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

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

15 Plaintiffs,

16 v.

17 **WILFREDO CID,**

18 Defendant.  
19  
20

2:09-CV-01185-KJM-CMK

**JOINT STATUS REPORT**

Date: None  
Time: None  
Dept: No. 3 – 15th Floor  
Judge: The Honorable Kimberly J. Mueller  
Trial Date: None  
Action Filed: April 30, 2009

21 Pursuant to this Court’s August 25, 2011 Minute Order, and pursuant to the October 2,  
22 2009 Memorandum and Order staying this action, and the August 9, 2010 order continuing the  
23 stay, Plaintiffs Ivan Peña, Roy Vargas, Doña Croston, Brett Thomas, Second Amendment  
24 Foundation, Inc., and The Calguns Foundation, Inc., along with Defendant Wilfredo Cid, submit  
25 this Joint Status Report.

26 **PLAINTIFFS' POSITION**

27 The parties are apparently in agreement that the stay should be lifted.  
28

1           Upon lifting of the stay, the Plaintiffs should be allowed to renew or re-file their motion for  
2 summary judgment, as their reason for taking it off-calendar has been vitiated. Plaintiffs do not  
3 begrudge the Defendant either his earlier request to re-submit his motion to dismiss the case, or  
4 submit supplemental pleadings, if he so chooses.<sup>1</sup> The case would then be ready for final  
5 resolution on cross-dispositive motions, in accordance with the normal practice under the rules in  
6 cases presenting only questions of law.

7           *Background*

8           California law generally prohibits the retail sale and import of handguns that do not appear  
9 on a special roster of handguns certified for sale.<sup>2</sup> Over the years, rostering requirements have  
10 become more restrictive, as the Legislature has demanded that new handguns possess ever rarer  
11 features. Most newly-designed handguns introduced since 2007 cannot be sold in California. The  
12 handgun rostering law also contains numerous exceptions and exclusions that raise significant  
13 equal protection concerns.

14           *Plaintiffs' Claims*

15           The individual plaintiffs seek to own four handguns that do not and cannot appear on the  
16 state's roster:

- 17           • Ivan Peña is denied permission to own a handgun that had once been approved for  
18 sale, but which is now no longer legal to purchase in California because the gun's  
19 manufacturer will not pay an annual fee in perpetuity to keep it rostered.
- 20           • Roy Vargas, born with only a left arm, is denied access to a handgun with an  
21 ambidextrous magazine release, even though the state would allow him the identical  
22 model handgun with a right-handed magazine release he cannot safely operate.

23  
24  
25           <sup>1</sup> Plaintiffs believe it is more efficient to simply re-brief the motion, rather than engage in  
26 a set of supplemental briefing that would have the Court and the parties looking through  
potentially six different briefs across a multi-year span.

27           <sup>2</sup> Individuals moving into California may bring their handguns with them upon relocation  
28 to the state, if they were acquired while residing out of state, and Californians may purchase  
handguns from these new neighbors, but California residents cannot import unrostered handguns.

- 1 • Doña Croston is denied permission to own a handgun because, effectively, it is the  
2 wrong color; the finish she desired was not introduced until after the roster became  
3 more restrictive.
- 4 • Brett Thomas is denied permission to own the exact model handgun that the  
5 Supreme Court held to be protected by the Second Amendment in *District of*  
6 *Columbia v. Heller*, 554 U.S. 570 (2008). That handgun is no longer manufactured  
7 and cannot be rostered.

8 Plaintiffs' claim is simple: these are all handguns of the kind "typically possessed by law-  
9 abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. "[T]he Second Amendment  
10 extends, prima facie, to all instruments that constitute bearable arms." *Id.*, 554 U.S. at 582.  
11 Because the Second Amendment protects handguns of the kind in common use, *id.*, 554 U.S. at  
12 627 (citation omitted), the State of California cannot place itself in the position of making  
13 demands as to what handguns should look like and how they should be designed.

