SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: **Edward Hunt vs State of California**	
LAW AND MOTION MINUTE ORDER	Case Number: **01CECG03182 AMS**

Hearing Date: **MARCH 22, 2007** Hearing Type: **Summary Judgment**

Department: **72** Judge/Temporary Judge: **Alan Simpson**

Court Clerk: K. Artis Reporter/Tape: S. McKennon

Appearing Parties:

Plaintiff: **Carl D. Michel, Attorney, via Court Call**

Counsel: Jason Davies, Attorney at Law, present in court

Defendant:

Counsel: Doug Woods, Attorney at Law

☐ Off Calendar

☐ Continued to ☐ Set for _____ at _____ Dept. _____ for _____

☐ Submitted on points and authorities with/without argument. ☒ Matter is argued and submitted.

☐ Upon filing of points and authorities.

☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.

☐ Taken under advisement

☐ Demurrer ☐ overruled ☐ sustained with _____ days to ☐ answer ☐ amend

☒ Tentative ruling becomes the order of the court. No further order is necessary.

☒ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

☒ Service by the clerk will constitute notice of the order.

☐ Time for amendment of the complaint runs from the date the clerk serves the minute order.

☐ Judgment debtor _____ sworn and examined.

☐ Judgment debtor _____ failed to appear.
Bench warrant issued in the amount of $ _____

Judgment:

☐ Money damages ☐ Default ☐ Other _____ entered in the amount of:
Principal $ _____ Interest $ _____ Costs $ _____ Attorney fees $ _____ Total $ _____

☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to $ _____ per _____

Further, court orders:

☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.

☐ $ _____ to be released to judgment creditor and balance returned to judgment debtor.

☐ Levying Officer, County of _____, notified. ☐ Writ to issue

☐ Notice to be filed within 15 days. ☐ Restitution of Premises

☒ Other: The plaintiff's Summary Judgment is denied and the defendants' Summary Judgment is granted as to the first cause of action. The defendants' motion as to the second, fifth and sixth causes of action is denied. See attachment for details.

03

Tentative Ruling

Re: ***Hunt v. State of California***
Case No. 01 CE CG 03182

Hearing Date: March 22nd, 2007 **(Dept. 72)**

Motion: Plaintiffs' Motion for Summary Judgment/Summary Adjudication

Defendants' Motion for Summary Judgment/Summary Adjudication

Tentative Ruling:

To deny the plaintiffs' motion for summary judgment, or in the alternative summary adjudication, in its entirety. (CCP § 437c.)

To grant defendants' motion for summary adjudication as to the first cause of action. (CCP § 437c.) To deny defendants' motion as to the second, fifth and sixth causes of action. (*Ibid.*)

Explanation:

Plaintiffs' Motion: The plaintiffs have moved for summary adjudication of the first, second, fifth and sixth causes of action. With regard to the motion for summary adjudication of the first cause of action, plaintiffs argue that the DOJ's regulation defining the term "flash suppressor" unlawfully expands the concept of a flash suppressor to include other types of devices such as muzzle brakes and compensators, which the Legislature did not intend to include as characteristics of assault weapons.

However, judicial review of administrative rulemaking is generally deferential, and "is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law." (*Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 605.) In the present case, the Legislature authorized the DOJ to promulgate those regulations "that may be necessary and proper to carry out the purposes and intent of [the Assault Weapons Control Act]." (Penal Code § 12276.5(c).) Thus, the Legislature granted the Attorney General broad authority to enact regulations necessary to effectuate the purposes of the AWCA.

DOJ regulation 12.8.978.20(b) defines the term "flash suppressor" as "any device designed, intended or that functions to perceptibly reduce or redirect

muzzle flash from the shooter's field of vision." (CCR § 12.8.978.20(b).) Plaintiffs contend that this definition conflicts with the established definition of the term "flash suppressor", which is generally defined as an object designed or intended to reduce flash. (See Decl. of Torrey Johnson, ¶. 6, Decl. of Jess Guy, ¶ 13.) However, defendants contend in opposition that there was no single, established definition of the term "flash suppressor" before the DOJ adopted its regulation, and that the existing definitions of the term did not consistently state that a flash suppressor must be designed or intended to reduce flash. (Ignatius Chinn decl., ¶ 13, Exhibit A to Chinn decl.)[1]

