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12 **IN THE UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**
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15 EDWARD PERUTA, MICHELLE)
LAXSON, JAMES DODD, DR. LESLIE)
16 BUNCHER, MARK CLEARY, and)
CALIFORNIA RIFLE AND PISTOL)
17 ASSOCIATION FOUNDATION)
18 Plaintiff,)
19 v.)
20 COUNTY OF SAN DIEGO, WILLIAM D.)
GORE, INDIVIDUALLY AND IN HIS)
21 CAPACITY AS SHERIFF,)
22 Defendants.)

CASE NO. 09-CV-2371 IEG (BGS)
**PLAINTIFFS’ EX PARTE MOTION FOR
LEAVE TO FILE SUR-REPLY IN
RESPONSE TO DEFENDANT’S REPLY
IN SUPPORT OF DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT,
EXHIBIT “A” (PROPOSED SUR-REPLY)**

Hon. Irma E. Gonzalez
Date Action Filed: October 23, 2009

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25 Plaintiffs hereby move this Court to allow Plaintiffs to file a five (5) page Sur-Reply in
26 opposition to Defendant William Gore’s Reply in Support of Defendant’s Motion for Summary
27 Judgment (“Defendant’s Reply”).
28

1 INTRODUCTION

2 The negotiated Stipulated briefing Schedule on these cross-motions was specifically
3 designed to provide both parties an equal amount of pages (45) to make their respective
4 arguments. With the Defendants' 5-page extension, they have now been given 50 pages.

5 Defendants, in violation of the Stipulated Briefing Schedule and contrary to Ninth Circuit
6 case law, raised new legal arguments in its Reply. Plaintiffs should be permitted to address these.

7 The filing of a brief sur-reply will not delay these proceedings. Per Local Rule 83.3.h.2,
8 counsel for the parties conferred prior to the filing of this motion. Counsel for Defendants stated
9 that they are unwilling to stipulate to allow Plaintiffs to file a sur-reply.

10 ARGUMENT

11 **I. Allowing Defendants to Exceed the Page Limits, but Denying Plaintiffs Leave to File a**
12 **Sur-Reply would Defeat the Purpose of the Stipulated Briefing Schedule and Prejudice**
13 **Plaintiffs**

14 In accordance with the stipulated briefing schedule stipulated to by the parties and granted
15 by this Court on September 8, 2010, the following events occurred:

16 On September 3, 2010, Plaintiffs filed a Motion for Partial Summary Judgment, the
17 supporting Points and Authorities which were not to, and did not, exceed 25 pages.

18 On October 4, 2010, Defendants filed their Opposition to Plaintiffs' Motion, and
19 simultaneously Defendants' Cross-Motion for Summary Judgment, the supporting Points and
20 Authorities for which were not to, and did not exceed 35 pages total.

21 On October 5, 2010, due to the fact that the Brady Campaign also submitted a lengthy and
22 substantial amicus curiae brief in support of Defendant's Cross-Motion for Summary Judgment
23 and Opposition to Plaintiffs' Motion for Partial Summary Judgment, and the fact that Defendants
24 included a lengthy declaration by Mr. Franklin Zimring in support of their Cross-Motion and
25 Opposition to Plaintiffs' Motion for Partial Summary Judgment, the parties filed a joint motion to
26 amend the briefing schedule in order to allow Plaintiffs an additional week to file their response.
27 Plaintiffs also agreed to grant Defendants an extra week to file their Reply.

28 On October 18, 2010, Plaintiffs filed their Consolidated Reply to Defendant's Opposition
and Plaintiffs' Opposition to Defendants' Cross-Motion, the supporting Points and Authorities for

1 which were not to, and did not, exceed 20 pages total, as had been agreed.

2 On November 1, 2010, Defendants filed their Reply to Plaintiffs' Opposition, the supporting
3 Points and Authorities for which were not exceed 10 pages. *The issues addressed in this Reply*
4 *were to be limited to responding only to the issues raised in Plaintiffs' Opposition to Defendants'*
5 *Cross-Motion*. Defendants sought leave to exceed the 10 page limitation by five pages. The Court
6 granted that request.

7 Defendants' reason for seeking a five (5) page extension on their Reply is to address the
8 expert declarations and the additional documents Plaintiffs submitted in support of their
9 Opposition. *See* Defendant's Motion to Exceed Page Limit for Reply 1:21-23 ("Because Plaintiffs
10 have offered new evidence in the form of three expert declarations as well as additional
11 documents with their Opposition, Defendant requires additional pages for the Reply."). But
12 despite Plaintiffs being faced with an extensive declaration, new evidence, and an amicus brief in
13 preparing their Opposition/Reply, in accordance with the stipulation and court order Plaintiffs did
14 not seek a page-limit extension.

