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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, v. **THE STATE OF CALIFORNIA; KAMALA D. HARRIS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE, AND DOES 1-25,** Defendants and Respondents.	Case No. 10CECG02116 **(1) THE STATE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES; and** **(2) DECLARATION OF PETER A. KRAUSE** **[BY FAX]** Date: July 26, 2011 Time: 3:30 p.m. Dept: 402 Judge: The Honorable Jeff Hamilton Action Filed: June 17, 2010

Defendants and respondents State of California, Kamala D. Harris, and the California Department of Justice (the "State") respectfully submit this opposition to plaintiffs Clay Parker, Herb Bauer Sporting Goods, California Rifle and Pistol Association, Able's Sporting, Inc., RTG Sporting Collectibles, and Steven Stonecipher's ("Plaintiffs") Motion for Attorneys Fees.

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INTRODUCTION

Plaintiffs seek more than $625,000.00 in statutory attorneys' fees from the State for preparing a complaint, taking limited discovery, and filing two motions, one of which was deemed defective by the Court and withdrawn by Plaintiffs after they had devoted more than 364 hours to the filing. To compound matters, Plaintiffs have all but prevented the State from effectively opposing their fee motion by failing and refusing to turn over their attorneys' bills. Plaintiffs instead proffer a single hearsay declaration to support their fee motion – a declaration that largely lacks foundation and is not based on personal knowledge. Plaintiffs' bloated request for fees should be denied or, at a minimum, substantially reduced, on several grounds.

First, Plaintiffs have not met their burden of establishing that their litigation costs transcend their personal interest under Code of Civil Procedure section 1021.5. By their own admission, four of the six plaintiffs in this case stood to gain financially if they prevailed in the litigation, barring recovery of private attorney general fees. Furthermore, Plaintiffs impermissibly seek to recover fees for a flawed preliminary injunction motion that was not necessary in the first instance, for tracking pending legislation, and for clerical activities billed by their paralegal.

Should the Court allow Plaintiffs to recover any fees under section 1021.5, which it should not, the amount should be substantially reduced due to duplicative and excessive billing, and the hourly rates should be lowered to those found in the Fresno County market. Although Plaintiffs assert that the "highly technical and specialized nature of this lawsuit required attorneys with specialized knowledge of firearms and civil rights litigation," in fact this lawsuit presented a straightforward legal question that only happened to relate to firearms. This is underscored by the fact that an employment law attorney handled all but one of the depositions for Plaintiffs.

On top of their inflated fee claim, Plaintiffs make an unjustified request for a lodestar multiplier of 1.5. If the Court is inclined to apply a multiplier, it should be a *reducing* multiplier of .5 to account for the excessive hours and redundant work. For all these reasons, and as explained more fully below, the State respectfully requests that the Court deny Plaintiffs' motion for attorneys' fees, or at least reduce the hourly rate and hours to a level commensurate with the work that reasonably was required in the case.

FACTUAL AND PROCEDURAL HISTORY

On June 17, 2010, Plaintiffs filed a complaint alleging that three statutes were void for vagueness under the due process clause of the Fourteenth Amendment. (Complaint, ¶¶ 1-2.) They asserted causes of action for (1) Due Process Vagueness – Facial, (2) Due Process Vagueness – As Applied, and (3) a Petition for Writ of Mandate. (Complaint, ¶¶ 88-109.) The State answered on August 4, 2010. (Declaration of Peter A. Krause ["Krause Decl."], ¶ 2.)

On September 7, 2010, Plaintiffs filed a Motion for Preliminary Injunction. (Krause Decl., ¶ 3.) At the November 17, 2010 hearing, however, the Court told Plaintiffs their preliminary injunction motion was defective, unsupported, and would be denied. (*Id.*) Rather than let their motion be denied, Plaintiffs opted to withdraw it. (*Id.* & Exh. "C.") At the case management conference held the same day, the Court proposed a summary judgment hearing on January 18, 2011, a date that Plaintiffs readily accepted because the hearing would occur before the effective date of the challenged statutes. (*Id.*) On October 7, 2010, Plaintiffs propounded four sets of written discovery that asked the same 30 or so questions in slightly different ways. (Krause Decl., ¶ 4.) The State responded to Plaintiffs' discovery requests on November 23, 2010 with complete responses requiring no meet and confer. (*Ibid.*)

On December 7, 2010, Plaintiffs filed a summary adjudication motion along with eleven supporting declarations, almost sixty exhibits, and 240 undisputed facts. (Krause Decl., ¶ 5.) Given the voluminous testimony, declarations, and exhibits submitted by Plaintiffs, the State defensively took four depositions (three plaintiffs and their expert witness), just in case the Court found factual matters to be relevant. (*Id.*) It did not.

Plaintiffs' summary judgment motion was heard on January 18, 2011. (Krause Decl., ¶ 6.) On February 23, 2011, the Court entered Judgment in favor of Plaintiffs on the first cause of action. (*Id.*) The other two claims were dismissed. On May 16, 2011, plaintiffs served this fee motion, seeking $625,048.75 in fees, comprised of a base lodestar amount of $396,473.50, augmented by a multiplier of 1.5, and $30,338.50 for post-judgment work. Plaintiffs seek recovery for 1,760.6 hours of time (Motion, p. 9:23), and claim to have written off another 626.6 hours (Motion, p. 11:5), for a total of ***2,387.2 hours*** spent litigating this case.

After examining Plaintiffs' moving papers, the State on June 3, 2011 requested that Plaintiffs produce their contemporaneous billing records to allow the State to identify duplicative work or other unrecoverable time. (Krause Decl., ¶ 7 & Exh. "E.") Plaintiffs rejected this request, even after the State told Plaintiffs that it would not dispute any time devoted to redacting for privilege. (*Id.* & Exh. "F.")

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION BECAUSE A PRIVATE ATTORNEY GENERAL FEE AWARD IS UNWARRANTED IN THIS CASE.

A. A Party Seeking an Award Of Fees Under Section 1021.5 Bears the Burden of Establishing Each Element of its Claim.

Code of Civil Procedure section 1021.5 codifies the private attorney general doctrine by which attorneys' fees may be awarded to certain successful litigants. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.) An award of fees is appropriate under section 1021.5 when three elements are met: "(1) plaintiffs' action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.'" (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214.) The burden is on the moving party to establish each of these elements. (*Consumer Cause Inc. v. Mrs. Gooch's Natural Foods Market, Inc.* (2005) 127 Cal.App.4th 387, 401.) The decision to award fees lies within the sound discretion of the trial court. (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 569.) Plaintiffs' have not met their burden.

B. Plaintiffs' Action Did not Vindicate Second Amendment Rights.

Plaintiffs concede that they "did not raise a Second Amendment claim" (Motion, p. 7:3), yet trumpet the Second Amendment as a basis for why they purportedly have met the first prong of the section 1021.5 test. (Motion, pp. 6-7.) Plaintiffs cite *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1 for the proposition that "a party need not 'have made the particular legal arguments which vindicated the public right affecting the public interest.'" (Motion, p.7:4-5.) That case, however, does not support the idea that Plaintiffs can

transform their vagueness challenge into a Second Amendment claim just because the challenged statutes happen to relate to ammunition. Plaintiffs want this Court to *assume* that they have protected a Second Amendment right. In contrast, the *Los Angeles Police Protective League* court actually decided the case on a legal theory not argued below, and defendants challenged the fee award (unsuccessfully) on the ground that "[plaintiff] did not urge the rationale or the particular right announced in our opinion." (*Ibid.* at p. 13 fn 1.) This is a far cry from claiming a Second Amendment victory where the theory was neither advanced nor addressed by the Court.

C. Plaintiffs Have Not Met Their Burden to Show that the Costs of Private Enforcement Outweighed Their Personal Stake in the Outcome.

A private attorney general fee award is only appropriate when the moving party has shown that the cost of his legal victory transcends his personal interest; that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his individual stake in the matter. (*Woodland Hills Residents Ass'n*, 23 Cal.3d at p. 941.) The necessity and financial burden prong examines two issues: (1) whether private enforcement was necessary and (2) whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys. (*Lyons v. Chinese Hosp. Ass'n* (2006) 136 Cal.App.4th 1331, 1348.)

Section 1021.5 is intended as a "bounty" for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public. (*California Licensed Foresters Ass'n*, 30 Cal.App.4th at p. 570.) It acts as an incentive for the pursuit of public interest litigation that might otherwise have been too costly to bring. (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 511.) "If the enforcement of the public interest is merely 'coincidental to the attainment of ... personal goals' [citation] ... then [the necessity and financial burden] requirement is not met." (*California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 750-751.)

A fee award is inappropriate here because four of the six plaintiffs had direct (or indirect) pecuniary stakes in the outcome of the case, and the suit was merely coincidental to the attainment of personal goals. According to the Complaint, if the restrictions on the sales and shipment of ammunition had gone into effect, some plaintiffs would have lost profits:

> Licensed business enterprises, including Plaintiffs ABLE's, RTG, and those represented by *CRPA FOUNDATION*, engaged in the business of shipping ammunition to individuals in the State . . . Plaintiffs ABLE's and RTG may be forced to cease all shipments of ammunition suitable for use in both handguns and rifles to their customers in California, ***thereby causing a significant decrease in sales and lost profits***.

(Complaint, ¶ 77; see also Complaint, ¶ 17 ["Plaintiffs initiate this action ***in their respective personal interests*** and as taxpayers and citizens . . ."]; Decl. of Barry Bauer in Support of Motion for Summary Judgment, ¶¶ 6-7 ["Ammunition sales usually account for a significant portion of the profit made by Herb Bauer's Sporting Goods., Inc. . . . It is ***costly and burdensome for Herb Bauer's Sporting Goods, Inc. to intake and store records*** for transfers of ammunition as required by Penal Code section 12061(a)(3)"] [emphasis added].)

