

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WRIGHT & L'ESTRANGE
Robert C. Wright (SBN 51864)
Andrew E. Schouten (SBN 263684)
401 West A Street, Suite 2250
San Diego, California 92101
(619) 231-4844
(619) 231-6710 (fax)

NATIONAL SHOOTING SPORTS FOUNDATION, INC.
Lawrence G. Keane, General Counsel
(pro hac vice pending)
11 Mile Hill Road
Newtown, Connecticut 06470
(203) 426-1320
(203) 426-7182 (fax)

Attorneys for Petitioners U.S. Firearms Company LLC, Eric W. Fisher, and
The National Shooting Sports Foundation, Inc.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA**

U.S. FIREARMS COMPANY LLC, a)
limited liability company; ERIC W.)
FISHER; and THE NATIONAL)
SHOOTING SPORTS)
FOUNDATION, INC., a non-profit)
trade association,)
Petitioners,)
v.)
CITY OF SUNNYVALE; THE)
SUNNYVALE CITY COUNCIL; and)
DOES 1 through 30, inclusive,)
Respondents.)

CASE NO. 113CV257353
**PETITIONERS' MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO SEAL DOCUMENTS
SUBMITTED PURSUANT TO ORDER TO
SHOW CAUSE RE: PRELIMINARY
INJUNCTION**
Date: February 11, 2014
Time: 9:00 a.m.
Dept: 3
Judge: Hon. William J. Elfving
Complaint Filed: December 9, 2013
Trial Date: None

1 Petitioners U.S. Firearms Company LLC ("U.S. Firearms"), Eric W. Fisher, and the
2 National Shooting Sports Foundation, Inc. ("NSSF") submit the following memorandum of
3 points and authorities in support of their Motion to Seal Documents Submitted Pursuant to
4 Order to Show Cause re: Preliminary Injunction.

5 INTRODUCTION

6 In response to this Court's December 18, 2013 Order to Show Cause for
7 Preliminary Injunction ("OSC") Petitioners and Respondents the City of Sunnyvale and the
8 Sunnyvale City Council lodged the following documents conditionally under seal in
9 support of their various positions:

- 10 • Respondents' Opposition to Order to Show Cause re: Preliminary
11 Injunction (Opposition");
- 12 • Exhibits "D" and "E" to the Declaration of Anthony Schoenberg in
13 support of Respondents' Opposition to Order to Show Cause re:
14 Preliminary Injunction ("Exhibits D and E"); and
- 15 • The Supplemental Declaration of Eric W. Fisher in support of Order
16 to Show Cause re: Preliminary Injunction ("Supplemental Fisher
17 Declaration").

18 The Opposition (13:12-14:10, 15:15-18, 28), Exhibits D (47:20-25, 61:1-22, 82:3-
19 25, 88:1-25, 95:1-96:25, 98:1-99:12) and E (USF0001-0004); and the Supplemental
20 Fisher Declaration (¶¶13, 14) contain confidential, competitively-sensitive information
21 concerning U.S. Firearms' sales of firearms and ammunition and its customers ("U.S.
22 Firearms Sales Information"). The information is confidential pursuant to this Court's
23 December 27, 2013 Stipulated Protective Order ("Protective Order"), and was disclosed
24 or obtained solely in reliance upon the Protective Order.

25 Petitioners request an order sealing the lodged documents pursuant to California
26 Rules of Court 2.550- 2.551. U.S. Firearms Sales Information constitutes confidential,
27 proprietary, and competitively-sensitive business information that is entitled to protection
28 as a trade secret and under the California right to privacy. Although pertinent to a showing
of irreparable injury, U.S. Firearms Sales Information is not pertinent to any of the
essential elements of U.S. Firearms' writ of mandate and declaratory relief claims. The
public's right to access court documents does not embrace such information, and public

1 disclosure would prejudice U.S. Firearms by destroying statutorily-protected privacy and
2 proprietary interests in the information and harming its ability to effectively compete in the
3 marketplace. The proposed sealing is narrowly tailored, and no less restrictive means
4 exist to permit U.S. Firearms to maintain the confidentiality of its information while
5 facilitating the presentation of proof to the Court.

