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 8 UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE COURTHOUSE | 280 S. 1ST STREET, SAN JOSE, CA 95113

11 LORI RODRIGUEZ, THE SECOND
 AMENDMENT FOUNDATION,
 12 INC., and THE CALGUNS
 FOUNDATION, INC.,
 13

14 Plaintiffs,

15 vs.

16 CITY OF SAN JOSE, CITY OF SAN
 JOSE POLICE DEPARTMENT,
 17 OFFICER STEVEN VALENTINE
 and DOES 1 TO 20,
 18

19 Defendants.

Case No.: 5:15-CV-03698 EJD

**PLAINTIFFS' RESPONSIVE
 SEPARATE STATEMENT OF FACTS
 IN OPPOSITION TO DEFENDANTS'
 MOTION FOR SUMMARY
 JUDGMENT OR PARTIAL
 SUMMARY ADJUDICATION**

- and -

**SEPARATE STATEMENT IN
 SUPPORT OF PLAINTIFFS' CROSS-
 MOTION FOR SUMMARY
 JUDGMENT OR PARTIAL
 SUMMARY ADJUDICATION**

Claim or Defense	Moving Party's Undisputed Facts & Supporting Evidence	Opposing Party's Response, Additional Facts, Undisputed Fact for Cross-Motion & Supporting Evidence
Article III Standing		
1. Second Amendment Foundation, Inc. (SAF) and Calguns Foundation, Inc. did not suffer an actual injury or immediate threat of actual injury.	Fact 1. Lori Rodriguez is not a member of SAF or Calguns. L. Rodriguez Dep. 13:23-14:2. Vanni Declaration Ex. G.	Undisputed.

<p>1 Second Amendment 2 Foundation, Inc., (SAF) 3 meets Article III standing requirements.</p>		<p>Additional Fact A¹: See: Declaration of Alan Gottlieb, Executive Vice- President of SAF.</p>
<p>4 Calguns Foundation, 5 Inc., (CGF) meets Article 6 III standing requirements.</p>		<p>Additional Fact B: See: Declaration of Brandon Combs, Executive Director of CGF.</p>
	<p>8 Fact 2. When detaining or 9 apprehending a person for 10 a 5150 hold, officers are to 11 confiscate any firearm 12 owned, in the possession or under the control of the subject. 13 Vanni Declaration ¶ 2 and Ex. A (SJPD Duty Manual § L5705) 14 Valentine Dep. 55:6-10. Vanni Declaration Ex. H.</p>	<p>Undisputed with respect to firearms controlled by or possessed by Edward Rodriguez. Disputed with respect to firearm(s) owned, registered or under the control of Lori Rodriguez. See: Valentine Dep. 16:8- 17:1, 68:11-20 Lori Declaration: ¶¶ 3, 4, 6, 7, 8, 12, 13, 14, 15, 16. Lori Dep. 18:4-20:5,</p>
<p>17 The Defendants were not 18 authorized under any 19 state law or decisional authority to seize firearms owned and 20 under the control of Lori Rodriguez.</p>		<p>Additional Fact C: All of the Rodriguez firearms were stored in a California Approved Firearm Safe. See: Lori Declaration ¶¶ 3, 4, 6, 7, 8, 12, 13, 14, 15, 16.</p>

25 ¹ Defendants set forth 21 numbered “facts” in support of their Motion for Summary
26 Judgment. Based on the Court’s Standing Order IV, Plaintiffs do not appear to be authorized to
27 submit a separate Separate Statement of Undisputed Facts in support of their Cross-Motion for
28 Summary Judgment. Therefore Plaintiffs will incorporate their moving party “facts” under the
additional facts protocol and use lettered facts (A, B, C, ...) to distinguish them as both
additional facts opposing Defendant’s Motion for Summary Judgment and as moving party facts
in support of Plaintiffs’ Cross-Motion for summary judgment.

