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17 UNITED STATES DISTRICT COURT

18
19 FOR THE EASTERN DISTRICT OF CALIFORNIA

20 WILLIAM WIESE, et al.,

21 Plaintiffs,

22 vs.

23 XAVIER BECERRA, in his official capacity as
24 Attorney General of California, et al.,

25 Defendants.
26
27

Case No. 2:17-cv-00903-WBS-KJN

JOINT STATUS REPORT

Date: August 28, 2017

Time: 1:30 p.m.

Courtm. 5

Judge: Sr. Judge William B. Shubb

1 Pursuant to the court's Order entered on July 31, 2017 (Doc. #56), plaintiffs WILLIAM
2 WIESE, JEREMIAH MORRIS, LANCE COWLEY, SHERMAN MACASTON, ADAM
3 RICHARDS, CLIFFORD FLORES, L.Q. DANG, FRANK FEDEREAU, ALAN NORMANDY,
4 TODD NIELSEN, THE CALGUNS FOUNDATION, FIREARMS POLICY COALITION,
5 FIREARMS POLICY FOUNDATION, and SECOND AMENDMENT FOUNDATION
6 ("Plaintiffs") and defendants XAVIER BECERRA and MARTHA SUPERNOR ("Defendants"),
7 in their respective capacities herein, hereby and jointly submit this JOINT STATUS REPORT in
8 advance of the Initial Status Conference presently set for **August 28, 2017 at 1:30 p.m.**, Hon.
9 William B. Shubb presiding.

10 Pursuant to the court's orders of April 28, 2017 and July 31, 2017, the parties met and
11 conferred by telephone on August 7, 2017, to discuss the propriety of a stay of proceedings in
12 this case pending the appeal in *Duncan v Becerra*, 17-cv-1017-BEN-JLB (S.D. Cal.), and a
13 proposed discovery plan. The parties were unable to agree upon the propriety of a stay, or
14 whether to proceed with discovery. The Parties agreed that a Rule 26 conference, including the
15 proper scope of discovery and appropriate schedule would turn, in part, upon this Court's
16 determinations regarding Plaintiffs' proposed Second Amended Complaint (Docs. #53, 55) and
17 whether this action should be stayed (Doc. #56). Accordingly, the parties agreed that it would be
18 most productive and efficient if they agreed to meet and confer pursuant to Rule 26 after the
19 Court rules on these matters. The parties respectfully request that the Court defer the Rule 26
20 conference currently set for August 28, 2017, until after these matters have been decided by the
21 Court.
22

23 Pursuant to this Court's Order of July 31, 2017, the parties' positions with respect to
24 whether this action should be stayed, and whether discovery should proceed, are set forth below.
25

26 Plaintiffs' Position

27 Plaintiffs' position is that a stay of these proceedings is not warranted. Plaintiffs believe
28 that any decision by the Ninth Circuit as to whether the district court erred in granting a

1 preliminary injunction in *Duncan*, with the standard of review to be applied therein, would not
2 likely be dispositive as to any or all of the issues to be determined herein. Furthermore, the
3 instant case encompasses claims – most notably the vagueness and overbreadth claims in Counts
4 III and IV arising from the dual chaptering issues presented by enactment of SB 1446 and
5 Proposition 63 – which are not presented in the *Duncan* case nor would they be addressed in the
6 State’s appeal of that matter.

7 A district court is generally vested with the power to stay proceedings “pending
8 resolution of independent proceedings which bear upon the case.” *Levva v. Certified Grocers of*
9 *Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). In determining the propriety of a stay, the district
10 court must “weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*,
11 299 U.S. 248, 254-255, 57 S.Ct. 163 (1936). But in considering such a stay, the moving party
12 (or party seeking a stay in this instance) must make a “clear case of hardship or inequity in being
13 required to go forward, if there is even a fair possibility that the stay for which he prays will
14 work damage to someone else.” *Adaptix, Inc. v. HTC Corp.*, 2015 WL 12837649 at *1 (N.D.
15 Cal. 2015) (citing *Landis*, 299 U.S. at 255.) And in general, requiring a defendant defend a suit
16 simply does not constitute a clear hardship or inequity for purposes of requesting a stay of
17 proceedings. *Adaptix*, at *2 (citing *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498
18 F.3d 1059, 1066 (9th Cir. 2007).

