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 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA
 11

12 **IVAN PEÑA, ROY VARGAS, DOÑA**
 13 **CROSTON, BRETT THOMAS, SECOND**
 14 **AMENDMENT FOUNDATION, INC., and**
THE CALGUNS FOUNDATION, INC.,

15 Plaintiffs,

16 v.

17 **WILFREDO CID,**

18 Defendant.
19

2:09-cv-01185-FCD-KJM

DEFENDANT CID'S SUPPLEMENTAL BRIEF

Date: None
 Time: None
 Dept: No. 2, 15th Floor
 Judge: Frank C. Damrell, Jr.
 Trial Date: None
 Action Filed: April 30, 2009

20 By order filed September 28, the Court directed "the parties to file supplemental briefing
 21 regarding why this action should not be stayed pending the Ninth Circuit's en banc decision in
 22 *Nordyke v. King*." (Doc. no. 20.) As explained below, Defendant Cid agrees that this action
 23 should be stayed until the Ninth Circuit issues its en banc decision in *Nordyke*.

24 **I. THE COURT SHOULD STAY THIS ACTION IN ITS ENTIRETY PENDING THE NINTH**
 25 **CIRCUIT'S EN BANC DECISION IN *NORDYKE V. KING*.**

26 On September 30, the Supreme Court granted the petition for certiorari in *McDonald v. City*
 27 *of Chicago*, No. 08-1521. This term, therefore, the Court will consider the applicability of the
 28 Second Amendment to the states and local entities.

1 Additionally, once the Supreme Court decides *McDonald*, the Ninth Circuit en banc panel
2 will decide *Nordyke*. Following oral argument en banc, the Ninth Circuit vacated the submission
3 of *Nordyke* pending the Supreme Court's disposition of *McDonald*, as well as *National Rifle*
4 *Ass'n of America, Inc. v. City of Chicago*, No. 08-1497, the companion case to *McDonald*, and
5 *Maloney v. Rice*, No. 08-1592, the New York Second Amendment case.¹

6 At the time Cid filed his motion to dismiss, the panel decision in *Nordyke* was important
7 because it both addressed the incorporation issue and evaluated whether the Second Amendment
8 invalidated the firearms regulation at issue in light of *District of Columbia v. Heller*, --- U.S. ---,
9 128 S. Ct. 2783 (2008). Although it now appears the Supreme Court will resolve the
10 incorporation issue, the en banc decision in *Nordyke* remains important because, apart from how
11 the incorporation question is answered, *Nordyke* will involve the Ninth Circuit's evaluation of a
12 firearms regulation in light of both *Heller* and *McDonald*. Cid therefore would disagree with any
13 suggestion that the *Nordyke* en banc opinion will have no relevance beyond the incorporation
14 issue. (See Pls.' Not. of Possible Relevant Auth. filed Aug. 24 at 2.)

15 In sum, in the upcoming months the Supreme Court will decide *McDonald*. And then the
16 Ninth Circuit will decide *Nordyke*. Both cases will at least instruct, if not directly control, this
17 case. It would be a waste of resources to proceed in this case in any fashion until the issuance of
18 the opinions in *McDonald* and then *Nordyke*. Thus, this action should be stayed in its entirety
19 pending the Ninth Circuit's issuance of the en banc decision in *Nordyke*.

20 **II. ANY ORDER STAYING THIS ACTION SHOULD DIRECT THAT ANY MOTION TO**
21 **DISMISS BY CID BE DECIDED BEFORE PLAINTIFFS FILE ANY MOTION FOR**
22 **SUMMARY JUDGMENT ONCE THE STAY IS LIFTED.**

23 Earlier in this case Plaintiffs attempted to have their motion for summary judgment heard at
24 the same time as Cid's motion to dismiss. Cid responded with an application for an order
25 shortening time and motion for relief under Federal Rule of Civil Procedure 56(f). The Court
26 then ordered that Cid's motion to dismiss remain set for October 2, as originally noticed, set the

27 ¹ Presumably, the Court will hold *National Rifle Ass'n of America* and *Maloney* until it
28 decides *McDonald*.

1 Rule 56(f) motion for hearing on October 16, and continued the hearing on Plaintiffs' motion for
2 summary judgment to October 30. Accordingly, if this action is stayed, and consistent with the
3 interest of conserving the resources of the Court and parties, Cid requests that any order staying
4 this action direct him to file any motion to dismiss within 30 days from the lifting of the stay and
5 further direct that Plaintiffs not file any motion for summary judgment until Cid's motion to
6 dismiss is decided, or until the 30-day period expires if Cid does not file a motion to dismiss.

7 Dated: October 2, 2009

Respectfully Submitted,

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11 /s/ ***Anthony R. Hakl***

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