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		<p>Additional Fact D:</p> <p>At the time Officer Valentine demanded surrender of the Rodriguez firearms, Edward was already on his way to the hospital and therefore unable to exercise control over any firearms in the Rodriguez’s gun safe.</p> <p>See: Valentine Dep. 28:11-24, 31:14-33:16, 54:1-4, 68:24 - 69:7</p>
		<p>Additional Fact E:</p> <p>Lori had the key to the combination dial in a secure place. The combination dial could not be turned without the key.</p> <p>See: Lori Dep. 45:20-46:21, 48:3-25, 50:8-15,</p> <p>Lori Declaration: ¶¶ 3, 4, 6, 7, 12, 13.</p>
		<p>Additional Fact F:</p> <p>Lori had the combination to the gun safe changed on April 26, 2013 and since then, has kept the key in a secure place. The key only unlocks the combination dial and she is the only person who knows the combination of the safe and it is not written down anywhere for Edward to discover.</p> <p>See: Lori Dep. 58:2-60:18.</p> <p>Lori Declaration: ¶¶ 3, 6, 7, 13.</p>

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First Claim for Relief: Second Amendment 42 USC § 1983, 1988		
<p>1. Defendants have not infringed upon Plaintiffs Second Amendment Rights to keep and bear arms for self-defense.</p>	<p>Fact 3. Lori Rodriguez can own, possess, or acquire firearms. Plaintiffs Complaint ¶ 28. L. Rodriguez Dep. 70:22-24. Vanni Declaration Ex. G.</p>	<p>Undisputed with respect to ownership, acquisition, and possession of future firearms. Disputed with respect to Lori’s right to “keep and bear” firearms already owned by her. See: Lori Declaration ¶¶ 3, 11, 15, 16, 17, 18, 19.</p>
<p>2. The City does not have a policy, practice, or custom that violates Plaintiffs’ Second Amendment Rights.</p>	<p>Fact 4. When detaining or apprehending a person for a 5150 hold, officers are to confiscate any firearm owned, in the possession or under the control of the subject. Vanni Declaration ¶ 2 and Ex. A (SJPD Duty Manual § L5705) Valentine Dep. 55:6-10. Vanni Declaration Ex. H.</p>	<p>Undisputed with respect to firearms owned, registered or under the control of Edward Rodriguez. Disputed with respect to firearm(s) owned, registered or under the control of Lori Rodriguez. See: Valentine Dep. 16:8-17:1, 68:11-20 Lori Declaration: ¶¶ 3, 4, 6, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19.</p>
	<p>Fact 5. After an evidentiary hearing pursuant to Section 8102, Judge Kirwan determined that it was not safe to return the firearms to Lori Rodriguez because it would likely be dangerous to Edward Rodriguez and others. Vanni Declaration ¶¶ 3-7 and Exs. B-F. Defendants’ Request for Judicial Notice ¶¶ 1-5.</p>	<p>Undisputed.</p>

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<p>The Defendants' policies, procedures and customs violate the rights of any law-abiding citizen who has the means to secure firearms, but who live with persons unable to possess firearms.</p>		<p>Additional Facts A, B, C, D, E and F - <i>supra</i>.</p>
<p>The Defendants' policies procedure and customs as applied to Lori Rodriguez, both at the time of the seizure and as a continuing circumstance violate, Lori's right to keep and bear her own firearms.</p>		<p>Additional Facts A, B, C, D, E and F - <i>supra</i>.</p> <p>Additional Fact G:</p> <p>Lori Rodriguez was the sole registered owner of at least one of the firearms seized by the Defendants.</p> <p>See: Valentine Dep. 16:8 - 17:1</p> <p>Lori Declaration: ¶¶ 3, 15</p> <p>Lori Dep. 23:12-15.</p>
		<p>Additional Fact H:</p> <p>Officer Valentine knew that Lori Rodriguez was the registered owner of at least one of the firearms stored in the Rodriguez gun safe and he confirmed that fact with his dispatcher.</p> <p>See: Valentine Dep. 16:8 - 17:1.</p>
		<p>Additional Fact I:</p> <p>Lori objected to the seizure of her personal firearm and conveyed that objection to Officer Valentine.</p> <p>See: Valentine Dep. 68:11-20</p> <p>Lori Declaration: ¶¶ 3, 16.</p>