19 In the present case, defendants who are apparently endorsing if not requesting a stay of
20 the instant proceedings, have not made the requisite showing that they will be prejudiced or will
21 suffer any type of legally cognizable hardship in having to defend against these proceedings,
22 which as defendants will acknowledge, encompass different claims.

23 As to discovery, Plaintiffs are prepared to proceed with discovery in this matter, and
24 would propose to conduct, at the very least, limited discovery on the vagueness and chaptering
25 issues, most notably related to the legislative history and intent of SB 1446 and Proposition 63,
26 and the State’s position with regard to the chaptering and harmonization of these enactments.
27 Discovery on these limited issues, at least, would not prejudice defendants’ interests in either this
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1 or any other matter. In fact, conducting discovery in this matter on such issues may work greatly
2 to clarify the parties' positions with regard to these independent claims. In short, defendants
3 have not established that either proceeding with the case, or conducting limited discovery on
4 these issues would constitute any type of undue hardship or inequity necessary to justify the
5 imposition of a stay.

6 It should be noted that in the *Duncan* matter, the defense has filed a formal motion to stay
7 proceedings pending appeal of that action under the standards set forth in *Landis*, claiming
8 among other things that they would suffer "considerable hardship and inequity" unless that
9 matter is stayed. Hearing of the defendants' motion in that matter is set for September 11, 2017,
10 Hon. Roger T. Benitez presiding. Thus, it would indeed be incongruous if defendants were
11 required to proceed to trial in that matter, because they may not have made the requisite showing
12 of hardship and inequity required, but were permitted a stay of the instant proceedings pending
13 an *appeal* of an order in the other matter.
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15 **Defendants' Position**

16 **A. Stay of Proceedings.**

17 Defendants respectfully submit that this Court should stay these proceedings in the
18 exercise of its authority to control its docket, pending resolution of the appeal of the preliminary
19 injunction in *Duncan v. Becerra*, Ninth Circuit Case No. 17-56081. The Ninth Circuit's decision
20 is likely to provide significant guidance, if not rulings of law, that will materially impact and/or
21 affect this litigation. Accordingly, a stay of these proceedings pending appeal will prevent the
22 Court and the parties from spending time and resources addressing issues and matters that may
23 be rendered unnecessary by the determination in the Court of Appeals. Because this action is at
24 an early stage, there is an accelerated briefing schedule in the Ninth Circuit, and the district court
25 in *Duncan v. Becerra*, 17-cv-1017-BEN-JLB (S.D. Cal.), has enjoined the challenged law
26 prohibiting the possession of large-capacity magazines, the requested stay will not prejudice
27 plaintiffs. By contrast, forcing defendants to litigate, simultaneously and perhaps needlessly, the
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1 same legal issues before this Court and the Court of Appeals would cause substantial hardship
2 and inequity.

3 A district court is authorized to issue a stay of proceedings pending an interlocutory
4 appeal. 28 U.S.C § 1292(b). In addition, as this Court has noted, a district court may stay
5 proceedings “incidental to the power inherent in every court to control the disposition of the
6 causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”
7 *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (citing *Landis v. North*
8 *American Co.*, 299 U.S. 248, 254 (1936)); *see also Clinton v. Jones*, 520 U.S. 681, 706-07
9 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power
10 to control its own docket”). In particular, “[a] trial court may, with propriety, find it is efficient
11 for its own docket and the fairest course for the parties to enter a stay of an action before it,
12 pending resolution of independent proceedings which bear upon the case.” *Leyva v. Certified*
13 *Growers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979); *see also Mediterranean Enters.,*
14 *Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983). This rule applies whether the
15 separate proceedings are judicial, administrative, or arbitral in character, and does not require
16 that the issues in such proceedings are necessarily controlling of the action before the court.”
17 *Levy*, 593 F.2d at 864. Rather, a finding that the matters present substantially similar issues is
18 sufficient. *See id.*

19 A stay is warranted where it prevents prejudice to one or both parties and serves the
20 interests of judicial economy and efficiency. *See, e.g., Rivers*, 980 F. Supp. at 1360 (citing
21 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3866 (1986)). When considering a
22 motion to stay proceedings pending an interlocutory appeal, the Court applies the factors set
23 forth in *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936), and *CMAX, Inc. v. Hall*, 300 F.2d
24 265, 268 (9th Cir. 1962), which include: “(1) the possible damage which may result from
25 granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go
26 forward; and (3) the orderly course of justice measured in terms of the simplifying or
27 complicating of issues, proof, and questions of law which could be expected to result from a
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1 stay.” *CMAX*, 300 F.2d at 268; *see also Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir.
2 2005). All of these factors weigh in favor of staying this action.

