

1 KAMALA D. HARRIS  
 Attorney General of California  
 2 MARK R. BECKINGTON, State Bar No. 126009  
 Supervising Deputy Attorney General  
 3 ANTHONY R. HAKL, State Bar No. 197335  
 Deputy Attorney General  
 4 1300 I Street, Suite 125  
 P.O. Box 944255  
 5 Sacramento, CA 94244-2550  
 Telephone: (916) 322-9041  
 6 Fax: (916) 324-8835  
 E-mail: Anthony.Hakl@doj.ca.gov  
 7 *Attorneys for Defendant Stephen Lindley*

8  
 9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 12

13 **IVAN PEÑA, ROY VARGAS, DOÑA**  
**CROSTON, BRETT THOMAS, SECOND**  
 14 **AMENDMENT FOUNDATION, INC. and**  
**THE CALGUNS FOUNDATION, INC.,**  
 15  
 16 Plaintiffs,  
 17  
 18 **STEPHEN LINDLEY,**  
 19 Defendant.

Case No. 2:09-CV-01185-KJM-CMK

**DEFENDANT STEPHEN LINDLEY'S  
 OPPOSITION TO PLAINTIFFS'  
 MOTION TO SUPPLEMENT THE  
 RECORD**

Date: February 28, 2014  
 Time: 10:00 a.m.  
 Dept.: Courtroom 3, 15th floor  
 Judge: The Hon. Kimberly J. Mueller  
 Trial Date: None at this time  
 Action Filed: May 1, 2009

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<b>Page</b>
Introduction .....	1
Relevant Procedural Background.....	1
Argument .....	1
I.    The rules do not authorize Plaintiffs’ motion. ....	1
II.   Plaintiffs have failed to show that the supplemental information could not have been discovered earlier. ....	2
III.  The declarations do not contain admissible evidence in support of any material facts. ....	3
Conclusion .....	4

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page**

**CASES**

*Pepper v. JC Penney Corp.*  
 No. C07-1781-JCC, 2008 WL 4614268 (W.D. Wash., Oct. 16, 2008) ..... 2

*Peterson v. Scotia Prince Cruises Ltd.*  
 328 F. Supp. 2d 119 (D. Maine 2004) ..... 2

**STATUTES**

Penal Code  
 § 31910(b)(7)(A) ..... 2, 3

**COURT RULES**

Federal Rules of Civil Procedure  
 rule 56 ..... 1, 3  
 rule 60(b)(2) ..... 2

1 **INTRODUCTION**

2 Plaintiffs’ motion to supplement the summary judgment record with declarations from the  
3 firearms manufacturers Sturm, Ruger & Co. and Smith & Wesson is not authorized by the rules.  
4 Nor have plaintiffs shown that, with reasonable diligence, they could not have produced the  
5 information contained in the declarations at an earlier time. And in any event, the contents of the  
6 declarations do not support any material fact in this case. Accordingly, and as explained further  
7 below, the Court should deny plaintiffs’ motion.

8 **RELEVANT PROCEDURAL BACKGROUND**

9 This matter is currently under submission on the parties’ cross-motions for summary  
10 judgment. The hearing on the motions, which have been fully briefed, occurred on December 16,  
11 2013. (Doc. no. 77.) All discovery and law and motion deadlines set forth in the Court’s  
12 scheduling order have passed. (See Doc. nos. 47 & 50.)

13 Following the hearing on the cross-motions for summary judgment, and in light of the  
14 discussion on the record during oral argument, the Court directed the parties to file a stipulation  
15 clarifying a certain statistic already in the record. (Doc. no. 78.) Pursuant to the Court’s order,  
16 the parties filed the stipulation on December 31, 2013. (Doc. no. 80.)