The sources cited by defendants do appear to show that there were many conflicting definitions of the term "flash suppressor" in use at the time the DOJ adopted its regulation, and that many of the definitions did not rely on the fact that the device was designed or intended to reduce flash. (Chinn decl., Exhibit A.) For example, The NRA/ILA Glossary does define a flash suppressor as "a muzzle attachment intended to reduce visible muzzle flash caused by burning propellant." (*Ibid.*) However, the Dictionary of Weapons and Military Terms states that a flash suppressor is "a device attached to the muzzle of a weapon which reduces the amount of visible light or flash created by burning propellant gases." (*Ibid.*) Thus, at least some reference materials did not rely on the design or intent of the device, but apparently defined a flash suppressor by the effect that the device has on flash. Consequently, the court cannot state as a matter of law that the DOJ's definition unlawfully expanded the accepted definition of the term "flash suppressor", since there was no unified definition of the term at the time the DOJ adopted its regulation.

Plaintiffs contend that the regulatory definition is not "necessary and proper to carry out the purposes and intent" of the AWCA, because the Act specifically states that it is not intended to restrict weapons that are primarily designed for legitimate purposes such as hunting, target shooting and other sporting or recreational activities. (Penal Code § 12275.5.) Plaintiffs contend that the DOJ's definition of "flash suppressor" would encompass legitimate civilian weapons with muzzle brakes or compensators, and thus the DOJ's definition violates the Legislature's declared purpose. However, the court notes that the language of the AWCA does not expressly exclude weapons with compensators or muzzle brakes, nor does it define the term "flash suppressor." Therefore, it is unclear whether the Legislature even intended to make a distinction between the different types of devices. As defendants' expert points out, some devices that are labeled muzzle brakes or compensators also have the effect of reducing flash. (Chinn decl., ¶ 13.) Thus, there is no reason to believe

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[1] Plaintiffs have raised multiple objections to the declaration of defendants' expert, Ignatius Chinn. Plaintiffs claim that Chinn is not qualified to offer expert testimony. However, the declaration of Chinn appears to sufficiently establish his credentials as a firearms expert. (See Chinn decl., ¶¶ 2-4.) Plaintiffs also question Chinn's qualifications to testify as to the legal position of the DOJ. Again, however, as a supervisor with the DOJ, Chinn appears to be qualified to testify as to the DOJ's position regarding the law. Therefore, the court intends to overrule the objections to Chinn's declaration, except as noted below with regard to defendants' motion.

that simply because the DOJ's definition of the term "flash suppressor" might encompass some muzzle brakes or compensators, therefore the regulation violates Legislative intent. Consequently, the court intends to deny the plaintiff's motion for summary adjudication as to the first cause of action.

Plaintiff's second cause of action raises a vagueness challenge regarding the regulatory definition of "flash suppressor." Plaintiffs argue that the defendants' definition of flash suppressor as a device that is "designed, intended to, or that functions to perceptibly reduce or redirect flash from the shooter's field of vision" is impermissibly vague, because there is no way for a person of ordinary intelligence or a law enforcement official to determine whether a device actually functions to reduce or redirect flash.

"A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California Constitutions." (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1151.) "A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications." (*Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498.)

On the other hand, the Supreme Court has indicated that a law may be void for vagueness where it reaches a substantial amount of constitutionally protected conduct. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8.) Also, where a statute imposes criminal penalties, the standard of certainty is higher. (*Ibid.*) "When vagueness permeates the text of such a law, it is subject to facial attack." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 55.)

Recently, the California Supreme Court in *In re Jorge M.* (2000) 23 Cal.4th 866 ruled on the question of whether the AWCA was unconstitutionally vague on its face. The court noted,

> That a criminal statute contains one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face (see *People v. Askey* (1996) 49 Cal. App. 4th 381, 386-387 [56 Cal. Rptr. 2d 782]), nor does it imply the statute cannot, in general, be fairly applied without proving knowledge of its terms. In cases where the information reasonably available to a gun possessor is too scant to prove he or she should have known the firearm had the characteristics making it a defined assault weapon, the possessor will not be subject to section 12280(b) as construed here. This is sufficient to protect against any significant possibility of punishing innocent possession. To require more--especially to require knowledge of the law as the amici curiae propose--would seriously impede effective enforcement of the AWCA, contrary to

the legislative intent. Nothing in the language or history of the AWCA suggests the Legislature intended to create, in section 12280, an exception to the fundamental principle that all persons are obligated to learn of and comply with applicable laws. (*Id.* at 886.)