14 The State may, of course, regulate the use and possession of protected Second Amendment  
15 arms subject to constitutional standards, and ensure that handguns function according to their  
16 manufacturer's design, but these are simply not the type of issues presented here.

#### 17 *Relevant Procedural History*

18 Defendant moved to dismiss the complaint for failure to state a claim, while Plaintiffs  
19 moved for summary judgment. Defendant responded to the summary judgment motion by  
20 seeking leave to take discovery per Rule 56(f).

21 Before any of these issues could be resolved, the Supreme Court granted certiorari in what  
22 would become *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). The Ninth Circuit had also  
23 re-heard en banc the long-running case of *Nordyke v. King*, No. 07-15763, but stayed its decision  
24 in the matter pending the outcome of *McDonald*. On September 28, 2009, this Court ordered the  
25 parties to brief the question of why this case should not be stayed pending the outcome of  
26 *Nordyke*.

27 Plaintiffs agreed that a stay of proceedings made sense considering the Supreme Court  
28 would be deciding the threshold question of the Second Amendment's applicability to the States.

1 For this reason, they took their motion for summary judgment off-calendar. Plaintiffs sought  
2 leave, however, to continue discovery, and requested the stay last only through the resolution of  
3 *McDonald*.

4 Defendant sought a complete stay of all proceedings through the resolution of *Nordyke*,  
5 indicated that he would want to re-file his motion to dismiss within 30 days following the  
6 *Nordyke* decision, and sought an order barring Plaintiffs from pursuing summary judgment until  
7 after resolution of the motion to dismiss. Plaintiffs responded that this last request was  
8 impractical and contrary to established practice.

9 On October 2, 2009, the Court stayed the matter in its entirety and ordered the filing of a  
10 joint status report within 10 days of the Ninth Circuit's en banc order in *Nordyke*. However, the  
11 *Nordyke* en banc order merely remanded the case back to the panel. The parties subsequently  
12 disagreed as to whether a further stay was required, the Plaintiffs arguing that *Nordyke* was too  
13 dissimilar as to offer much guidance, as it did not concern any common-use protected arms  
14 questions, and was unlikely to be resolved by the panel in any event. The Court continued the  
15 stay pending the panel decision in *Nordyke*, ordering the filing of this joint status report ten days  
16 following the panel's decision.

17 The Ninth Circuit issued an opinion on May 2, 2011 in *Nordyke* addressing standard of  
18 review in Second Amendment challenges. The Plaintiffs in that matter filed a Petition for  
19 Rehearing and/or Petition for Rehearing En Banc. The Ninth Circuit ordered the County of  
20 Alameda to file a response to the petition. The *Nordyke* appellants were granted leave to file a  
21 reply. The rehearing petition was submitted and has been pending since July 19, 2011.

22 *Course of Future Proceedings*

23 This remains a case with undisputed facts, presenting a clear question of law. Accordingly,  
24 it should be heard on cross-dispositive motions as contemplated by the rules of civil procedure  
25 and established practice.

26 Plaintiffs are disappointed by Defendant's continuing request to bar them from being heard,  
27 as is normally their right under Rule 56. Barring Plaintiffs from presenting their motion is  
28 unfounded, contrary to the rules, and could seriously waste judicial resources. To be sure, were

1 the parties arguing different legal questions, considering only one side first could make sense.  
2 For example, were Defendant arguing immunity from suit, and the Plaintiffs were seeking to  
3 establish negligence, the immunity question would take precedence. But here, the question is  
4 singular: is there a Second Amendment violation? It makes no sense to allow only one side to  
5 move on their position with respect to one issue, and Plaintiffs submit doing so is contrary to  
6 normal practice.

7 The rules support Plaintiffs. Rule 56 provides that summary judgment motions may be filed  
8 “at any time” unless otherwise directed, presumably for some specific reason. If a defendant  
9 believes that the summary judgment motion is premature, the remedy is not to deprive the  
10 plaintiffs of their day in court—the remedy is explicitly provided for in Rule 56(f), allowing the  
11 defendant a continuance to seek specific discovery. The standards for such a motion are high.  
12 “The mere hope that further evidence may develop . . . is an insufficient basis for a continuance  
13 under Fed. R. Civ. P. 56(f).” *Apache Survival Coalition v. United States*, 21 F.3d 895, 911 n.17  
14 (9th Cir. 1994) (citation omitted).