6 Accordingly, this Court should order the following documents be filed under seal:
7 (1) the Opposition; (2) Exhibits D and E; and (3) the Supplemental Fisher Declaration.

8 **BACKGROUND**

9 On December 23, 2013, Respondents served Petitioners with a notice of
10 deposition of Eric W. Fisher and Request for Production of Documents (Wright Decl. ¶ 2).
11 While making arrangements for Mr. Fisher's deposition, Petitioners alerted Respondents
12 that some of the information they sought was confidential, proprietary, and competitively-
13 sensitive (*id.* at ¶ 3). The parties stipulated to make the deposition and the information
14 covered therein subject to a protective order, which they then drafted and submitted to the
15 Court (*id.* at ¶ 3).

16 On December 27, 2013, the Court entered the parties' Stipulated Protective Order
17 as an order of the Court. It defines "Confidential Information" as "means any information
18 contained in a document which may constitute trade secrets, or otherwise proprietary,
19 commercial information, or may be protected by applicable privileges and/or the right of
20 privacy." (Protective Order at ¶ 3). Petitioners may "designate any document as
21 'CONFIDENTIAL' which they in good faith believe contains Confidential Information." (*Id.*
22 at ¶ 4.) Respondents are permitted to share Confidential Information with attorneys of
23 record, employees, experts retained for purposes of the motion, the Court, Court
24 personnel, and stenographic reporters, who, in turn, may not disclose such information
25 (*id.* at ¶ ¶ 5-6).

26 Documents marked "Confidential" and information contained in such documents
27 "may be used by the Respondents only for the purposes of this case." (*Id.* at ¶ 8.) Any
28 "CONFIDENTIAL" document or pleading or memorandum purporting to reproduce or

1 paraphrase information in a “Confidential” document must be lodged conditionally under
2 seal as required by California Rules of Court, Rule 2.551 (*id.* at ¶¶ 9-10).

3 Mr. Fisher was deposed on December 27, 2013 (Wright Decl. ¶ 5). Among other
4 things, Respondents’ counsel asked Mr. Fisher about U.S. Firearms Sales Information (*id.*
5 at ¶ 5). U.S. Firearms Sales Information has not been publicly disclosed and cannot
6 otherwise be obtained in any public record (*id.* at ¶ 5). Petitioners marked portions of his
7 deposition transcript detailing U.S. Firearms Sales Information “Confidential.” (*id.* at ¶ 5).

8 On December 30, 2013, Respondents filed their Opposition to the OSC. Pursuant
9 to the Protective Order and California Rule of Court 2.551(b)(5), Respondents filed
10 redacted copies of their Opposition memorandum and Exhibits D and E, and lodged
11 unredacted copies of those documents with the Court conditionally under seal pending
12 resolution of this Motion (Wright Decl. ¶ 6). The unredacted documents purport to
13 summarize or contain “Confidential Information” designated as such by Petitioners
14 pursuant to the Protective Order (*id.* at ¶ 6).

15 On January 6, 2014, Petitioners filed their reply in support of the OSC. Pursuant to
16 the Protective Order and California Rule of Court 2.551(b)(5), Respondents filed redacted
17 copies of the Supplemental Fisher Declaration and lodged an unredacted copy of the
18 declaration conditionally under seal pending resolution of this Motion (Wright Decl. ¶ 6).
19 The unredacted Supplemental Fisher Declaration summarizes or contains “Confidential
20 Information” designated as such by Petitioners pursuant to the Protective Order (*id.* at ¶
21 6).