15 **II. Plaintiffs Should be Allowed to Address Defendants' New Arguments**

16 Under the recitals set forth in both joint motions to amend the briefing schedule, the most
17 recent of which was granted by the Court on October 8, 2010, the issues in Defendant's Reply
18 were to be limited exclusively to those raised in Plaintiffs' Opposition to Defendant's Motion for
19 Summary Judgment. *See* Joint Motion to Adopt Stipulated Briefing Schedule (October 5, 2010) at
20 3:13-15 ("The issues addressed in this Reply shall be limited to responding to the issues raised in
21 Plaintiffs' Opposition to Defendants' Cross-Motion."). That Joint Motion was granted because the
22 Court found good cause for amending the briefing schedule of this case "*in accordance with the*
23 *parties' request.*" (Order Granting Joint Motion of the Parties to Adopt Stipulated Briefing
24 Schedule, October 8, 2010) (emphasis added).

25 Despite this limitation, Defendants last brief raised new arguments as to why their CCW
26 issuance policy is constitutional, as well as arguments regarding their position on the applicable
27 standard of review in this case. Defendants are now arguing that unloaded, open carry of a firearm
28 with ammunition nearby is a method of carrying a firearm that satisfies the requirements of the

1 Second Amendment. And, Defendants reveal new cases involving the question of bearing arms
2 pending before the Ninth Circuit, neither of which Plaintiffs have had an opportunity to address.

3 Defendants had ample opportunity to raise the arguments in their Opposition to Plaintiffs'
4 Motion, but failed to. "Parties should not raise new issues for the first time in their reply briefs."
5 *Pac. Rollforming, LLC v. Trakloc N. Am., LLC*, 2010 U.S. Dist. LEXIS 60756 (S.D. Cal. June 17,
6 2010). *See also Ass'n of Irrigated Residents v. C & R Vanderham Dairy*, 435 F. Supp. 2d 1078,
7 1089 (E.D. Cal. 2006) ("It is inappropriate to consider arguments raised for the first time in a
8 reply brief."); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) ("[W]e decline
9 to consider new issues raised for the first time in a reply brief."); *Bazuaye v. INS*, 79 F.3d 118, 120
10 (9th Cir. 1996) ("Issues raised for the first time in the reply brief are waived."); *United States ex*
11 *rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving
12 party to introduce new facts or different legal arguments in the reply brief than those presented in
13 the moving papers.").

14 When a court does exercise its discretion and chooses to rely on materials raised for the first
15 time in a reply brief, the opposing party *must* be afforded a reasonable opportunity to respond. *See*
16 *Beaird v Seagate Tech, Inc.*, 145 F.3d 1159, 1164-1165 (10th Cir. 1998).

17 Because Defendants raised new issues in their Reply brief in direct violation of the recitals
18 of the Joint Stipulated Briefing Schedule, and Ninth Circuit precedent, thereby placing Plaintiffs
19 in a precarious and prejudicial position, Plaintiffs seek to file the proposed sur-reply attached
20 hereto as Exhibit "A."

21 CONCLUSION

22 For the aforementioned reasons, Plaintiffs respectfully request leave to file their proposed
23 five (5) page Sur-Reply in Opposition to Defendant's Reply.

24 MICHEL & ASSOCIATES, PC

PAUL NEUHARTH, JR., APC

25
26 By: /s/ C. D. Michel
(as approved on 11/8/10)
27 C. D. Michel
Attorney for Plaintiffs

By: /s/ Paul Neuharth, Jr.
(as approved on 11/8/10)
Paul Neuharth, Jr.
Attorney for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD PERUTA, MICHELLE)	CASE NO. 09-CV-2371 IEG (BGS)
LAXSON, JAMES DODD, DR.)	
LESLIE BUNCHER, MARK)	CERTIFICATE OF SERVICE
CLEARY, and CALIFORNIA RIFLE)	
AND PISTOL ASSOCIATION)	
FOUNDATION)	
)	
Plaintiff,)	
)	
v.)	
)	
COUNTY OF SAN DIEGO,)	
WILLIAM D. GORE,)	
INDIVIDUALLY AND IN HIS)	
CAPACITY AS SHERIFF,)	
)	
Defendants.)	

IT IS HEREBY CERTIFIED THAT:
I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

**PLAINTIFFS’ EX PARTE MOTION FOR LEAVE TO FILE SUR-REPLY IN
RESPONSE TO DEFENDANT’S REPLY IN SUPPORT OF DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT, EXHIBIT “A” (PROPOSED SUR-REPLY)**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on November 8, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs