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8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE EASTERN DISTRICT OF CALIFORNIA

11  
12 **IVAN PEÑA, ROY VARGAS, DOÑA**  
13 **CROSTON, BRETT THOMAS, SECOND**  
14 **AMENDMENT FOUNDATION, INC., and**  
**THE CALGUNS FOUNDATION, INC.,**

15 Plaintiffs,

16 v.

17 **WILFREDO CID,**

18 Defendant.  
19

2:09-cv-01185-FCD-KJM

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
DEFENDANT CID'S RULE 56(f)  
MOTION.**

Date: October 16, 2009  
Time: 10:00 a.m.  
Dept: No. 2, 15th Floor  
Judge: Frank C. Damrell, Jr.  
Trial Date: None  
Action Filed: April 30, 2009

20 **INTRODUCTION**

21 Plaintiffs brought this action against Defendant Wilfredo Cid, Chief of the Bureau of  
22 Firearms of the California Department of Justice, to invalidate California's Unsafe Handgun Act  
23 ("UHA", or "the Act") on Second Amendment and equal protection grounds. The Act regulates  
24 the sale of certain handguns in California and requires, among other things, that those handguns  
25 be tested and listed on a particular state roster before they can be sold to consumers. Cid's motion  
26 to dismiss is set be heard on October 2.

27 Last week, plaintiffs filed a motion for summary judgment to be heard simultaneously with  
28 the motion to dismiss. But that motion for summary judgment is premature for a number of

1 reasons. First, the pending motion to dismiss will likely moot the summary judgment motion.  
2 Hearing the motions at the same time imposes unnecessary burdens on the Court and the parties.  
3 Second, this case is in its infancy and no discovery has taken place. Service of process was  
4 completed less than four months ago, the time for initial disclosures has yet to come and go, and  
5 this Court has declined to issue a scheduling order in light of Cid's motion to dismiss. Third, if  
6 for some reason this case overcomes the legal problems discussed in the motion to dismiss, it will  
7 become necessary to develop a specific factual record before litigating any motion for summary  
8 judgment. This matter involves facial and as-applied constitutional challenges to the entirety of  
9 the UHA.

10 Accordingly, this Court should grant Defendant Cid's motion under Federal Rule of Civil  
11 Procedure 56(f) and deny Plaintiffs' motion for summary judgment without prejudice to re-filing  
12 it, if appropriate, following the resolution of the motion to dismiss and after the parties have had  
13 an adequate time to conduct any necessary discovery.

#### 14 **LEGAL STANDARDS FOR RULE 56(F) MOTIONS**

15 When a party opposing a motion for summary judgment cannot present "facts essential to  
16 justify his opposition" to the motion, Rule 56(f) permits the party to submit an affidavit stating  
17 such reasons, and the court may continue or deny the motion if the opposing party needs to  
18 discover essential facts. *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th  
19 Cir. 1987) (citing *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302,  
20 1306 (9th Cir. 1986)). Specifically, Rule 56(f) provides:

21 If a party opposing the motion shows by affidavit that, for specified reasons, it cannot  
22 present facts essential to justify its opposition, the court may: (1) deny the motion; (2)  
23 order a continuance to enable affidavits to be obtained, depositions to be taken, or  
24 other discovery to be undertaken; or (3) issue any other just order.

24 Fed. R. Civ. Proc. 56(f).

25 The burden is on the party seeking a denial or continuance to demonstrate that the  
26 information sought exists, and that it would prevent summary judgment. *Nidds v. Schindler*  
27 *Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1997) (citations omitted). As a general rule, the  
28

1 moving party must also demonstrate that it diligently pursued previous discovery opportunities.  
2 *Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (9th Cir. 1994).

3 “Where, however, a summary judgment motion is filed so early in the litigation, before a  
4 party has had any realistic opportunity to pursue discovery relating to its theory of the case,  
5 district courts should grant any Rule 56(f) motion fairly freely.” *Burlington Northern & Santa Fe*  
6 *R.R. Co. v. The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana*, 323  
7 F.3d 767, 773 (9th Cir. 2003) (citations omitted). When “no discovery whatsoever has taken  
8 place, the party making a Rule 56(f) motion cannot be expected to frame its motion with great  
9 specificity as to the kind of discovery likely to turn up useful information, as the ground for such  
10 specificity has not yet been laid.” *Id.* at 774.

