

1 C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
3 180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
4 Telephone: (562) 216-4444
Fax: (562) 216-4445
5 cmichel@michellawyers.com

6 Attorneys for Plaintiffs/Petitioners

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF FRESNO
10

11 SHERIFF CLAY PARKER, TEHAMA)	CASE NO. 10CECG02116
12 COUNTY SHERIFF; HERB BAUER)	
13 SPORTING GOODS; CALIFORNIA RIFLE)	PLAINTIFFS' EVIDENTIARY
14 AND PISTOL ASSOCIATION)	OBJECTIONS TO DEFENDANTS'
15 FOUNDATION; ABLE'S SPORTING,)	REQUEST FOR JUDICIAL NOTICE
16 INC.; RTG SPORTING COLLECTIBLES,)	
17 LLC; AND STEVEN STONECIPHER,)	
18)	Date: January 18, 2011
19)	Time: 8:30 a.m.
20 Plaintiffs and Petitioners,)	Location: Dept. 402
21)	Judge: Hon. Jeff Hamilton
22 vs.)	
23)	Date Action Filed: June 17, 2010
24 THE STATE OF CALIFORNIA; JERRY)	
25 BROWN, IN HIS OFFICIAL CAPACITY)	
26 AS ATTORNEY GENERAL FOR THE)	
27 STATE OF CALIFORNIA; THE)	
28 CALIFORNIA DEPARTMENT OF)	
JUSTICE; and DOES 1-25,)	
)	
)	
Defendants and Respondents.)	

23 **TO THIS HONORABLE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**
24 **PLEASE TAKE NOTICE** that Plaintiffs SHERIFF CLAY PARKER, TEHAMA COUNTY
25 SHERIFF, et al., make the following evidentiary objections to the Request for Judicial Notice made in
26 support of Defendants THE STATE OF CALIFORNIA, et al.'s Opposition to Motion for Summary
27 Judgment. These objections are made pursuant to California Rule of Court 3.1354.
28

Objections to Request For Judicial Notice

Objection No. 1

Entirety of Exhibit "A".

Grounds for Objection No. 1:

Relevance. (Evid. Code, § 352.) Here, the State asks the Court to take judicial notice of a federal complaint which also challenged AB 962, but fails to identify in its opposition papers for what purpose the complaint is to be judicially noticed, other than a vague reference to "the truth of the results reached". Nowhere in the opposition points and authorities or separate statement is any citation made to Exhibit "A". Thus, it is entirely unclear what bearing the document has on this litigation or why its consideration in this matter is therefore proper.

Not the Proper Subject of Judicial Notice. (Evid. Code, § 452.) Here, the State asks the Court to take judicial notice of a federal complaint for "the truth of the results reached". Except for the purposes of asserting the doctrines of res judicata or collateral estoppel against the same party to that prior action who is also a party to the present action, "factual findings in a prior judicial opinion are not a proper subject of judicial notice." (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 149.) As none of the plaintiffs in this matter were parties to the federal action, there would be no proper basis for judicially noticing the results of the federal action. (See *id.* at 149.)

Objection No. 2

Entirety of Exhibit "B".

Grounds for Objection No. 2:

Relevance. (Evid. Code, § 352.) Here, the State asks the Court to take judicial notice of an order of dismissal in a federal lawsuit which also challenged AB 962, but fails to identify in its opposition papers for what purpose the complaint is to be judicially noticed, other than a vague reference to "the truth of the results reached". Nowhere in the opposition points and authorities or separate statement is any citation made to Exhibit "B". Thus, it is entirely unclear what bearing the document has on this litigation or why its consideration in this matter is therefore proper.

Not the Proper Subject of Judicial Notice. (Evid. Code, § 452.) Here, the State asks the Court to

1 take judicial notice of a federal order for “the truth of the results reached”. Except for the purposes of
2 asserting the doctrines of res judicata or collateral estoppel against the same party to that prior action who
3 is also a party to the present action, “factual findings in a prior judicial opinion are not a proper subject
4 of judicial notice.” (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 149.) As none of the
5 plaintiffs in this matter were parties to the federal action, there would be no proper basis for judicially
6 noticing the results of the federal action. (See *id.* at 149.)

8 **Objection No. 3**

9 Entirety of Exhibit “D”.

10 **Grounds for Objection No. 3:**

11 Alteration of Writing Not Explained. (Evid. Code, § 1402.) The State asks the Court to take
12 judicial notice of a printout of a webpage from the website of Plaintiff Able’s Ammo which is purported
13 “to show how several ammunition vendors *classify ammunition as handgun ammunition*.” (Deft’s Req.
14 For Jud. Not., at 3:3-4 [emphasis added].) The State fails to disclose that the printout provided is an
15 alteration of the normal operation of the webpage, insomuch as the Plaintiffs’ website does not have a
16 category for “handgun ammunition” displayed on its webpage. Rather the State caused the webpage to
17 list the calibers and cartridges in Exhibit “D” by entering the specific search term “handgun ammunition”
18 into the webpage’s search feature. That action materially altered the normal function of the webpage.
19 The State has not met its burden of explaining the alteration it made to the website before the printout
20 purported “to show how several ammunition vendors *classify ammunition as handgun ammunition*” may
21 be admitted into evidence as a genuine writing.

