

Appellate Case No. 09-16852

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ROTHERY and ANDREA HOFFMAN,

Appellants

vs.

COUNTY OF SACRAMENTO, et al.,

Appellees.

JOINT MOTION BY APPELLEES/DEFENDANTS FOR FURTHER STAY OF
APPELLATE PROCEEDINGS

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APPELLEES, County of Sacramento, Lou Blanas, John McGinness, Tim Sheehan and Kamala D. Harris, hereby collectively move this court for an extension of the current stay of proceedings in this matter pending the Ninth Circuit's disposition of *Nordyke v. King*, Case No. 07-15763, and thereafter the court's final disposition in the related case of *Mehl v. County of Sacramento, et al.*, Case No. 08-15773. Gary Gorski, Esq., counsel for Appellants, has been contacted regarding this motion for further stay of proceedings, and responded that he has no objections to the granting of continued stay.

The briefs or an appropriate motion in this case are currently due on or before March 23, 2011. For the reasons set forth in the following declaration of their counsel, appellees request that the current stay in proceedings in this matter continue until ninety (90) days following the issuance of the Ninth Circuit's ruling in *Mehl v. County of Sacramento, et al.*, 9th Circuit Case No. 08-15773, which has been stayed *sua sponte* by this Court until the disposition is made in *Nordyke v. King*, Case No. 07-15763, in which proceedings have been remanded for further consideration based upon the decision by the United States Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020; 177 L. Ed. 2d 894 (2010), Case No. 08-1521.

By order entered December 30, 2009, this Court stayed proceedings in this matter until decision in *Nordyke*, or March 22, 2010, without prejudice to the parties requesting a further stay by stipulation if *Nordyke* had not been decided by then. Notwithstanding the absence of rulings in *McDonald* and *Nordyke*, Appellants filed their opening brief on May 5, 2010. Upon joint request by Appellees, this Court continued the stay in these proceedings until August 16, 2010, at which time the Court requested status and a motion be filed by Appellees if answering briefs were not yet filed. Appellees filed a motion for continued stay on August 12, 2010, to which the court issued a further stay and ordered

responding briefs or request for status and motion by October 15, 2010. At that time, Appellees again requested by motion that the current stay of proceedings continue until 60 days following the court's ruling in the *Nordyke* case. The Ninth Circuit has not yet issued its disposition of *Nordyke*. Appellees therefore request that because the Court's decision in *Nordyke* is essential for Appellees to even begin to address the issues raised by Appellants on appeal, that this Court continue the current stay of proceedings until 90 days after the issuance of the Court's opinions in both *Nordyke* and thereafter *Mehl*.

In the related case, *Mehl v. County of Sacramento*, 9th Circuit Case No. 08-15773, this court *sua sponte* entered a stay of submission after oral argument to await the results of the Court's analysis of *Nordyke*. Defense counsel herein are the same as in the *Mehl* case. Likewise, Plaintiffs' counsel, Gary Gorski, is the same in both *Mehl* and *Rothery*. All defendants in both *Mehl* and *Rothery*, believe that not only should the *Rothery* case await the holding in *Nordyke*, but it should also await the Court's application of that law to the *Mehl* case before proceeding with further briefing in *Rothery*. Therefore, Defendants/Appellees request that briefing in this case be stayed until ninety (90) days following issuance of the Court's opinion or other disposition of the *Mehl* case.

Appellants' counsel had previously filed an opposition to Appellees' motion for stay in this matter. However, upon inquiry at this time, Mr. Gorski, appellants'

counsel, indicated he has no objection to a continuation of the current stay of appellate proceedings.

DATED: March 22, 2011

KAMALA D. HARRIS
Attorney General of California

/s/ Geoffrey L. Graybill

By _____
GEOFFREY L. GRAYBILL
Deputy Attorney General

DATED: March 22, 2011

LONGYEAR, O'DEA & LAVRA,
LLP

/s/ Jeri L. Pappone

By _____
JERI L. PAPPONE

JOINT DECLARATION OF JERI L. PAPPONE AND GEOFFREY L. GRAYBILL IN SUPPORT OF APPELLEES' MOTION FOR FURTHER STAY

WE, Jeri L. Pappone and Geoffrey L. Graybill, declare as follows:

1. We are attorneys licensed to practice law before all courts in the State of California and are admitted to practice before this Court. Jeri Pappone is an associate of the law firm of Longyear, O'Dea & Lavra, LLP, counsel of record for Defendants/Appellees, County of Sacramento, Lou Blanas, John McGinness, and Tim Sheehan. Geoffrey L. Graybill is a Deputy Attorney General for the State of California and counsel of record for Defendant/Appellee Kamala D. Harris, the Attorney General of the State of California.