22 LEGAL STANDARD

23 The First Amendment generally provides a right of access to ordinary civil trials
24 and proceedings. *NBC Subsidiary, Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1212.
25 California Rules of Court 2.550-2.551 “recognize the First Amendment right of access to
26 documents used at trial or as a basis of adjudication.” *Mercury Interactive Corp. v. Klein*
27 (2007) 158 Cal.App.4th 60, 84. “They provide, subject to certain exceptions . . . , that a
28 court ‘record must not be filed under seal without a court order.’” *Id.*

1 Rules 2.550-2.551 create a presumption of public access to documents submitted
2 to the Court in conjunction with a preliminary injunction motion. *NBC Subsidiary*, 20
3 Cal.4th at 1208. That presumption may be overcome, and the instant records sealed, if
4 the Court finds facts showing:

- 5 (1) There exists an overriding interest that overcomes the right of public
6 access to the record;
- 7 (2) The overriding interest supports sealing the record;
- 8 (3) A substantial probability exists that the overriding interest will be
9 prejudiced if the record is not sealed;
- 10 (4) The proposed sealing is narrowly tailored; and
- 11 (5) No less restrictive means exist to achieve the overriding interest.

12 Cal. R. Court, Rule 2.550(d)(1)-(5).

13 Petitioners bear the burden on the first four factors, while Respondents bear the
14 burden on the fifth factor. *NBC Subsidiary*, 20 Cal.4th at 1208; *H.B. Fuller Co. v Doe*
(2007) 151 Cal.App.4th 879, 894.

15 ARGUMENT

16 **A. PRESERVATION OF U.S. FIREARMS' TRADE SECRETS AND FINANCIAL** 17 **INFORMATION ARE OVERRIDING INTERESTS THAT SUPPORT SEALING** 18 **THE RECORD.**

19 Petitioners can demonstrate the existence of the first two Rule 2.550(d) factors
20 because "statutory privileges, trade secrets and privacy interests, when properly asserted
21 and not waived, may constitute 'overriding interests'" appropriate to support an order
22 sealing records. *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298 n.3;
23 Cal. R. Court, Rule 2.550, cmt.

24 Three such statutory privileges or privacy interests exist here. First, protection of
25 U.S. Firearms' trade secrets is an overriding interest supporting the sealing of the U.S.
26 Firearms Sales Information. *NBC Subsidiary*, 20 Cal.4th at 1223 n.46; *McGuan v.*
27 *Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974, 988. The owner of a trade
28 secret has a statutory privilege to refuse to disclose, and to prevent others from
disclosing, the secret. Evid. Code § 1060. "This privilege is granted so that secret

1 information essential to the continued operation of a business or industry may be afforded
2 some measure of protection against unnecessary disclosure.” Evid. Code § 1060, cmt.
3 “[T]he privilege prevents the use of the witness’ duty to testify as the means for injuring an
4 otherwise profitable business where more important interests will not be jeopardized.” *Id.*

5 Business or technical information may qualify for trade secret status¹ if it is “that is
6 sufficiently valuable and secret to afford an actual or potential economic advantage over”
7 other companies that do not have it. See *Yield Dynamics, Inc. v. TEA Systems Corp.*
8 (2007) 154 Cal.App.4th 547, 564 (quoting Restatement (Third) Unfair Competition § 39).

9 Here, the U.S. Firearms Sales Information consists, in part, of sales figures, profit
10 margins, product and service mixes, market research, and potential opportunities for
11 competitors (see Opp. 13:12-14:10, 15:15-18, 28; Ex. D at 47:20-25, 61:1-22, 67:16-24;
12 Ex. E at USF0001-0004; Fisher Supp. Decl. ¶¶ 13-14, which has always been maintained
13 confidential and is not available in the public domain (Fisher Decl. ¶ 6). Because this type
14 of information would permit competitors to compete against and undercut U.S. Firearms, it
15 has independent value and qualifies for treatment as a trade secret under Evid. Code §
16 1060 and Civ. Code § 3426.1. See *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th
17 1443, 1455 (competitive pricing and marketing information are trade secrets).