Thus, the Supreme Court found that a gun owner does not have to have actual knowledge that a gun possesses certain characteristics making it an assault weapon under the AWCA, as long as the owner knew or reasonably should have known that the weapon possessed characteristics bringing it within the AWCA. (*Id.* at 885.) In other words, the *mens rea* requirement of the AWCA sufficiently protects against the possibility that innocent gun owners will be prosecuted under the AWCA due to a failure to understand what types of weapons are restricted under the law. (*Id.* at 886.)

Here, there is at least a triable issue as to whether the *mens rea* requirement of the AWCA provides insurance that innocent firearms owners will not be unfairly prosecuted based on their failure to understand what constitutes a flash suppressor. Since the prosecution will have to prove beyond a reasonable doubt that the defendant in a criminal prosecution under the AWCA knew or reasonably should have known that his or her weapon had a flash suppressor, the fact that some devices may, unbeknownst to the owner, function to reduce or redirect flash will not necessarily expose the owner to a high risk of criminal conviction. It is worth noting in this regard that plaintiffs have never pointed to any criminal prosecutions or threatened prosecutions based on confusion over the flash suppressor definition of the AWCA, despite the fact that the present case has been pending for over five years. The absence of such prosecutions indicates that the danger to an average gun owner posed by any confusion over the definition of the term "flash suppressor" is not inordinately high.

Also, while plaintiffs may be correct that it is difficult or impossible for an average person to determine with any degree of certainty whether a device actually functions to reduce or redirect flash, since proper testing procedures and facilities are not generally available to the public, an average gun owner may nevertheless be on notice that their particular weapon might have a flash suppressor based on a visual inspection of the weapon. Therefore, defendants' expert's statement that an ordinary person could determine whether their rifle has a flash suppressor by inspection of the device is sufficient to raise a triable issue of material fact with regard to the vagueness challenge. (Chinn decl., ¶ 11.) Likewise, if the manufacturer's manual describes the device as a flash suppressor, then clearly the owner would be on notice of the fact that his weapon falls within the DOJ definition. (*Ibid.*)

In addition, law enforcement officials are also on notice as to what constitutes a flash suppressor based on the same widely available and easily obtained information, so there is no need for them to develop complicated testing procedures. (Chinn decl., ¶ 11.) Nor is there a need for the DOJ incorporate

standards for such testing in its regulatory definition of the term "flash suppressor." Therefore, the court intends to deny the plaintiffs' motion for summary adjudication on the second cause of action.

Plaintiffs' fifth cause of action alleges that the term "permanently alter" in Penal Code §§ 12020(c)(5) and 12276.1 is unconstitutionally vague and confusing, and that the DOJ must issue a regulation defining the term. Plaintiffs claim that the term "permanently alter" is subject to multiple interpretations, and therefore the DOJ must issue a regulation to define the term more precisely. However, the plaintiffs concede that the DOJ original proposed definition of the term to mean "any irreversible change or modification" was not helpful, because any object can be altered given sufficient time and resources. (Decl. of Jess Guy, ¶ 47-51.) Indeed, the DOJ apparently agreed with the plaintiffs' position, since it decided that its original proposed definition did not add any clarity to the term. (See Chinn decl., ¶ 17.) The DOJ concluded that the term "permanently alter" was sufficiently understood without further definition. (*Ibid.*)

There is at least a triable issue as to whether the term "permanently alter" is not so confusing or unclear that the DOJ was required to issue a regulation defining it further. An administrative agency is not required to issue regulations to address every conceivable question. (*Shalala v. Guernsey Memorial Hospital* (1995) 514 U.S. 87, 96.)

> [I]n the absence of an express legislative command, the decision whether administrative regulations are necessary or appropriate is a matter entrusted to the discretion of the administrative agency. [Citation omitted.] The agency's decision, which is legislative in character, comes to the court with a strong presumption of correctness, and the court must defer to the agency's expertise unless its decision is arbitrary and capricious. [Citations.] As stated in *Tailfeather v. Board of Supervisors* (1996) 48 Cal. App. 4th 1223 [56 Cal. Rptr. 2d 255], an agency decision not to institute rulemaking should be overturned only in the rarest and most compelling circumstances. [Citation.] (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 503.)