15 Defendant has previously filed a Rule 56(f) motion. Presumably, if upon seeing Plaintiffs’  
16 new summary judgment motion, Defendant still believes some facts are undeveloped, the issue  
17 could then be explored according to the rules. But it is unclear whether any problem would  
18 remain, as Plaintiffs will provide at least some of the information—regarding the identity of the  
19 handgun sellers—previously requested by the Defendant in their forthcoming summary judgment  
20 papers. Although Plaintiffs believe the information is irrelevant, they have no objection to  
21 supplying it, if this satisfies Defendant’s request.

22 The benefits of having a unitary “question of law” case proceed on cross-dispositive  
23 motions are manifest. First, since it is always possible that either side is legally correct, nobody is  
24 disadvantaged, or unfairly advantaged, by weighing consideration of the matter in only one  
25 direction. The adversary system works best when *both* sides are equally heard. Indeed there is a  
26 meaningful risk that the motion to dismiss might be converted to one for summary judgment, so it  
27 would be unfair to bar one side from fully presenting evidence.  
28

1 Second, the courts—including reviewing courts—should work with a complete record. The  
2 risk of piecemeal litigation is to be avoided. This consideration extends to an appellate court,  
3 which on a record containing cross-motions, can resolve more questions by granting in whole or  
4 in part motions that were not granted by lower courts, without need of additional proceedings.  
5 Indeed, this was exactly the procedure followed in *Heller*. The District Court granted the city’s  
6 motion to dismiss and denied the plaintiffs’ motion for summary judgment, but the D.C. Circuit  
7 specifically granted the summary judgment motion, *Parker v. District of Columbia*, 478 F.3d 370,  
8 401 (D.C. Cir. 2007)(“Since there are no material questions of fact in dispute, the district court is  
9 ordered to grant summary judgment to *Heller* consistent with the prayer for relief contained in  
10 appellants' complaint”), and the Supreme Court affirmed, *Heller*, 554 U.S. at 635.

11 There simply exists no reason to depart from the structure of Rule 56. Defendant may be  
12 fully heard, *under the rules*, if he still feels that there is some fact issue open upon seeing the new  
13 summary judgment papers. But it would be unfair and prejudicial to Plaintiffs, and detrimental to  
14 the Court’s ability to fully consider the question at issue, to hear from only one side.

15 Accordingly, the parties should be allowed to refile their respective dispositive motions, or  
16 file supplemental briefing. Plaintiffs suggest December 9, 2011 as the deadline for new or  
17 supplemental pleadings, with a hearing date in early January 2012. If Defendant wishes to again  
18 file under Rule 56(f), he could do so in accordance with the federal and local rules.

## 19 DEFENDANT'S POSITION

### 20 I. INTRODUCTION

21 This case involves Second Amendment and equal protection challenges to California's  
22 Unsafe Handgun Act, a law that regulates the sale of handguns. Since October 2, 2009, it has  
23 been stayed in its entirety pending the Ninth Circuit's decision in the case *Nordyke v. King*, 07-  
24 15763. On May 2, 2011, the Ninth Circuit issued its opinion in *Nordyke*. Accordingly, this Court  
25 should now lift the stay and turn to the resolution of Cid's motion to dismiss, which has been fully  
26 briefed and pending since the imposition of the stay.

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1 **II. PROCEDURAL HISTORY**

2 Earlier this year, this case was reassigned from District Judge Frank C. Damrell, Jr. to  
3 District Judge Kimberly J. Mueller for all further proceedings. (Doc. no. 29.) For the Court's  
4 reference, and in support of Cid's request that the Court lift the stay and resolve the pending  
5 motion to dismiss, Cid offers the following procedural history.