Plaintiffs fail to address the pecuniary interests held by Herb Bauer Sporting Goods, RTG Collectibles, or internet ammunition vendor Able's Sporting, Inc., except in the most cursory way. (Motion, p. 8:27-9:7.) Even worse, they make no attempt to compare their litigation costs to the economic gain they anticipate from the continued ability to ship and sell ammunition in California without restriction. Their sole contention is that the general public received a benefit at Plaintiffs' expense. This is not the test; they must show that the necessity for pursuing the lawsuit placed a burden on them disproportionate to their individual stakes in the matter. Plaintiffs have made no such showing, mandating denial of their motion. (*Beach Colony II v. California Coastal Comm'n* (1985) 166 Cal.App.3d 106, 114-115 [reversing fee award where the record contained no evidence that plaintiff's financial burden of attorney fees was out of proportion to its personal stake in litigating the case].)

Plaintiffs argue that CRPA had no financial stake because it is a non-profit organization. (Motion, p. 8:20-21.) CRPA's corporate status is irrelevant – what matters is that its *members* stood to lose profits had the laws taken effect. (Complaint, ¶ 77.) This issue is controlled by *California Licensed Foresters Association*. There, the plaintiff was a non-profit association of foresters that had obtained an injunction barring enforcement of timber harvest regulations. (*California Licensed Foresters Assn.*, 30 Cal.App.4th at p. 567.) Plaintiff argued incorrectly that it was entitled to fees because, as an entity separate from its members, it had no financial stake in the outcome. (*Id.* at p. 570.) Similarly here, CRPA is claiming non-profit status and asserts that

it had no pecuniary interest in the case, rendering the financial burden disproportionate to its personal stake in the matter. (Motion, p. 8:20-22.) However, this assertion is undermined by the allegation that businesses "represented by CRPA Foundation" are affected by the law and presumably would have lost profits. (Complaint, ¶ 77.)

In determining whether there is a financial stake, the Court must estimate the monetary value of the litigation results to Plaintiffs and compare it with the costs incurred obtaining the result. (*In re: Conservatorship of Whitley*, 50 Cal.4th at pp. 1215-1216.) Plaintiffs Able's Sporting Goods, RTG Collectibles, and businesses represented by plaintiff CRPA alleged that they stood to lose business within California because the companies ship dozens of different calibers of ammunition directly to California residents. (Complaint, ¶¶ 14, 15.) Since these businesses are able to continue shipping ammunition to California without restrictions, they have gained hundreds of thousands, perhaps millions, of dollars in value. Similarly, by avoiding the recordkeeping requirements of the statutes, plaintiff Herb Bauer Sporting Goods avoided the alleged costs, burdens, and lost profits that purportedly would have flowed from the laws. These gains easily outstrip even the inflated $400,000.00 base lodestar amount sought by Plaintiffs.

Plaintiffs also argue that they were motivated by "non-pecuniary interests in the Fourteenth and Second Amendments." (Motion, p.8:23) But the fact that this litigation had a non-financial effect – the invalidation of statutes on vagueness grounds – does not entitle Plaintiffs to fees – they had a financial incentive in this litigation distinct from the general public's:

> While every citizen theoretically benefits by rulings which compel a governmental body to follow the law and which resolve disputes over applicable law, that benefit is not pecuniary in nature. As a member of the general public, [plaintiff] shares equally in those nonpecuniary benefits flowing from the litigation. *However, only [plaintiff] reaps the substantial, present economic benefit it would have lost had the litigation been unsuccessful.*

(*Beach Colony II*, 166 Cal.App.3d at p. 113 [emphasis added].) In sum, Plaintiffs make no credible argument that the litigation imposed a burden out of proportion to their stake in the matter. (See *California Licensed Foresters*, 30 Cal.App.4th at p. 570; *Beach Colony II*, 166 Cal.App.3d 106 at p. 114.) This case would have been filed with or without the prospect of a fee award, thus Plaintiffs are not eligible for fees under section 1021.5.

II. PLAINTIFFS' ARE NOT ENTITLED TO FEES FOR TRACKING LEGISLATION, CLERICAL ACTIVITIES, OR THE WITHDRAWN PRELIMINARY INJUNCTION MOTION

Under section 1021.5, the prevailing party is only entitled to recover fees for all hours *reasonably* expended. (*Serrano v. Unruh (Serrano IV)* (1982) 32 Cal.3d 621, 639.) But, the Court may reduce or disallow hours that were not reasonably expended to which the opposing party objects. (*Coalition for LA County Planning v. Bd. of Supervisors* (1977) 76 Cal.App.3d 241, 251.) The hours billed in this case and calculated into Plaintiffs' lodestar include 1,760.6 hours billed by four attorneys, a law clerk, and one paralegal. (Monfort Decl., Exh. J.) As set forth below, much of this time is unreasonable, unsupported, and should not be allowed.

A. Time Spent Tracking Assembly Bill 2358 Should be Deducted.

Plaintiffs seek fees for 15.2 hours spent analyzing and tracking Assembly Bill 2358 "to determine the potential impacts passage of this legislation would have on Plaintiffs' legal challenge in this case." (Monfort Decl., ¶ 26.) But this bill "died on the Senate Floor, thus failing to pass." (Monfort Decl., ¶ 27.) In any event, these hours were not reasonably spent because analyzing and tracking the bill did not advance the litigation and had no bearing on the outcome of this case. (See *Gates v. Gomez* (9th Cir. 1995) 60 F.3d 525, 535 [finding the lower court erred in allowing recovery of attorneys' fees for media contacts because it is an activity attorneys generally do at their own expense].)

B. Fees for Clerical Activities Should Be Deducted.

Plaintiffs seek recovery for 3.4 hours time spent on secretarial tasks such as "formatting documents for filing," filing pleadings, and preparing the tables and evidence. (Monfort Decl., ¶¶ 67, 79.) Purely clerical work is not recoverable at a paralegal rate. (*Missouri v. Jenkins* (1989) 491 U.S. 274, 288 [purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them].) These hours should be deducted.

C. The Court Should Deny Recovery of Fees Associated with Plaintiffs' Withdrawn Preliminary Injunction Motion

Plaintiffs have conceded that they voluntarily withdrew their Motion for Preliminary Injunction on November 17, 2010. The effect of withdrawing a motion is to place the record

where it stood prior to the filing of the motion; in other words, as though the motion had not been made. (*Hammons v. Table Mountain Ranches Owners Assn., Inc.* (Wyo. 2003) 72 P.3d 1153, 1157 ["A motion withdrawn leaves the record as it stood prior to the filing of the motion, i.e., as though it had not been made"]; *Altsman v. Kelly* (Pa. 1939) 9 A.2d 423, 488 [same].)

Plaintiffs argue that the preliminary injunction motion was necessary to the litigation and that the State forced Plaintiffs to file the Motion because the State would not agree to file cross-motions for summary judgment before the effective date of the challenged statutes. (Motion, p. 3:3-10.) This argument assumes incorrectly that Plaintiffs needed the State's permission before filing a summary judgment motion. It also misstates the factual record, which establishes that Plaintiffs opted for strategic reasons to seek a preliminary injunction after the State declined their unreasonable demand to reduce their summary judgment notice period from 75 to 30 days.[1]

Plaintiffs were always free to file a summary judgment motion on regular statutory notice, which is what they appeared to be doing when they calendared a summary judgment hearing for December 16, 2010 – a full six weeks before the February 1, 2011 effective date of the challenged statutes. (Krause Decl., ¶ 2.) But Plaintiffs never filed their moving papers, and opted instead to seek a preliminary injunction. Given that Plaintiffs could have had their summary judgment motion heard by December 16, their preliminary injunction motion was wholly unnecessary. Consequently, the State did not drive Plaintiffs to seek a preliminary injunction.

Plaintiffs seek recovery for 364 hours spent preparing their Motion for Preliminary Injunction. This is over *two full months* worth of time devoted to a motion that was not necessary in the first instance, was deemed procedurally and substantively defective by the Court, and was ultimately withdrawn by Plaintiffs. Given the excessive amount of time billed to this unnecessary and motion, and its complete lack of success, the Court should deny recovery of all fees.

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[1] On August 4, 2010, the day the State filed its Answer, counsel for Plaintiffs contacted counsel for the State and asked the State to waive the 75-day summary judgment notice period, stipulate to undisclosed facts, and agree to a briefing schedule on *their* summary judgment motion that would have given the State just ***16 days*** to prepare and file its opposition papers. (Krause Decl., ¶ 2 & Exh. B.) Given that the State had just answered the complaint and was still researching and investigating the matter, the State declined Plaintiffs' request, but left open the possibility of filing cross-motions for summary judgment before the February 1, 2011 effective date of the statutes. (*Id.* & Exh. C.)

III. SHOULD THE COURT EXERCISE ITS DISCRETION TO AWARD ANY FEES, IT SHOULD REDUCE THE HOURLY RATES TO LOCAL MARKET RATES AND MAKE SUBSTANTIAL REDUCTIONS FOR DUPLICATIVE AND EXCESSIVE BILLING.

A. Plaintiffs' Attorneys Are Not Entitled to Home Market Rates Because They Have Not Met Their Burden to Show Impracticability in Retaining Local Counsel.

A court assessing attorney fees begins with a lodestar figure, based on the careful compilation of the time spent and reasonable hourly compensation of each attorney. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) The reasonable value of attorney services is defined as the hourly amount to which attorneys of like skill in the court's jurisdiction would typically be entitled. (*Ketchum v. Moses* (2001) 22 Cal.4th 1122, 1233; *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1243 [Los Angeles and San Francisco attorneys fees reduced to reflect rates that were reasonable within Kern County].)

Plaintiffs hired the Long Beach, California firm of Michel & Associates, P.C., but filed their complaint in Fresno County Superior Court. They now claim entitlement to home market rates because they are "unaware" of any attorney in Fresno with comparable experience, expertise, and resources. (Motion, p. 12:12-13, 25-26.) But Plaintiffs have provided no *evidence* (as they must) to show that they made a good faith effort to find local counsel or to demonstrate that hiring them was impracticable. (*Nichols*, 155 Cal.App.4th at p. 1243 [where plaintiff showed a good-faith effort to find local counsel and demonstrated that hiring local was impracticable, trial court should have considered out-of-town counsel's higher rates]; *Horsford v. Board of Trustees of Cal. State Univ.* (2006) 132 Cal.App.4th 359, 399 [declarations of local counsel unwilling to take plaintiff's case provided, demonstrating impracticability of obtaining local attorneys].)

Plaintiffs submit the declaration of Jason Davis (a former associate at the Michel law firm) to opine that Michel & Associates' rates are reasonable and within the market range for attorneys "handling comparable litigation in Southern California." (Davis Decl., ¶ 6). Mr. Davis provides no evidence that he has knowledge of the local Fresno County market or that hiring qualified Fresno counsel was impracticable. (See *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 618-619 [declaration evidencing knowledge of local market and the impracticality of hiring local attorney sufficient evidence of impracticality].)

Because Plaintiffs have not met their burden to establish "home" market rates, the hourly rates should be reduced according to Fresno County market rates, which have been found to range from $275.00 to $380.00. (See In *Jadwin v. County of Kern* (E.D. Cal., Jan. 24, 2011) 2011 WL 240695 at pp. *47-*48; *Luna v. Hoa Trung Vo dba Save More 98 Discount Stores* (E.D. Cal., May 25, 2011) 2011 WL 2078004 at pp. *4-*5.[2]) Three of Plaintiffs' attorneys seek rates that are higher than these rates. The lead attorney on the case, Clinton Monfort, has 3 years experience working in firearms law and seeks $325.00. (Davis Decl., ¶ 9.) Mr. Monfort's hourly rate should be reduced to $275, which is comparable to the attorney in *Jadwin* who practiced in California for four years and was the lead attorney. Mr. Dale, an employment law attorney, has been practicing for 10 years (http://michellawyers.com/attorney-profile/joshua-r-dale/) and seeks $375 (Davis Decl., ¶ 8), this amount should be reduced to the local Fresno rate of $295, for similar experience and responsibility in case. (See *Luna*, 2011 WL 2078004 at p. *6 [associate attorney with 10 years experience had reduced rate to $295 based on experience and responsibility in the case].) Mr. Michel has over 20 years experience and is seeking $450, which should be reduced to $380, similar to the experience of an attorney practicing for 30 years within Fresno county. (See *Jadwin,* 2011 WL 240695 at p. *51 [lawyer with over 30 years experience and the court reduced rate from $660 to $380].) The Court should calculate any fees awarded based on these prevailing Fresno County hourly rates.

B. The Fees Claimed by Plaintiffs' Counsel Include Substantial Amounts of Duplicative, Excessive, and Unsupported Billing and Should Be Reduced.

If the prevailing party can establish the elements of a section 1021.5 fee award, it generally is entitled to an award of fees for all hours reasonably expended. (*Serrano v. Priest* (1982) 32 Cal.3d 621, 639.) But, the court may reduce or entirely disallow hours that were not reasonably expended to which the opposing party objects. (See *Coalition for L.A. County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251.) Inefficient and duplicative work should be

[2] These decisions are informative of rates recently awarded attorneys of comparable experience in other cases in the Fresno Community. California courts often seek guidance from federal case law when deciding upon fee award. (*Flannery v. Prentice* (2001) 26 Cal.4th 572.)

substantially reduced by trial courts. (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 839-845 [reversing a fee award and holding that on remand the award should be reduced by applying a negative multiplier due to the duplication of work].) Here, a substantial reduction in fees is warranted because Plaintiffs' counsel billed wildly excessive amounts of time to every task they performed and have failed to meet their burden to justify such a recovery – a problem that is compounded by Plaintiffs' refusal to produce their contemporaneous billing records.

1. The Court should disallow recovery of fees incurred by anyone other than Mr. Monfort because he is not competent to testify about work performed by other legal professionals.

As a threshold matter, Plaintiffs' motion suffers from a lack of evidence. Despite a formal request and offers to pay for any time spent redacting privileged information (Krause Decl., ¶ 7 & Exh. "E"), Plaintiffs refused to turn their attorneys' bills over to the State in connection with this motion and instead proffer the hearsay declaration of Mr. Monfort describing, in very general terms, the tasks that *every* attorney and paralegal allegedly performed during the nine month duration of the case. Although fee motions may be supported by declarations rather than contemporaneous time records, the moving party still bears the burden of producing competent evidence of the work performed. (*Mardirossian & Assoc., Inv. v. Ersoff* (2007) 153 Cal.App.4th 257, 268 [billing records not required where each attorney testified at "length concerning the work he or she performed, the complexity of the issues and the extent of the work that was required"]).[3]

[3] Plaintiffs will likely seek refuge in cases holding that a fee motion can be supported by declarations, but those cases are distinguishable and usually involve contingency fee cases in which the attorneys have not maintained any time records and each attorney has either testified about the work they did or submitted a declaration. Here, in contrast, Plaintiffs admit they have the bills, but refuse to turn them over, and one lawyer without personal knowledge purports to testify about what everyone else did. (Cf. *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 255 [fees awarded where adequate declarations provided by *all* attorneys evidencing their reasonable hourly rate and establishing the number of hours spent on their services]; *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1586-1587 [court awarded fees to the only attorney handling the case based on his declaration].) In contrast, Plaintiffs here offer only the hearsay declaration of Mr. Monfort in Support of their request for over 1,700 hours worth of fees. One attorney's declaration is not sufficient evidence to support all other attorneys' reasonable hourly fees and amount of services rendered. (See *Mardirossian*, 153 Cal.App.4th at p. 269 [plaintiffs could receive attorneys' fees in a contingency case even though they did not maintain billing records, but "***the attorney's testimony must be based on the attorney's personal knowledge of the time spent and fees incurred***"] [emphasis added].)

Although the State can only speculate about why Plaintiffs refuse to allow the State to scrutinize their bills, Mr. Monfort's declaration lacks foundation, is not based on personal knowledge and is too vague to be of any use in identifying unnecessary and duplicative work. The State's evidentiary objections to Mr. Monfort's declaration accompany this opposition. Based upon those objections, the Court should disallow recovery for *all time* spent by legal professionals other than Mr. Monfort because the hours are unsupported by competent evidence.

2. The hours devoted to the preliminary injunction motion are excessive.

If the Court is not inclined to disallow recovery for the 364 hours of attorney time devoted to Plaintiffs' withdrawn preliminary injunction motion (see Section II.C, above), the Court should reduce any recovery because Plaintiffs' counsel spent excessive amounts of time conducting duplicative work drafting and revising the motion. Law clerk Barvir spent 134 hours researching, drafting, and preparing the motion, while attorneys Monfort and Brady spent another 152.5 and 75.5 hours, respectively, doing the very same thing. (Monfort Decl., ¶¶ 78-81.) This equates to *nine weeks* worth of time devoted to a motion that the Court deemed defective and was prepared to deny before Plaintiffs withdrew it. The Court should reduce this by at least fifty percent.

3. The time devoted to discovery is excessive.

Plaintiffs claim a total of 228.5 hours spent on discovery between three attorneys, one law clerk, and one paralegal. Again, because Plaintiffs have not provided their bills, it is difficult to know how much time was devoted to each discovery activity, and what sort of inefficient or duplicative efforts exist. (*Ketchum*, 24 Cal.4th at p. 1132.) This was not a discovery intensive case and certainly did not require 228.5 hours (over five weeks) worth of work. The State propounded no written discovery, while Plaintiffs propounded four sets of written discovery that asked the same 30 or so questions in slightly different ways. (Krause Decl., ¶ 4.) The State's discovery responses were short, complete, and to the point, requiring no meet and confer. (*Id.*) Nevertheless, excessive time was spent analyzing and revising requests and analyzing discovery responses. (Monfort Decl., ¶¶ 83-91.) Further, excessive and duplicative amount of time was spent by four attorneys assisting in the preparation for taking one deposition and defending four others. (*Id.*) Mr. Monfort's declaration is unclear as to how much time was spent between

analyzing and revising requests and assisting in deposition preparation because he lumps all discovery activities into vague and general entries. Since the Plaintiffs have only provided the State with a conclusory declaration and no way to identify time spent on individual tasks, the hours spent on the discovery should be reduced by at least fifty percent.