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		<p>Additional Fact J:</p> <p>Lori always stood ready, willing and able to execute the necessary paper work to transfer sole registration and ownership of all of the Rodriguez firearms to her name.</p> <p>See: Lori Declaration: ¶¶ 2, 4, 5, 8, 9, 10, 15, 19.</p>
		<p>Additional Fact K:</p> <p>Lori knew and understood her duty to prevent Edward from obtaining possession of the firearms under her control.</p> <p>See: Lori Declaration: ¶¶ 4, 6, 7, 12, 13, 14.</p> <p>Lori Dep. 75:9-12, 76:6-20, 84:1-17.</p>
		<p>Additional Fact L:</p> <p>The California Department of Justice approved the transfer and registration of all the Rodriguez firearms to Lori during the month of May 2015.</p> <p>See: Lori Declaration: ¶¶ 5, 6, 7, 8, 9, 10.</p>

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		<p>Additional Fact M:</p> <p>Lori Rodriguez obtained a Law Enforcement Gun Release Approval letter pursuant to California Penal Code § 33800 <i>et seq.</i>, for each and every firearm seized by the Defendants on June 1, 2015 and tendered those to the Defendants on June 11, 2015.</p> <p>See: Lori Declaration: ¶¶ 5, 6, 7, 8, 9, 10.</p>
		<p>Additional Fact N:</p> <p>On or about July 6, 2015 the Defendants refused to release firearms owned and registered to Lori Rodriguez.</p> <p>See: Lori Declaration: ¶11.</p>
		<p>Additional Fact O:</p> <p>It is not rational to refuse the return of a firearm to an owner for “safety” reasons – when the owner is eligible to purchase, own and can safely store those firearms, or can purchase new ones, in compliance with state and federal law.</p> <p>See: Lori Declaration: ¶¶ 15, 17, 19.</p> <p>Lori Dep. 70:22-71:18.</p>

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Second Claim for Relief: Fourth Amendment 42 USC § 1983, 1988		
<p>1. The confiscation of the firearms was reasonable under the Fourth Amendment.</p>	<p>Fact 6. Edward Rodriguez was detained for a 5150 hold and is a prohibited person under Section 8103.</p> <p>Plaintiffs' Complaint ¶ 18.</p> <p>L. Rodriguez Dep. 70:17-21. Vanni Declaration Ex. G.</p>	<p>Undisputed.</p>
<p>Warrantless seizures from the home violate the Fourth Amendment unless there is a valid exception to the warrant requirement.</p>		<p>Additional Fact P:</p> <p>The police did not have warrant to seize Lori's firearms and she did not consent to them being seized.</p> <p>See: Lori Declaration ¶ 17.</p>
<p>The warrantless seizure of the firearm registered and owned by Lori Rodriguez, even if the seizure of other firearms was valid, was unreasonable and violated the Fourth Amendment.</p>		<p>Additional Facts C-O, <i>supra</i>.</p> <p>Additional Fact Q:</p> <p>Lori Rodriguez was not being detained for a 5150 and is not now, nor has she ever been a prohibited person under any theory of law.</p> <p>See: Lori Declaration: ¶ 14.</p>
	<p>Fact 7. Lori called the San Jose Police Department because her husband was in distress and exhibited signs of erratic behavior.</p> <p>Plaintiffs' Complaint ¶ 18.</p> <p>L. Rodriguez Dep. 28:15-17. Vanni Declaration Ex. G.</p>	<p>Undisputed.</p>

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	<p>Fact 8. Edward mentioned to Officer Valentine that he had a lot of guns inside a nearby gun safe in the kitchen.</p> <p>Valentine Dep. 44:21-45:3. Vanni Declaration Ex. H.</p>	<p>Undisputed.</p>
		<p>Additional Fact R:</p> <p>Edward Rodriguez’s statements about firearms in his safe may have been in response to a question by Officer Valentine.</p> <p>See: Valentine Dep. 44:12 - 45:6.</p>
		<p>Additional Fact S:</p> <p>There were no firearms located outside of the Rodriguez gun safe at any time prior to Edward being transported to the Hospital.</p> <p>See: Valentine Dep. 43:7-15</p> <p>Lori Dep. 40:24-41:10</p>
	<p>Fact 9. All firearms were in a gun safe owned by Edward and Lori, which was located in the kitchen of their home at the opposite end of the room where Edward was located.</p> <p>Complaint ¶ 14.</p> <p>L. Rodriguez Dep. 40:24-41:1; 43: 8-11; 49:12-14; 50:4-7. Vanni Declaration Ex. G.</p>	<p>Undisputed.</p>