Here, the court cannot hold as a matter of law that the DOJ's decision not to issue a rule was arbitrary or capricious. The DOJ determined that any definition it issued would not provide greater clarity to the term "permanently alter", and it therefore chose not to issue any definition at all, instead relying on the common meaning of the term. (Chinn decl., ¶ 17.) Webster's Dictionary defines "permanent" as "continuing or enduring without fundamental or marked change." (Webster's New Collegiate Dictionary (1977), p. 854.) Thus, applying the commonly understood definition, to "permanently alter" a magazine to accept no more than 10 rounds would mean to alter the magazine in a way that continues without fundamental change. As a practical matter, it does not appear to be possible for the DOJ to issue a definition that lists every possible way for a

gun owner to permanently alter a magazine to accept no more than 10 rounds. (Chinn decl., ¶ 18.) At the very least, there is a triable issue of material fact as to whether the DOJ's decision not to issue a regulation defining the term "permanently alter" was arbitrary or capricious. Therefore, the court intends to deny the motion for summary adjudication of the fifth cause of action.

Finally, plaintiffs seek summary adjudication of their sixth cause of action, which alleges that defendants have engaged in a pattern of "misleading and inconsistent communications and actions" regarding the AWCA. However, the court notes that plaintiffs have stated that they intend to dismiss their claim as it relates to the allegedly confusing definition of the term "detachable magazine", so that portion of the complaint is no longer at issue. (See plaintiffs' reply, p. 1:22.)

Also, the plaintiffs' argument regarding the alleged inconsistency of allowing the Single Action Shooting Society (SASS) to import large capacity lever action rifles into the state for shooting competitions is now moot. Subsequent to the filing of the present suit, the Legislature enacted an exception to the law that exempts lever action rifles from the definition of "assault weapons." (See Penal Code § 12020(c)(25)(C).) Therefore, there is no need for the court to rule on the question of whether the defendants acted inconsistently in allowing the importation of lever action rifles into the state.

Plaintiffs also argue in the motion for summary adjudication that defendants have acted inconsistently with regard to Smith & Wesson's Walther P22 pistol, and in issuing assault weapons permits to gun dealers, and in making certain statements on its web page regarding removal of characteristics of a weapon. (See plaintiffs' points and authorities, pp. 18:7-19:22.) However, none of these allegedly inconsistent statements and actions are alleged in the first amended complaint. A motion for summary judgment can only address issues raised in the pleadings. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98.) Therefore, the plaintiffs cannot obtain summary adjudication based on these alleged inconsistencies.

The only remaining ground alleged in the sixth cause of action is the plaintiffs' claim that the DOJ has issued inconsistent statements regarding whether the Browning BOSS and Springfield Armory Muzzle Break devices are "flash suppressors" within the meaning of the regulatory definition. The DOJ has issued letters stating that the devices are not flash suppressors, yet the plaintiffs contend that the devices do function to reduce flash from the shooter's field of vision, and therefore they are flash suppressors under the DOJ's definition. Thus, plaintiffs conclude that the DOJ has taken a position that is inconsistent with their own regulations.

However, the plaintiffs' own expert states that the Springfield Muzzle Break and Browning BOSS "each has some unintended effect in redirecting some of the flash out of the shooter's field of vision (***albeit, these devices may***

also be redirecting as much or more flash back into the field of vision)." (Guy decl., ¶ 39, emphasis added, see also Torrey Johnson decl., ¶ 31.) Thus, plaintiffs' expert apparently concedes that the devices may tend to direct at least as much flash back into the shooter's field of vision as they direct out of the field of vision, which would mean that they are not "flash suppressors" within the DOJ definition. This is consistent with the DOJ's conclusion that the devices are not flash suppressors.

Consequently, the plaintiffs have failed to meet their burden of producing evidence showing that the DOJ's determination that the Browning and Springfield devices are not flash suppressors was incorrect and inconsistent with the DOJ's definition. Consequently, the court intends to deny the motion for summary adjudication of the sixth cause of action.

