 2008 U.S. Dist. LEXIS 88494, at *-6-*7 (W.D. Wash. Oct.
13 16, 2008).

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17 CONCLUSION

18 Plaintiffs respectfully request that the record be supplemented.

19 Dated: January 28, 2014

Respectfully submitted,

20 Alan Gura, Cal. Bar No.: 178221
21 Gura & Possessky, PLLC
22 105 Oronoco Street, Suite 305
23 Alexandria, VA 22314
24 703.835.9085/Fax 703.997.7665
alan@gurapossessky.com

Donald E.J. Kilmer, Jr., Cal. Bar No. 179986
Law Offices of Donald Kilmer, A.P.C.
1645 Willow Street, Suite 150
San Jose, CA 95125
408.264.8489/Fax 408.264.8487
Don @DKLawOffice.com

25 /s/ Alan Gura

Alan Gura

25 /s/ Donald E.J. Kilmer, Jr.

Donald E.J. Kilmer, Jr.

26 Attorneys for Plaintiffs
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