18 Second, the U.S. Firearms Sales Information also includes certain information
19 about U.S. Firearms’ customer identities, relationships, preferences and buying habits
20 (see Opp. 13:12-14:10, 15:15-18, 28; Ex. D. at 82:3-25, 88:1-25, 95:1-96:28, 98:1-99:12).
21 Such information qualifies as a trade secret because its disclosure would allow a
22 competitor of U.S. Firearms “to direct its sales efforts to those customers who have
23 already shown a willingness to use a unique type of service or product,” and “to solicit
24 both more selectively and more effectively.” *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th
25 1514, 1522; see, e.g., *Western Electro-Plating Co. v. Henness* (1960) 180 Cal.App.2d

26 _____
27 ¹ A trade secret is defined as “information, including a formula, pattern, compilation, program, device,
28 method, technique, or process,” which: (1) “Derives independent economic value, actual or potential from
not being generally known to the public or to other persons who can obtain economic value from its
disclosure or use”; and (2) “Is the subject of efforts that are reasonable under the circumstances to maintain
its secrecy.” *McGuan*, 182 Cal.App.4th at 988 (quoting Civ. Code § 3426.1(d)).

1 442, 448-449 (customer preferences, value of customer accounts for chrome-plating
2 business in defined sales territories); *Scavengers Protective Ass'n v. Serv-U-Garbage Co.*
3 (1933) 218 Cal. 568, 572 (preferred customer information, including nature of business,
4 usual quantity and value of services, and rates).

5 Third, this information is also protected against disclosure by the constitutional right
6 of privacy. The right exists as to U.S. Firearms' confidential financial affairs,² even when
7 the information sought is admittedly relevant to the litigation. *Valley Bank of Nevada v.*
8 *Superior Court* (1975) 15 Cal.3d 652, 656; *Moskowitz v. Superior Court* (1982) 137
9 Cal.App.3d 313, 316. The same is true of U.S. Firearms' customers.³ *See Fortunato v.*
10 *Superior Court* (2003) 114 Cal.App.4th 475, 481 ("there is a right to privacy in confidential
11 customer information *whatever* form it takes, whether that form be tax returns, checks,
12 statements, or other account information"); *see also Pioneer Electronics (USA), Inc. v.*
13 *Sup. Ct.*, 40 Cal.4th 360, 364 (2007) (customers' identities and contact information are
14 private, but could be disclosed in discovery where customers self-identified and court
15 fashions appropriate procedures to minimize intrusion).

16 Finally, U.S. Firearms keeps its pricing, financial, and marketing information
17 confidential (Fisher Decl. ¶ 6), and it is legally obligated to maintain customer information
18 confidential, Cal. Code Regs. tit. 11, § 4035. U.S. Firearms requested and obtained the
19 Protective Order prior to requesting this information and designated the information
20 produced during Mr. Fisher's deposition "Confidential" pursuant to that Order (Wright
21 Decl. ¶ 6). The parties lodged the documents containing the U.S. Firearms Sales
22 Information conditionally under seal, and U.S. Firearms timely moved for a sealing order.
23 There has been no waiver of these privilege and privacy interests. *Cf. Savaglio v. Wal-*
24 *Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 600 (finding complete waiver where party
25 filed confidential material with Court but failed to comply with sealing rules and

26 ² As a closely-held company (Fisher Decl. ¶ 2), U.S. Firearms enjoys privacy rights in this context. *Schnable*
27 *v. Superior Court* (1993) 5 Cal.4th 704, 718 (court had to consider closely-held corporation's privacy rights
in marital dissolution proceedings); *see H&M Assoc. v. City of El Centro* (1980) 109 Cal.App.3d 399, 410
(city invaded corporation's privacy right by improperly divulging information obtained for proper purpose).