11 Finally, “where the facts are in possession of the moving party a continuance of a motion  
12 for summary judgment for purposes of discovery should be granted almost as a matter of course.”  
13 *Int’l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949 (3d Cir. 1990) (internal  
14 quotations and citations omitted).

## 15 ARGUMENT

### 16 I. THIS CASE IS AT ITS EARLIEST STAGE AND A POTENTIALLY DISPOSITIVE MOTION TO 17 DISMISS IS PENDING.

18 This case is only a few months old. After filing their initial complaint, and then an  
19 amended complaint, Plaintiffs did not complete service of process until May 14, which was less  
20 than four months ago. (Decl. of Anthony R. Hakl in Supp. of Def. Cid's Rule 56(f) Mot. (“Hakl  
21 Decl.”) ¶ 2.)

22 Additionally, Defendant Cid has not yet filed an answer. Rather, on July 6 he timely filed a  
23 motion to dismiss, noticing it for hearing on October 2, a date convenient to the schedules of all  
24 counsel. (Hakl Decl. ¶ 3; Doc. no. 8.) Plaintiffs want their motion for summary judgment to be  
25 heard on the same day. (Hakl Decl. ¶ 4.) But the Court’s granting of the motion to dismiss  
26 would dispose of this case in its entirety. (Hakl Decl. ¶ 3.) It would be a waste of the parties and  
27 Court’s resources to litigate a motion for summary judgment before the resolution of Defendant’s  
28 motion to dismiss.

1           Moreover, the parties only met and conferred as required under Federal Rule of Civil  
2 Procedure 26(f) on August 17, which was less than thirty days ago. (Hakl Decl. ¶ 5.) On August  
3 18, they filed a joint status report, in which Defendant set forth his position on discovery. (Hakl  
4 Decl. ¶ 6; Doc. no. 11.) Defendant explained that if this matter did not resolve at the pleadings  
5 stage, he would need to conduct discovery regarding Plaintiffs' claims, which include facial and  
6 as-applied challenges to an entire state statutory scheme. (Doc. no. 11.) The joint status report  
7 also reflects the parties' agreement to make initial disclosures on September 16, a date which has  
8 yet to pass. (*Id.*) Initial disclosures mark the very beginning of the discovery process in federal  
9 court. In the joint status report, Defendant also indicated an intention to object to any premature  
10 motion for summary judgment. (*Id.*)

11           Finally, by Minute Order filed August 21, this Court declined to even schedule this case in  
12 light of the pending motion to dismiss. (Doc. no. 12.) The order explained that a schedule would  
13 issue only if necessary following the issuance of an order on the motion. (*Id.*) Thus, there is not  
14 even a discovery cut-off date at this time.

15           This case is in its infancy with a potentially dispositive motion to dismiss pending. The  
16 Court should therefore grant Cid's Rule 56(f) motion and deny Plaintiffs' motion for summary  
17 judgment without prejudice to re-filing it, if appropriate, following the resolution of the motion to  
18 dismiss. *See Burlington Northern & Santa Fe R.R. Co.*, 323 F.3d at 773 ("district courts should  
19 grant any Rule 56(f) motion fairly freely" where "a summary judgment motion is filed so early in  
20 the litigation, before a party has had any realistic opportunity to pursue discovery relating to its  
21 theory of the case"). Additionally, as explained below, any renewed motion for summary  
22 judgment should not be filed and heard until the parties have had an adequate time to conduct  
23 discovery, which will be necessary only if Defendant's motion to dismiss is denied.

24       **II. IF THIS MATTER SURVIVES THE MOTION TO DISMISS, DEFENDANT WILL NEED TO**  
25       **ADDRESS A NUMBER OF FACTUAL MATTERS THROUGH DISCOVERY TO ADEQUATELY**  
26       **OPPOSE ANY MOTION FOR SUMMARY JUDGMENT.**

27           The early stage of this case has precluded any meaningful opportunity to conduct discovery.  
28 Defendant also has not served any discovery requests in light of the pending motion to dismiss  
and in the interest of conserving everyone's resources. (Hakl Decl. ¶ 8.) Indeed, at such an early

1 stage, Defendant cannot be expected to frame with much specificity the kind of discovery that  
2 will be needed. *Burlington Northern & Santa Fe R.R. Co.*, 323 F.3d at 774 ("where . . . no  
3 discovery whatsoever has taken place, the party making a Rule 56(f) motion cannot be expected  
4 to frame its motion with great specificity as to the kind of discovery likely to turn up useful  
5 information, as the ground for such specificity has not yet been laid.").

