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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

LEONARD FYOCK, SCOTT  
HOCHSTETLER, WILLIAM DOUGLAS,  
DAVID PEARSON, BRAD SEIFERS, and  
ROD SWANSON,

Plaintiffs,

vs.

THE CITY OF SUNNYVALE, THE  
MAYOR OF SUNNYVALE, ANTHONY  
SPITALERI, in his official capacity, THE  
CHIEF OF THE SUNNYVALE  
DEPARTMENT OF PUBLIC SAFETY,  
FRANK GRGURINA, in his official  
capacity, and DOES 1-10,

Defendants.

**CASE NO: CV 13-05807 RMW**

**PLAINTIFFS' OBJECTIONS TO  
EVIDENCE OF DEFENDANTS THE  
CITY OF SUNNYVALE ET AL.**

Hearing: February 21, 2014  
Time: 9:00 a.m.  
Place: San Jose Courthouse  
Courtroom 6, 4<sup>th</sup> Floor  
280 South 1<sup>st</sup> Street  
San Jose, CA 95113

PLEASE TAKE NOTICE that Plaintiffs Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson, through their undersigned counsel, hereby object to the following evidence presented by Defendants, The City of Sunnyvale et al., in connection with their Opposition to Plaintiffs' Motion for Preliminary Injunction, set for hearing on February 21, 2014, before this Court.

1. **Defendants' Opposition (Docket Document 35) at 3:18-20<sup>1</sup>** ("the frequency of these [i.e., mass] shootings has shown no signs of decreasing[,] as stated in "Active Shooter Events from 2000 to 2012", Jan. 2014, by J. Peter Blair et al., as published in the FBI Law Enforcement Bulletin; attached as Exhibit 3 to the Declaration of Roderick M. Thompson): Fed. R. Evid. 702-703, 801-802. The declarant provides no information that he has specialized knowledge such that he could utilize the document at issue to formulate an admissible expert opinion. Fed. R. Evid. 703. Thus, Defendants offer the document, and the alleged facts and opinions it contains, without putting forth an expert that can speak directly to the reliability thereof, in contravention of Fed. R. Evid. 702. Because the document itself is an out of court statement being offered for the truth of its contents, and because Fed. R. Evid. 703 does not apply, the document's contents are inadmissible hearsay and should not be considered by the Court. Fed. R. Evid. 801-802.

2. **Defendants' Opposition (Docket Document 35) at 12:3-13** (argument based on statements in "The Militarization of the U.S. Civilian Firearms Market", June 2011, by Violence Policy Center; attached as Exhibit 11 to the Declaration of Roderick M. Thompson): Fed. R. Evid. 702-703, 801-802. For the reasons stated in the argument in support of Objection No.1 above, the document's contents are inadmissible hearsay and should not be considered by the Court.

3. **Defendants' Opposition (Docket Document 35) at 10:13-15** (argument based on statements in "Assault Weapons 'Mass Produced Mayhem'", Oct. 2008, by Brady Center to Prevent Gun Violence; attached as 18 to the Declaration of Roderick M. Thompson):

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<sup>1</sup> For ease of use, the page references herein are based on Plaintiffs' pagination.

Fed. R. Evid. 702-703, 801-802. For the reasons stated in the argument in support of Objection No. 1 above, the document's contents are inadmissible hearsay and should not be considered by the Court.

4. **Defendants' Opposition (Docket Document 35) at 21:26-8 & 22:27-28 (fn. 14), 8:25 - 9:5** (argument based on statements in "Statement of Professors of Constitutional Law: The Second Amendment and the Constitutionality of the Proposed Gun Violence Prevention Legislation", Jan. 30, 2013; attached as Exhibit 19 to the Declaration of Rodrick M. Thompson): Fed. R. Evid. 702-703, 801-802. For the reasons stated in the argument in support of Objection No. 1 above, the document's contents are inadmissible hearsay and should not be considered by the Court.
5. **Defendants' Opposition (Docket Document 35) at 18:7-21** (attempt to incorporate by reference four pages of argument found in a brief filed in another case where the issues are similar); Fed. R. Evid. 703, 801-802. Because the document itself is an out of court statement being offered for the truth of its contents, and because Fed. R. Evid. 703 does not apply, the content of the brief excerpts are inadmissible hearsay and should not be considered by the Court. Fed. R. Evid. 801-802. Further, as Defendants' Opposition has a separate caption page and the signature block is on page 26 of the Opposition, it seems likely that this was a knowing attempt to gain an "extra" few pages of briefing, i.e., an impermissible gambit intended to circumvent the relevant page limit. See San Luis & Delta-Mendota Water Authority v. Salazar, 760 F. Supp. 2d 855, 939 n.44 (E.D. Cal. 2010). For these reasons, the outside briefing should be disregarded by the Court.
6. **Declaration of John J. Donohue, III, at 3: 17-19** (conclusion that "every survey of gun ownership conducted over time . . . show that the percentage of household [sic] with guns today is lower than it was two decades ago"): Fed. R. Evid. 702-703; Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146-47 (1997). The declarant does not identify the data upon which he bases this sweeping conclusion that every gun survey shows decline in ownership by household. Nothing in the prior statements by the declarant lays a foundation for reaching the conclusion, as the declarant identified only three past surveys of gun ownership he

relied upon. In fact, the cited-to report attached as Exhibit “B” to the declaration states that “the percentage of individuals owning firearms has remained relatively constant over the past several decades (GSS 2010)[.]” (Donohue Decl. Ex. B, at 6.) The Court may exclude the testimony if there is too great a gap between the data and the opinion proffered. Gen. Elec. Co., 522 U.S. at 146.

7. **Declaration of John J. Donohue, III, at 4:10-16** (Paragraph 8): Fed. R. Evid. 702-703; Gen. Elec. Co., 522 U.S. at 146. The declarant does not identify any data upon which he bases his opinion that purchasers are purchasing firearms in anticipation of gun bans so that such purchasers can sell such banned guns at a price premium. Such a conclusion appears to be mere speculation. Nothing in the prior statements by the declarant lays a foundation for reaching such a conclusion. Moreover, such a conclusion is logically inconsistent, inasmuch as once a class or type of firearms or constituent parts are banned in California, no market would reasonably exist for the banned firearms. The declarant provides no data from which it could even be inferred that such a market would exist, e.g., the declarant provides no data that (a) there is a secondary, i.e., “black” market for the sale of banned firearms or firearm parts; (b) that in a black market, prices for banned firearms or firearms parts are significantly higher than the pre-ban purchase to support speculation in those banned firearms or parts; or (c) that significant numbers of citizens do or would participate in a black market.

8. **Declaration of John J. Donohue, III, at 4:21-27** (Paragraph 10): Fed. R. Evid. 702-703; Gen. Elec. Co., 522 U.S. at 146. Fed. R. Evid. 702-703; Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1321-22. The declarant admits in the preceding paragraph that he has no basis for making the conclusions he reaches in Paragraph 10: “I am not aware of any current social science research providing for an estimate for the number of American households that own large-capacity magazines . . . or for the number of LCMs in private hands in America.” (Donohue Decl., at 4:17-20) Despite this lack of knowledge or data, the declarant then admittedly speculates (“It is reasonable to assume . . . .”) about the demographic trends regarding owners of magazines with a capacity greater than ten

1 rounds. An expert's lack of certainty may lead to exclusion of evidence on the basis that  
2 the testimony is unreliable or unhelpful. Daubert, 43 F.3d at 1321-22.

3 The declarant also impermissibly attempts to base his conclusion on a January 2013 New  
4 York Times/CBS News poll. Little information is given about the poll except that it  
5 queried adults on whether they favored a ban on "high-capacity magazines." The  
6 declarant offers no basis as to why a poll on preferences on the legality of "high-capacity  
7 magazines" is reliable indicia of ownership of magazines with a capacity greater than ten  
8 rounds. Nothing in the declarant's statements suggests that use of such a poll regarding  
9 respondents' preferences on firearms laws is an accepted method within the declarant's  
10 field for determining firearms or magazine ownership rates. Further, the declarant offers  
11 no information that he is aware of the types of questions posed in the survey he relied  
12 upon, and whether such questions show indicia of being the same or similar to the issues  
13 raised in this lawsuit's challenge, e.g., how the term "high-capacity magazines" was  
14 represented to poll respondents in eliciting the responses; as magazines greater than ten  
15 rounds, thirty rounds, fifty rounds? If poll respondents believed they were discussing very  
16 large capacity magazines – magazines with at least three times the capacity of the ten-  
17 rounds-or-less magazines unaffected by the Sunnyvale ban – then poll respondents' views  
18 on the legality of such much higher capacity magazines would have no relevance at all to  
19 whether firearms purchasers prefer magazines with a capacity greater than ten rounds, but  
20 less than thirty rounds.

- 21 9. **Declaration of John J. Donohue, III, at 4:28 - 5:9** ("A review of the resolution of mass  
22 shootings in the U.S. suggests that bans on large capacity magazines can be crucial to  
23 saving lives by forcing mass shooters to pause and reload ammunition. Citizens have  
24 frequently taken advantage of a perpetrator stopping to reload his weapon to tackle or  
25 subdue him in at least 20 separate shootings in the United States since 1991 . . . ."): Fed.  
26 R. Evid. 402, 702-703; Gen. Elec. Co., 522 U.S. at 146. The declarant provides no data or  
27 other citation for his claim that shootings (though not necessarily mass shootings — the  
28 declaration is unreasonably vague on that point) were halted on twenty separate occasions

1 while a perpetrator was reloading a magazine. Indeed, he does not even indicate if the  
2 “review” he mentions is one he performed or the work of some currently anonymous  
3 source. Either way, it is impossible to state, based on the information given, that the  
4 review is or includes the type of data reasonably relied on by experts in the relevant field.  
5 Fed. R. Evid. 703. And if the twenty shootings referred to are not mass shootings, the  
6 declarant’s statement is irrelevant to the instant discussion and should be ignored by the  
7 Court. Fed. R. Evid. 402. There is reason to suspect at least some of those shootings are  
8 not relevant to the discussion of mass shootings, because declarant bases his opinion, in  
9 part, on one event where no one was shot (the incident of October 29, 1994, outside the  
10 White House).

11 Further, regarding the three specific instances of mass shootings the declarant mentions  
12 (the fourth was not a mass shooting, as described above), where it is claimed in hearsay  
13 accounts that the perpetrator’s pause to reload a firearm allowed the perpetrator to be  
14 subdued or for victims to escape, the declarant provides no data or information as to why  
15 these three relied-upon instances support the conclusion that a ban on magazines with a  
16 capacity greater than ten rounds would have a statistically significant effect in reducing  
17 the number of casualties in mass shootings. E.g., the declarant provides no context about  
18 what percentage of mass shootings the four shootings relied upon by the declarant  
19 represent as a total of mass shootings over a sampled period of time. The Court may  
20 exclude the testimony if there is too great a gap between the data and the opinion  
21 proffered. Gen. Elec. Co., 522 U.S. at 146. Also, because the testimony is not founded on  
22 any media reports or facts or data that show there have been twenty mass shootings that  
23 ended as a result of a shooter having to change magazines, there is no data for the expert  
24 to reasonably rely on in making his opinion, which means that opinion is inadmissible  
25 pursuant to Fed. R. Evid. 702 and 703.

- 26 10. **Declaration of Christopher S. Koper**, at 3:16 - 4:1 (Paragraph 7): Fed. R. Evid. 702-  
27 703; Gen. Elec. Co., 522 U.S. at 146. Fed. R. Evid. 702-703; Daubert, 43 F.3d at 1321-22.  
28 The declarant bases his conclusions in Paragraph 7 about the increased danger from use of

large capacity magazines in shooting incidents on his own research paper, but the conclusion reached in that paper, i.e., that “studies . . . suggest that attacks with semiautomatics . . . result in more shots fired, persons wounded, and wounds per victim than other gun attacks,” is not supported within that paper. Specifically, the relied-upon report, at p. 97 thereof, notes that “[g]uns with LCMs are used in up to a quarter of gun crimes, but it is not clear how often the outcomes of gun attacks depend on the ability to fire more than 10 shots . . . without reloading.” After reaching this conclusion, report relied upon by the declarant nonetheless then goes on to speculate that reducing crimes with LCMs “could” have non-trivial effects on gunshot victimizations. The support for this speculation in the report is a “few available studies,” which are unidentified in the report, and which are admittedly “not entirely consistent,” whatever this characterization means. As to this speculation, the relied-upon report admits in conclusion, “the evidence on these matters is too limited (both in volume and quality) to make firm projections of the [federal Assault Weapons] ban’s impact, should it be reauthorized.” An expert’s lack of certainty may lead to exclusion of evidence on the basis that the testimony is unreliable or unhelpful. Daubert, 43 F.3d at 1321-22. The Court may exclude the testimony if there is too great a gap between the data and the opinion proffered. Gen. Elec. Co., 522 U.S. at 146.

11. **Declaration of Christopher S. Koper, at 15:4-13** (Paragraph 50): FRE 702 & 703; Williams v. Illinois, 132 S. Ct. 2221, 2240 (2012). To support the declarant’s conclusions regarding the effect of the federal Assault Weapons Ban on the increase or decrease in use of large capacity magazines in crime, the declarant’s opinion is formed entirely from a single study constituting hearsay. In the absence of this hearsay study, the declarant’s own studies and data “were too limited and inconsistent to draw any clear conclusions in this regard.” (Koper Decl., at 14:14-17.) While a declarant offering expert opinion may rely upon hearsay information to form that opinion, that declarant must show that the hearsay information constitutes facts or data that experts in the declarant’s field reasonably rely upon in forming their opinions. Williams, 132 S. Ct. at 2240. Nothing in



1 the declarant's statements indicate that the single Washington Post "investigation" the  
 2 declarant relies upon is the type of information relied upon by members of the declarant's  
 3 field to draw conclusions regarding gun trends. For example, the methodology used by  
 4 the newspaper in its investigation is not described by the declarant or in the attached  
 5 newspaper article, nor is any information about the reliability of the methodology used by  
 6 admittedly non-scholar reporters to reach the conclusions of their investigation described  
 7 or critiqued by the declarant. See, e.g., Dukes v. Wal-Mart, Inc., 222 F.R.D. 189, 196-97  
 8 (N.D. Cal. 2004).

9 The declarant also does not indicate in his opinions why the results of a study of a single  
 10 state – Virginia – even if conducted in a reliable and accepted manner, is applicable to  
 11 other states or cities, or can reasonably support a conclusion regarding the nationwide  
 12 effect of the large capacity magazine ban in the federal Assault Weapons Ban. The Court  
 13 may exclude the testimony if there is too great a gap between the data and the opinion  
 14 proffered. Gen. Elec. Co., 522 U.S. at 146. Where the declarant formed an opinion about  
 15 the nationwide effect of a large- capacity magazine ban, and then extrapolated that  
 16 opinion to the likely effect on Sunnyvale residents, based solely on the supposed long-  
 17 term effects of such a ban in Virginia, the failure of the declarant to account for or discuss  
 18 any reasonable alternative explanations occasioned by the geography, demography, and  
 19 other factors exclusive to Virginia or exclusive of Sunnyvale, may render the opinion  
 20 unreliable under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590-93  
 21 ("Daubert test"). See Claar v. Burlington N. R. R. Co., 29 F.3d 499, 502 (9th Cir. 1994).