6 **A. The filing of the complaint and initial round of motions**

7 Plaintiffs initiated this action by filing a complaint on April 30, 2009. (Doc. no. 1.) They  
8 filed an amended complaint once as a matter of course on May 11, 2009. (Doc. no. 6.)

9 On July 6, 2009, Cid filed a motion to dismiss, noticing it for hearing on October 2, 2009.  
10 (Doc. no. 8.)

11 In a joint status report filed August 18, 2009, Plaintiffs expressed an intention to file a  
12 motion for summary judgment as soon as possible, claiming that this case presents solely legal  
13 issues and no factual controversy. (Doc. no. 11 at p. 2.) Cid objected to any motion for summary  
14 judgment being filed or heard prior to the resolution of his motion to dismiss. (Doc. no. 11 at pp.  
15 2-3.) Cid also expressed an intention to conduct discovery on Plaintiffs' claims, which include  
16 facial and as-applied constitutional challenges, if this matter were not resolved at the pleadings  
17 stage. (Doc. no. 11 at p. 3.)

18 By order filed August 21, 2009, Judge Damrell deferred the scheduling of this action and  
19 indicated that a Pretrial Scheduling Order would issue only if necessary after the issuance of an  
20 order on the motion to dismiss. (Doc. no. 12.)

21 On September 2, 2009, Plaintiffs filed a motion for summary judgment, noticing it for  
22 hearing on the same day Cid's motion to dismiss was to be heard. (Doc. no. 14.) Cid responded  
23 with a motion under Federal Rule of Civil Procedure 56(f), which explained in detail why any  
24 motion for summary judgment was premature. (Doc. nos. 15 & 16.)

25 By order filed September 10, 2009, and in light of the pending motion to dismiss, Judge  
26 Damrell organized the parties' motions on his calendar. The Court gave priority to Cid's motion  
27 to dismiss. (Doc. no. 17.) Specifically, the Court kept the motion to dismiss set for hearing on  
28

1 October 2, 2009; set the Rule 56(f) motion for hearing on October 16, 2009; and continued  
2 Plaintiffs' motion for summary judgment to October 30, 2009. (*Ibid.*)

3 Plaintiffs filed written opposition to the motion to dismiss on September 18, 2009. (Doc.  
4 no. 18.) Cid filed a reply on September 25, 2009. (Doc. no. 19.)

5 **B. The initial stay**

6 By order filed four days prior to the scheduled hearing on the motion to dismiss, Judge  
7 Damrell acknowledged the Ninth Circuit's en banc rehearing in *Nordyke*, and its order vacating  
8 the submission of *Nordyke* pending the Supreme Court's disposition of *McDonald v. City of*  
9 *Chicago*, 08-1521, a Seventh Circuit case in which the Supreme Court had recently granted  
10 certiorari. (Doc. no. 20.) At the time, the issue of whether the Second Amendment applies to  
11 state and local governments (i.e., the incorporation issue) was central in both *McDonald* and  
12 *Nordyke*. Accordingly, Judge Damrell directed the parties to file supplemental briefing as to why  
13 the action should not be stayed pending the en banc decision in *Nordyke*. (*Ibid.*)

14 In their supplemental brief regarding a stay, Plaintiffs withdrew their motion for summary  
15 judgment. (Doc. no. 21 at p. 2.)

16 Plaintiffs also argued that the Court should stay this case only until the Supreme Court *or*  
17 Ninth Circuit resolved the issue of whether the Second Amendment applies to state and local  
18 governments. (See Doc. no. 21; Mem. & Order filed Oct. 2, 2009, at 2.) Cid argued that any stay  
19 should remain in effect pending the resolution of *Nordyke*, which the en banc panel had put on  
20 hold pending the Supreme Court's decision in *McDonald*. (See Doc. no. 22; Mem. & Order filed  
21 Oct. 2, 2009, at 2.)