4. The summary adjudication motion.

Although the summary judgment motion was undeniably an important motion, it should not have required substantially more work than the preliminary injunction motion on which it was based. Nevertheless, Plaintiffs spent ***802.7 hours*** on this motion. From Mr. Monfort's summary of the bills, substantial duplication of work is evident. For instance, Ms. Monfort and Ms. Barvir claim 114.3 and 87.9 hours, respectively, for drafting the motion. (Monfort Decl, ¶¶ 93-94.) In addition, large amounts of time were spent drafting, revising, editing, and reviewing the supporting documents by three attorneys and one law clerk. (*Id.*, pp. 21-23.) Mr. Brady spent another 161 hours on the motion (itself a month's worth of time). (*Id.*, ¶ 95.) Another 100 hours was spent by Mr. Monfort and Mr. Brady "analyzing and developing litigation strategies." (*Id.*, ¶ 93:15, 95:26-27.) And over 40 hours were spent in meetings and teleconferences with unidentified "co-counsel" and experts with no explanation as to why the repetitive meetings are reasonable. Counsel spent another 79.2 hours preparing, assembling and reviewing exhibits and supporting documents, but it is unclear how this work differed from other work performed on the motion. And Mr. Dale's time (52.2 hours) is not even broken down between tasks. (*Id.*, ¶ 96.)

All of this excessive and apparently duplicative work by four attorneys and one law clerk is unreasonable – a problem compounded by Plaintiffs' refusal to turn over even redacted copies of their bills, which prevents the State (and the Court) from knowing the nature of the work that any single legal professional performed.

With so many attorneys, clerks, and paralegals, it is understandable that duplicative and excessive work would occur, but that does not mean it is reasonable or recoverable. If Plaintiffs are awarded fees (and they should not be), the amount they claim should be reduced by *at least* fifty percent to correct for the excessive and duplicative billing and the lack of detail that prevents the State from effectively opposing the fee motion.

IV. THE COURT SHOULD REJECT PLAINTIFFS' REQUEST FOR A LODESTAR MULTIPLIER AND INSTEAD APPLY A NEGATIVE MULTIPLIER TO ACCOUNT FOR EXCESSIVE AND REDUNDANT WORK.

Once a reasonable lodestar figure is established, courts may adjust the figure upward or downward in light of a number of factors. (*Serrano III,* 20 Cal.3d at p. 49; see also *Ketchum,* 24 Cal.4th at p. 1138.) The determination of a multiplier is separate and distinct from the determination of the lodestar. (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 626 [improper for trial court to consider the same factors twice, not only to calculate a reasonable hourly rate for purposes of awarding the lodestar award amount but also to enhance it]; *In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1056-1058 [reversing a multiplier award where risks were not as large as counsel portrayed them].)

The factors a court may look to in deciding whether to apply a multiplier include the novelty and difficulty of the questions involved, the skill displayed in presenting them, the extent to which the nature of the litigation precluded other employment by the attorneys, the fact that an award against the State would ultimately fall upon the taxpayers, and the contingent nature of the fee award. (*Ketchum,* 24 Cal.4th at p. 1139.) Plaintiffs ask the Court to apply a 1.5 multiplier, but a fair application of these factors establishes that an upward multiplier is inappropriate.

First, the single issue presented in this case (whether the challenged definition was vague) did not require specialized knowledge of firearms, nor did it "forge a new legal theory," as Plaintiffs now argue. This Court merely applied existing vagueness case law to the challenged definition. Second, Plaintiffs' rationale for applying a multiplier (counsels' experience and firearms expertise) also does not justify a multiplier since that factor has already been subsumed by Plaintiffs' excessive lodestar calculation. (Motion, p. 14:14-15.) The same factors may not be used to justify both the lodestar amount and a multiplier. (*Ketchum*, 24 Cal.4th at p. 1139; *Ramos*, 82 Cal.App.4th at p. 626.) A trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. (*Ibid.*) This factor does not apply here.

Finally, Plaintiffs cite the contingent nature of "civil rights cases" as a reason to apply a multiplier (Motion, pp. 14-15), but Plaintiffs submit no evidence that their attorneys were working on a contingency fee basis and this was not a civil rights case. To the contrary, Plaintiffs' counsel revealed in a post-judgment press release that the litigation was funded by plaintiff CRPA, as well as the NRA, and as explained above Plaintiffs stood to gain financially by a victory. (Krause Decl., ¶ 8 & Exh. "G," p. 4, § 5.A ["Funding for this case was provided by the Legal Action Project, a joint effort between the NRA and CRPA Foundation"].) Plaintiffs' effort to premise a multiplier on the fact that was a contingent fee case is misleading, at best.

Plaintiffs have failed to satisfy their burden of proving that an upward multiplier is appropriate in this case. If anything, the Court should reduce Plaintiffs' fee award by applying a *negative* multiplier as the court did in *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th at p. 844 -845 (reversing fee award and holding that plaintiffs' fee award should be reduced by applying a negative multiplier due to the duplication of work). This is especially true where, as where, the fee award would ultimately fall upon California taxpayers. (See *Serrano III*, 20 Cal.3d at p. 49.)

CONCLUSION

For all the foregoing reasons, the Court should deny plaintiffs' motion in its entirety or, alternatively, reduce any award substantially to account for unnecessary, excessive, and duplicative billing.

Dated: July 13, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

PETER A. KRAUSE
Supervising Deputy Attorney General
Attorneys for Defendants and Respondents State of California, Kamala D. Harris, and the California Department of Justice

DECLARATION OF PETER A. KRAUSE

I, Peter A. Krause, declare as follows:

1. I am an attorney at law duly licensed to practice before all courts of the State of California. I am a Deputy Attorney General in the Office of the Attorney General, counsel for defendants and respondents the State of California, Kamala D. Harris, and the California Department of Justice (collectively, the "State") in this action. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

2. The State answered Plaintiffs' complaint and verified petition for writ of mandate on August 4, 2010. On August 4th, the State filed its Answer in the case, Plaintiffs' counsel contacted me and asked the State to waive the 75-day summary judgment period, to stipulate to undisclosed facts, and to agree to a briefing schedule on their summary judgment motion that would have given the State just 16 days to prepare and file its opposition papers. (A true and correct copy of the August 4, 2010 letter from Plaintiffs' counsel is attached hereto as Exhibit "A.") Given that the State had just answered the complaint and was still researching and investigating the matter, the State declined Plaintiffs' request, but left open the possibility of filing cross-motion for summary judgment before the February 1, 2011 effective date of the statutes. (A true and correct copy of the State's response dated October 8, 2010 is attached hereto as Exhibit "B.")

3. On September 7, 2010, Plaintiffs filed a Motion for Preliminary Injunction. After several continuances, the Court scheduled Plaintiffs' preliminary injunction motion for hearing on November 17, 2010. I attended the hearing and argued the motion on behalf of the State. At the hearing, the Court informed Plaintiffs their preliminary injunction motion was defective insofar as only one of eight declarations was properly verified and there was little showing of irreparable harm. Accordingly, the Court indicated that it would deny the motion, but offered to allow Plaintiffs to withdraw it from the calendar. Counsel for Plaintiffs accepted the Court's offer and the motion was taken off calendar. (A true and correct copy of the Court's 11/17/10 Minute Order is attached hereto as Exhibit "C.") At the Status Conference held the same day, the Court

set a January 18, 2011 summary judgment hearing date, with Plaintiffs' opening brief due on December 7, 2010. Plaintiffs' counsel accepted these dates in order to have the motion heard prior to the challenged statutes' February 1, 2011 effective date.

4. On October 7, 2010, Plaintiffs propounded one set each of form interrogatories, requests for admissions, requests for production, and special interrogatories that asked the same 30 or so questions in slightly different ways. The State responded to Plaintiffs' discovery requests on November 23, 2010 with complete responses that required no meet and confer.

5. On December 1 and 2, 2010, Plaintiffs deposed Special Agent Supervisor Blake Graham. On December 7, 2010, Plaintiffs filed a Motion for Summary Judgment or, in the Alternative, Summary Adjudication, along with eleven supporting fact declarations, almost sixty exhibits, and 240 undisputed facts. In light of the voluminous testimony, declarations and exhibits lodged by Plaintiffs, the State defensively took four depositions (three plaintiffs and expert witness Stephen Helsley), just in case the Court found factual matters to be relevant. One of those depositions, that of Herb Bauer Sporting Goods, was taken primarily to flesh out the company's as-applied vagueness cause of action, a claim that was voluntarily dismissed by Plaintiffs. Three attorneys from Plaintiffs' law firm – Clinton Monfort, Sean Brady, and Joshua Dale – attended every deposition, though only Mr. Dale took an active role. Mr. Monfort and Mr. Brady observed the proceedings.

6. Plaintiffs' summary judgment motion was heard on January 18, 2011. On January 31, 2011, the Court issued an Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication. (A true and correct copy of excerpts from the January 31, 2011 Order are attached hereto as Exhibit "D.") On February 23, 2011, the Court entered Judgment in favor of Plaintiffs on the first cause of action in the Complaint. Plaintiffs dismissed the second and third causes of action. Plaintiffs served Notice of Entry of Judgment on March 2, 2011. On March 11, 2011, Plaintiffs served their Memorandum of Costs.

7. On June 3, 2011, the State requested Plaintiffs produce their contemporaneous billing records to allow the State to examine whether there was a duplication of efforts or other

inefficiencies, but Plaintiffs refused, even after the State told Plaintiffs it would not dispute any time devoted to redacting for privilege. (A true and correct copy of the email from the State, dated June 3, 2011, as well as Plaintiffs' counsel's June 20th response, are attached hereto as Exhibits "E" & "F.")

8. Attached hereto as Exhibit "G" is a true and correct copy of a "Memorandum" issued by the Michel & Associates law firm after the judgment in this case describing the case, its result, and who funded the litigation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Sacramento, California on July 13, 2011.