Defendants' Motion: As discussed above with regard to plaintiffs' motion, the fundamental premise of plaintiffs' first cause of action is that there was already an established definition for the term "flash suppressor" in the industry, and that the DOJ unlawfully expanded this definition when it issued its regulation defining the term as a device that is "designed, intended, or that functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision." (11 CCR § 5469(b).)

However, the Legislative has granted the Attorney General broad authority to promulgate regulations that may be necessary and proper to carry out the purposes of the AWCA. (Penal Code § 12276.5(c).) Thus, the DOJ's regulations are entitled to great deference from the court. (*Dabis v. San Francisco Redevelopment Agency* (1975) 50 Cal.App.3d 704, 706.) "[J]udicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law." (*Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 605.)

Here, the evidence presented by defendants indicates that there was no unified definition of the term "flash suppressor" in use at the time the DOJ adopted its regulation. Definitions varied considerably, with some sources citing the design or intent of the device, and others relying on the actual effect that the device has to reduce flash. (See Chinn decl., ¶ 13, and Exhibit A to Chinn decl.) While plaintiffs attempt to raise a triable issue as to whether there was an established definition of the term, they do not dispute most of the sources cited by plaintiffs' expert. (See plaintiffs' response to undisputed facts 7-21.) Since the many sources cited by defendants show considerable variation in the definition of the term "flash suppressor", plaintiffs cannot establish that there was only a single meaning for the term at the time the Legislature passed the AWCA.

Plaintiffs argue that, if there was no established definition for the term at the Legislature passed the AWCA, then the Legislature violated due process by

enacting a statute that relies on a term with no established meaning. (*U.S. v. Cohen Grocery Co.* (1921) 255 U.S. 81.) However, in *Cohen*, the Supreme Court struck down a law that "made [it] unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." (*Id.* at 89.) The court found that the phrase "unjust or unreasonable rate or charge" was so vague that it failed to warn potential defendants of the exact conduct that was prohibited. Here, on the other hand, the term "flash suppressor", while apparently having no established single meaning, is still specific enough to place the public on notice of the kind of device that is prohibited, particularly after the regulation clarified the meaning of the term.

Next, plaintiffs argue that the term "suppressor" implies an intentional effect rather than an incidental one, and therefore the Legislature must have intended to limit the law to only devices that are designed or intended to suppress flash. However, plaintiffs point to no authority or definition that states that "suppression" must be intentional. Also, the language of the statute does not expressly state that a flash suppressor must be designed or intended to suppress flash. It merely describes the device as a "flash suppressor" without further explanation. (Penal Code § 12276.1(a)(1)(E).) The omission appears to be deliberate, since the Legislature clearly knows how to describe firearms devices according to their design or intent when it intends to make the design or intent of a device a limiting factor. (See Penal Code § 12020(c)(1)(B), (c)(1)(E), (c)(2)(E), (c)(4), (c)(9), and (c)(10).) Thus, the fact that the Legislature chose not to define the term "flash suppressor" by the design or intent of the device appears to indicate that the DOJ's interpretation was not incorrect.

Plaintiffs also argue that defendants' definition would lead to absurd results. For example, plaintiffs point out that longer barrels tend to reduce flash, and thus a long-barreled hunting rifle could be deemed an "assault weapon." However, the plaintiffs' argument ignores the fact that the DOJ definition of "flash suppressor" relates to a "device" that functions to reduce or redirect flash. (11 CCR § 5469(b).) To interpret the regulation to mean that a rifle barrel is itself a "device" that functions to reduce or redirect flash would stretch logic to the breaking point. Clearly, the regulation refers to a device that is attached to the barrel in some manner, rather than merely the length of the barrel itself.

It appears that plaintiffs' primary objection to defendants' regulatory definition is that it may cause some devices labeled as muzzle brakes or compensators to be deemed "flash suppressors" for the purposes of the AWCA. Plaintiffs point to the Springfield Muzzle Break and the Browning BOSS as examples of such devices that would qualify as flash suppressors under the DOJ definition, even though they are allegedly not flash suppressors under common industry definitions. Again, however, plaintiffs assume that there is a single accepted definition of "flash suppressor" in the firearms industry. As discussed above, this does not appear to be the case.