22 Hearsay. (Evid. Code, § 1200.) The State insists the printouts are being offered “not for their
23 factual content, and that “[i]t is appropriate for the court to take judicial notice *of the existence of a*
24 *website*.” (Deft’s Req. For Jud. Not., at 3:2-4 [emphasis added].) Contrary to the State’s characterization,
25 how ammunition vendors “classify ammunition” on their website is not seeking to merely prove the
26 existence of the website, but is seeking to prove the truth of the otherwise hearsay statements on the site,
27 i.e., that certain cartridges and calibers of ammunition have been stated by that particular vendor to be
28 “handgun ammunition.”

1 The hearsay exception generally applicable for the undisputed fact of the existence of a webpage
2 and its contents under Evidence Code section 452(h), is not available here because the fact for which the
3 webpage is submitted is reasonably subject to dispute, i.e., what vendors consider "handgun ammunition."
4 In fact, each of the other website exhibits sought to be judicially noticed are not uniform in their listing
5 of calibers and cartridges of "handgun ammunition" on their sites. At most, the exhibit is noticeable only
6 for the fact that some ammunition vendors have a category called "handgun ammunition" listed on their
7 site, not what is listed under that category.

8 Foundation. (Evid. Code, § 702.) In addition to the website printouts being hearsay of what the
9 vendors state regarding handgun ammunition, there is no foundation provided for assessing how or why
10 the vendors made such characterizations. As the State's expert admitted in his deposition testimony, no
11 effort was made to determine what each of the vendor's websites meant when it listed "handgun
12 ammunition," i.e., whether such designation was puffery designed to encourage buyers to purchase certain
13 stock of ammunition, whether such designation reflected an understanding of the vendor regarding which
14 types of ammunition were popular with its customers as handgun ammunition, whether such designation
15 reflected whether such ammunition was sold for use in both handguns and rifles to the vendor's customers,
16 and in what proportion such use was intended or made by the customers as between handguns and rifles,
17 or whether such designation is based upon the vendor having the "common understanding" of the use of
18 the ammunition that the State avers exists among firearm vendors and owners:

19 Q: Okay. Did you, at any point, contact the administrators of this
20 Web site or the owners of the Cheaper Than Dirt Web site to find out what
21 they meant about "most popular"?

22 A: No.

23 Q: No. Did you do any other type of independent investigation to
24 determine whether or not Cheaper Than Dirt's representation of what the
25 most popular ammunition they sold was an accurate representation?

26 A: Did I contact other Web sites? Is that what your question was?

27 Q: Did you do anything to find out? So contact other Web sites,
28 call the owner, call a competing Web site and find out that Cheaper Than

1 Dirt's reputation regarding what its most popular ammunition type sold was
2 an accurate representation?

3 A: No. I made no other -- *no phone calls to ammunition vendors*
4 *to check on the validity of Cheaper Than Dirt's, I guess, statements that*
5 *they make.*

6 Q: Okay. And then let's look at the J & G Sales. What part of this
7 particular Web site did you rely upon to help formulate your opinion that
8 .45 caliber ammunition was appropriately included on the DOJ's caliber
9 list?

10 A: The section here that says "ammo for handguns" and it gives a
11 listing of various rounds, there's a portion of it that says ".45 ACP, .45 GAP
12 and .45 LC," which I understand to be Long Colt.

13 Q: Okay. And again, *you didn't contact the proprietors of J & G*
14 *Sales, either the store or Web site, to determine how they came up with this*
15 *particular listing; is that correct?*

16 A: *Correct.*

17 Q: Okay. And would it be fair to say that, similarly true, *you didn't*
18 *contact the proprietors of Cabela's or Midway USA to determine how they*
19 *ended up listing those calibers on their Web sites?*

20 A: *That's correct.*

21 (Deposition of Blake Graham, Vol. 2, at 262:10-263:23 [emphasis added].)

22 Although the State's own expert correctly characterizes the information sought to be obtained as
23 "statements" by a witness, subject to laying of a foundation, in the absence of any information regarding
24 the speaker's use of the terms "Most Popular" and "Handgun Ammunition" on the subject webpages, the
25 webpages the State seeks to have judicially noticed have no context, no reasonable indication of their
26 meaning, and lack foundation for admission.

27 Not the Proper Subject of Judicial Notice. (Evid. Code, § 452.) As argued above, the State seeks
28 judicial notice not just of the existence of the webpage, and what is listed on it, but wants to impute to the

1 author of the webpage the statements made and the truth of those statements regarding what constitutes
2 handgun ammunition.¹ This is an inappropriate use of judicial notice.