Peter A. Krause

EXHIBIT A

Peter Krause - Parker v. CA

From: "Clint B. Monfort" <CMonfort@michellawyers.com>
To: Peter Krause <Peter.Krause@doj.ca.gov>
Date: 8/4/2010 6:01 PM
Subject: Parker v. CA

Peter,

Nice chatting with you today. I already talked to Chuck and I think we are both content to hold off on moving for a preliminary injunction and go ahead with our MSJ if you would be willing to stipulate to a shortened briefing schedule i.e. we don't want to wait 75 days while the State Ammunition case moves forward, possibly with a preliminary injunction motion, etc.

Obviously we will need to stipulate to some facts to narrow it down to a purely legal issue for the court.

We will be happy to work around your vacation time, of course.

Please let me know if this will work for you. If so, what would you think about scheduling the hearing date a few days after you return from vacation (around Sept. 10) which would set your opposition due date prior to your vacation. I think we can have our MSJ filed by next Friday realistically as our P's and A's and supporting dec.'s are basically ready to go. I will be available to discuss stipulated/undisputed facts on Friday if you are still available that day. If we agree to file our Motion by next Friday that would give you 16 days to file your opposition prior to your vacation.

I realize that this is a pretty tight schedule but this will be a basically "discovery-less" MSJ and we can get the legal issues directly before the Court. Both of us are showing our hands openly so the MSJ efforts shouldn't require a whole lot of time. This seems like the best way to get to potential resolution of all claims before we have litigation and motions moving forward on three different fronts.

Thanks again. I'll be available tomorrow if you would like to discuss over the phone.

Clint B. Monfort
Attorney

MICHEL & ASSOCIATES, P.C.
Attorneys at Law
Firearms - Environmental - Land Use - Employment Law

Direct: (562) 216-4456
Main: (562) 216-4444
Fax: (562) 216-4445
Email: CMonfort@michellawyers.com
Web: www.michellawyers.com
180 E. Ocean Blvd.
Suite 200
Long Beach, CA 90802

EXHIBIT B

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 324-5328
Facsimile: (916) 324-8835
E-Mail: Peter.Krause@doj.ca.gov

October 8, 2010

VIA E-MAIL

Clint B. Monfort
Michel & Associates
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802

RE: *Sheriff Clay Parker, et al. v. State of California, et al.*
Fresno Superior Court Case No. 10CECG02116

Dear Mr. Monfort:

I am writing in response to your October 5 e-mail regarding experts and discovery.

The State has not reached a final decision regarding the use of expert witnesses, so I cannot answer your question about who the State might rely upon. The State will, of course, disclose the identity of any expert witnesses it intends to rely on at trial in accordance with Code of Civil Procedure section 2034.210, et seq.

You also request that the State stipulate to shorten time in which to respond to discovery that plaintiffs have not yet served. Plaintiffs have been free to serve written discovery since late June. It is unclear why they have not propounded any in the intervening three months, but I cannot agree to shorten the State's time in which to respond to discovery that I have not seen. It is not the State's job to ensure that plaintiffs have all the discovery they need for an unfiled summary judgment motion that is calendared on a date that plaintiffs unilaterally chose.

On the issue of plaintiffs' summary judgment motion, I want to be clear that the State has not agreed unconditionally to shorten the summary judgment notice period to allow plaintiffs' motion to be heard on December 16. At the September 14 telephonic status conference, the parties agreed to table the discussion about plaintiffs' summary judgment motion (which I understood to include the briefing schedule and hearing date) until October 26. Although the State remains flexible on a modified briefing schedule, that flexibility is not unlimited. If I am reading your October 5 e-mail correctly, plaintiffs want to keep the December 16 hearing date that they reserved several weeks ago, while waiting to file their moving papers until as late as November 12 (November 11 is a court holiday). This timetable is unacceptable because it would give the State only about two weeks to prepare an opposition.

Apart from Mr. Michel's argument during the September status conference that plaintiffs are entitled to "two bites at the apple," plaintiffs have not articulated any reason why they cannot file their summary judgment motion now, or more accurately, why they must wait until two weeks after the preliminary injunction hearing. If plaintiffs need discovery, again, they have had several months to seek it. Plaintiffs created the summary judgment filing deadline when they reserved the December 16th hearing date. If plaintiffs were unprepared to timely file their motion based upon that date, then they should not have reserved the hearing. The State will not be pressured into agreeing to bear the burden of a drastically reduced notice period based upon the artificial sense of urgency that the December 16 hearing date has created.

In light of the above, the State is prepared to agree to the following. Based upon the December 16 hearing date that you reserved, the last day to file moving papers should have been October 1. The State is willing to give plaintiffs until October 18 to file their papers. That reduces the notice period from 75 days to 60 days and still gives the State enough time to effectively oppose the motion. The parties can then discuss a modified opposition and reply schedule at the October 26 hearing. Alternatively, if plaintiffs want to wait until mid-November to file their moving papers, then any discussion about summary judgment at the October 26 status conference will have to involve a rescheduled hearing date that gives the State sufficient time to oppose the motion. I simply cannot compromise the State's defense of this case just because plaintiffs chose a December hearing date for which they apparently were unprepared.

Finally, you continue to cite my August vacation as a justification for plaintiffs' various delays, most recently in the declaration attached to your reply in support of the preliminary injunction motion. To set the record straight about my brief vacation, I never asked you to postpone *filing* any motion, nor to delay serving discovery. I merely asked you not to select a hearing date that would cause the State's *opposition brief* to fall due during my short absence. You were free to file your preliminary injunction motion at any time. Any suggestion to the contrary is false.

Please let me know if you have any questions, and also whether plaintiffs will file and serve their summary judgment motion by Monday, October 18.

Sincerely,

PETER A. KRAUSE
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

SA2010101624
10622810.doc

EXHIBIT C

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: **Sherrif Clay Parker vs. State of California**	
LAW AND MOTION MINUTE ORDER	Case Number: **10CECG02116 JH**

Hearing Date: **NOVEMBER 17, 2010** Hearing Type: **Status Conf,CMC,Mtn. Prelim Injunction**

Department: **97A** Judge/Temporary Judge: **Jeff Hamilton**

Court Clerk: M.Santana Reporter/Tape: Stacy Obel-Jorgensen

Appearing Parties:

Plaintiff: Defendant:

Counsel: Clinton Monfort, Sean Brady, C.D. Michel, Counsel: Peter Krause, Zackery Morazzini,

[X] Motion Preliminary Injunction- OFF Calendar
Motion Judgment on Pleadings and Summary Judgment 12/16/10 ordered vacated. Opening to be filed 12/03/10. Opposition due 01/03/2011. Reply due 01/07/2011. All Depositions due 12/16/10. Stipulation/Order to be submitted in writing to the court for signature.

[ ] Continued to [X] Set for 01/18/11 at 8:30a.m Dept. 402 for Court Trial

[X] **Must have at least 2 witnesses ready to go on 01/18/2011** [ ] Matter is argued and submitted.

[ ] Upon filing of points and authorities.

[ ] Motion is granted [ ] in part and denied in part. [ ] Motion is denied [ ] with/without prejudice.

[ ] Taken under advisement

[ ] Demurrer [ ] overruled [ ] sustained with _____ days to [ ] answer [ ] amend

[ ] Tentative ruling becomes the order of the court. No further order is necessary.

[ ] Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

[ ] Service by the clerk will constitute notice of the order.

[ ] Time for amendment of the complaint runs from the date the clerk serves the minute order.

[ ] Judgment debtor _____ sworn and examined.

[ ] Judgment debtor _____ failed to appear.
Bench warrant issued in the amount of $ _____

Judgment:

[ ] Money damages [ ] Default [ ] Other _____ entered in the amount of:
Principal $ _____ Interest $ _____ Costs $ _____ Attorney fees $ _____ Total $ _____

[ ] Claim of exemption [ ] granted [ ] denied. Court orders withholdings modified to $ _____ per _____

Further, court orders:

[ ] Monies held by levying officer to be [ ] released to judgment creditor. [ ] returned to judgment debtor.

[ ] $ _____ to be released to judgment creditor and balance returned to judgment debtor.

[ ] Levying Officer, County of _____, notified. [ ] Writ to issue

[ ] Notice to be filed within 15 days. [ ] Restitution of Premises

SUPERIOR COURT OF CALIFORI COUNTY OF FRESNO Civil Department, Central Division 2317 Tuolumne Street Fresno, CA 93721 (559) 497-4100	FOF URT USE ONLY
TITLE OF CASE: Sherrif Clay Parker vs. State of California	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 10CECG02116 JH

Name and address of person served:

Peter Andrew Krause
Office of the Attorney General
1300 I Street, Ste 125
Sacramento, CA 95814

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the 11/17/10 Minute Order was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California, on:

Date: **November 18, 2010** Clerk, by MARIA G. SANTANA, Deputy
M. Santana

C. D. Michel, 180 East Ocean Blvd., Suite 200, Long Beach CA 90802
Peter A. Krause, Office of the Attorney General, 1300 I Street, Ste 125, Sacramento CA 95814

EXHIBIT D

FILED
JAN 31 2011
FRESNO SUPERIOR COURT
By _____ DEPT. 402 - DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

Sheriff Clay Parker, et al., Plaintiffs, v. State of California, et al., Defendants.	No. 10 CECG 02116 ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

A hearing on Plaintiffs Sheriff Clay Parker's, Herb Bauer Sporting Goods, Inc.'s, California Rifle and Pistol Association Foundation's, Able's Sporting, Inc.'s, RTG Sporting Collectibles, LLC's, and Steven Stonecypher's motion for summary judgment, or, in the alternative, for summary adjudication was held in this court on January 18, 2011. Appearances by counsel were noted on the record. After argument by counsel, the Court orally denied PLAINTIFFS' motion for summary judgment, denied Plaintiff Herb Bauer Sporting Goods, Inc.'s motion for summary adjudication of its second cause of action for declaratory and injunctive relief - as applied vagueness challenge, and granted PLAINTIFFS' motion for summary adjudication of their first cause of action for

declaratory and injunctive relief - facial vagueness challenge. The Court now issues the following written decision and rules as follows:

