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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**JEFF SILVESTER, BRANDON
COMBS, THE CALGUNS
FOUNDATION, INC., a non-profit
organization, and THE SECOND
AMENDMENT FOUNDATION,
INC., a non-profit organization,**

Plaintiffs,

v.

**KAMALA HARRIS, Attorney
General of California (in her
official capacity), and DOES 1 to
20.**

Defendants.

Case No. 1:11-cv-02137-AWI-SKO

**PLAINTIFFS' MOTION IN LIMINE
RE EXCLUSION OF DOCUMENTS**

1 **I. INTRODUCTION**

2 Plaintiffs hereby move this Court for an order excluding any and all evidence,
3 references to evidence, testimony or arguments relating to all of the legislative
4 history, court filings, books, government and NGO reports, scholarly articles and
5 magazine and newspaper articles. The motion is based upon the ground that the
6 evidence lacks a necessary foundation for admission, lacks proper authentication,
7 lacks relevance and is inadmissible hearsay.

8 Defendant has produced a list of documents that it intends to use at trial with
9 no explanation on what parts of the documents that she wishes to offer into
10 evidence or the relevancy. Most of the documents are not self-authenticating or
11 subject to judicial notice. In addition, the persons listed on Defendant's witness list
12 generally cannot lay the necessary foundation for the documents.¹ Without an offer
13 of proof regarding the admissibility, Plaintiffs will have to object when the
14 Defendant attempts to introduce each document which is unduly prejudicial to
15 Plaintiffs and a waste of this Court's time.

16 Defendant also failed to produce all of the court filings, the majority of the
17 books, the majority of government and NGO reports, the majority of the scholarly
18 articles, and all of the magazine and newspaper articles during discovery.

19 **II. LEGAL ARGUMENTS**

20 The Defendant has listed 16 books that it intends to use, 3 court filings, 13
21 government Reports, 25 supposedly scholarly articles and 11 magazine and
22 newspaper articles. Assuming these are relevant², it seems extremely unlikely that
23 the Defendant can lay the proper foundation or provide an exception to the hearsay
24 rule. It is anticipated that the Defendant will use some of these documents to
25 circumvent her failure to designate expert witnesses.³ It is therefore appropriate for
26 the Court to direct Defendant to make an offer of proof on the admissibility of each

27 ¹ The documents that Defendant proposes to use at attached to the Joint Pre-Trial Statement.

28 ² The relevance of some documents such as the books may become relevant depending on how
the Court rules on Plaintiffs' Motion in Limine on Burden of Proof.

³ Plaintiffs have filed a Motion in Limine regarding opinion testimony.

1 document.

2 **A. Relevance**

3 Because we do not know how the Defendant intends to use each document, it
4 is impossible to make a determination as to relevance.

5 **B. Foundation**

6 Defendant cannot lay a foundation for many of the documents on her list. She
7 has not listed the people qualified to testify about the foundational requirements on
8 her witness list, most of the documents do not fall within any exception such as a
9 business record and they cannot be judicially noticed.

10 **C. Test Results and Studies**

11 The Defendant has the burden to justify the 10-Day waiting period. This can
12 only be done through the use of expert testimony which the Court has already ruled
13 is not admissible. As set forth in the Court's Order denying Defendant's Motion For
14 Summary Judgment: "Additionally, as applied to individuals who already own a
15 gun, the Court has great difficulty envisioning how the "cooling off" rationale could
16 pass the appropriate level of scrutiny. If an individual already possesses a firearm,
17 then nothing about this rationale would prevent the individual from acting on a
18 sudden impulse to commit gun violence with the gun already in his or her
19 possession." The Defendant proposes to introduce documents related to firearm
20 availability and suicide prevention and other violence. These documents, however,
21 are not admissible. (See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.
22 579, 582-98, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993)
23 (expert and scientific evidence has a large potential to prejudice the other party and
24 confuse and mislead the jury, and for that reason, the trial judge must exercise
25 careful control over the admission of expert and scientific testimony and evidence
26 through the consideration of the Rule 403 factors).

27 **D. Excluding Evidence for Undue Prejudice**

28 This motion is used to exclude published articles and related evidence where

1 the prejudicial nature of such evidence outweighs the probative value. See
2 Staniewicz v. Beecham, Inc., 687 F.2d 526, 528–30, 11 Fed. R. Evid. Serv. 345 (1st
3 Cir. 1982); Federal Rule of Evidence 403. For example, newspaper articles have
4 been excluded where they were unduly cumulative [Bass v. Janney Montgomery
5 Scott, Inc., 210 F.3d 577, 587–88, 2000 FED App. 0135P (6th Cir. 2000)] or where
6 they contained inadmissible hearsay [McClure v. Mexia Independent School Dist.,
7 750 F.2d 396, 399–03, 21 Ed. Law Rep. 1167, 17 Fed. R. Evid. Serv. 109 (5th Cir.
8 1985)].

9 **E. Excluding Evidence Not Produced During Discovery**

10 In order to expeditiously litigate this matter on the issues framed during
11 discovery, it is appropriate to instruct Defendant to limit its evidence to those
12 documents, contentions and witnesses disclosed during discovery. Should
13 Defendant seek to introduce previously undisclosed matters, it is appropriate for the
14 court to exclude such evidence as an evidence sanction. (*Do It Yourself Moving &*
15 *Storage, Inc. v. Brown* (1992) 7 Cal.App.4th 27, 35.)

16 **III. CONCLUSION**

17 Based on the foregoing, Plaintiffs request this court exclude all of the above
18 referenced documentary evidence or require Defendants to submit an offer of proof
19 as to it's admissibility prior to the start of trial.

20
21 DATED: February 18, 2014

OTTEN & JOYCE, LLP

24 /s/ Victor Otten
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Victor Otten, Esq.
26 Attorneys for Plaintiffs
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