6 Nevertheless, if for some reason this action survives the legal challenges raised in the  
7 pending motion to dismiss, Defendant is currently aware of some of the factual matters that will  
8 likely need to be addressed through discovery. For example, Defendant will need to know the  
9 identity of each "willing seller" for each of the handguns referenced in the amended complaint.  
10 (Hakl Decl. ¶ 9.) Plaintiffs will need to prove that each seller is someone actually subject to the  
11 Act, such as a licensed firearm dealer, as opposed to someone to whom the Act does not apply,  
12 such as a private party (i.e., one who does not hold a dealer's license) seeking to transfer a firearm  
13 to another private party. *See* Cal. Penal Code § 12132(a). Non-party discovery to each seller,  
14 such as a records or deposition subpoena, will also be necessary to verify that he or she is in fact  
15 willing and otherwise qualified to sell the firearms at issue. (Hakl Decl. ¶ 9.)

16 Additionally, Cid will likely need to ascertain the precise nature of Plaintiffs' claims  
17 brought against him in his individual capacity. (Hakl Decl. ¶ 10.) It is simply unclear at this  
18 early stage whether Plaintiffs' individual-capacity claims have any factual basis. Thus, Defendant  
19 will need to depose each of the individual Plaintiffs to ascertain what conduct by Cid, if any, links  
20 him personally to each of the constitutional violations alleged in the complaint. *See Taylor v.*  
21 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (stating that defendants are liable under section 1983  
22 upon showing of personal participation and that supervisors are liable for the constitutional  
23 violations of their subordinates "if the supervisor participated in or directed the violations, or  
24 knew of the violations and failed to act to prevent them").

25 Indeed, as discussed in Defendant's motion to dismiss, all of Plaintiffs' claims fail as a  
26 matter of law. But if for some reason this action survives that motion, a factual record of some  
27 specificity will be needed before this Court could rule in Plaintiffs' favor on their claims that the  
28 Unsafe Handgun Act violates both the Second Amendment and equal protection on its face and as

1 applied to each of the Plaintiffs. As the Supreme Court has stated, courts should not “formulate a  
2 rule of constitutional law broader than is required by the precise facts to which it is to be applied.”  
3 *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1191 (2008)  
4 (internal quotations omitted).

5 Any development of the factual record in this case will likely involve discovery, perhaps  
6 expert discovery, regarding the characteristics of each of the firearms Plaintiffs want to buy and  
7 how they differ from firearms on the state roster. For example, whether the differences between  
8 the particular firearm Plaintiff Doña Croston wants to buy and the handguns already on the roster  
9 are more than cosmetic will likely be material to Croston's claim that the UHA is being  
10 unconstitutionally applied to her. Other discovery will be aimed at determining whether any of  
11 the more than 1,300 firearms on the roster are suitable to Plaintiffs, which will likely be material  
12 to evaluating whether the Act meaningfully impedes on the rights asserted by Plaintiffs. (Hakl  
13 Decl. ¶ 11.)

14 These are just some of the questions that will probably need to be answered to adequately  
15 respond to any summary judgment motion by plaintiffs if this action manages to survive the  
16 pending motion to dismiss. In fact, in that event, the Court itself may identify additional factual  
17 issues that will need to be resolved.

18 Finally, Defendant believes that any discovery, if it becomes necessary, can be completed  
19 within the time frames he proposed in his joint status report. (Hakl Decl. ¶ 12.)

## 20 CONCLUSION

21 This case has been on file for scarcely four months. As discussed in Defendant's motion to  
22 dismiss, all of Plaintiffs' claims fail as a matter of law. There is no need to rush to the summary  
23 judgment stage or the discovery process that summary judgment motions entail. A factual record  
24 of some specificity should be developed only if necessary following the resolution of Defendant's  
25 motion to dismiss. Therefore, the Court should grant Defendant's Rule 56(f) motion and deny  
26 Plaintiffs' motion for summary judgment without prejudice to re-filing it, if appropriate,  
27 following the resolution of the motion to dismiss and after the parties have had an adequate time  
28 to conduct discovery. In the alternative, the Court should at least continue the hearing on the

1 motion for summary judgment to a date after the motion to dismiss hearing so that Cid will have  
2 an opportunity to conduct discovery.

3 Dated: September 9, 2009

Respectfully Submitted,

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7 /s/ ***Anthony R. Hakl***

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