- 22 12. **Declaration of Christopher S. Koper, at 16:1-2** ("and a possibly significant impact  
 23 [based on the Washington Post's analysis of Virginia data] on those crimes involving  
 24 LCMs."): Fed. R. Evid. 702-703; Williams, 132 S. Ct. at 2240; Dukes, 222 F.R.D. at 196-  
 25 97. See argument in support of Objection No. 6 re declarant's reliance in forming an  
 26 opinion on a single hearsay study conducted by newspaper reporters in which the  
 27 declarant had no information about the methodology utilized in the study and provided no  
 28 testimony on whether such methodology and its results would be relied upon by experts in



1 declarant's field.

- 2 13. **Declaration of Christopher S. Koper, at 16:3-6** ("there is evidence that, has a federal  
3 ban remained in effect longer (or were it renewed), it could conceivably have yielded  
4 significant additional societal benefits as well, potentially preventing hundreds of gunshot  
5 victimizations annually . . . ."): Fed. R. Evid. 702-703; Gen. Elec. Co., 522 U.S. at  
6 146.Fed. R. Evid. 702-703; Daubert, 43 F.3d at 1321-22. The declarant's conclusion is  
7 based upon a footnote in his 2004 study (Koper Decl. Ex. C), and the concluding remarks  
8 of his 2013 book (Koper Decl. at Ex. D). (See Koper Decl., at 15:10-11) Neither source  
9 relied upon for the conclusion by the declarant of "significant additional societal benefits"  
10 provides data or evidence supporting the conclusion. Both sources relied upon admittedly  
11 frame the concept of reduced gunshot victimization from a large capacity magazine ban as  
12 wholly speculative, with the lack of data leading to "uncertainty regarding the ban's  
13 potential impact" (Koper Decl. Ex. C at 100, n.118), and the data being "too limited to  
14 make firm projections" of the effect of a long-term ban (Koper Decl. Ex. D, at 166). (See  
15 also Koper Decl. Ex. D, at 167, discussing a Jersey City study being instructive as a  
16 "tentative guide" to "imply" that a large capacity magazine ban "could" have eventually  
17 produced a "small" reduction in shootings, which, in turn, "could" yield significant  
18 societal benefits.) In the source material, the declarant substantially qualifies the  
19 conclusions about the effects of a long-term large capacity magazine ban as being  
20 speculative and not based on reliable data; how this becomes "evidence" of yielding  
21 "significant additional societal benefits" in the declaration is therefore unclear. But based  
22 on the lack of support in the source material for the declarant's statement, and the failure  
23 to make any type of substantial causative statement, the Court should disregard the  
24 statement. Gen. Elec. Co., 522 U.S. at 146; see also Daubert, 43 F.3d at 1321-22.
- 25 14. **Declaration of Christopher S. Koper, at 16:16 15:2** (Paragraph 53): Fed. R. Evid. 702-  
26 703; Gen. Elec. Co., 522 U.S. at 146.Fed. R. Evid. 702-703; Daubert, 43 F.3d at 1321-22.  
27 The declarant's conclusions about other significant benefits of a long-term, large capacity  
28 magazine ban are speculative and not supported upon the relied-upon source material.

The declarant's speculation is based upon the same section of the declarant's 2013 book, which source material in turn admits that it is speculative, and not based upon reliable data. See argument in support of Objection No. 8 regarding the admissions of the lack of data and speculative nature of the conclusions on pages 166-167 of the declarant's 2013 book.

