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

|    |                    |   |                                |
|----|--------------------|---|--------------------------------|
| 18 | Ivan Peña, et al., | ) | Case No. 2:09-CV-01185-FCD-KJM |
|    |                    | ) |                                |
| 19 | Plaintiffs,        | ) | PLAINTIFFS' SUPPLEMENTAL       |
|    |                    | ) | REPLY BRIEF                    |
| 20 | v.                 | ) | RE: STAY OF ACTION             |
| 21 | Wilfredo Cid,      | ) | Date: Oct. 2, 2009             |
|    |                    | ) | Time: 12:00 p.m.               |
| 22 | Defendants.        | ) | Judge: Frank C. Damrell, Jr.   |
|    |                    | ) |                                |

23 Plaintiffs respectfully oppose the suggestion by Defendant that no summary judgment  
24 motion be considered until after a motion to dismiss is first resolved. This suggestion quite  
25 simply contradicts the established practice of resolving cases, as well as the express language  
26 of the forthcoming revision to Rule 56, effective December 1, 2009.

27 District courts traditionally resolve cases on dispositive cross-motions because doing  
28 so conserves judicial resources. An appellate court, on a record containing cross-motions, can  
resolve more questions by granting in whole or in part motions that were not granted by lower  
courts, without need of additional proceedings. Indeed, this was exactly the procedure

1 followed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The District Court granted  
2 the city's motion to dismiss and denied the plaintiffs' motion for summary judgment, but the  
3 D.C. Circuit specifically granted the summary judgment motion, and the Supreme Court  
4 affirmed. *McDonald v. City of Chicago*, No., 08-1521 may well follow the identical path.  
5

6 Rule 56 currently allows plaintiffs to file summary judgment motions within 20 days  
7 of the initiation of the action. Under the current rules the motion would therefore be timely  
8 upon the lifting of any stay. However, Rule 56 as it would be operative in a post-*McDonald*,  
9 post-*Nordyke* environment (after Dec. 1, 2009) will authorize a summary judgment motion by  
10 either party "at any time until 30 days after the close of all discovery."  
11

12 Respectfully, the Court should decide this matter on a full record, consistent with  
13 Plaintiffs' prerogatives under Rule 56 and in accordance with the normal procedure governing  
14 the disposition of cases on cross-motions.

15 Dated: October 2, 2009

Respectfully submitted,

16  
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