17 On January 28, 2014, plaintiffs filed the instant motion, which is styled “Motion to  
18 Supplement the Record on Pending Cross-Motions for Summary Judgment.” (Doc. no. 82.)  
19 Plaintiffs seek an order from the Court accepting into the record the declarations of Michael O.  
20 Fifer, the Chief Executive Officer of Sturm, Ruger & Co., and Peter James Debney, the President  
21 and Chief Executive Officer of Smith & Wesson. Sturm, Ruger & Co. and Smith & Wesson are  
22 firearms manufacturers, but neither is a party in this case.

23 **ARGUMENT**

24 **I. THE RULES DO NOT AUTHORIZE PLAINTIFFS’ MOTION.**

25 Nothing in the Federal Rules of Civil Procedure authorize Plaintiffs’ motion to supplement  
26 the record after cross-motions for summary judgment have been briefed, argued and submitted for  
27 decision. See Fed. R. Civ. P. 56. Plaintiffs concede as much. (Mem. of P. & A. in Supp. of Pls.’  
28

1 Mot. to Supp. the Record on Summ. J. (“Pls.’ Mem.” at 3.) For this reason alone, the Court  
2 should deny the motion.

3 **II. PLAINTIFFS HAVE FAILED TO SHOW THAT THE SUPPLEMENTAL INFORMATION**  
4 **COULD NOT HAVE BEEN DISCOVERED EARLIER.**

5 In terms of case law, plaintiffs cite one unreported decision involving a motion to  
6 supplement the summary judgment record. *See Pepper v. JC Penney Corp.*, No. C07-1781-JCC,  
7 2008 WL 4614268 (W.D. Wash., Oct. 16, 2008). In that case, though, the Court granted the  
8 motion after considering whether the proposed supplement of the record was “newly discovered  
9 evidence that, with reasonable diligence, could not have been discovered earlier.” *Id.* at 2 (citing  
10 Fed. R. Civ. P. 60(b)(2) and local rule allowing for reconsideration due to new facts which could  
11 not have been brought to court’s attention earlier).<sup>1</sup> In a similar situation, another court has also  
12 considered whether the “new” evidence could have been discovered earlier. *See Peterson v.*  
13 *Scotia Prince Cruises Ltd.*, 328 F. Supp. 2d 119, 120 (D. Maine 2004) (denying plaintiff’s motion  
14 for leave to supplement the record where the supplement was “simply a late effort to do what she  
15 should have done in responding to the initial summary judgment motion”).

16 Here, plaintiffs have failed to show that the information from the firearms manufacturers  
17 could not have been discovered earlier with reasonable diligence. In this regard, the motion  
18 contains only vague and conclusory references like “newly-developed circumstances.”  
19 (Pls.’ Mem. at 3.) Neither the motion nor declarations address the precise timing of plaintiffs’  
20 discovery of these circumstances.

21 Additionally, the apparent decision of Sturm, Ruger & Co. and Smith & Wesson to have  
22 certain handguns fall off the roster is tied to the Unsafe Handgun Act’s (UHA) microstamping  
23 requirements. Those requirements were enacted in 2007, and had an initial effective date of  
24 January 1, 2010. Cal. Penal Code § 31910(b)(7)(A). Defendants acknowledge that the  
25 Department of Justice did not certify that the technology used to create the microstamp imprint

---

26  
27 <sup>1</sup> The motion in *Pepper* was also unopposed and involved evidence obtained by the party  
28 after it filed its reply brief, not after the case was argued and submitted. *Pepper*, 2008 WL  
4614268 at 2.

1 “is available to more than one manufacturer unencumbered by any patent restrictions” until May  
2 17, 2013 (*id.*), but that was still seven months prior to the hearing on the cross-motions for  
3 summary judgment. In the face of this history, plaintiffs, who include individual firearms  
4 enthusiasts and organizations dedicated to Second Amendment advocacy efforts, cannot  
5 reasonably contend that they had no reason to inquire as to the position of gun manufacturers on  
6 microstamping at any time prior to December 16, 2013.