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	<p>Fact 10. Officer Valentine informed Lori of the laws pursuant to a 5150 hold and that, pursuant to the law, he was to confiscate the firearms.</p> <p>L. Rodriguez Dep. 51:4-11. Vanni Declaration Ex. G.</p> <p>Valentine Dep. 46:23-47:25; 60:10-13; 62:24-63:2. Vanni Declaration Ex. H.</p>	<p>Undisputed.</p>
<p>Defendants' warrantless seizure of Lori's Rodriguez's firearms was not consensual because it was obtained under duress.</p>		<p>Additional Fact T:</p> <p>It is a crime to obstruct, delay or interfere with a peace officer in the performance of his or her duty.</p> <p>See: Penal Code § 148.</p>
		<p>Additional Fact U:</p> <p>Lori Rodriguez was aware at time of the seizure of her firearm(s), that it was wrong to delay, obstruct or interfered with a peace officer in the performance of his/her duty.</p> <p>See: Lori Declaration: ¶ 16.</p>

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	<p>Fact 11. After being told that the Officers had [to] confiscate any firearms, Lori went, by herself, to retrieve the key to the gun safe from a locked filed cabinet in a home office. She then went to get the combination that was written down inside an address book located inside a desk in a bedroom. She then gave this information to an officer so they could open the safe and confiscate the firearms.</p> <p>L. Rodriguez Dep. 46:12-21; 48:13-49:4; 54:2-22; 55:3-7; 60:19-61:7. Vanni Declaration Ex. G.</p>	<p>Undisputed.</p>
<p>The seizure of the firearms was not consensual.</p>		<p>Additional Fact V:</p> <p>Officer Valentine did not use the San Jose Police Department form for documenting consensual searches.</p> <p>See: Valentine Depo 18:16-22, 46:12-15</p>
<p>There were no exigent circumstances to justify the warrantless seizure of the Rodriguez firearms.</p>		<p>Additional Fact W:</p> <p>Officer Valentine was Officer in Charge at the Rodriguez home and made the decision to seize the firearms.</p> <p>See: Valentine Dep 28: 11-24.</p>

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		<p>Additional Fact X:</p> <p>Any discussions had by Officer Valentine about seizing the firearms did not take place until after Edward Rodriguez was secured and shortly after that Edward was transported by ambulance to the hospital for a 72 hour hold pursuant to 5150.</p> <p>See: Valentine Dep 31:14-33:16, 54:1-4</p>
		<p>Additional Fact Y:</p> <p>Lori Rodriguez did not report that any domestic violence had occurred.</p> <p>Valentine Depo: 37:25 - 38:5</p>
		<p>Additional Fact Z:</p> <p>Officer Valentine filed a declaration in the state action that contained a <u>false statement</u> saying he had conducted a “protective sweep” of the Rodriguez home. He admits in his deposition that this was an error and that his report, which does not refer to a protective sweep, is the more accurate description of the events in question. Namely that there were no exigent circumstances at the Rodriguez home requiring protective sweeps.</p> <p>Valentine Depo: 38:6 - 43:6.</p>

