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11
 12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE EASTERN DISTRICT OF CALIFORNIA
 14 FRESNO DIVISION

15
 16 **JEFF SILVESTER, MICHAEL POESCHL,
 BRANDON COMBS, THE CALGUNS
 17 FOUNDATION, INC., a non-profit
 organization, and THE SECOND
 18 AMENDMENT FOUNDATION, INC., a
 non-profit organization,**

19
 20 Plaintiffs,

21 v.

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

24 Defendants.
 25
 26
 27
 28

1:11-cv-02137-AWI-SKO

**DEFENDANT KAMALA D. HARRIS'S
 NOTICE OF MOTIONS AND MOTIONS
 IN LIMINE**

[Motion in Limine No. 1: FRE 403 and 702]
 [Motion in Limine No. 2: FRE 802]

Date: March 11, 2014
 Time: 1:30 p.m.
 Courtroom: 2

Action Filed: December 23, 2011
 Trial Date: March 25, 2014

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, at 1:30 p.m. on March 11, 2014, or as soon thereafter as the
3 matter may be heard, in Courtroom 2 (Senior U.S. District Judge Anthony W. Ishii, presiding) on
4 the eighth floor of the above-entitled Court, located at the Robert E. Coyle Federal Courthouse,
5 2500 Tulare St., Fresno, CA 93721, Defendant Kamala D. Harris, sued in her capacity as the
6 Attorney General of the State of California (the "Attorney General"), will and hereby does move
7 *in limine* for an order excluding at trial any testimonies, references to testimonies, or argument
8 relating to the testimonies of lay witnesses Alan Gottlieb and Gene Hoffman regarding all matters
9 outside of their first-hand knowledge. (Motion In Limine No. 1.) The motion is based on the
10 grounds that these lay witnesses have not been designated or qualified as experts in this case, are
11 not qualified as experts to provide expert testimony under Federal Rule of Evidence, Rule
12 ("FRE") 702, and any purported expert testimony from these witnesses would be confusing,
13 misleading, and time-wasting pursuant to FRE 403.

14 The Attorney General further moves *in limine* for an order excluding at trial any
15 testimonies, references to testimonies, or argument relating to anecdotes or other matters told to
16 Plaintiffs' witnesses by out-of-court declarants, i.e., hearsay. (Motion In Limine No. 2.) The
17 motion is based on the grounds that such evidence is inadmissible hearsay under FRE 801 and
18 802.

19 These motions are supported by the following memorandum of points of authorities, the
20 accompanying declaration of Jonathan M. Eisenberg, and all pleadings and documents on file
21 herein.

22
23 Dated: February 18, 2014

Respectfully Submitted,

24 KAMALA D. HARRIS
25 Attorney General of California
26 MARK BECKINGTON
Supervising Deputy Attorney General

27 /s/ Peter H. Chang
PETER H. CHANG
Deputy Attorney General
28 *Attorneys for Defendant Kamala D. Harris,*
Attorney General of California

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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2
3 Plaintiffs challenge the constitutionality of two California state firearm laws, California
4 Penal Code sections 26815 and 27540, which mandate a 10-day waiting period between the
5 application to purchase and delivery of a firearm, for all California residents not statutorily
6 exempt from the waiting period.

7 Plaintiffs have identified Alan Gottlieb and Gene Hoffman, among others, as trial
8 witnesses. Mr. Gottlieb is the corporate representative of Plaintiff The Second Amendment
9 Foundation, Inc. Mr. Hoffman is the corporate representative of Plaintiff The CalGuns
10 Foundation, Inc. Plaintiffs have not designated any expert witnesses or produced any expert
11 reports. Nonetheless, based upon the deposition testimonies of Messrs. Gottlieb and Hoffman,
12 Defendant Kamala D. Harris, sued in her official capacity as the Attorney General of the State of
13 California (the “Attorney General”), believes that Plaintiffs may seek to introduce as evidence at
14 trial certain opinions of Messrs. Gottlieb and Hoffman that would be in the province of expert
15 opinion and thus should be excluded from trial.