28 ³ U.S. Firearms has standing to assert the privacy interests of its customers in conjunction with this motion.
Valley Bank of Nevada, 15 Cal.3d at 658 (business may object to discovery on customer privacy grounds).

1 procedures); *Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1142 (trade secret
2 privilege waived where material produced without objection, but party could still obtain
3 protective order restricting dissemination of material).

4
5 **B. THERE IS A SUBSTANTIAL PROBABILITY U.S. FIREARMS WILL BE
6 PREJUDICED UNLESS THE BILLING STATEMENTS ARE SEALED.**

7 This third factor of the 2.550(d) analysis requires the Court to assess the
8 probability of prejudice, which ordinarily calls for a certain amount of speculation as to the
9 likely effect of an event. *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1025 (court had
10 to determine potential prejudice to defendant's fair trial rights from disclosure of details of
11 alleged child abuse crimes).

12 Here, however, the Court need not speculate because public disclosure of the U.S.
13 Firearms Sales Information would destroy the privacy and proprietary interests at issue.
14 See *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 686 ("once privileged
15 matter has been disclosed there is no way to undo the harm which consists in the very
16 disclosure"). Indeed, prejudice from disclosure necessarily flows from a showing of trade
17 secret status. *Providian*, 96 Cal.App.4th at 304 ("Public disclosure ... is fatal to the
18 existence of a trade secret"); see, e.g., *McGuan*, 182 Cal.App.4th at 988 (Rule 2.550(d)
19 findings underlying trial court's sealing order satisfied by showing that company's
20 proprietary procedures for complying with FDA regulations were trade secrets).

21 **C. U.S. FIREARMS' PROPOSED SEALING ORDER IS NARROWLY TAILORED.**

22 The fourth factor is also met. U.S. Firearms' request is narrowly tailored in that it
23 seeks to have sealed only limited portions of Respondents' Opposition, Exhibits D and E,
24 and the Supplemental Fisher Declaration that contains the U.S. Firearms Sales
25 Information (Wright Decl. at ¶ 8). Because it would seal only portions of those documents
26 that implicate its identified privilege and privacy interests, U.S. Firearms' proposed sealing
27 order is narrowly tailored. Cf. *NBC Subsidiary*, 20 Cal.4th at 1223 (blanket sealing order
28 was not narrowly tailored because trial court failed to identify particular proceedings that
contained information justifying closure); *In re Burkle* (2006) 135 Cal.App.4th 1045, 1065-

1 66 (statute authorizing sealing of entire pleading in family law court file that contained
2 identifying information about litigant assets was not narrowly tailored to further overriding
3 interest in preventing identity theft, because sealing order would seal all information
4 related to litigant assets, and not just "identifying information that would facilitate identity
5 theft or other financial crimes").

6
7 **D. U.S. FIREARMS' PROPOSED SEALING ORDER EMBODIES THE LEAST
RESTRICTIVE MEANS.**

8 As noted, Respondents bear the burden of proof on the final factor, i.e.,
9 demonstrating "less restrictive means of achieving the overriding interest" than sealing.
10 *Jackson*, 128 Cal.App.4th at 1026.

11 Here, U.S. Firearms proposes limited redaction of the Opposition, Exhibits D and
12 E, and the Supplemental Fisher Declaration, which is a reasonable alternative to sealing
13 the entire record, or even those documents in their entirety. *Burkle*, 135 Cal.App.4th at
14 1067.

15 **CONCLUSION**

16 For the foregoing reasons, Petitioners respectfully request that this Court order that
17 unredacted copies of the Opposition, Exhibits D and E, and the Supplemental Fisher
18 Declaration currently lodged under seal be filed under seal, while making the redacted
19 copies of those documents available to the public.

20
21 WRIGHT & L'ESTRANGE
22 Attorneys for Petitioners

23
24 Dated: January 8, 2014

25
26
27
28
By  _____
Robert G. Wright