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		<p>Additional Fact AA:</p> <p>Officer Valentine told Lori Rodriguez that he was required by law to confiscate all weapons in the Rodriguez home.</p> <p>Valentine Depo: 46:23 - 48:18, 58:20 - 59:1, 60:10-15. 62:24 - 63:15, 67:13-21</p>
<p>2. The retention of the firearms is reasonable under the Fourth Amendment.</p>	<p>Fact 12. After an evidentiary hearing pursuant to Section 8102, Judge Kirwan determined that it was not safe to return the firearms to Lori Rodriguez because it would likely be dangerous to Edward Rodriguez and others.</p> <p>Vanni Declaration ¶¶ 3-7 and Exs. B-F.</p> <p>Defendants' Request for Judicial Notice ¶¶ 1-5.</p>	<p>Undisputed.</p>
<p>Retention of the firearms registered to and cleared for release to Lori Rodriguez <i>after</i> the Sixth District Court of Appeal authorized release violates the Fourth Amendment, even if the original seizure was justified.</p>		<p>Additional Fact BB:</p> <p>The Sixth District Court of Appeal authorized release of the firearms to Lori if she complied with Penal Code § 38880.</p> <p>See Vanni Declaration Exhibit F, pg. 61-62 of Document #23, pg. 16-17 of the 6th DCA opinion.</p>

<p>3. Plaintiffs cannot identify a policy, practice, or custom that infringes their Fourth Amendment Rights.</p>	<p>Fact 13. When detaining or apprehending a person for a 5150 hold, officers are to confiscate any firearm owned, in the possession or under the control of the subject.</p> <p>Vanni Declaration ¶ 2 and Ex. A (SJPD Duty Manual L5705)</p> <p>Valentine Dep. 55:6-10. Vanni Declaration Ex. H.</p>	<p>Undisputed with respect to firearms owned or registered to Edward Rodriguez.</p> <p>Disputed with respect to firearm(s) owned or registered to Lori Rodriguez.</p> <p>See: Lori Declaration: ¶¶ 3, 4, 6, 7, 8, 12, 13, 14, 15, 16.</p>
<p>Seizure of of the firearm registered to Lori Rodriguez violated the Fourth Amendment.</p>		<p>See Additional Facts C-Q, <i>supra</i>.</p>
<p>Retention of the firearms registered to and cleared for release to Lori Rodriguez <i>after</i> the Sixth District Court of Appeal authorized release violates the Fourth Amendment, even if the original seizure was justified.</p>		<p>See Additional Fact BB, <i>supra</i>.</p>
<p>Third Claim for Relief: Fifth Amendment (Takings) 42 USC § 1983, 1988</p>		
<p>1. Defendants acquired the firearms under section 8102.</p>	<p>Fact 14. Edward Rodriguez was detained for a 5150 hold and is a prohibited party under Section 8103.</p> <p>Plaintiffs' Complaint ¶ 18.</p> <p>L. Rodriguez Dep. 70:17-21. Vanni Declaration Ex. G.</p>	<p>Undisputed.</p>
<p>Taking of personal property, even if justified on the grounds of Public Safety, requires just compensation if the seizure turns into a forfeiture.</p>		<p>Additional Fact Q. <i>supra</i>.</p>

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<p>2. The City retains the firearms pursuant to a valid Court order.</p>	<p>Fact 15. After an evidentiary hearing pursuant to Section 8102, Judge Kirwan determined that it was not safe to return the firearms to Lori Rodriguez because it would likely be dangerous to Edward Rodriguez and others.</p> <p>Vanni Declaration ¶¶ 3-7 and Exs. B-F.</p> <p>Defendants' Request for Judicial Notice ¶¶ 1-5.</p>	<p>Undisputed.</p>
<p>Conversion of personal property for public use requires just compensation.</p>		<p>Additional Fact CC:</p> <p>The firearms owned and registered to Lori Rodriguez are valuable personal property.</p> <p>See: Lori Declaration: ¶ 18.</p>
<p><u>Fourth Claim for Relief: Fourteenth Amendment 42 USC § 1983, 1988</u></p>		
<p>1. Lori had Procedural Due Process under Section 8102</p>	<p>Fact 16. The City initiated a petition, City of San Jose v. Edward Rodriguez under Section 8102.</p> <p>Vanni Declaration ¶ 3 and Ex. B (City's Petition).</p> <p>Defendants' Request for Judicial Notice ¶ 1.</p>	<p>Undisputed with respect to all dates prior to June 11, 2015.</p> <p>Disputed with respect to all dates after the California Department of Justice approved the transfer and release of firearms to Lori Rodriguez.</p>
<p>The Fourteenth Amendment Procedural Due Process claim arises after the Sixth District Court of Appeal authorized the release of the firearms through the process of Penal Code ¶ 33800 <i>et seq.</i></p>		<p>See: Additional Facts L, M, N, O and BB. <i>Supra.</i></p> <p>See: Lori Declaration ¶ 5, 6, 7, 8, 9, 10, 11, 15, 19.</p>