In any event, defendants have stated that they do not consider the Springfield and Browning devices to be flash suppressors. (Chinn decl., ¶ 15.) Also, plaintiffs' own experts appear to admit that the Springfield and Browning devices redirect some flash out of the shooter's field of vision, but may also redirect as much or more flash back into the field of vision. (Johnson decl., ¶ 31, Guy decl., ¶ 39.) Thus, there does not appear to be any triable issue of material fact with regard to the question of whether the DOJ's definition of "flash suppressor" unlawfully expanded the term's meaning under the AWCA. Consequently, defendants are entitled to summary adjudication of the first cause of action.

Next, defendants seek summary adjudication of the second cause of action, which challenges the "flash suppressor" definition on the ground that it is unconstitutionally vague. Plaintiffs allege that it is impossible for an ordinary gun owner or law enforcement official to determine whether a device meets the definition of a "flash suppressor" because it would require complicated scientific testing. However, defendants contend that a gun owner can refer to the owner's manual of the weapon to determine if a device is a flash suppressor or not. (Chinn decl., ¶ 11.) An owner can also visually check the weapon to see if it has a device that might be likely to reduce or divert flash. (*Ibid.*) In addition, defendants note that the *mens rea* requirement of the AWCA would protect innocent gun owners from prosecution in cases where it would be difficult to determine whether a device is a flash suppressor. (*In re Jorge M., supra*, 23 Cal.4th at 886.) If the prosecution cannot show that a gun owner knew or reasonably should have known that a device functioned to reduce or redirect flash, then the owner would not be subject to prosecution.

However, it does appear that plaintiffs have raised triable issues of material fact regarding the question of whether a person of ordinary intelligence could determine that a device is a flash suppressor. Plaintiffs' experts state that it would require scientific test firing of a rifle to determine whether a device actually reduces or redirects flash. (Shain decl., ¶ 10.) Plaintiffs also contend that there is no way for an ordinary gun owner to visually determine whether a device reduces or redirects flash or not. (*Ibid.*) Scientific testing is also impractical for ordinary gun owners and even law enforcement officials because such testing would have to be done at night, would involve complicated photographic techniques, and there are no established standards for determining how much flash must be diverted or reduced in order to show that a device is a flash suppressor. (*Id.* at ¶¶ 11-15.) Other factors such as the type of sights used, whether the weapon is fired from the shoulder or hip, the type of ammunition used, etc. may also affect the amount of flash. (*Id.* at ¶ 16.) Thus, plaintiffs have succeeded in raising some triable issues of material fact as to whether the definition of "flash suppressor" is so vague that an ordinary person cannot know what is prohibited. Consequently, the court intends to deny summary adjudication of the second cause of action.

Next, with regard to the motion for summary adjudication of the fifth cause of action, defendants argue that plaintiffs cannot show that the DOJ's failure to issue a regulation defining the term "permanently alter" renders the law impermissibly vague in all of its applications. (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 495.) The defendants are correct that the DOJ's decision not to issue a regulation is entitled to great deference.

> [I]n the absence of an express legislative command, the decision whether administrative regulations are necessary or appropriate is a matter entrusted to the discretion of the administrative agency. [Citation omitted.] The agency's decision, which is legislative in character, comes to the court with a strong presumption of correctness, and the court must defer to the agency's expertise unless its decision is arbitrary and capricious. [Citations.] As stated in *Tailfeather v. Board of Supervisors* (1996) 48 Cal. App. 4th 1223 [56 Cal. Rptr. 2d 255], an agency decision not to institute rulemaking should be overturned only in the rarest and most compelling circumstances. [Citation.] (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 503.)

Here, the defendants contend that the term "permanently alter" is sufficiently clear and unambiguous to require no further definition. As discussed above with regard to plaintiffs' motion, however, there appear to be triable issues of material fact regarding the issue of whether the DOJ's decision not to issue a definition was arbitrary and capricious. Plaintiffs point out that there is no way to "permanently" alter a magazine to prevent it from holding more than 10 rounds, since it is always possible to reverse any modification given enough time and resources. (Guy decl., ¶¶ 47-51, Helsey decl., ¶¶ 6-8.) The DOJ apparently agrees with plaintiffs' position here, since the DOJ originally intended to define "permanently alter" to mean "any irreversible change or modification." (Chinn decl., ¶ 17.) However, the DOJ withdrew the proposed regulation, apparently because it realized that no change or modification is truly irreversible. (*Ibid.*) The DOJ then decided that the term "permanently alter" was self-explanatory, and declined to issue any definition at all. (*Ibid.*)