22 In the stay order, Judge Damrell agreed with Cid that the case should be stayed pending the  
23 resolution of *Nordyke*. (Mem. & Order filed Oct. 2, 2009, at 2.) The Court explained that the  
24 Supreme Court had granted certiorari in *McDonald*, which involved the incorporation issue. (*Id.*  
25 at 3 & 5.) The Court further explained that once *McDonald* was decided, the decision in *Nordyke*  
26 "will also evaluate a firearms regulation in light of [the Supreme Court's 2008 decision in *District*  
27 *of Columbia v. Heller*] and *McDonald*. Such evaluation will almost certainly provide crucial  
28 direction to the court in its analysis of the firearms regulation in this case." (*Id.* at 5.) The Court



1 therefore stayed this case in its entirety pending the en banc decision in *Nordyke*. (*Id.*) The Court  
2 required the parties to submit a joint status report within ten days of that decision. (*Id.*)

3 **C. The continuance of the stay**

4 On June 28, 2010, the Supreme Court issued its opinion in *McDonald*, which resolved the  
5 incorporation issue. The Court held that "the Second Amendment right is fully applicable to the  
6 States." *McDonald v. City of Chicago*, 561 U.S. ----, 130 S.Ct. 3020, 3026, --- L.Ed.2d ----  
7 (2010).

8 Then, on July 12, 2010, the *Nordyke* en banc panel issued a one-sentence order, which read:  
9 "The panel opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), is vacated and the case is  
10 remanded to that panel for further consideration in light of *McDonald v. City of Chicago*, No. 08-  
11 1521, slip op. (U.S. June 28, 2010). (Order filed July 12, 2010 (Doc. No. 127), *Nordyke v. King*,  
12 No. 07-15763 (9th Cir.))

13 Because the Ninth Circuit's remand order arguably triggered the parties' obligation to file a  
14 joint status report, Cid prepared a joint status report along with Plaintiffs. In that report, however,  
15 Cid argued that the one-sentence remand order was hardly the meaningful decision from the  
16 Ninth Circuit that the Court and parties had been waiting for, and that the Ninth Circuit's  
17 impending evaluation of a firearms regulation was still important. (Doc. no. 27 at pp. 3-6.) Cid  
18 therefore urged the Court to continue the stay. (*Ibid.*) Plaintiffs continued to claim that *Nordyke*  
19 was irrelevant to this case and requested that the Court issue a schedule for summary judgment  
20 motions. (Doc. no. 27 at pp. 1-3.)

21 By order filed August 9, 2010, Judge Damrell again agreed with Cid and rejected Plaintiffs'  
22 assertion. The Court continued the stay of this action in its entirety pending the decision in  
23 *Nordyke*. (Doc. no. 28.) The Court directed the parties to submit a joint status report within ten  
24 days of the decision. (*Ibid.*)

25 **D. Recent events**

26 By order filed January 20, 2011, this case was reassigned from District Judge Frank C.  
27 Damrell Jr. to District Judge Kimberly J. Mueller for all further proceedings.

1 On May 2, 2011, the three-judge panel issued the much-awaited decision in *Nordyke*. See  
2 *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011). As expected, the opinion evaluated the firearms  
3 ordinance at issue in that case and, in the process, laid out the standard of review for Second  
4 Amendment cases in the Ninth Circuit.

5 On May 12, 2011, the parties filed a joint status report as required. (Doc. no. 31.) On  
6 August 25, 2011, by Minute Order, the Court directed the parties to file this updated joint status  
7 report. (Doc. no. 34.)

8 **III. CID REQUESTS THAT THE COURT LIFT THE STAY AND RESOLVE THE PENDING**  
9 **MOTION TO DISMISS BEFORE ANY MOTIONS FOR SUMMARY JUDGMENT.**

10 Since the Ninth Circuit has now issued a meaningful opinion laying out the standard of  
11 review for Second Amendment cases, Cid requests that the Court lift the stay of this action. If the  
12 most recent *Nordyke* opinion is vacated or otherwise ordered not to be cited as precedent in light  
13 of any en banc or Supreme Court proceedings, however, Cid may request the Court to consider  
14 another stay.<sup>3</sup>

15 Cid also requests that the Court now turn its attention to the motion to dismiss. Cid filed  
16 the motion at the outset of this case. It was fully briefed and set to be heard at the time of the  
17 initial stay. Moreover, the motion, if successful, will dispose of this case in its entirety.