16 Again, neither Mr. Gottlieb nor Mr. Hoffman has been designated or qualified as an expert
17 in any subject matter in this case. Therefore, they may not offer testimony as to any purportedly
18 scientific, technical, or other specialized knowledge within the scope of expert witnesses under
19 Federal Rule of Evidence, Rule (“FRE”) 702. Furthermore, any purported “expert” testimony
20 provided by Mr. Gottlieb or Mr. Hoffman would be confusing, misleading, and time-wasting
21 pursuant to FRE 403 because they are lay witnesses.

22 Further, and also based upon the deposition testimonies of Messrs. Gottlieb and Hoffman,
23 the Attorney General believes that these witnesses intend to testify as to anecdotes purportedly
24 told to them by their respective foundation’s members or supporters. These anecdotes are
25 inadmissible hearsay under FRE 802.

1 **II. MOTION IN LIMINE NO. 1:**
2 **TO EXCLUDE IMPROPER EXPERT TESTIMONY BY GOTTLIEB AND HOFFMAN**

3 The first motion is made under FRE 403 and 702. Any expert testimony from Messrs.
4 Gottlieb or Hoffman would not be admissible under FRE 702 because neither Mr. Gottlieb nor
5 Mr. Hoffman has been designated or qualified as experts. Any apparent expert testimony from
6 Messrs. Gottlieb or Hoffman should be excluded under FRE 403, which provides that “[t]he court
7 may exclude relevant evidence if its probative value is substantially outweighed by a danger of ...
8 unfair prejudice, confusing the issues, ... undue delay, [or] wasting time....” Any probative value
9 that the testimonies of Messrs. Gottlieb or Hoffman may provide would be substantially
10 outweighed by a danger of unfair prejudice, confusing the issues, unduly delay, and wasting of
11 time.

12 FRE 702 provides that a witness who is qualified as an expert by knowledge, skill,
13 experience, training, or education may testify in the form of an opinion or otherwise if: (a) the
14 expert’s scientific, technical, or other specialized knowledge will help the trier of fact to
15 understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient
16 facts or data; (c) the testimony is the product of reliable principles and methods, and (d) the
17 expert has reliably applied the principles and methods to the facts of this case.¹

18 The District Court exercises a gatekeeping function that is critically important to ensure the
19 reliability and relevancy of expert testimony. *Jinro America Inc. v. Secure Investments, Inc.*, 266
20 F.3d 993, 1005 (9th Cir. 2001), citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152
21 (1999). In this case, Plaintiffs have not proffered Messrs. Gottlieb or Hoffman as expert
22 witnesses and yet the Attorney General justifiably expects Plaintiffs to attempt to elicit improper
23 expert testimony from Messrs. Gottlieb and Hoffman relating to subject matters including:

- 24 1. The social impact and effect, if any, of the 10-day waiting period;

25 _____
26 ¹ This motion is based primarily on Plaintiffs’ failure to designate Gottlieb and Hoffman
27 as expert witnesses and these witnesses’ lack of qualification to provide expert testimony on any
28 relevant subject matter. To the extent Plaintiffs seek to elicit any expert testimony from Gottlieb
and Hoffman with respect to specific subjects at trial, the Attorney General intends to further
challenge any such specific testimony based on, for example, the requirements of FRE 702 and
703, and inadmissible hearsay.

- 1 2. The social impact and effect, if any, of the 10-day “cooling off” period;
- 2 3. The social impact and effect, if any, of any California firearms law;
- 3 4. The commercial impact and effect, if any, of the 10-day waiting period;
- 4 5. Criminology and comparative analysis of crime data;
- 5 6. The legislative intent behind parts of the California Penal Code;
- 6 7. The computer systems used by the California Department of Justice and/or the
- 7 Federal Bureau of Investigation to conduct background checks on prospective firearms purchasers
- 8 or to process “Dealer’s Record of Sale” (“DROS”) information;
- 9 8. The processing of DROS information by the California Department of Justice.

10 For example, in his deposition, Mr. Gottlieb provided unsupported opinion as to the

11 legislative intent behind the firearms laws in question here:

12 Q: Does the Second Amendment Foundation have a position or an opinion about

13 what the California Legislature’s intent was in enacting Penal Code Section 26815

14 and 27540, which is the ten-day-waiting-period laws?

