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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION**

**JEFF SILVESTER, BRANDON
COMBS, THE CALGUNS
FOUNDATION, INC., a non-profit
organization, and THE SECOND
AMENDMENT FOUNDATION,
INC., a non-profit organization,**

Plaintiffs,

v.

**KAMALA HARRIS, Attorney
General of California (in her
official capacity), and DOES 1 to
20.**

Defendants.

Case No. 1:11-cv-02137-AWI-SKO

**OBJECTION TO DEFENDANT'S
REQUEST FOR JUDICIAL NOTICE**

1 I. INTRODUCTION

2 Plaintiff hereby objects to Defendant Kamala Harris, Attorney General's
 3 request for judicial notice (Doc # 78). Defendant is trying to sidestep her burden of
 4 proving that her exhibits are admissible by asking this court to take judicial notice
 5 of essentially her entire exhibit list comprising over 130 documents. Request for
 6 judicial notice is improper because it is unclear exactly *how* Defendant intends to
 7 use the information derived from said exhibits and Plaintiff is entitled to an
 8 evidentiary hearing in order to clarify the meaning and context of statements relied
 9 on and the weight to be given to them.

10 Furthermore, many of the exhibits appear to be medical/scientific studies
 11 conducted by (social) scientists addressing the utility of firearms in the home. That
 12 issue has already been resolved by the Supreme Court. *District of Columbia v.*
 13 *Heller*, 554 U.S. 570 (2008). Nor is the mere possibility of danger a valid reason to
 14 restrict/infringe a fundamental right. *McDonald v. City of Chicago*, 561 U.S. ___,
 15 130 S. Ct. 3020, 3045-46 (2010).

16 Additionally the analysis of these articles is, "near-identical to the free-
 17 standing "interest-balancing inquiry" that Justice Breyer proposed – and that the
 18 majority explicitly rejected – in *Heller*. See *Heller*, 554 U.S. at 689-90 (Breyer, J.,
 19 dissenting)(proposing that in the Second Amendment cases the court should "ask[]
 20 whether the statute burdens a protected interest in a way or to an extent that is out
 21 of proportion to the statute's salutary effects upon other important governmental
 22 interests"); see also *id.* at 634-35 (majority opinion) (rejecting a "judge-empowering
 23 'interest-balancing inquiry'" as a test for the constitutionality of Second Amendment
 24 regulations because "no other enumerated constitutional right [had its] core
 25 protection . . . subjected to [such] a freestanding" inquiry)." *Peruta v. County of San*
 26 *Diego*, 2014 WL 555862 (9th Cir. Feb. 13, 2014) at page 71 of the slip opinion.

27 Finally, many of these submissions are an attempt to introduce "expert
 28

1 opinion” in violation of this Court’s Pre-trial order. Neither party has disclosed
 2 experts and both parties have objected to the introduction of expert testimony.

3 **II. LEGAL ARGUMENTS**

4 **a. Judicial Notice is Improper for all of the Defendant’s Categories of** 5 **Evidence**

6 “Judicial Notice” is the court's recognition of the existence of a fact without
 7 the necessity of formal proof. See *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017, 1026
 8 (9th Cir. 1992). The Federal Rules of Evidence (“FRE”) only govern judicial notice
 9 of an adjudicative fact, and not a legislative fact. Fed. R. Evid. 201(a). Adjudicative
 10 facts are the facts of the particular case that would go to the trier of fact. Whereas
 11 legislative facts “are those which have relevance to legal reasoning and the
 12 lawmaking process, whether in the formulation of a legal principle or ruling by a
 13 judge or court or in the enactment of a legislative body.” See Advisory Comm. Note
 14 (a) to Fed. R. Evid. 201(a).

15 Under the FRE, the court may only judicially notice a fact that is not subject
 16 to reasonable dispute because it: (1) is generally known within the trial court's
 17 territorial jurisdiction; or (2) can be accurately and readily determined from sources
 18 whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); see also *In*
 19 *Re Mora*, 199 F.3d 1024, 1026 n. 3 (9th Cir. 1999) (Refusing to take judicial notice
 20 of the supposed fact that United States Post Office “generally delivers mail
 21 overnight to ‘locally designated cities.’”).

22 Whether something is an adjudicative or legislative fact depends on the
 23 manner in which it is used. For example, a legal rule may be a proper adjudicative
 24 fact for judicial notice if offered to establish the factual context of the case, but not
 25 to state the governing law, i.e. a legislative fact. See *Toth v. Grand Trunk R.R.*, 306
 26 F.3d 335 (6th Cir. 2002) (“[J]udicial notice is generally not the appropriate means to
 27 establish the legal principles governing the case.”).
 28

1 Here, Defendant is asking the court to take judicial notice of five (5) broad
2 categories of evidence, not any “facts.” These categories essentially comprise
3 Defendant’s entire list of over 130 exhibits, all with voluminous pages of
4 information that, Plaintiff contends, are not “facts” at this point, but rather historical
5 documents with what may be nothing more than irrelevant information that
6 constitutes hearsay. Moreover, it is unclear for what purpose Defendant seeks to
7 admit every single document. And regardless of whether the information constitutes
8 adjudicative or legislative facts, Plaintiff would still have reasonable disputes as to
9 the information. Therefore, judicial notice is improper.