Yet without some guidance from the DOJ, an ordinary gun owner would be left to take his or her chances that any alteration he or she makes to a magazine will not be sufficiently "permanent" to satisfy the law, and thus would be subject to prosecution. Plaintiffs have submitted declarations from several gun owners who claim to face just such a dilemma. (Helsey decl., ¶¶ 4-8, Drenkowski decl, ¶¶ 3-5.) Since the DOJ has not issued any official regulation explaining the meaning of the term "permanently alter", gun owners have no way of interpreting the provision of the AWCA that was intended to permit an exception to the general rule against weapons having a magazine capable of holding more than 10 rounds. Thus, there appears to be at least a triable issue

of fact with regard to the fifth cause of action, and the court cannot grant summary adjudication of that claim.

Defendants also move for summary adjudication of the sixth cause of action, which alleges various inconsistent statements and actions by the defendants. Plaintiffs have agreed to withdraw the second claim of the sixth cause of action, which concerns statements regarding the meaning of the phrase "detachable magazine". Therefore, it appears that the second sub-claim is moot. Also, the third sub-claim regarding the DOJ's decision to allow the SASS to import lever action rifles into the state is also moot, since the Legislature has amended the AWCA to specifically exempt lever action rifles. (Penal Code § 12020(c)(25)(C).)

Thus, the only remaining sub-claim is the first claim regarding the DOJ's statement that the Browning BOSS and Springfield Muzzle Break are not "flash suppressors" under the law. Plaintiffs have alleged that the DOJ's determination contradicts the DOJ's own definition of "flash suppressor" because the devices do function to reduce or redirect flash. Defendants claim, however, that they determined that the Springfield device was not a flash suppressor based on the determination of the ATF. (Chinn decl., ¶ 15 and Exhibit B thereto.) Defendants also claim that the Browning BOSS "redirects flash in a 360 degree arc around the barrel such that, on balance, it floods the shooter's field of vision with flash." (*Ibid.*)

However, defendants have not shown that the ATF's definition of "flash suppressor" is the same as California's definition. The letter from the ATF cited by defendants' expert does not explain what criteria the ATF used to determine whether the Springfield device was a flash suppressor, or what kind of testing the ATF performed. (Exhibit B to Chinn decl.) The letter merely states that "The sample was tested on a M1A type rifle and it was found that the device does not visibly suppress the flash of a .308 Winchester caliber cartridge fired through the device." (*Ibid.*) Without some indication of what definition of the term "flash suppressor" the ATF applied, however, there is no way to be certain that the ATF's determination was consistent with California, as opposed to federal, law. Thus, to the extent that Chinn's declaration relies on the ATF's testing and assessment of the Springfield device, it is without foundation and the court intends to sustain the plaintiff's objections to that portion of the declaration.

Also, there does not appear to be any basis for the defendants' statement that the Browning BOSS "floods the shooter's field of vision with flash." Defendants have admitted that they do not conduct testing on the various devices. (Chinn decl, ¶ 9.) Thus, if the defendants did not conduct any kind of testing to make a determination of whether the device truly has the effect of suppressing flash, then the statement that the Browning device "floods the shooter's field of vision with flash" is unsupported. Therefore, the court intends to sustain the plaintiff's objection to the statement that the Browning device "floods

the shooter's field of vision with flash" for lack of foundation. Without Chinn's statements, there is no support for defendants' motion with regard to the sixth cause of action, and the court must deny the motion for summary adjudication of the sixth cause of action.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: _____ **on** _____.
(Judge's Initials) (Date)

SUPERIOR COURT OF CALIFORN... COUNTY OF FRESNO **Civil Department - Non-Limited** 1100 Van Ness Avenue Fresno, CA 93724-0002 (559)488-3352	FOR ...URT USE ONLY
TITLE OF CASE: **Edward Hunt vs State of California**	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: **01CECG03182 AMS**

Name and address of person served:

C. D. Michel, Esq.
Trutanich & Michel LLP
180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the ruling was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California, on:

Date: **March 22, 2007** Clerk, by _____, Deputy

Kathleen A. Lynch, 765 University Ave., Ste 200, Sacramento CA 95825
C. D. Michel, Trutanich & Michel LLP, 180 E Ocean Blvd., Suite 200, Long Beach CA 90802