2. We are also counsel of Record for Defendants/Appellees in the pending 9th Circuit case of *Mehl v. Lou Blanas, et al.*, Case No. 08-15773.

3. *Mehl v. Lou Blanas, et al.*, is closely related to the *Rothery* case herein and has been brought by the same Plaintiffs' counsel, Gary Gorski, making many of the same claims in both cases. *Mehl* has been argued before this court, and thereafter the court *sua sponte* withdrew the appeal from submission pending the decision by the court in *Nordyke*. See Exhibits A and B hereto, Court orders of September 11, 2009 and July 20, 2010.

4. In the current case of *Rothery*, herein, Appellants' opening brief has been filed.

5. Appellees' Answering Briefs, or in the alternative a status report and motion are currently due on March 23, 2011.

6. Appellate proceedings in this matter had previously been stayed by order entered on October 15, 2010, pending ruling by this Court in *Nordyke v. King*, Case No. 07-15763, or until March 23, 2011, unless the parties sought an extension of the stay by stipulation. A true and correct copy of this Court's order is attached hereto as Exhibit C.

7. Decision after hearing *en banc* in *Nordyke* was stayed pending decision by the United States Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020; 177 L. Ed. 2d 894 (2010), Case No. 08-1521, which was issued on June 28, 2010.

8. *Nordyke* is likely to be the first application of *Heller* and *McDonald* in the Ninth Circuit. The above-cited cases are closely related to the issues on appeal in this case regarding the scope and applicability of the Second Amendment of the United States Constitution to the individual States, and the subsequent, if any, impact on California law regarding the issuance of Carry Concealed Weapons permits/licenses that is the principal subject of the appeal in this matter, as well as in *Mehl*, and may as well effect other regulations of gun possession.

9. The Ninth Circuit issued an order in *Nordyke* on July 12, 2010, remanding that case for further consideration in light of the *McDonald* opinion. See Exhibit D hereto.

10. Appellate proceedings in this matter had previously been stayed by order entered on January 18, 2011, pending ruling by this Court in *Nordyke v. King*, Case No. 07-15763, or until March 23, 2011, unless the parties sought an extension of the stay by stipulation. A true and correct copy of this Court's order is attached hereto as Exhibit E.

11. Appellees have exercised diligence in this matter, but will have only one opportunity to address the Second Amendment and related issues raised by appellants, and will not be able to adequately present their cases without analyzing the expected decision in *Nordyke* after the court applies *McDonald*. Further, as the case of *Rothery* is similar to the *Mehl* case, both brought by attorney Gary Gorski, it is appropriate to await the Court's application of *Nordyke* to *Mehl* prior to any further briefing in *Rothery*. The requested continuation of the stay to a date ninety (90) days after the issuance of the Ninth Circuit's opinion in *Mehl* is therefore reasonable and will enable appellees' counsel to fulfill their obligations to their clients and to this Court.

12. On March 22, 2011, Deputy Attorney General Geoffrey L. Graybill contacted Gary Gorski, appellants' counsel, inquiring whether or not he had any objection to appellees' motion for continued stay of appellate proceedings pending the Court's rulings in the *Nordyke* and *Mehl* cases. On March 22, 2011, Gorski responded that he had no objection.

Declarants above-named each have personal knowledge of the foregoing and if called upon to testify thereto could competently do so.

Each declarant separately declares under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

EXECUTED this 22nd day of March, 2011, at Sacramento, California.

/s/ Jeri L. Pappone

JERI L. PAPPONE

EXECUTED this 22nd day of March, 2011, at Sacramento, California.

/s/ Geoffrey L. Graybill

GEOFFREY L. GRAYBILL