

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

RALPH MARK NEWTON, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 1:22-cv-00150-CL

**AFFIDAVIT OF BRIAN
ALLEN BARKER**

**In Support of Defendants'
Motion to Dismiss**

I, Brian Allen Barker, hereby declare as follows:

1) I am a custodian of records for the Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Division's National Instant Criminal Background Check System (NICS) Section in Clarksburg, West Virginia. I have reviewed any and all information maintained by the NICS Section regarding an individual named "Ralph Mark Newton."

2) Under the Brady Handgun Violence Prevention Act of 1993 (Brady Act), the U.S. Attorney General was charged with establishing and operating a nationwide criminal background check system that federal firearms licensees (FFLs) must contact prior to transferring a firearm to a non-licensee to determine if receipt of a firearm by the transferee would violate subsections (g) or (n) of 18 U.S.C. § 922 or state law. The Brady Act required the U.S. Attorney General to establish NICS on or before November 30, 1998. The U.S. Attorney General established NICS in accordance with this directive and delegated the authority to manage NICS to the FBI under 28 C.F.R. §§ 0.85, 25.3. Guidelines pertaining to the establishment, maintenance, and use of NICS are set forth in 28 C.F.R. §§ 25.1–25.11.

3) Under 28 C.F.R. § 25.6(b) and (d), NICS background checks may be conducted by either the NICS Section or a local or state law enforcement agency serving as an intermediary between an FFL and the FBI. These intermediaries are referred to as Points of Contact (POC). *See* 28 C.F.R. § 25.2. POCs are designated by state statute, regulation or executive order. FFLs are required to contact the NICS Section directly, or a designated POC, for a background check prior to the transfer of any long gun or handgun to a non-licensee, unless a Bureau of Alcohol, Tobacco, Firearms and Explosives alternate permit is presented at the time of the sale or transfer. The State of Oregon is a full POC state; therefore all background checks initiated by FFLs in Oregon are processed by the state designee.

4) The FFL provided to the NICS Section through allegations made in this matter has been confirmed as active. The FFL of Fox Firearms, LLC, doing business as Fox Firearms, Grant Passs, Oregon, FFL number “993033013A04253” has been active in the NICS since December 4, 2013.

5) When an FFL initiates a NICS background check, the NICS searches three electronic databases containing federal, state, local, and tribal records that may reveal information indicating that an individual’s receipt or possession of a firearm is prohibited under federal or state law. Those three databases are (1) the Interstate Identification Index, which contains criminal history records; (2) the National Crime Information Center, which contains records regarding wanted persons, protection orders, deported felons, and other criminal justice data; and (3) the NICS Indices (used interchangeably with the “NICS Index”), which contain records regarding individuals subject to state and federal firearm prohibitions.

6) Under 28 C.F.R. § 25.6, NICS must create a unique NICS Transaction Number (NTN) for every background check inquiry that it processes, and the Brady Act, 18 U.S.C. § 922(t)(2)(C), requires that all NTN and their creation dates be retained indefinitely. Additionally, the FBI, pursuant to 28 C.F.R. § 25.9, is required to maintain an automated NICS Audit Log of all incoming and outgoing transactions that pass through the system, including the type of transaction, the time and date of inquiry, identifying information about the prospective transferee, and the NTN. The NICS Audit Log is used to conduct audits of the use and performance of NICS.

7) On February 23, 2022, pursuant to 28 C.F.R. §§ 25.9(b)(2), the NICS Section conducted an audit of the databases utilized by NICS for background checks. The purpose of this audit was to determine if, at that time, a record existed that demonstrated that Mr. Newton was prohibited from receiving or possessing a firearm under 18 U.S.C. § 922(g) or (n) or under state law. The audit revealed that Mr. Newton had a date of arrest of December 26, 1981, from Yosemite National Park that reflected a conviction for “Disorderly Conduct-Fighting” and a charge of “Assault by Striking, Beating, Wounding.”

8) When a NICS background check reveals a conviction for, e.g., “Disorderly Conduct-Fighting” or “Assault by Striking, Beating, Wounding,” NICS procedures require the FBI to conduct additional research to determine if the underlying offense meets the physical-force and qualifying-relationship elements of a “misdemeanor crime of domestic violence,” thus requiring application of 18 U.S.C. § 922(g)(9). Qualifying relationships applicable to that prohibition are found under 18 U.S.C. § 921(a)(33).

9) The NICS Section contacted the Yosemite National Park Police and the United States District Court in Sacramento to try to obtain additional information regarding Newton’s disorderly-conduct conviction and assault charge, including information regarding Mr. Newton’s relationship to the victims. To date, the NICS Section has not received information from either agency. Accordingly, the NICS Section was unable to resolve whether Mr. Newton’s 1981 assault charge resulted in a conviction and/or whether that charge or the Disorderly Conduct conviction were prohibitive based on the information available to NICS.