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	<p>Fact 17. Lori intervened into City of San Jose v. Edward Rodriguez and requested a hearing to seek return of the firearms.</p> <p>Vanni Declaration ¶ 4 and Ex. C (Lori’s Request for Hearing).</p> <p>Defendants’ Request for Judicial Notice ¶¶ 3.</p>	<p>Undisputed.</p>
	<p>Fact 18. Judge Kirwan conducted a full evidentiary hearing where Lori argued that the Court should order the City to return the firearms to her.</p> <p>Vanni Declaration ¶ 5 and Ex. D (Reporter’s Transcript).</p> <p>Defendants’ Request for Judicial Notice ¶¶ 1-5.</p>	<p>Undisputed.</p>
	<p>Fact 19. Lori appealed Judge Kirwan’s decision to the California Sixth District Court of Appeal, which issued a decision finding that Judge Kirwan’s decision was supported by substantial evidence.</p> <p>Vanni Declaration ¶ 7 and Ex. F (Decision of Sixth District Court of Appeal in <i>City of San Jose v. Edward Rodriguez et al.</i>).</p> <p>Defendants’ Request for Judicial Notice ¶ 5.</p>	<p>Undisputed.</p>

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<p>Even if the original seizure provided full due process protection, the retention of the firearms after the Court of Appeals authorized release, violates due process.</p>		<p>See: Additional Facts L, M, N, O and BB. <i>Supra.</i></p> <p>See: Lori Declaration ¶ 5, 6, 7, 8, 9, 10, 11, 15, 19.</p>
<p>2. The City retains the firearms because Judge Kirwan’s order regarding the safety of returning the firearms to Lori.</p>	<p>Fact 20. After an evidentiary hearing pursuant to section 8102, Judge Kirwan determined that it was not safe to return the firearms to Lori Rodriguez because it would likely be dangerous to Edward Rodriguez and others.</p> <p>Vanni Declaration ¶¶ 3-7 and Exs. B-F.</p> <p>Defendants’ Request for Judicial Notice ¶¶ 1-5</p>	<p>Undisputed.</p>
<p>Even if the original seizure provided full due process protection, the retention of the firearms after the Court of Appeals authorized release, violates due process.</p>		<p>See: Additional Facts L, M, N, O and BB. <i>Supra.</i></p> <p>See: Lori Declaration ¶ 5, 6, 7, 8, 9, 10, 11, 15, 19.</p>
<p><u>Fifth Claim for Relief: State Law Claim under Cal. Penal Code §§ 33800 et seq.</u></p>		
<p>1. The City retains the firearms because Judge Kirwan’s order regarding the safety of returning the firearms to Lori.</p>	<p>Fact 21. After an evidentiary hearing pursuant to Section 8102, Judge Kirwan determined that it was not safe to return the firearms to Lori Rodriguez because it would likely be dangerous to Edward Rodriguez and others.</p> <p>Vanni Declaration ¶¶ 3-7 and Exs. B-F.</p> <p>Defendants’ Request for Judicial Notice ¶¶ 1-5</p>	<p>Undisputed.</p>

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<p>The Sixth District Court of Appeals authorized the release of firearms to Lori Rodriguez upon her compliance with Penal Code § 33800 <i>et seq.</i>, and the Defendants have violated that code section by refusing to return said firearms.</p>		<p>See: Additional Facts L, M, N, O and BB. <i>Supra.</i></p> <p>See: Lori Declaration ¶ 5, 6, 7, 8, 9, 10, 11, 15, 19.</p>

I attest that the evidence cited herein fairly and accurately supports or disputes the facts as asserted.

Respectfully Submitted on September 15, 2016,

/s/ Donald Kilmer
Attorney for Plaintiffs