15. **Declaration of Christopher S. Koper, at 17:16 - 17:14** (Paragraphs 55-58): Fed. R. Evid. 702-703; Gen. Elec. Co., 522 U.S. at 146; Daubert, 43 F.3d at 1321-22; Claar v. Burlington N. R. R. Co., 29 F.3d 499, 502 (9th Cir. 1994). The declarant's conclusions regarding the likely effect of Sunnyvale's ban on magazines with a capacity of greater than ten rounds are based on the exact same unreliable or hearsay evidence identified in the above objections. See arguments re Objections Nos. 5-9 above, regarding lack of reliability, foundation, and unsupported hearsay used by declarant to support his conclusions as to efficacy of the federal Assault Weapons Ban's ban on magazines with a capacity greater than ten rounds in reducing crime, injuries, and the costs of shootings.
16. **Declaration of Lucy P. Allen, at 3:1 - 4:11** (Paragraphs 7-9 and accompanying table): Fed. R. Evid. 702-703; Gen. Elec. Co., 522 U.S. at 146; Daubert, 43 F.3d at 1321-22; Claar, 29 F.3d at 502. The declarant bases her opinions in these paragraphs, which refer to the average number of shots fired in defensive gun use scenarios, by using entirely anecdotal evidence drawn from a regular National Rifle Association magazine feature about defensive gun uses. The declarant provides no information as to how such data were collected by the NRA for its magazine feature, what biases the magazine's editors might have had in culling the information that was used in the feature, or other indicia of methodology or reliability. See Dukes, 222 F.R.D. at 196-97.

The lack of reliability in basing statistical conclusions on a self-selected group of self-reporting magazine readers, over which the declarant had no involvement or knowledge of what self-selection biases occurred, is patent. The declarant also provides no evidence that any credible member of the declarant's field would rely upon self-reported anecdotal data generated by a third party to form statistical conclusions. As set forth by Plaintiffs'

expert Kleck in his reply declaration, declarant's reliance on such unknown, anecdotal data generated by a third party, with no knowledge of the methodology or indicia of reliability of the information, is not an accepted practice within the field of statistical analysis, and violates basic, cardinal rules of statistical sampling and analysis. Id. In using anecdotal evidence gleaned from a third-party's magazine feature to make statistical conclusions regarding defensive gun uses – in addition to the many biases and indicia of unreliability in such information – the declarant also does not discuss or account for alternative explanations for the data in reaching her conclusions. See Claar, 29 F.3d at 502. The declarant makes no mention of or assesses an alternative explanation for the data such as that the magazine editors themselves culled reported submissions on defensive gun uses based on editorial or space limitations. Again, whether any of these or other alternative explanations is true or not, is unclear, but there is no information that the declarant took any action to obtain knowledge of how the data was compiled and what limitations were present. Her conclusions are wholly unreliable and violate basic rules of statistical sampling.

17. **Declaration of Lucy P. Allen, in its entirety:** Fed. R. Evid. 701, 702; Daubert, 509 U.S. at 590-93; Dukes, 222 F.R.D. at 196-97. Because the declarant engaged in a fundamentally-flawed statistical analysis of third-party anecdotal evidence, and proffered unqualified conclusions based upon such an unacceptable and shoddy methodology, the Court should exercise its discretion to disregard the entirety of the declaration.
18. **Declaration of Anthony Spitaleri , at 3:6-9** (restatement of the City of Sunnyvale's determination that use of guns presents a "clear and present danger to the populace" and that "sensible gun safety measures provide some relief from that danger and are of benefit to the entire community."): Fed. R. Evid., 401-402, 701-702, 802; Daubert, 509 U.S. at 590-93. The declarant offers evidence that is simply a repeat of statements made by the City of Sunnyvale, thus it should not be considered by the Court, as the statement does not have a "tendency to make a fact more or less probable than it would be without the evidence[.]" Fed. R. Evid. 401(a); *see also* Fed. R. Evid. 402 (allowing judicial disregard

of any proposed evidence that wastes time or is unduly cumulative). Further, this evidence constitutes the *City's* opinion, making it both hearsay and otherwise inadmissible as an improper attempt at offering an expert opinion. Fed. R. Evid. 702, 801-802.