1. PLAINTIFFS Sheriff Clay Parker's, Herb Bauer Sporting Goods, Inc.'s, California Rifle and Pistol Association Foundation's, Able's Sporting, Inc.'s, RTG Sporting Collectibles, LLC's, and Steven Stonecypher's First Cause of Action for Declaratory and Injunctive Relief - Facial Vagueness Challenge

PLAINTIFFS Sheriff Clay Parker, Herb Bauer Sporting Goods, Inc., California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven Stonecypher have filed a motion for summary judgment of their complaint and summary adjudication of their first cause of action for declaratory and injunctive relief - due process vagueness - facial. In PLAINTIFFS' first cause of action, the PLAINTIFFS allege that an actual controversy has arisen and now exists between PLAINTIFFS and all DEFENDANTS because the PLAINTIFFS contend that Penal Code §§ 12060, 12061, and 12318 that regulate "handgun ammunition" as defined in Penal Code §§ 12060(b) and 12323(a) are void for vagueness on their face and the DEFENDANTS contend that the statutes are not unconstitutionally vague and that they can be constitutionally enforced. In order to establish a cause of action for declaratory relief, a plaintiff must prove: (1) a proper subject of declaratory relief within the scope of Code of Civil Procedure § 1060, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*See* 5 Witkin, California Procedure (5th ed.) § 853.) Injunctive relief is a type of damage or relief and

is a derivative cause of action, not a stand-alone cause of action.

The Court determines the issue of whether or not a statute is facially vague as a matter of law. (*People v. Cole* (2006) 38 Cal. 4th 964, 988 ["Ultimately, the interpretation of a statute is a question of law for the courts to decide."].)

Penal Code 12060(b) states:

> "Handgun ammunition" means handgun ammunition as defined in subdivision (a) of Section 12323, but excluding ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code. Handgun ammunition does not include blanks.

Penal Code § 12323(a) provides:

> "Handgun ammunition" means ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, as defined in subdivision (a) of Section 12001, notwithstanding that the ammunition may also be used in some rifles.

Penal Code § 12001(a) states:

> (a)(1) As used in this title, the terms "pistol," "revolver", and "firearm capable of being concealed upon the person" shall apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.
>
> (2) As used in this title, the term "handgun" means any "pistol," "revolver," or "firearm capable of being concealed upon the person."

In their first cause of action, the PLAINTIFFS contend that Penal Code §§ 12060, 12061, and 12318 that regulate "handgun ammunition" as defined in Penal Code §§ 12060(b) and 12323(a) are facially void for vagueness because the statutes fail to provide

notice to persons of ordinary intelligence regarding which calibers of ammunition are "handgun ammunition" and thus subject to enforcement under Sections 12060, 12061, and 12318 and because the statutes encourage or invite arbitrary and discriminatory enforcement of the law. Specifically, the PLAINTIFFS contend that the entire statutory scheme envisioned by Sections 12060, 12061, and 12318 fail for vagueness because the definition of "handgun ammunition" -- the subject matter regulated by the statutes - is itself facially impermissibly vague. After careful consideration, the Court finds that the definition of "handgun ammunition" as established in Penal Code §§ 12060(b) and 12318(b)(2) is unconstitutionally vague and, because the definition of "handgun ammunition" is vague, Penal Code §§ 12060, 12061, and 12318, which define and regulate sales and transfers of "handgun ammunition" are also impermissibly vague.

Consequently, the Court grants the PLAINTIFFS' motion for summary adjudication of their first cause of action.

"The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of 'life, liberty, or property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7)." (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567.) While Penal Code § 12060 is simply a definitional statute, Penal Code §§ 12061 and 12318 are criminal statutes. More specifically, Section 12061(c)(1) provides that a violation of Section 12061(a)(3), (a)(4), (a)(6), and (a)(7) is a misdemeanor and Section 12318(a) provides that a violation of Section 12318 is a misdemeanor.

"Under both Constitutions, due process of law in this context requires two elements: a criminal statute must "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112, 141].)

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the U.S. Supreme Court] ha[s] recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." [Citation.] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

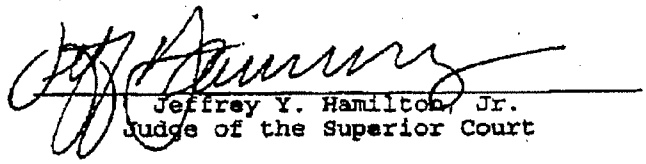
(*Kolender v. Lawson* (1983) 461 U.S. 352, 357-58 [quoting *Smith v. Goguen* (1974) 415 U.S. 566, 574-75].)

"A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084.)

> The California Supreme Court has not articulated a single test for determining the propriety of a facial challenge. [Citation.] Under the strictest test, the statute must be upheld unless the party establishes the statute "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." [Citation.] Under the more lenient standard, a party must establish the statute conflicts with constitutional principles "in the generality or great majority of cases." [Citation.] Under either test, the plaintiff has a heavy burden to show the statute is unconstitutional in all or most cases, and "cannot prevail by suggesting that in some future hypothetical

Sporting Goods, Inc.'s motion for summary adjudication of its second cause of action for declaratory and injunctive relief - due process vagueness - as applied.

DATED this 31st day of January, 2011.



Jeffrey Y. Hamilton, Jr.
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited 1130 "O" Street Fresno, CA 93724-0002 (559)457-1900	FOR COURT USE ONLY
TITLE OF CASE: **Sherrif Clay Parker vs. State of California**	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: **10CECG02116 JH**

Name and address of person served:

Peter Andrew Krause
Office of the Attorney General
1300 I Street, Ste 125
Sacramento, CA 95814

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the 01/31/11 minute order and copy of Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California, on:

Date: **February 1, 2011** Clerk, by M. Santana, Deputy

C. D. Michel, 180 East Ocean Blvd., Suite 200, Long Beach CA 90802
Peter A. Krause, Office of the Attorney General, 1300 I Street, Ste 125, Sacramento CA 95814

EXHIBIT E

From: Peter Krause
To: cmonfort@michellawyers.com
CC: Claudia Ayala,Kimberly Graham
Date: 6/3/2011 3:32 PM
Subject: Parker v. California

Clint,

I am writing about a couple of issues relating to Plaintiffs' fee motion. First, neither the electronic courtesy copy nor the service copy of your declaration in support of Plaintiffs' Motion for Attorneys' Fees includes a copy of Exhibit "J," which is supposed to be a chart breaking down by billing professional and project the hours for which recovery is sought. Could you please arrange to have a copy of Exhibit J sent to me as soon as possible?

Second, unless Exhibit J contains an extremely detailed description of each task performed by every attorney and paralegal throughout the course of the litigation, the State requests that Plaintiffs provide it with copies of the "extensive daily time records" mentioned in footnote 8 of your points and authorities.

I understand that redaction might be required, but given the significant amount of fees sought for a case that lasted a relatively short period of time, it is essential for the State to obtain contemporaneous time records in order to analyze the types of pre-litigation activities billed for, whether recovery is sought for lobbying efforts on AB2358, to identify duplicative and clerical work, and to identify unreasonable hours devoted to any given task. Without the bills, the State is left to guess about what was done and will be unable to effectively oppose the motion.

While Plaintiffs have offered to make the records available to the Court in camera, the judge will have neither the time nor the ability (not to mention the desire) to sift through hundreds of pages of timekeeping records to identify redundancy and unrecoverable time. I can represent to you that the State will not dispute any amounts billed for reviewing and redacting billing entries should the Court award fees in the case.

I hope that Plaintiffs will seriously consider our request. Thanks, and please call if you have any questions.

Peter

Peter A. Krause
Supervising Deputy Attorney General
Office of the Attorney General
Civil Division, Government Law Section
1300 I Street
Sacramento, CA 95814
Telephone: (916) 324-5328
Fax: (916) 324-8835

EXHIBIT F

Dawn McFarland - Parker Fee Motion

From: "Clint B. Monfort" <CMonfort@michellawyers.com>
To: Peter Krause <Peter.Krause@doj.ca.gov>
Date: 6/20/2011 6:01 PM
Subject: Parker Fee Motion
CC: "C.D. Michel" <CMichel@michellawyers.com>

Peter,

I'm writing to follow up with your regarding your request that our office produce individual billing entries in support of Plaintiffs' fee motion.

As you are aware, California courts require less documentation and trial courts have greater discretion to determine whether a party's claimed hours are sufficiently supported. See, e.g., *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 ("California case law permits fee awards in the absence of detailed time sheets").

Because controlling law allows for the submission of an attorney's declaration as proof of hourly rates, time spent, and reasonableness of time spent in lieu of billing entries, because such entries contain a great deal of information that is protected by the attorney-client and work product privileges, and because Plaintiffs' Motion is supported by detailed declarations, including my declaration of over twenty-four pages, which describes why plaintiffs proceeded with litigation tasks in the manner they did and why all work performed was reasonable, and is broken down into categories and subcategories that describe the nature and amount of work performed, our office respectfully declines Defendants' request. *See Weber v. Langholz* (1995) 39 Cal.App.4th 1578 (attorney's declaration summarizing work performed and listing hourly rates and total fees incurred was sufficient for fee award, even though unsubstantiated by time records and billing statements); *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 620 (trial court did not abuse discretion when it accepted attorney's declaration as sufficient proof of her hourly rate, time spent, and reasonableness of time spent).