10 The 2nd Circuit has held that “[W]hen facts or opinions found in historical
11 materials or secondary sources are disputed, it is error to accept the data (however
12 authentic) as evidence_._._, at least without affording an opposing party the
13 opportunity to present information which might challenge the fact or the propriety
14 of noticing it.” *Oneida Indian Nation of New York v. State of New York* 691 F.2d
15 1070, 1086 (parentheses in original).

16 In the case of *Oneida*, the lower court had to interpret voluminous historical
17 documents, and had taken judicial notice of “pertinent individual records, notes,
18 correspondence, histories, articles and other data...” *Oneida*, 691 F2d, at 1086. In
19 its opinion, the 2nd Circuit Court criticized the lower court because “both sides and
20 the court appear to have referred to, relied upon, and quoted from numerous
21 untested primary and secondary historical sources, including history books,
22 treatises, and other papers.” *Id.*

23 Therefore, depending on *which* portion of the voluminous exhibits the
24 Defendant seeks to introduce, judicial notice of any factual statements therefrom is
25 improper without affording the Plaintiff’s an evidentiary hearing in order to clarify
26 the meaning and context of statements relied on and the weight to be given to them.
27 Moreover, any factual statements that are in dispute cannot be analyzed through
28

1 expert testimony on Defendant's part because the Defendant has no expert witness
2 who could testify as such.

3
4 **b. Even If the Court Takes Judicial Notice, The Exhibits Still Must**
5 **Be Otherwise Admissible**

6 While Plaintiff does not concede that the Court should take judicial notice as
7 Defendant requests, even if the Court is inclined to take judicial notice of
8 Defendant's proposed exhibits, as with evidence generally, the matter to be
9 judicially noticed must be *relevant* to the issues in the case. Fed. R. Evid. 402; see
10 *Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.*, 407 F.3d 876, 881 (7th
11 Cir. 2005) (The court did not err by refusing to take judicial notice of FDA
12 standards for impeachment purposes when defendant never claimed its products
13 met the standards).

14 In this case, Defendant seeks judicial notice of approximately 130 exhibits
15 that are many pages long, but in some cases only seeks to admit excerpts. Plaintiff
16 contends the purpose for which Defendant seeks to admit the exhibits is not
17 relevant to the issues in this case. Defendant is attempting to introduce evidence
18 that the 10-day waiting period is needed to conduct background checks to make
19 sure that prohibited persons do not come into possession of another firearm. The
20 plaintiffs in this action, however, already have a firearm. If an individual already
21 possesses a firearm, then nothing about this rationale would prevent that individual
22 from acting on a sudden impulse to commit gun violence with a gun already in his
23 or her possession.

24 Defendant has justified the 10-day waiting period laws on two grounds: 1) it
25 provides enough time for sufficient background checks on prospective firearms
26 purchasers and 2) and as creating a cooling-off period for people who may seek
27 guns impulsively to commit violent acts. Defendant Trial Brief, pg 18, ln 9-12.
28

1 Defendant's exhibits are not relevant to this the issues in this case, and even
2 if the court is inclined to take judicial notice, they are limited by their relevance.

3 Moreover, many, if not all, of Defendant's proposed exhibits contain hearsay
4 statements for which there is no exception under the Federal Rules of Evidence. If
5 Defendant offers statements from the proposed documents for their truth, they
6 constitute hearsay. Fed. R. Evid. 802(c). No exception to the hearsay applies to *any*
7 of the categories of documents Defendant seeks to admit.

8 The public records do not qualify fall under FRE 803(8) because "evaluative
9 reports" or "status reports" do not qualify. See, e.g. *Lomax Transp. Co. v. United*
10 *States*, 183 F.2d 331 (9th Cir. 1950). Statements in periodicals only fall under the
11 exception *if* statement is called to the attention of an *expert witness* on direct or
12 cross-examination and the called the publication is established as a reliable
13 authority by the expert's admission or testimony, by another expert's testimony, or
14 by judicial notice. Fed. R. Evid. 803(18). Even if the court takes judicial notice that
15 the publication is established as reliably authentic, no expert can testify because
16 "there was no expert discovery in this case." Defendant's Trial Brief at 7:10.

17 Defendant's exhibits are not subject to judicial notice.

18 **III. CONCLUSION**

19 Based on the foregoing, Plaintiffs request this court to deny Defendant's
20 Request for Judicial Notice.

21 DATED: March 25, 2014

Otten & Joyce, LLP

/s/ Vic Otten

24 _____
Victor J. Otten

25 Attorneys for Plaintiff