19. **Declaration of Anthony Spitaleri , at 3:10-11** (stating belief that Sunnyvale's ban on the possession of magazines holding more than ten rounds "constitutes one such sensible gun safety measure and that it will benefit the community of the City of Sunnyvale and promote public safety"): Fed. R. Evid. 702; Daubert, 509 U.S. at 590-93. The declarant has no expertise related to firearms, regulatory efficacy, statistics, forensic science, or psychology; his experience as a firefighter and mayor are simply insufficient to allow him to give opinion testimony. Fed. R. Evid. 702. Further, as the efficacy of a firearm regulation, and the related legal questions, are outside the scope of permissible lay opinion testimony (see Fed. R. Evid. 701), this evidence should not be considered by the Court.

20. **Declaration of Anthony Spitaleri, in its entirety**: Fed. R. Evid. 401-403, 702; Daubert, 509 U.S. at 590-93. The declarant has no expertise related to firearms, statistics, forensic science, or psychology; his experience as a firefighter and mayor are simply insufficient to allow him to give opinion testimony. Fed. R. Evid. 702. And even assuming that intent is relevant, the intent at issue is completely expressed in the relevant ordinance as passed (Sunnyvale Ordinance No. 3027-13), meaning the proposed evidence is nor relevant, and thus should not be considered by the Court, because it does not have a "tendency to make a fact more or less probable than it would be without the evidence[.]" Fed. R. Evid. 401(a); *see also* Fed. R. Evid. 402 (allowing judicial disregard of any proposed evidence that wastes time or is unduly cumulative). Put simply, the former mayor's declaration provides no new and relevant material for the Court to consider, which means the declaration should be disregarded in its entirety.

21. **Declaration of Frank Grgurina, at 2:10-14** (indicating that magazines holding more than ten rounds are not needed for home or self defense based on his statement that he is

“not personally aware of any specific instance in the Cities of Fremont and Sunnyvale where a citizen was unable to defend him or herself as a result of not having a large capacity magazine.”): Fed. R. Evid. 702-703; Daubert, 509 U.S. at 590-93. First, the declarant states no basis for why his positions in the Sunnyvale or Fremont police departments would provide him any access to accounts of citizen self defense of any kind, especially so much so that the declarant would have the required specialized knowledge to give the opinion at issue. For the foregoing reason, the opinion is not based on any specialized knowledge, and is thus inadmissible under Fed. R. Evid. 702. Second, the Declarant is attempting to give an opinion that is based only on a lack of something within his personal memory, without any analysis of the available data (e.g., incident reports) that might be used to formulate the same opinion. In that way, his opinion is not based on the type of data or facts reasonably relied on by an expert, making the opinion inadmissible under Fed. R. Evid. 703. *See Williams*, 132 S. Ct. at 2240.

22. **Declaration of Frank Grgurina, at 2:16-26** (Paragraph 4): Fed. R. Evid. 401-402, 701-703, 802. In this paragraph, the declarant opinions that criminals in possession of magazines holding more than ten rounds are a significant threat to public safety and public safety officers, based on “several incidents in which criminal suspects have used a large capacity magazine to harm and kill others and themselves” – though only one incident is relayed by the declarant. First, as criminals in possession of *any* weapon are a significant threat to public safety and public safety officers, the opinion at issue is a lay opinion that does not assist the Court, meaning it is inadmissible. Fed. R. Evid. 401, 402. Second, the testimony fails as expert testimony, because there is no explanation as the “several incidents” the declarant (apparently) making it impossible to tell of the incidents, collectively, are the type of data reasonably relied on by experts in the relevant field. Fed. R. Evid. 703. Third, declarant’s discussion concerning criminal suspect Shareef Allman should be disregarded because it appears to be hearsay, without a cited source, which is not the kind of information an expert would rely on. Fed. R. Evid. 703. That is, there are surely police records regarding the alleged incident, and the declarant’s failure to use such information

1 makes it clear that his testimony on this point should not be considered. Indeed, the  
 2 declarant does not even state whether Shareef Allman actually used a magazine with a  
 3 capacity of greater than ten rounds during the incident the declarant relates. For this and  
 4 the other reasons stated in this objection, Paragraph 4 should be ignored by the Court.

