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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 SOUTHERN DIVISION
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14 **STEVEN RUPP, et al.,**

15 Plaintiffs,

16 v.

17 **XAVIER BECERRA, in his official**
18 **capacity as Attorney General of the**
State of California, et al.,

19 Defendants.
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8:17-cv-00746-JLS-JDE

**DEFENDANT'S OBJECTIONS TO
EVIDENCE FILED IN SUPPORT
OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Date: May 31, 2019
Time: 10:30 a.m.
Courtroom: 10A
Judge: Hon. Josephine L. Staton
Trial Date: N/A
Action Filed: April 24, 2017

Defendant Xavier Becerra, Attorney General of the State of California, sued in his official capacity, submits the following objections to evidence filed in support of Plaintiffs' motion for summary judgment.

No.	Plaintiffs' Evidence	Defendant's Objections
1	<p>Plaintiffs' Exhibits 21-24¹ (objection to the exhibits in their entirety).</p> <p>Plaintiffs' Exhibit 21 is cited on page 6, lines 16-18, of Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Memorandum"), ECF No. 86.</p> <p>Plaintiffs' Exhibits 21-24 are also extensively cited in, and relied upon by, the Expert Report of William English (Pls. Exh. 2).</p>	<p>Plaintiffs' Exhibits 21-24 ("NSSF Reports"), and all references to these exhibits in Plaintiffs' Memorandum and Plaintiffs' Exhibit 2 (English Rpt.), should be stricken from the record because they were not timely made available to Defendant, and Defendant's expert did not have an opportunity to review them when preparing a rebuttal report. (Fed. R. Civ. P. 26(a)(2)(B)(ii) ("The [expert] report must contain . . . the facts or data considered by the witness in forming [the expert's opinions]"); Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information . . . as required by Rule 26(a) . . . , the party is not allowed to use that information . . . to supply evidence on a motion . . .").)</p> <p>The NSSF Reports are trade publications not freely available to the general public. (Supplemental Decl. of Peter H. Chang in Supp. of Def.'s Opp. to Pls.' Mot. for Summ. J. ("Supplemental Chang Declaration" or "Supp. Chang. Decl."), ¶ 4.) Plaintiffs did not produce the NSSF Reports in discovery. (<i>Id.</i> at ¶ 5.) Plaintiffs'</p>

¹ Citations to "Plaintiffs' Exhibits" or "Pls. Exh." are to exhibits annexed to the Declaration of Sean. A. Brady in Support of Plaintiffs' Motion for Summary Judgement, ECF No. 78.

expert, William English, relied extensively on the NSSF Reports to prepare his opening expert report. (*See* Pls. Exh. 2 (English Rpt.), ECF No. 78-0, at 3-6; *see id.*, References.) On October 30, 2018, Defendant requested the NSSF Reports from Plaintiffs so that Defendant's expert may review them and use them in rebutting English's report. (*Id.* at ¶ 6.) Plaintiffs did not provide the NSSF Reports to Defendants before rebuttal expert reports were due. (*Id.*) Therefore, Defendant's expert witness, John Donohue, did not have an opportunity to review the NSSF Reports that English relied on before preparing his rebuttal report. (Def. Exh. 7 at 247 n.3.)²

Plaintiffs had possession of the NSSF Reports since at least before October 25, 2018, when they served the expert report of William English, and likely much earlier. (*See* Def. Exh. 46 at 1549:16-1551:4.) Yet, even though Defendant expressly requested them so Defendant's expert may review them for the rebuttal report, Plaintiffs did not provide the NSSF Reports to Defendant until December 10, 2018, two days before the deposition of William English, and well after rebuttal reports were due. (Supp. Chang Decl., ¶ 6.)

² Citations to "Defendant's Exhibit" or "Def. Exh." are to the exhibits annexed to the Declaration of Peter H. Chang, ECF No. 76 (for exhibits 1-45) or the accompanying Supplemental Chang Declaration (for exhibit 46).

1	2	Plaintiffs' Exhibit 2 (Expert Report of William English) (objection to report in its entirety).	Failure to timely produce underlying NSSF Reports. (<i>See</i> Objection No. 1.)
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4			Lack of qualification to provide expert testimony. (Fed. R. Evid. 702; <i>Sundance, Inc. v. DeMonte Fabricating Ltd.</i> , 550 F.3d 1356, 1362 (Fed. Cir. 2008) (holding that the trial court abused its discretion to permit a witness to testify as an expert where the witness had "no skill in the pertinent art" and thus was not "a qualified technical expert"); Pls. Exh. (English Rpt.) at 1-3 (claiming that his "scholarly research has focused on empirical methods in the social sciences, behavioral economics, and regulatory policy" and that he is "in the process of conducting research on the impact of various firearms laws within the United States").)
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17			Lack of sufficient facts and unreliable methodology. (Fed. R. Evid. 702; <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579, 593 (1993) (observing that Federal Rule of Evidence 702 requires the court to conduct "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue"); <i>see</i> Def. Exh. 7 (Donohue Rebuttal Rpt. ¶ 2) at 245-52, ¶¶ 14-19 (the English Report is based on an unpublished student
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		<p>paper that relied on flawed data-collection methodology.)</p> <p>Speculative expert testimony. (Fed. R. Evid. 702; <i>United States v. Hermanek</i>, 289 F.3d 1076, 1094 (9th Cir. 2002) (“The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted.” (quoting Fed. R. Evid. 702, comm. note)); Brady Decl., Ex. 2 (English Rpt.) at 6 (“Based on the statistics, research, and estimates [from National Shooting Sports Foundation production data for AR-platform rifles], it is my opinion that semiautomatic, centerfire rifles with detachable magazines and [that qualify as assault weapons under the AWCA] are commonly owned and used by millions of law-abiding Americans for a variety of lawful purposes.”); Def. Exh. 7 (Donohue Rebuttal Rpt. ¶ 2) at 245-52, ¶¶ 14-19 (the English Report is based on an unpublished student paper that relied on flawed data-collection methodology.)</p>
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2 Dated: May 2, 2019

Respectfully submitted,

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/s/ Peter H. Chang

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