15 ***

16 A: Well, our understanding and opinion is that it was proposed basically for a couple

17 of reasons. One was a cooling off period between the time a person would buy a

18 gun and pick it up to do something evil with it that they would have time to calm

19 down. And the other one was to try and retard and make it harder to purchase

20 firearms so that less firearms would be sold.

21 Q: What’s the basis for Second Amendment Foundation’s position that the

22 Legislature was trying to retard...the supply of firearms in circulation in

23 California?

24 A: A lot of antigun rights groups has [sic] supported the legislation and a lot of

25 politicians have supported and made comments of that nature.

26 Exhibit 1 (Gottlieb Deposition Transcript) to Jonathan M. Eisenberg Declaration (“Eisenberg

27 Decl.”), at pp. 71-72. In another example, Mr. Hoffman improperly opines on criminology data,

28 which he is not competent to, and he conceded was difficult to, interpret:

 Q: [D]oes CGF [Calguns Foundation] understand that it’s the difference in carry laws

 between Texas and California that’s the primary reason that there is a difference

 between gun homicide rates?

1 A: Well, I will caveat answering that question with: The criminological information
2 here is thick, rich, and hard to decouple. It may also include the value of the drug
3 market in both states. But to the extent we're talking about firearm policy, it is
4 CGF's supposition that the liberal carry issuance in Texas is more of a deterrent
5 than the reverse being that the ten-day wait somehow decreases gun crime.

6 Exhibit 2 (Hoffman Deposition Transcript) to Eisenberg Decl., at p. 106.

7 Thus, in their depositions, both Messrs. Gottlieb and Hoffman provided quasi-expert
8 opinions yet are only lay witnesses. The Court should exclude any purported expert testimony by
9 Messrs. Gottlieb and Hoffman on these and any other relevant subjects.

10 **III. MOTION IN LIMINE NO. 2: TO EXCLUDE HEARSAY TESTIMONY**

11 FRE 802 states that "[h]earsay is not admissible unless any of following provides
12 otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court." In the
13 present case, the Attorney General expects Messrs. Gottlieb and Hoffman to testify as to
14 anecdotes of the purported effects of the 10-day waiting period on certain of their respective
15 foundation's members or supporters, as told to Messrs. Gottlieb and Hoffman.

16 For example, Mr. Hoffman, in his deposition, provided improper and unreliable hearsay
17 testimony regarding the alleged effects of 10-day waiting periods:

18 Q: Has CGF attempted to gather information from members about whether the ten-
19 day waiting period has prevented them from effectively defending themselves or
20 their families in their homes?

21 A: We are aware of a couple situations where it has been a real hindrance, yes.

22 ***

23 Q: What was her attempt to obtain firearms in connection with, if anything?

24 A: She had someone who she was concerned was a stalker.

25 ***

26 Q: How did you become aware that this woman had this predicament?

27 A: A conversation with a friend of hers who was a volunteer for us.

28 ***

Q: Did you talk to this woman directly?

1 A: No, I did not.

2 Exhibit 2 to Eisenberg Decl., at pp. 134, 137-38. In this example of double hearsay, Hoffman
3 testified about a situation that was told to him out-of-court by someone who heard it from a
4 second out-of-court declarant. This anecdote and others that Messrs. Gottlieb or Hoffman may
5 have heard are hearsay not within any recognized exception, and therefore inadmissible. *See*
6 *United States. v. \$11,500.00 in U.S. Currency*, 710 F.3d 1006, 1014 (9th Cir. 2013) (holding that,
7 to the extent witness sought to testify based on information that another witness told him, it was
8 hearsay).

9 III. CONCLUSION

10 For the foregoing reasons, the Attorney General respectfully requests that the Court
11 preclude Plaintiffs' witnesses Messrs. Gottlieb and Hoffman from offering any "expert"
12 testimony, and further requests that the Court preclude Messrs. Gottlieb and Hoffman from
13 offering hearsay testimony.

14 Dated: February 18, 2014

Respectfully Submitted,

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16 KAMALA D. HARRIS
Attorney General of California
17 MARK BECKINGTON
Supervising Deputy Attorney General

18
19
20 /s/ Peter H. Chang
PETER H. CHANG
Deputy Attorney General
21 *Attorneys for Defendant Kamala D. Harris,*
22 *Attorney General of California*