10) Law enforcement and/or court records regarding Mr. Newton's arrest on December 26, 1981, and any known or potential subsequent conviction(s) are not available to NICS. Thus, the NICS Section has been unable to determine Mr. Newton's relationship to the victim(s) of the underlying offenses. In such situations, NICS's procedures allow the NICS Section to accept a notarized, sworn statement regarding victim relationship for the purpose of reaching a final determination regarding whether a conviction is prohibitive under 18 U.S.C. § 922(g)(9). To be considered by the NICS Section, an individual must submit such a statement with an appeal or a Voluntary Appeal File (VAF) application. The NICS Section encourages individuals to submit such a statement with a VAF application, as this is the only way that NICS can retain the information for future transactions. Individuals may submit a VAF application to the FBI to request that NICS retain certain information, documents, and research. If a VAF application is approved, the materials are saved and linked to a "unique personal identification number" (UPIN). The individual must use his or her UPIN for future firearms transfers requiring a NICS background check to avoid extended delays or erroneous denials, provided no additional prohibiting events occur or are discovered after the UPIN was issued.

11) It is my understanding that on March 14, 2022, the FBI, by and through counsel of record for Defendants in this matter, sent Mr. Newton, through his counsel, a letter encouraging him to submit a VAF application with a notarized, sworn statement describing the circumstances of his 1981 arrest, including an explanation of his relationship to the victims of the underlying offenses. A true and correct copy of this letter is attached as Exhibit A. It is my understanding that on March 28, 2022, Mr. Newton, by and through his counsel, informed the FBI that he would not submit a new VAF application in accordance with the criteria set forth in the March 14, 2022, letter. As of April 20, 2022, there is no VAF application or notarized, sworn statement on file for Mr. Newton.

In accordance with 28 U.S.C. § 1746, I affirm under penalty of perjury that the foregoing is true and correct.

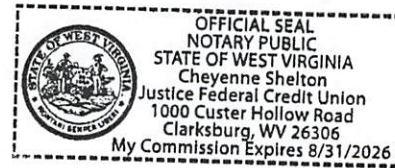
Executed this 25th day of April 2022



Brian Allen Barker
Lead Legal Administrative Specialist
Clarksburg, West Virginia

Subscribed and sworn to before me, the undersigned authority, on this the 25 day of April
2022.

Cheyenne Shelton
NOTARY PUBLIC



In and for the state of West Virginia
My commission expires: 8-31-2026

Exhibit A



U.S. Department of Justice

Civil Division

Federal Programs Branch

Mailing Address

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Overnight Delivery Address

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March 14, 2022

Via Electronic Mail

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Shannon McCabe
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1000 SW Disk Dr.
Bend, OR 97702

Re: *Newton v. United States*, No. 1:22-cv-150 (D. Or.)

Dear Counsel:

After reviewing plaintiffs' complaint in the above-referenced matter, the Federal Bureau of Investigation conducted an audit of plaintiff Ralph Mark Newton's criminal record. Based on its audit and the information available to it, the FBI has confirmed that Newton's criminal record contains multiple convictions that could potentially prohibit him from possessing a firearm under 18 U.S.C. § 922(g)(9). Section 922(g)(9) prohibits, as relevant here, any person convicted of a misdemeanor crime of domestic violence from possessing a firearm. The FBI also has determined that reliable information identifying Newton's relationship to the victims of the underlying offenses could resolve whether Newton's convictions are in fact prohibitive under §922(g)(9).

Accordingly, the FBI encourages Newton to submit a new Voluntary Appeal File ("VAF") application, a fingerprint card, and appropriate supporting documentation—*i.e.*, a notarized, sworn statement describing the circumstances of his potentially prohibitive convictions, including an explanation of his relationship to the victim or victims of the underlying offenses—to the FBI's Criminal Justice Information Services Division by U.S. Postal Service or electronically at www.fbi.gov/nics-

appeals. In order to be considered in the evaluation of any VAF application, the statement must be signed by Newton and must possess a notarized stamp. Instructions for completing and submitting a VAF application can be found at www.fbi.gov/nics-appeals under the section heading “How to Apply for the VAF.”

If Newton chooses to submit a new VAF application in accordance with the criteria outlined above, his application will be eligible for expedited processing. Assuming the application includes a notarized, sworn statement sufficient to nullify the potentially prohibitive information contained in his criminal record, the FBI will issue Newton a Unique Personal Identification Number (“UPIN”) and will retain a record of his statement. By obtaining a UPIN through the VAF-application process, Newton will enable NICS to promptly resolve and clear the relevant convictions in any future firearm transactions. Otherwise, absent a change in his criminal record (*e.g.*, expungement of the potentially prohibitive convictions), Newton will receive a “Delay” status from NICS in all future transactions, because it will be unable to clear the potentially prohibitive information reflected in his criminal record without first obtaining additional information and the requisite notarized, sworn statement from Newton.

Recognizing that much of the relief that Newton seeks in the above-referenced case is available to him through the VAF-application process, defendants are optimistic that any dispute between the parties can be resolved without the need for judicial intervention. Defendants, by and through their undersigned counsel, therefore propose that the parties jointly stipulate to a stay of district court proceedings to provide them the opportunity to resolve this litigation informally. Alternatively, defendants propose that the parties jointly stipulate to a 60-day extension of defendants’ deadline to respond to the complaint.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Jody D. Lowenstein

Jody D. Lowenstein

Trial Attorney

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