3 A stay would promote economy of time and effort for the Court and the parties, as it
4 would relieve both from expending time and resources on decisions that may have to be
5 reconsidered in light of the Ninth Circuit’s rulings, or that those rulings may render moot. *See*
6 *Gustavson v. Mars, Inc.*, No. 13-cv-04537, 2014 WL 6986421, *3 (N.D. Cal. Dec. 10, 2014) (“in
7 determining whether the [orderly course of justice] factor weighs in favor of a stay,
8 considerations of judicial economy are highly relevant.”). Indeed, district courts routinely stay
9 proceedings where resolution of an appeal may provide guidance in deciding issues before the
10 district court. *See, e.g., Washington v. Trump*, No. C17-0141JLR, 2017 WL 2172020, *2–3
11 (W.D. Wash. May 17, 2017) (granting a stay of district court proceedings where appeal in related
12 case “will likely settle many” issues and “simplify others, such that a stay will facilitate the
13 orderly course of justice and conserve resources for both the court and the parties.”) (citation and
14 internal punctuation omitted); *Fed. Home Loan Mortg. Corp. v. Kama*, CV 14-00137 ACK-KSC,
15 2016 WL 922780, *8-9 (D. Haw. Mar. 9, 2016) (granting stay where Ninth Circuit’s resolution
16 of related cases “w[ould] likely involve an analysis of” issues that would “provid[e] further
17 guidance to the district court); *Pickup v. Brown*, No. 2:12-cv-02947, 2013 WL 411474, *1 (E.D.
18 Cal. Jan. 29, 2013) (“because the preliminary injunction appeal will resolve issues related to the
19 constitutionality of [the statute] that this court will need to address in order to move forward, it
20 will achieve efficiencies to await the outcome of the Ninth Circuit proceedings.”). This approach
21 not only preserves resources for the parties and the Court, but also “reduces the risk of
22 inconsistent rulings” that might need to be “disentangle[d].” *Washington v. Trump*, No. C17-
23 0141JLR, 2017 WL 1050354, *5 (W.D. Wash. Mar. 17, 2017); *see also Welch v. Brown*, No.
24 CIV. 2:12-2484 WBS, 2013 WL 496382, at *1 (E.D. Cal. Feb. 7, 2013).

25 By granting a stay, this Court can avoid unnecessarily addressing issues or questions of
26 law that will be impacted, if not resolved, by the Court of Appeals’ eventual resolution.

27 A number of issues regarding the constitutionality of Section 32310 currently are before the
28 Ninth Circuit on appeal. Specifically, in reviewing the grant of a preliminary injunction, the

1 Ninth Circuit will consider such dispositive issues of law as: (1) what is the appropriate test for
2 determining the level of scrutiny to apply to Second Amendment claims; (2) what level of
3 scrutiny applies to Section 32310; (3) what evidentiary showing the State is required to make in
4 order to satisfy the applicable level of scrutiny; and (4) what is the appropriate legal framework
5 for evaluating plaintiffs' facial takings claim. Waiting for the Ninth Circuit's guidance before
6 proceeding to discovery, motion practice, and/or trial, will streamline issues, proof, and
7 questions of law and thus best serve the interests of judicial economy and efficiency. *See Landis*,
8 299 U.S. at 254-255; *see also Kotrous v. Goss-Jewett Co. of Northern California, Inc.*, No. Civ.
9 S021520, 2005 WL 2452606, *4-5 (E.D. Cal. Oct. 4, 2005).