- 5 23. **Declaration of Frank Grgurina, at 3:6-12** (Paragraph 46): Fed. R. Evid. 702. The  
 6 declarant's legal opinions about the effect and scope of Sunnyvale Municipal Code  
 7 section 9.44.050 are not the proper subject of expert witness testimony. See Dean v. City  
 8 of Fresno, 546 F. Supp. 2d, 798, 817 n.23 (E.D.Cal. 2008) (citing Nieves-Villanueva, 133  
 9 F.3d at 100 n.11). This is an issue of law which the Court is solely tasked with resolving.
- 10 24. **Declaration of Roderick M. Thompson, at 2:14-16 and Exhibit 5** (attempt to introduce  
 11 evidence not mentioned in the Opposition - "Exhibit 5[,]" i.e., various newspaper articles  
 12 "downloaded from Westlaw New [sic] Room regarding media accounts where a shooter  
 13 was subdued or tackled while reloading"): Fed. R. Evid. 702-703, 801-802. For the  
 14 reasons stated in the argument in support of Objection No. 1 above, the document's  
 15 contents are inadmissible hearsay and should not be considered by the Court.
- 16 Furthermore, neither the Court nor the Plaintiffs should be forced to sift through multiple  
 17 newspaper articles to distill what Defendants actually seek to put before the Court,  
 18 especially as to "evidence" that is does not appear to be relied on in Defendants' brief.  
 19 Defendants have no legal right to produce an Exhibit that is, effectively, a "data dump"  
 20 that can be later scavenged for evidence that might support Defendants' arguments in the  
 21 future. *Cf. Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028-31 (9th  
 22 Cir. 2001) (holding that, in the context of a summary judgment motion, a district court  
 23 need only consider information that is raised in the relevant brief "with adequate  
 24 references so that it could conveniently be found") (italics added). Accordingly,  
 25 Plaintiffs request the Court ignore the entirety of Exhibit 5 to the declarant's declaration.  
 26 Plaintiffs will respectfully request the Court to sustain the above objections at the hearing  
 27 on the motion and to strike the evidence referred to above. To the extent the Court  
 28 concludes any of the disputed evidence is admissible or preliminarily admissible,

1 Plaintiffs request that, based on the discussion above, each and every disputed evidentiary  
2 item be given no weight in the Court's deliberations vis-à-vis the pending motion. See  
3 Dr. Suess Enters., L.P. v. Penguin Books USA, Inc., 924 F. Supp 1559, 1562 (S.D. Cal.  
4 1996) (holding that a court hearing a preliminary injunction motion has discretion to  
5 weigh evidence that may not meet the standards for admissibility at trial) (citation  
6 omitted).

7 Date: February 10, 2014

**MICHEL & ASSOCIATES, P.C.**

9 /s/ C. D. Michel  
10 C. D. Michel  
11 Attorney for Plaintiffs  
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LEONARD FYOCK, SCOTT )  
HOCHSTETLER, WILLIAM DOUGLAS, )  
DAVID PEARSON, BRAD SEIFERS, and )  
ROD SWANSON, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
THE CITY OF SUNNYVALE, THE )  
MAYOR OF SUNNYVALE, ANTHONY )  
SPITALERI, in his official capacity, THE )  
CHIEF OF THE SUNNYVALE )  
DEPARTMENT OF PUBLIC SAFETY, )  
FRANK GRGURINA, in his official )  
capacity, and DOES 1-10, )  
 )  
Defendants. )

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.

**PLAINTIFFS' OBJECTIONS TO EVIDENCE OF  
DEFENDANTS THE CITY OF SUNNYVALE ET AL.**

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