As noted in Plaintiffs' Motion, should the Court wish to review the extensive daily time records Plaintiffs' counsel kept over the course of the litigation, Plaintiffs would be willing to submit those records for in camera review.

Also, Peter, our office is planning to request copies of the State's records of hours spent litigating this case under the California Public Records Act. Can you please direct me to the appropriate contact for submission of that request?

Thanks,

Clint

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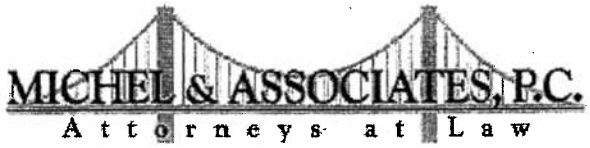

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M E M O R A N D U M

FROM THE DESK OF C. D. MICHEL

Date: February 22, 2011
Re: **AB 962 Victory and Acknowledgments**

I. INTRODUCTION

On behalf of the legal team that was privileged to work on behalf of the National Rifle Association and to represent the California Rifle & Pistol Association Foundation ("CRPA Foundation") and the other plaintiffs in *Parker v. California,* the lawsuit successfully challenging the ammunition regulations enacted by Assemblyman Kevin de Leòn's Assembly Bill 962 ("AB 962 "), I wanted to get some information out so people can understand what went into obtaining this decision, can fully appreciate the value of the results, and can recognize the contributions of all those involved.

If it had gone into effect, AB 962 would have imposed burdensome and ill-conceived restrictions on the sale of ammunition in and into California. AB 962 required that "handgun ammunition" be stored out of the reach of customers, that ammunition vendors collect ammunition sales registration information and thumbprints from purchasers, and conduct transactions face-to-face for all deliveries and transfers of "handgun ammunition."

The central issue in the lawsuit was whether the definition of "handgun ammunition" as used in certain provisions of AB 962 was unconstitutionally vague. This lawsuit, funded *exclusively* by the NRA and CRPA Foundation, was prompted in part by the many concerns and questions raised by confused police, ammunition purchasers, and sellers about this infringement on their rights, and about what ammunition was covered by the new laws.

The lawsuit alleged, and the Court agreed, that certain provisions of AB 962 are unconstitutionally vague on their face because they fail to provide sufficient legal notice of what ammunition is "principally for use in a handgun," and thus is considered to be "handgun ammunition" subject to those provisions. It is practically impossible, both for those subject to the law and for those who must enforce it, to determine whether any of the thousands of

different cartridges that can be used in handguns are actually "principally for use in," or used more often in, a handgun than a rifle. The proportional usage of any given cartridge is impossible to determine, and in any event changes with market demands. In fact, the legislature itself was well aware of the vagueness problem with AB 962's definition of "handgun ammunition" and tried to redefine it via AB 2358 during the 2010 legislative session. AB 2358 failed in the face of opposition from the NRA and CRPA based on the proposal's many nonsensical infringements on ammunition sales to law-abiding citizens.

II. BACKGROUND

The lawsuit was filed in Fresno Superior Court on June 17, 2010, challenging certain statutes made law by AB 962. The suit challenged the bills requirement that so-called "handgun ammunition" be stored out of the reach of customers and that transfers of so-called "handgun ammunition" be recorded by vendors (which records were to include the purchaser's identifying information, including a thumbprint, as well as the type of ammunition purchased), and conducted only when parties are face-to-face and the transferee provides bona fide identification, thereby prohibiting its transfer via mail order and internet. The lawsuit primarily alleged that the mandates of AB 962 were incomprehensible, because the applicable definition of "handgun ammunition" was unconstitutionally vague.

In a highly unusual move that reflects growing law enforcement opposition to ineffective gun control laws, Tehama County Sheriff Clay Parker was the lead plaintiff in the lawsuit. Other plaintiffs included the CRPA Foundation, Herb Bauer Sporting Goods, ammunition shipper Able's Ammo, collectible ammunition shipper RTG Sporting Collectibles, and individual Steven Stonecipher. The decision and all briefs filed in the case are posted at www.michellawyers.com/parkervca.

Department of Justice ("DOJ") lawyers representing the State of California declined to file a demurrer to our Complaint (the equivalent of a motion to dismiss at the pleadings stage), indicating they did not see any grounds that would support such a motion. Instead, acknowledging the potential merits of our case, the DOJ worked with the Legislature in a frantic last-minute attempt to moot the lawsuit by amending a pending bill, AB2358, to include a list of ammunition that would have replaced the nonsensical definition of "handgun ammunition" in AB 962.

But as mentioned above, AB 2358, which contained multiple other problematic provisions that would have hurt California gun owners, failed to pass.

AB 2358's fate was somewhat legally inconsequential with respect to the *Parker* lawsuit because AB 2358 was wrought with its own legal problems that would have been challenged in the *Parker* case regardless. But the consideration of the bill did force us to temporarily stall litigation, as we would have had to change the legal arguments if it had passed.

Once AB 2358 failed to pass, we immediately sought a preliminary injunction to stop AB 962's contested provisions from taking effect. We filed the motion and accompanying declarations on September 7, 2010, and worked with the Court and opposing counsel at the

DOJ to negotiate an adjusted briefing schedule for this important motion. Although the lawsuit was still being prepared and fine-tuned to maximize the potential for success, we were forced to rush to file the preliminary injunction motion in the face of the fast-approaching date on which AB 962 was set to take effect.

On November 17, 2010, our legal team appeared in Fresno Superior Court for the hearing on the Motion for Preliminary Injunction and related case management and scheduling conferences. During the hearing, the Court expressed concerns over the amount of "irreparable harm" that Plaintiffs might incur if an injunction was not issued at that time and suggested any harm could simply be "repaired" with money damages.

The Court encouraged the parties to focus on the underlying substantive issue and assisted us in reaching an agreement on how to expedite a decision on the merits prior to the effective date of February 1st. In doing so, the Court noted that although trials were being set out to December of 2012 at that time, the Court was willing to grant Plaintiffs an unusual trial setting preference. The Court then set a briefing schedule for an extremely expedited joint Motion for Summary Judgment and Trial, and set the hearing on Plaintiffs' Motion for Summary Judgment/Trial for January 18, 2011. Noting that "time was of the essence" for Plaintiffs, the Court ensured a ruling would either be made on the date of the hearing or within a few days thereafter to ensure the case was resolved in its entirety prior to February 1st. Plaintiffs' Motion for Summary Judgment/Trial was filed on December 7, 2010.

In light of the Court's willingness to expedite the litigation and reach a final decision on Plaintiffs' claims before the effective date of many of AB 962's provisions, Plaintiffs opted to withdraw their Motion for a Preliminary Injunction instead of protracting the litigation by arguing and requesting supplemental briefing on Plaintiffs' irreparable harm claims.

III. THE DECISION

On January 18, 2011, in a dramatic ruling giving gun owners a win in this NRA/CRPA Foundation lawsuit, Fresno Superior Court Judge Jeffrey Hamilton ruled that AB 962 was unconstitutionally vague on its face.

On January 24, 2011, the Court issued an Order formally enjoining enforcement of the statutes, allowing mail order ammunition sales to California to continue and prohibiting enforcement of the requirement that ammunition sales be registered. The ruling came just days before the portion of the law that banned mail order sales of so called "handgun ammunition" was set to take effect.

A week later, on January 31, 2011, the Court issued its awaited Opinion formally documenting its January 18th oral ruling from the bench. In its 22 page Opinion, the Court explained, "[a]fter careful consideration, the Court finds that the definition of 'handgun ammunition' as established in Penal Code §§ 12060(b) and 12318(b)(2) is unconstitutionally vague and, [that] because the definition of 'handgun ammunition' is vague, Penal Code §§ 12060, 12061, and 12318, which define and regulate sales and transfers of 'handgun ammunition' are also impermissibly vague."

Constitutional vagueness challenges to state laws are extremely difficult to win, particularly in California firearms litigation, so this success is particularly noteworthy. Even so, an appeal by the State is likely. But in the meantime, the Court's Order enjoining enforcement of these laws, which took effect on February 1, 2011, remains in force.

V. PARTICIPANTS

This success was the result of a team effort, both in terms of the plaintiffs who were named in the lawsuit itself and the several organizations, companies, and individuals who also contributed to the effort and to this victory. Each of these parties played a vital role in achieving this tremendous result for those who choose to exercise their Second Amendment rights and not be arbitrarily subjected to prosecution for doing so.

Below is a list of the plaintiffs and a description of their involvement. Below that is a list of others who contributed to this success in a variety of ways.

A. Sponsor

Funding for this case was provided by the Legal Action Project, a joint effort between the NRA and CRPA Foundation. The NRA is a non-profit membership organization founded in 1871 and incorporated under the laws of New York, with headquarters in Fairfax, Virginia and an office in Sacramento, California. Principal funding for the case was provided by the NRA. The NRA represents several hundred thousand individual members and hundreds of affiliated clubs and associations in California. Donations to support this and similar cases can be made at www.nraila.org.

Seventeen years ago the NRA and CRPA joined forces to fight local gun bans being written and pushed in California by the gun ban lobby. Their coordinated efforts became the NRA/CRPA "Local Ordinance Project" (LOP) - a statewide campaign to fight ill-conceived local efforts at gun control and educate politicians about available programs that are effective in reducing accidents and violence without infringing on the rights of law-abiding gun owners. The NRA/CRPA LOP has had tremendous success in beating back most of these anti-self-defense proposals.