3 Although the State asserts in its request that webpages are properly judicially-noticed for their
4 “existence”, and cites cases identifying circumstances where webpages were and were not judicially
5 noticed, the State’s characterization fails to acknowledge that in each of those cases, the meaning of the
6 content of the webpage was not in dispute and hence judicial notice could be made under Evidence Code
7 section 452(h) because the undisputed contents of the webpage were all that were sought to be noticed;
8 the meaning of those contents, and the intent of the authors of those contents, was not at issue.

9 Thus in *In re Mille*, the court took judicial notice of the mission statement on the webpage of a
10 psychiatric hospital as a background fact for discussing the hospital’s role in the treatment of patients,
11 plaintiff in that action was a patient. (See *In re Mille* (2010) 182 Cal.App.4th 635.) The meaning of the
12 mission statement was not disputed by the parties. (See *id.*)

13 Although the State purports that In *Searles Valley Minerals Operations, Inc. v. State Bd. of*
14 *Equalization* supports the taking of judicial notice of the websites for the purposes the State desires,
15 *Searles Valley* supports Plaintiffs’ position that the websites are not the proper subject of judicial notice
16 to prove or disprove an understanding of handgun ammunition. In *Searles Valley*, the appellate court
17 upheld the trial court’s refusal to take judicial notice of two websites containing information regarding the
18 uses of coal, the key issue in a tax assessment matter. “[A]lthough it might be appropriate to take judicial
19 notice of the existence of the Web sites, the same is not true of their factual content.” (See 160
20 Cal.App.4th 514, 519.) Thus, the websites were not admissible to help prove that the uses of coal by the
21 taxpayers fell within an exempt category of taxation. (See *id.*)

22 Whether the State characterizes its attempts to have the websites judicially noticed is merely for
23 their existence, it is clear that the State is seeking to use the information on the websites to prove what
24 “handgun ammunition” is, or what it is understood to be. These are underlying facts regarding the
25

26
27 ¹ Per Section 452(h), judicial notice can be taken as to “[f]acts and propositions that are
28 not reasonably subject to dispute and are capable of immediate and accurate determination by
resort to sources of reasonably indisputable accuracy.” It is under this subdivision that each
of the cases cited by the State allowed or disallowed judicial notice to be taken of a webpage.

1 characterization of handgun ammunition on the websites, and judicial notice is therefore entirely
2 inappropriate. (See *Searles Valley*, *supra*, at 519.)

3
4 **Objection No. 4**

5 Entirety of Exhibit “E”.

6 **Grounds for Objection No. 4:**

7 Hearsay. (Evid. Code, § 1200.); Foundation. (Evid. Code, § 702.); and Not the Proper
8 Subject of Judicial Notice. (Evid. Code, § 452.)

9
10 **Objection No. 5**

11 Entirety of Exhibit “F”.

12 **Grounds for Objection No. 5:**

13 Hearsay. (Evid. Code, § 1200.); Foundation. (Evid. Code, § 702.); and Not the Proper
14 Subject of Judicial Notice. (Evid. Code, § 452.)

15
16 **Objection No. 6**

17 Entirety of Exhibit “G”.

18 **Grounds for Objection No. 6:**

19 Hearsay. (Evid. Code, § 1200.); Foundation. (Evid. Code, § 702.); and Not the Proper
20 Subject of Judicial Notice. (Evid. Code, § 452.)

21
22 **Objection No. 7**

23 Entirety of Exhibit “H”.

24 **Grounds for Objection No. 7:**

25 Hearsay. (Evid. Code, § 1200.); Foundation. (Evid. Code, § 702.); and Not the Proper
26 Subject of Judicial Notice. (Evid. Code, § 452.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Objection No. 8

Entirety of Exhibit "I".

Grounds for Objection No. 8:

Hearsay. (Evid. Code, § 1200.); Foundation. (Evid. Code, § 702.); and Not the Proper
Subject of Judicial Notice. (Evid. Code, § 452.)

Objection No. 9

Entirety of Exhibit "J".

Grounds for Objection No. 9:

Hearsay. (Evid. Code, § 1200.); Foundation. (Evid. Code, § 702.); and Not the Proper
Subject of Judicial Notice. (Evid. Code, § 452.)

Dated: January 7, 2011

Respectfully Submitted,
MICHEL & ASSOCIATES, P.C.



Clinton Monfort
Attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On January 7, 2011, I served the foregoing document(s) described as

**PLAINTIFFS' EVIDENTIARY OBJECTIONS TO DEFENDANTS'
REQUEST FOR JUDICIAL NOTICE**

on the interested parties in this action by placing

☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

(BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on January 7, 2011, at Long Beach, California.

(PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on January 7, 2011, at Long Beach, California.

X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on January 7, 2011, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

CLAUDIA AYALA