10 Although plaintiffs contend that the Ninth Circuit's decision in *Duncan* will not address its
11 vagueness and overbreadth claims, there is no requirement that an appeal definitively resolve
12 every, or any, cause of action for a stay to issue. *See Levy*, 593 F.2d at 863-64. Courts
13 regularly stay proceedings to avoid piecemeal litigation. *See, e.g., California Assoc. for Health*
14 *Services at Home*, No. 2012 WL 893782, at *2-3 (granting stay where Ninth Circuit decisions
15 "are likely to narrow issues" in case). This is particularly appropriate where, as here, plaintiffs'
16 vagueness and overbreadth claims are, even if cognizable, without merit.

17 The remaining *Landis* factors also militate in favor of staying this action. Given that this
18 action is at a very early stage and enforcement of Section 32310 has been enjoined, plaintiffs will
19 suffer no prejudice if a stay issues. In fact, a stay will benefit plaintiffs in the same way that it
20 will benefit defendants, as it will enable them to avoid expending resources on discovery and
21 matters that may become moot in light of the Ninth Circuit's decision in the appeal
22 in this case. *See Minor v. FedEx*, No. C 09-1375, 2009 WL 1955816, *1 (N.D. Cal.
23 Jul. 6, 2009) (granting stay and determining that "[t]o the extent that both [p]laintiffs and
24 [d]efendants will be able to tailor discovery and avoid duplicative or unnecessary tasks, this
25 causes a benefit, rather than damage, to accrue to both parties."). Because this is an appeal from
26 a preliminary injunction, there is an expedited briefing schedule in the Court of Appeals, and
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1 thus there is no threat of significant delay in resuming proceedings in this Court. *See Cal.*
2 *Assoc. for Health Servs. at Home v. Sebelius*, No. CV 11-10618, 2012 WL 893782, *3
3 (C.D. Cal. Mar. 13, 2012); Ninth Cir. R. 3-3. Accordingly, there is no meaningful
4 possibility that the proposed stay would “work damage” to plaintiff. *Dependable*
5 *Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007).

6 By contrast, if this action is not stayed, defendants will be forced to litigate the
7 same issues simultaneously before the district and the appellate court, and without
8 the guidance of the Court of Appeals. *See Gustavson v. Mars, Inc.*, No. 13-cv-
9 04537, 2014 WL 6986421, *3 (N.D. Cal. Dec. 10, 2014). Having to expend time and resources
10 litigating, including taking discovery and proceeding to summary judgment or trial, based on
11 standards that the Ninth Circuit may reject, would impose an inequitable and unfair burden on
12 defendants that warrants granting a temporary stay pending appeal. *See, e.g., In re Lorazepam &*
13 *Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 6 (D.D.C. 2002) (granting stay and noting that
14 “because two significant issues are currently pending before the Court of Appeals, one of which
15 could dispose of this litigation while the other could substantially reshape it,” “proceeding
16 headlong with discovery and other matters before this Court has the very real potential of
17 unnecessarily wasting significant resources of all parties”); *Lakeland Vill. Homeowners Ass’n v.*
18 *Great Am. Ins. Grp.*, 727 F. Supp. 2d 887, 897 (E.D. Cal. 2010) (granting stay during
19 interlocutory appeal where “it would be a waste of judicial and party resources” to conduct
20 discovery and motion practice while appeal was pending); *Cal. Assoc. for Health Servs. at*
21 *Home*, 2012 WL 893782, at *2-3 (granting stay where Ninth Circuit decisions “are likely to
22 narrow issues” in case).

23 **B. Discovery**

24 Defendants’ submit that plaintiffs’ proposal to conduct limited discovery on its vagueness
25 claims is unwarranted. Given that plaintiffs bring a facial vagueness challenge, very little, if any,
26 discovery is appropriate. In light of this, and because almost all of the discovery plaintiffs seek
27 is publicly available, there is no reason why plaintiffs need to proceed with discovery on these
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1 claims, if at all, then during the pendency of the appeal in *Duncan*.

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Respectfully submitted,

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Dated: August 14, 2017

SEILER EPSTEIN ZIEGLER & APPLGATE LLP

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/s/ George M. Lee

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George M. Lee

Attorneys for Plaintiffs

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Dated: August 14, 2017

OFFICE OF THE ATTORNEY GENERAL

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/s/ Alexandra Robert Gordon

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