18 Of course, since Cid filed his motion, there have been significant developments in Second  
19 Amendment law. Perhaps most significantly, the Supreme Court issued its opinion in *McDonald*  
20 and the Ninth Circuit issued the *Nordyke* opinion. Accordingly, Cid requests that the parties be  
21 provided an opportunity to refresh the briefing on the motion to dismiss prior to the hearing on  
22 the motion. More specifically, Cid requests that the Court order the following supplemental  
23 briefing schedule for the motion to dismiss:

24  
25 <sup>3</sup> Indeed, the Court should be aware that since the last joint status report, Plaintiffs and  
26 Appellants in *Nordyke* filed a petition for rehearing en banc (Appellants' Pet. for Panel Rehearing  
27 and/or En Banc Rehearing filed May 23, 2011 (Doc. No. 180), *Nordyke v. King*, No. 07-15763  
28 (9th Cir.)), and the Ninth Circuit directed Appellees to respond to the petition. (Order June 13,  
2011 (Doc. No. 181), *Nordyke v. King*, No. 07-15763 (9th Cir.)) Accordingly, a petition for  
rehearing en banc is fully briefed and awaiting a decision by the Ninth Circuit.

1 Last day for Defendant to file supplemental moving papers: October 31, 2011

2 Last day for Plaintiffs to file supplemental opposition: November 14, 2011

3 Last day for Defendant to file a supplemental reply: November 21, 2011

4 Cid requests that the hearing on the motion to dismiss be set for a date during the first week  
5 of December.

6 As indicated above, Plaintiffs have withdrawn their motion for summary judgment. If they  
7 are inclined to immediately re-file such a motion, Cid requests that the Court direct Plaintiffs to  
8 refrain from doing so at least until the Court resolves the motion to dismiss. Such a course would  
9 be consistent with the normal course of litigation. And it would be consistent with Judge  
10 Damrell's previous orders setting the course for this case, especially the order directing that the  
11 motion to dismiss be heard before any summary judgment motion.

12 Resolving the motion to dismiss first would also be the most efficient use of the Court and  
13 parties' resources. Unlike the motion to dismiss, any possible resolution of Plaintiffs' facial and  
14 as-applied constitutional claims, including claims against Cid in his individual capacity, by way  
15 of summary judgment will depend on discovery and the introduction of evidence by Cid, all of  
16 which will be unnecessary if the Court grants the motion to dismiss. Cid has been unable to  
17 conduct discovery due to the stay of this case, but intends to do so should this case not be  
18 resolved through the motion to dismiss. Finally, Plaintiffs will suffer no prejudice under this  
19 proposed schedule.

20 Accordingly, consistent with the Court's previous orders and the status of this case at the  
21 time of the stay, Cid requests that the Court now lift the stay and, prior to the filing and hearing of  
22 any motions for summary judgment, set a schedule for supplemental briefing on the motion to  
23 dismiss and resolve that motion.

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1 Dated: September 26, 2011

Respectfully Submitted,

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8 Dated: September 26, 2011

LAW OFFICES OF DONALD KILMER, A.P.C.

9

*/s/ Donald E.J. Kilmer, Jr.*

10

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12 Dated: September 26, 2011

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*/s/ Alan Gura*

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ALAN GURA  
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16 Dated: September 26, 2011

DAVIS & ASSOCIATES

17

*/s/ Jason A. Davis*

18

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**CERTIFICATE OF SERVICE**

Case Name: Ivan Pena, et al. v. Wilfredo Cid No. 2:09-CV-01185-KJM-CKD

I hereby certify that on September 26, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**JOINT STATUS REPORT**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 26, 2011, at Sacramento, California.

Janice Smialek  
Declarant

/s/ Janice Smialek  
Signature