In addition to fighting local gun bans, for decades the NRA has been litigating dozens of cases in California courts to promote the right to self-defense and the Second Amendment. In the post-*Heller* and *McDonald* legal environment, NRA and CRPA Foundation have formed the NRA/CRPA Foundation Legal Action Project (LAP), a joint venture to proactively strike down ill-conceived gun control laws and ordinances and advance the rights of firearms owners, specifically in California. Sometimes success is more likely when LAP's litigation efforts are kept low profile, so the details of every lawsuit are not always released.

To see a partial list of the LOP's and LAP's recent accomplishments, or to contribute to the NRA or to the NRA/CRPAF LAP and support this and similar Second Amendment cases, visit www.nraila.com and www.crpafoundation.org.

B. Plaintiffs

1. Associations/Corporations

California Rifle & Pistol Association Foundation is a non-profit entity headquartered in Fullerton, California. Contributions to CRPA Foundation are used for the direct benefit of Californians. Funds granted by the Foundation benefit a wide variety of constituencies throughout California, including gun collectors, hunters, target shooters, law enforcement, and those who choose to own a firearm to defend themselves and their families. CRPA Foundation seeks to: raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms. The CRPA Foundation also supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans. In this suit, CRPA Foundation represented the interests of the tens of thousands of its supporters who reside in the State of California who were too numerous to conveniently bring this action individually and who would have been impacted by the unconstitutional statutes of AB 962. www.crpa.org

Herb Bauer Sporting Goods, Inc. is a retail sporting goods store in Fresno, California that sells a variety of ammunition. **Barry Bauer** is the President of Herb Bauer Sporting Goods. www.herbbauersportinggoods.com

Able's Ammo is an ammunition vendor that ships many different types of firearm ammunition directly to California residents. www.ableammo.com

RTG Sporting Collectibles is a collectible ammunition vendor that ships many different types of firearm ammunition. www.rtgammo.com

2. Individuals

Sheriff Clay Parker was the duly elected Sheriff for the County of Tehama, California. Sheriff Parker has been a law enforcement officer since 1981 and is a graduate of the Federal Bureau of Investigation's National Academy. He was originally elected Sheriff of Tehama County in 1998 and was re-elected to that position twice. Sheriff Parker is also the immediate past President of the California State Sheriffs' Association and is a former President of the Western States' Sheriffs' Association. He became a plaintiff in this lawsuit when he realized he did not know how to enforce certain provisions of AB 962 due to the vagueness of the term "handgun ammunition" used therein.

Stephen Stonecipher is a resident of Fresno, California who mails ammunition to friends and family and sometimes receives ammunition in the mail from out-of-state shippers of ammunition.

C. Other Assistance

1. Associations/Corporations

Midway USA is a Missouri ammunition vendor. Through its Chief Executive Officer, **Larry Potterfield,** Midway USA submitted a declaration in support of Plaintiffs' Motion for Summary Judgment explaining the real world impact of AB 962's vagueness. www.midwayusa.com

Chattanooga Shooting Supplies D/B/A Natchez Shooters Supplies is a Tennessee ammunition distributor. Through its Vice President, **Brian Hall,** Natchez Shooters Supplies submitted a declaration in support of Plaintiffs' Motion for Summary Judgment explaining the real world impact of AB 962's vagueness. www.natchezss.com

Cheaper Than Dirt is a Texas ammunition distributor. Through its Chief Executive Officer, **Michael Tenny,** Cheaper Than Dirt submitted a declaration in support of Plaintiffs' Motion for Summary Judgment explaining the real world impact of AB 962's vagueness. www.cheaperthandirt.com

2. Individuals

Stephen Helsley retired from the California Department of Justice as the Assistant Director of the Division of Law Enforcement. For the past eighteen years he has worked for the NRA, first as a State Liaison and then as a political consultant. Mr. Helsley has a wealth of knowledge regarding firearms and ammunition. He shared this knowledge with the Court by way of expert testimony and declarations submitted in support of Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Motion for Summary Judgment. All of this was provided by Mr. Helsley *pro bono*.

Mike Haas is the creator and author of "Haas' Guide to Small Arms Ammunition," a free computer utility that provides technical information on over 100 cartridges and their ballistics. He also runs Ammo Guide, the leading community reloading website. Mr. Haas provided expert testimony in support of Plaintiffs' Motion for Preliminary Injunction *pro bono*. www.ammoguide.com

Sheriff Tom Allman is the Sheriff-Coroner for the County of Mendocino, California. He has been a law enforcement officer since 1980 and was elected Sheriff-Coroner of Mendocino County in 2006 - a position he has held since. Sheriff Allman submitted a declaration in support of Plaintiffs' Motion for Summary Judgment explaining the difficulty law enforcement would face in trying to enforce AB 962.

D. Legal Team

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Clint B. Monfort
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Michel & Associates attorneys advocate on behalf of a variety of civil rights, including the Second Amendment right to keep and bear arms, and Michel & Associates has one of the most recognized and respected firearms litigation practices in the nation. We provide outstanding advocacy on behalf of the NRA, the CRPA, other Second Amendment and self-defense civil rights advocacy groups, and individual gun owners. We are uniquely qualified to represent our clients in what is still a highly charged and dynamic political environment, one in which inadvertent violations can be all too common and potential legal consequences unjustly severe.

Michel & Associates, P.C. does much more than practice firearms law. For more information about our law practice, please visit our website www.michellawyers.com. Michel & Associates, P.C. can help with a variety of legal matters. We hope you will consider coming to us first for all your legal needs.

Unlike many law firms that support anti-gun-owner efforts to undermine your right to keep and bear arms by providing *probono* services to the gun ban lobby and subsidized the effort with the legal fees paid by their clients, Michel & Associates, P.C. provides many hours of *probono* legal service to gun owners and to the associations that protect their rights. Shop for your legal service provider carefully!

VI. WHAT'S NEXT?

A. Recovery of Fees and Costs

As the prevailing party in the lawsuit, NRA/CRPA Foundation's attorneys at Michel and Associates, P.C., are currently preparing a motion to recover all legal fees and costs from the State of California that were incurred in the *Parker* litigation. The fees recovered in this case will be used to fund subsequent litigation efforts on behalf of California firearm owners.

B. Potential Appeal and Impact on Second Amendment Jurisprudence

Attorneys for State are currently considering whether to appeal the decision, which would be an interesting prospect in terms of developing Second Amendment jurisprudence in the California Court of Appeals and potentially the California Supreme Court.

In striking down AB962, Judge Hamilton did not feel it necessary to apply a "heightened standard" of clarity in finding the definition of "handgun ammunition" unconstitutional in *Parker*. Should the case be appealed, Plaintiffs will urge the Court of Appeal to adopt (as they did with the trial court) a heightened standard of clarity because AB 962 implicates the exercise of fundamental rights. The issue of whether Second Amendment regulations are entitled to the same constitutional requirements of clarity as the First Amendment and other fundamental rights is one of first impression, and the prospect of an appellate court adopting a novel standard for Second Amendment due process challenges is much more likely than at the trial court level.

The application of a heightened standard could have far reaching impacts on due process challenges to current and future firearms legislation that cannot be successfully challenged directly on Second Amendment grounds. So while AB 962 is currently enjoined from enforcement, an appeal by the state could result in a written appellate opinion establishing that firearms-related legislation must provide the utmost clarity for firearm owners. Such an opinion could have promising impacts as gun owners continuously struggle to decipher the ever-tangled web of federal, state, and local regulations imposed on law-abiding firearm owners.

C. New Proposed Legislation Restricting the Right to Acquire Ammunition

Despite this win for common sense over ill-conceived, counterproductive, and poorly-drafted gun laws, additional legislation on this and related subjects has been proposed in Sacramento this legislative session. Senator de Leòn has already introduced legislation (Senate Bill 124) which will attempt to clarify the vagueness found in AB 962 by amending the definition of "handgun ammunition" to include all ammunition that "can be used in a handgun," that is, virtually *all* ammunition.

As with AB 962 and AB 2358, SB 124 is similarly wrought with problems that will be met with multiple legal challenges in the courts should it pass. But legal challenges are costly and time-consuming, and the best way to defeat ill-conceived and counter-productive legislation is before it passes. NRA and CRPA Foundation attorneys at Michel and Associates, P.C. are currently preparing memoranda exposing the numerous flaws in this legislation, which

will be used to counter this ineffective, knee-jerk reaction to the *Parker* decision that will cause far more problems than it will solve.

It remains absolutely critical that those who believe in the right to keep and bear arms stay informed and make their voices heard in Sacramento. When AB 962 passed, there was loud outcry from law-abiding gun owners impacted by the new law. Those voices must be heard during the legislative session and before a proposed law passes, not after it is signed into law. To help, sign up for legislative alerts at www.nraila.com and www.calnra.com and respond when called upon.

Thank you for your support in making NRA and CRPAF strong.

#CDM#

#176231v3<Interwoven> -Parker Thank You-Victory Memo

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Sheriff Clay Parker, et al. v. The State of California**

No.: **10CECG02116**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On July 13, 2011, I served the attached

(1) THE STATE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES; and (2) DECLARATION OF PETER A. KRAUSE

(1) THE STATE'S OBJECTIONS TO THE DECLARATION OF CLINTON MONFORT SUBMITTED IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES; (2) [PROPOSED] ORDER THEREON

THE STATE'S NOTICE OF LODGING FEDERAL AUTHORITIES AND NON-CALIFORNIA AUTHORITIES CITED IN THE STATE'S OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight courier service, addressed as follows:

C.D. Michel
Michel & Associates, P.C.
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802

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 July 13, 2011, at Sacramento, California.

Brenda Apodaca
Declarant

Brenda Apodaca
Signature

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