7 Plaintiffs have failed to demonstrate that the information offered by Sturm, Ruger & Co.  
8 and Smith & Wesson could not have been discovered earlier with reasonable diligence. For this  
9 reason as well, the Court should deny the motion.

10 **III. THE DECLARATIONS DO NOT CONTAIN ADMISSIBLE EVIDENCE IN SUPPORT OF**  
11 **ANY MATERIAL FACTS.**

12 Plaintiffs’ motion should also be denied because the proffered declarations do not contain  
13 any admissible evidence relevant to any material fact. *See* Fed. R. Civ. P. 56. In addition to  
14 being generally vague, conclusory and speculative, the crux of Mr. Fifer’s declaration is that the  
15 UHA is “forcing Ruger” to cease certain handgun sales in California. (Decl. of Michael Fifer  
16 ¶ 7.) Mr. Debney’s declaration is similarly deficient and, at bottom, asserts that complying with  
17 the microstamping requirements “appears infeasible” and that “many” Smith & Wesson handguns  
18 will be “forced off the roster.” (Decl. of James Debney ¶¶ 6 & 7.) Yet even assuming these  
19 statements accurately capture the declarants’ beliefs, they are not evidence in support of any  
20 material fact. They are simply argument that attempts to characterize the UHA in a particular  
21 manner. Defendants could just as easily argue that under the UHA firearms manufacturers  
22 remain free to decide to limit certain handguns sales in California rather than comply with the  
23 statutory requirements governing those sales, which is a business decision that Sturm, Ruger &  
24 Co. and Smith & Wesson apparently have made. But that argument regarding the nature of the  
25 UHA is not subject to evidentiary proof.

26 Nevertheless, while the declarations from non-parties Sturm, Ruger & Co. and Smith &  
27 Wesson are irrelevant, the parties appear to be in agreement that the total number of handguns on  
28 the roster is a consideration. Plaintiffs have requested that the Court take judicial notice of a

1 more recent version of the roster. (Pls.' Mem. at 2.) Defendants do not object to that request.  
2 Defendants have never contended that the number of handguns on the roster is static. On the  
3 contrary, the number fluctuates as handguns are added and removed over time.

4 Additionally, and in light of plaintiffs' request for judicial notice, defendants have filed a  
5 Declaration of Stephen Lindley in Support of Defendant's Opposition to Plaintiffs' Motion to  
6 Supplement the Record. That declaration updates the statistics initially set forth in Mr. Lindley's  
7 declaration filed on October 25, 2013. The declaration also contains a corresponding update of  
8 the statistics the parties stipulated to on December 31, 2013, in response to the Court's order. To  
9 summarize the most current data, as of February 13, 2014, there were 1,119 handguns listed on  
10 the Roster of Handguns Certified for Sale in California. Of those 1,119 handguns, 796 are semi-  
11 automatic handguns. 717 of those semi-automatic handguns are centerfire, and 79 are rimfire.  
12 Finally, all of the 796 semi-automatic handguns are grandfathered and not subject to the UHA's  
13 microstamping requirement.

#### 14 CONCLUSION

15 Plaintiffs initiated this action years ago and cross-motions for summary judgment have been  
16 fully briefed, argued and submitted for decision. Both sides have had the benefit of fully  
17 exploring the issues in writing, participating in a lengthy oral argument, and answering the  
18 questions of the Court. The Court should reject plaintiffs attempt to add to the record at this stage  
19 of the proceedings. The motion should be denied.

20  
21 Dated: February 14, 2014

Respectfully Submitted,

22 KAMALA D. HARRIS  
23 Attorney General of California  
24 MARK R. BECKINGTON  
25 Supervising Deputy Attorney General

/s/ ANTHONY R. HAKL

26 ANTHONY R. HAKL  
27 Deputy Attorney General  
28 *Attorneys for Defendant Stephen Lindley*

SA2009310413  
11281851.doc